

This Opinion is not a  
Precedent of the TTAB

Mailed: May 31, 2023

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

*In re Sensory Path Inc.*

Serial No. 88667617

Stephan McDavid of McDavid & Associates PC,  
for Sensory Path Inc.

Philip Liu, Trademark Examining Attorney, Law Office 109,  
Michael Kazazian, Managing Attorney.

Before Lykos, Heasley, and Allard,  
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Applicant Sensory Path Inc. seeks registration on the Principal Register of the



composite mark

for “interactive decals with permanent

adhesive backing, designed for use by children to improve cognition and other skills,” in International Class 16.<sup>1</sup>

The Trademark Examining Attorney has refused registration of the mark unless Applicant disclaims the words THE SENSORY PATH as merely descriptive of its goods, 15 U.S.C. §§ 1052(e)(1), 1056(a). While maintaining that the wording is not merely descriptive, Applicant argued in the alternative that THE SENSORY PATH had acquired distinctiveness under Section 2(f) of the Trademark Act. 15 U.S.C. § 1052(f). The Examining Attorney, however, found that Applicant failed to meet its burden of proving that THE SENSORY PATH has acquired distinctiveness, and maintained the refusal to register based on Applicant’s failure to disclaim the wording as merely descriptive.

For the reasons explained below, we affirm.

### **I. Applicant’s and the Examining Attorney’s Arguments and Evidence**

Applicant’s original specimen (shown below) shows how its adhesive decals can be applied to create paths in elementary school hallways or classrooms. As the specimen illustrates, the paths are designed to help the students (especially autistic students) who follow them tune out distracting environmental sensory stimuli and focus on their school subjects:

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<sup>1</sup> Application Serial No. 88667617 was filed on October 24, 2019, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use anywhere as of September 11, 2018 and use in commerce since at least as early as September 25, 2018. According to the description in the Application, “[t]he mark consists of the wording ‘THE SENSORY PATH’ in stylized font, superimposed over three human silhouettes with raised arms above three ovals, all within a circle.” Color is not claimed as a feature of the mark.

# WHY US?

**More Than Just a Sticker**  
We are the only company that creates sensory paths with special education research. Our founder and former special-ed teacher, Holly Clay, created our product based on necessary proprioceptive and vestibular input so the child is able to refocus in the classroom.

**RESEARCH**



**INCLUSIVE CLASSROOMS**



**No Kid Left Behind**  
The Sensory Path is designed for the benefit of every child in the hope of inclusion in the classroom. This provides an interactive space for sensory needs while bridging the gap for children who primarily receive one-on-one attention.

**COMMERICAL GRADE MATERIALS**



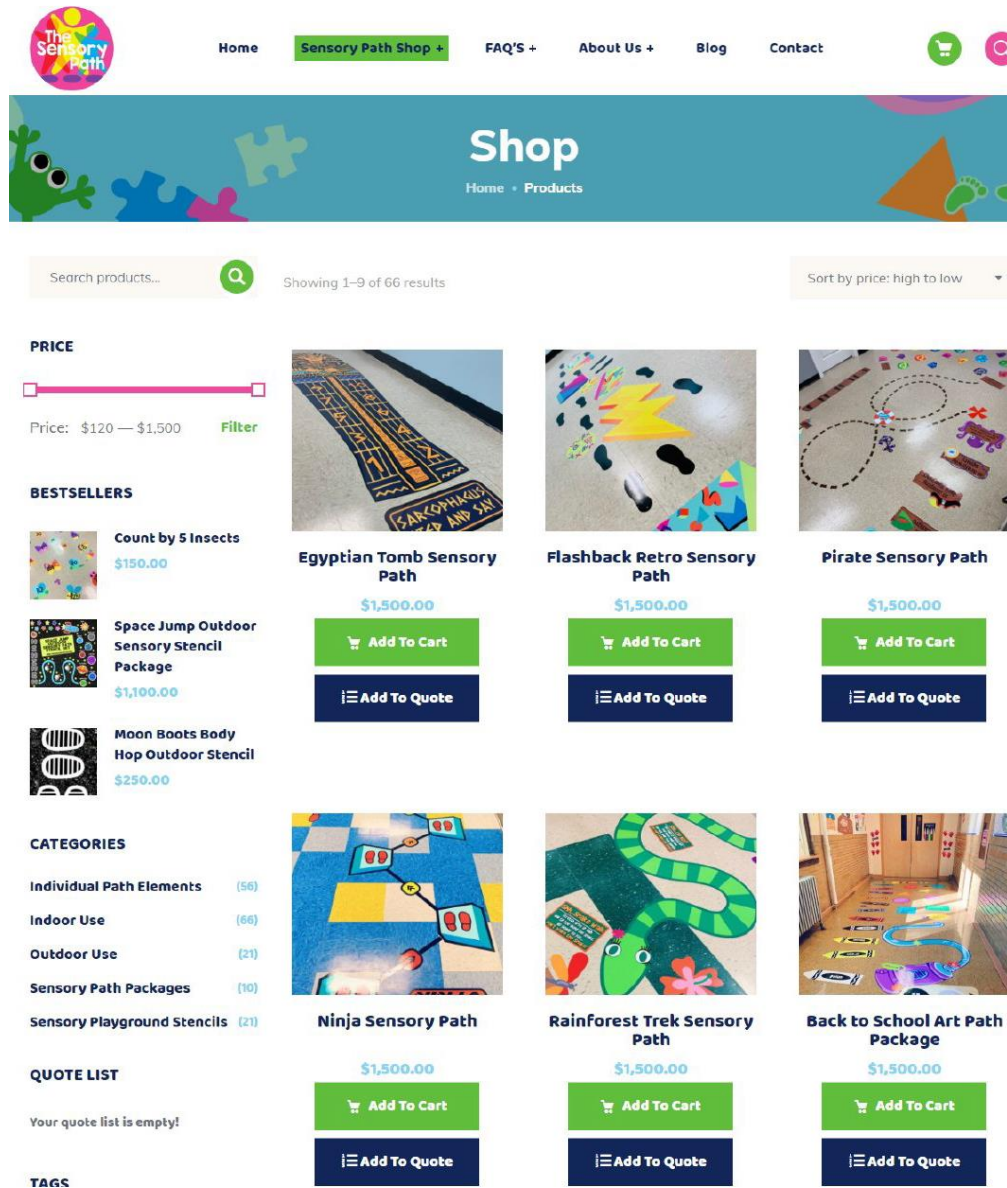
**Long Lasting Product**  
The materials we use for our path elements, with proper care, are guaranteed to uphold their original quality even in high-trafficked areas in your school.



 **ORDER FOR YOUR SCHOOL TODAY!**  
Visit [www.thesensorypath.com](http://www.thesensorypath.com)  
email us at [madison@thesensorypath.com](mailto:madison@thesensorypath.com)

<sup>2</sup> Specimen, Oct. 24, 2019. The Examining Attorney initially refused registration because, inter alia, Applicant's specimen webpage appeared to be mere advertising material. Feb. 6,

Applicant furnished a substitute specimen showing, in pertinent part, its online marketing:



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2020 Office Action at TSDR 2. The refusal was subsequently withdrawn following Applicant's submission of a substitute specimen.

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.

<sup>3</sup> TheSensoryPath.com 8/5/2020, Aug. 6, 2020 Response to Office Action at TSDR 23, 35.

The Examining Attorney has required Applicant to “disclaim the wording ‘THE SENSORY PATH’ because it is not inherently distinctive, arguing that these unregistrable term(s) at best are merely descriptive of an ingredient, quality, characteristic, function, feature, purpose, or use of applicant’s goods and/or services.”<sup>4</sup> “SENSORY,” he posits, means “of or relating to the senses”, and “PATH” means “the route or course along which something travels or moves.”<sup>5</sup>

The Examining Attorney notes that Applicant’s specimen website shows use of the term to describe its goods: e.g., “Egyptian Tomb Sensory Path”, “Pirate Sensory Path.”<sup>6</sup>

Further, the Examining Attorney maintains, “The wording SENSORY PATH or variations are commonly used in the relevant industry to describe decals used to improve cognition and other skills, especially for children.”<sup>7</sup> To illustrate:

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<sup>4</sup> Feb. 6, 2020 Office Action at TSDR 3.

<sup>5</sup> AHDictionary.com, Feb. 6, 2020 Office Action at TSDR 3.

<sup>6</sup> September 12, 2020 Office Action at TSDR 2.

<sup>7</sup> *Id.* at TSDR 4.



## Create Active Play Everywhere with Fit & Fun Playscapes

as seen on NBC4 New York!

Reusable Stencils & Paint • Sensory Path Stickers • Indoor Roll-out Games

Affordable, easy-to-implement fitness, educational and social-emotional activities that engage all kinds of kids.



DREN / SENSORY PATHS! WHAT THE HECK ARE THOSE?

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Posted on January 11, 2019 at 5:02 pm by [Todd Spring](#) / [Healthy Lifestyle for Children, Sensory Paths and Hallways, Universal Design](#) / [21 Comments](#)

Sensory paths! What the heck are those?

A sensory path is a colorful, creative and playful way for kids to build sensory pathways, connections in the brain that are responsible for sight, touch, sound, etc., which enable kids to complete complex, multi-stage tasks. A sensory path is a great way for kids to develop motor skills like balance, hand-eye coordination, and spatial awareness, and is normally made with stickers that can be stuck to any surface.

A typical sensory pathway, like our [Super Stickers™ Nature Sensory Path Set](#) or the [Recenter Reset Super Stickers™ Deluxe Package](#), consists of several exercises specifically designed to develop the motor



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<sup>8</sup> [FitAndFunPlayscapes.com/sensory-paths-what-the-heck-are-those/](#) 2/6/2020, Feb. 6, 2020  
Office Action at TSDR 7.

Shelly Dunn, Physical Education teacher at Maywood Hills Elementary, stated in the release that she was thrilled to have the grant for building a sensory path for students.

“This path will be a way for my students to take a productive break when overwhelmed by what is happening. It will also be a way for them to get a break from their cognitive learning with classroom and special ed teachers,” Dunn states. “The path will be something new and exciting for the students when they return to the classroom.”

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## Here’s why more schools should explore sensory paths

 By Study International Staff |  November 25, 2019

**3**  
SOCIAL BUZZ

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Young students are brimming with energy, which can often impact their focus in the classroom.

Sensory paths let young students hop or tip-toe through floors, or lean into walls with their hands, but more than an outlet for kids to let go and hang loose, they serve a much broader purpose.

Many schools have found these colourful, interactive pathways – which are typically made with stickers and can be found in hallways or on walls – as platforms that allow students to [release stress and cope with different emotions](#).

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In addition, according to a letter of protest from competitor Fit and Fun, “sensory path” is commonly used in elementary schools in a descriptive or generic sense.

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<sup>9</sup> Kirkland Reporter.com 9/12/2020, Sept. 12, 2020 Office Action at TSDR 7.

<sup>10</sup> StudyInternational.com 9/12/2020, *id.* at TSDR 8.

RACINE, Wis. — Students are about to head back to class in Racine and one elementary school has a new way to keep kids focused. The sensory path at Mitchell Elementary School looks like it a colorful game on the floor. Instead, it is a way to help students calm down and refocus, so they can learn.



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<sup>11</sup> Letter of Protest Memorandum, September 23, 2020 administrative response at TSDR 55. The Examining Attorney noted this evidence on September 23, 2020 and later, on November 1, 2022. Examining Attorney's brief, 22 TTABVUE 5. *See In re Information Builders Inc.*, 2020 USPQ2d 10444, at \*5 n.11 (TTAB 2020) (evidence submitted with the Letter of Protest Memorandum and relied upon by the examining attorney was properly of record), appeal dismissed, No. 20-1979 (Oct. 20, 2020); see also TBMP § 1207.06 ("During prosecution, evidence included in the application record as a result of the letter of protest procedure and relied upon by the Examining Attorney or submitted with any Office action will be considered by the Board as evidence of record.").





When Forest Elementary School held its Open House for back-to-school week, there was something special waiting for the children. Installed over the summer as a permanent feature in the school, a sensory path now decorates the hallway, providing a fun and meaningful resource for all students, but especially those with a sensory processing disorder.

**What is a sensory path?** It's a series of colorful shapes, numbers and pictures that guide children through various activities, obstacles and puzzles, combining movement and enhanced cognitive functioning.

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Applicant argues that:

- Its founder, Holly Clay, a teacher who worked with children with autism and sensory processing disorders, created the movement paths, which she began referring to as “Sensory Paths,” in May/June 2018. Applicant became the first company to sell these products using the trademark SENSORY PATH.<sup>13</sup>
- SENSORY PATH is suggestive, not merely descriptive. It does not refer to the senses or sensation, or to the route or course along which something travels or moves, as in the dictionary definitions. Rather, it helps children with sensory processing issues, such as autism, by leading them in a series of actions, such as running, jumping, and hopping. Thus, SENSORY PATH requires “a multi-

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<sup>12</sup> BedfordEducation.com 1/16/2020 *id.* at TSDR 60.

<sup>13</sup> Aug. 6, 2020 Response to Office Action at TSDR 8.

stage reasoning process in order to determine what product or services characteristics the term indicates” and is suggestive.<sup>14</sup>

- In the alternative, Applicant argues that the wording THE SENSORY PATH has acquired distinctiveness. In support of its claim of acquired distinctiveness in part, Applicant points to Ms. Clay’s Facebook video showing a child using the product went viral with over 43,000,000 views and nearly 1,000,000 shares:



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The Oxford School District posted another video featuring Ms. Clay’s outdoor sensory path, which received over 5,600,000 views”; there are over 300 unsolicited news articles about Ms. Clay.<sup>16</sup>

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<sup>14</sup> In support, Applicant alludes to its website, and an article entitled “Sensory Integration in Autism Spectrum Disorders” [Autism.org/sensory-integration/](https://www.autism.org/sensory-integration/) to show that its product addresses sensory processing disorder, and is more than just a path. *Id.* at TSDR 10-11, 15-16, 28-29.

<sup>15</sup> *Id.* at TSDR 18.

<sup>16</sup> *Id.* at TSDR 8-9, 11-12.

- Third-party use of SENSORY PATH does not invalidate Applicant's trademark rights. Fit and Fun Playscapes, LLC ("Fit and Fun") is a recent competitor of Applicant that "immediately began attempting to undermine [Applicant's] business and trademark rights through its own use of SENSORY PATH in connection with its products. Fit and Fun also attempted to use SENSORY PATH in a generic or descriptive manner, as seen in the definition and article (shown above) provided by the Examining Attorney, 'Sensory Paths! What the heck are those?'" Applicant is engaged in litigation with Fit and Fun.<sup>17</sup> Further, Applicant need not enforce its rights against another third-party, A Higher Class, as its "products are clearly distinguishable from [Applicant's] products, featuring simple designs...."<sup>18</sup>
- Applicant also made of record survey evidence purporting to show that THE SENSORY PATH is perceived as a trademark and is not merely descriptive.<sup>19</sup>

The Examining Attorney argues that Applicant's proffered evidence of acquired distinctiveness does not meet its burden of proving secondary meaning because the attention Ms. Clay garnered for her Facebook video and other media coverage does not establish that the viewers view "sensory path" as a mark.<sup>20</sup> He also maintains that Applicant's surveys lack probative value, as they were not framed properly to determine the relevant public's perception of the distinctiveness of "SENSORY

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<sup>17</sup> *Id.* at TSDR 9-10. Applicant has alluded to its litigation with Fit & Fun in *Sensory Path, Inc. v. Fit and Fun Playscapes, LLC and Pamela A. Gunther*, Civil Action No. 3:19-cv-219 (N.D. Miss.) (granting Defendant Fit and Fun and Gunther's motion for summary judgment and dismissing with prejudice Sensory Path, Inc.'s claims for trademark infringement and related state and common law claims for unfair competition on the ground that "sensory path" is generic and thus not entitled to trademark protection), *appeal docketed*, No. 22-60645 (5<sup>th</sup> Cir. Dec. 8, 2022). *See, e.g.*, Applicant's brief, ex. B, caption to expert report of Gary Myers. 20 TTABVue 7, 26. Applicant has not requested that this appeal be suspended pending disposition of the civil action, nor do we find good cause for doing so. TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1213 (2022).

<sup>18</sup> *Id.* at 12-13.

<sup>19</sup> 16 TTABVue.

<sup>20</sup> Sept. 12, 2020 Office Action at TSDR 3.

PATH.”<sup>21</sup>

## II. Discussion and Analysis

### A. Disclaimer Requirement

The Trademark Act provides that the USPTO can “require the applicant to disclaim an unregistrable component of a mark otherwise registrable.” 15 U.S.C. § 1056(a). In the absence of acquired distinctiveness, merely descriptive terms are unregistrable under Section 2(e)(1), and therefore are subject to disclaimer if the mark is otherwise registrable. Thus, the USPTO “may require a disclaimer as a condition of registration if the mark is merely descriptive for at least one of the products or services involved.” *In re Stereotaxis, Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005). Failure to comply with a disclaimer requirement is a basis for refusal. *Id.*; *In re UST Global (Singapore) Pte. Ltd.*, 2020 USPQ2d 10435, at \* 2 (TTAB 2020).

“Disclaiming unregistrable components prevents the applicant from asserting exclusive rights in the disclaimed unregistrable terms.” *Royal Crown Co., Inc. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1045 (Fed. Cir. 2018) (quoting *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262, 1265 (Fed. Cir. 2015)). Because other entities need to be able to use the wording in marketing similar goods or services, no single trademark owner may appropriate exclusive rights to the descriptive wording. “The major reasons for not protecting such [merely descriptive terms] are: (1) to prevent the owner of a mark from inhibiting competition in the sale

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<sup>21</sup> May 27, 2022 Office Action.

of particular goods; and (2) to maintain freedom of the public to use the language involved, thus avoiding the possibility of harassing infringement suits by the registrant against others who use the mark when advertising or describing their own products.” *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978).

The disclaimer requirement furthers this purpose:

The Lanham Act’s disclaimer requirement strikes a statutory balance between two competing trademark principles. On the one hand, it provides the benefits of the Lanham Act to applicants for composite marks with unregistrable components. On the other hand, the Act prevents an applicant from claiming exclusive rights to disclaimed portions apart from composite marks. The applicant’s competitors in the same trade must remain free to use descriptive terms without legal harassment.

*Dena Corp. v. Belvedere Int’l, Inc.*, 950 F.2d 1555, 21 USPQ2d 1047, 1051 (Fed. Cir. 1991).

## **B. Mere Descriptiveness**

A term or phrase is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods with which it is used. *Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 2021 USPQ2d 1069, at \*12 (Fed. Cir. 2021). It need not immediately convey an idea of each and every specific feature of the goods in order to be considered merely descriptive; it is enough if it describes one significant attribute, function or property of the goods. *In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005); *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1513 (TTAB 2016). The determination of whether a term or phrase is merely descriptive must be made in relation to the goods for which



registration is sought, not in the abstract. *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007). Evidence that a term is merely descriptive to the relevant purchasing public “may be obtained from any competent source, such as dictionaries, newspapers, or surveys,” *id.* at 1831, as well as “labels, packages, or in advertising material directed to the goods.” *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978). It may also be obtained from websites and publications, and, in the case of a use-based application, an applicant’s own specimen of use and any explanatory text included therein. *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017); *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1565 (Fed. Cir. 2001).

Applicant argues that THE SENSORY PATH is not merely descriptive, but suggestive of its goods. It maintains that a fine line separates descriptiveness from suggestiveness, and that THE SENSORY PATH falls on the suggestive side.<sup>22</sup> Wording is suggestive if “imagination, thought, or perception is required to reach a conclusion on the nature of the goods.” *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987), or if one must exercise mature thought or follow a multi-stage reasoning process in order to determine what product characteristics the term indicates. *RxD Media, LLC v. IP Application Development LLC*, 125 USPQ2d 1801, 1810 (TTAB 2018).

We must, however, consider the term as a whole and do so in the context of the goods at issue. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247,

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<sup>22</sup> Applicant’s brief, 20 TTABVUE 10, 14-15.

103 USPQ2d 1753, 1757 (Fed. Cir. 2012). “Descriptiveness must be evaluated ‘in relation to the particular goods or services for which registration is sought, the context in which the mark is used, and the possible significance the term would have to the average consumer because of the manner of its use or intended use.’” *In re Chamber of Commerce*, 102 USPQ2d at 1219 (quoting *Bayer*, 82 USPQ2d at 1831).

In this case, the Examining Attorney’s evidence shows that the term “sensory path” is a commonly used tool in elementary schools to develop motor and executive functioning skills—particularly for students with special education needs—and that the average consumers—elementary school teachers or administrators—would understand it to describe paths formed by adhesive decals.<sup>23</sup> Applicant’s own website uses the term in this descriptive sense: “We are the only company that creates sensory paths with special education research.”<sup>24</sup> The website shows examples of sensory paths, such as:



See *In re Berkeley Lights, Inc.*, 2022 USPQ2d 1000, at \*9 (TTAB 2022) (“[T]he United States Patent and Trademark Office (‘USPTO’) commonly looks to an applicant’s

<sup>23</sup> Applicant agrees that teachers are the target market for this product. *Id.* at 15.

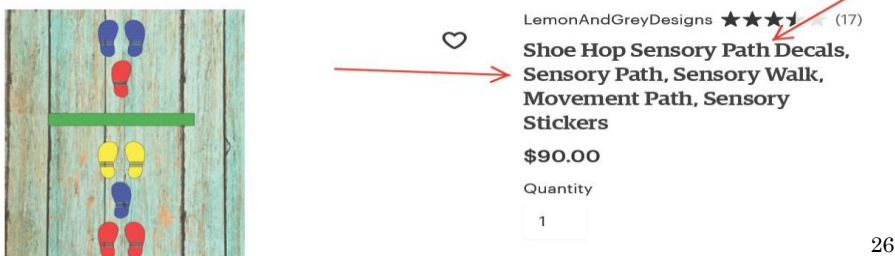
<sup>24</sup> Specimen, Oct. 24, 2019.

<sup>25</sup> TheSensoryPath.com 8/5/2020, Aug. 6, 2020 Response to Office Action at TSDR 23, 35.

website when it is made of record for possible evidence of descriptive use of a proposed mark.”). “[A]n applicant’s own website or marketing materials may be probative, or even ... ‘the most damaging evidence,’ in indicating how the relevant public perceives a term.” *In re Mecca Grade Growers, LLC*, 125 USPQ2d 1950, 1958 (TTAB 2018) (quoting *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1112 (Fed. Cir. 1987)).

Further, the record shows that the term “sensory path” is commonly used in the primary educational field to describe the very sort of paths Applicant’s decals are used to create. In addition to the evidence set forth above, we see:

- **Sensory path decals on Etsy-**



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- **Project Summary for an Elementary School-**

**Sudduth Elementary School Action Teams 1 and 2: Sensory Path for Motor Skills  
Executive Project Summary**

As a team we aspired to enhance the learning environment in a creative way. The goal of this action team was to create a functional and fun sensory path. The purpose was to provide the children with a fun and educational way to learn while maintaining focus. The sensory path allows students to use in-class learning skills while having fun and releasing energy.

In the process of volunteering at Sudduth Elementary School, our action team has actually produced several positive outcomes that have and will benefit the children. We created a successful sensory path that helps the children express themselves and even release some energy that might be trapped throughout the day. 27

<sup>26</sup> Etsy.com 1/13/2020, Letter of Protest Evidence, Sep. 23, 2020 at TSDR 4.

<sup>27</sup> DayOne.MSStant.edu 1/13/2020, *id.* at TSDR 11.

- **Teachers Pay Teachers Online Marketplace for Educational Resources-**



Numbers Sensory path for school, Printable floor decals, Math hopscotch

by PsychoScreen

This digital download includes:\* PDF in letter size with 34 pages. 8.5" x 11". You can shrink it on A4 size. \* 34 SVG files (vectors)\* PNG - 34 images (300 dpi) \* JPG - 34 images (300 dpi) 2550 x 3300px, 8.5"x...

Subjects: Math, Numbers, Physical Education

Grades: PreK, Kindergarten, 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>

Types: Fun Stuff, Classroom Forms, Games

Also included in: [Bundle of 13 Hopscotches, Floor designs, Floor paths, Floor decals + Wall clock](#)



WORD Sensory Path for floor, Printable floor decals, Words hopscotch

by PsychoScreen

This digital download includes:\* 1 Editable PDF in letter size with 63 pages. 8.5" x 11". You can shrink it on A4 size. \* 1 Not editable PDF in letter size with 63 pages. 8.5" x 11". You can shrink it on A4 size. \* ... 28

- **Grant Request for a Sensory Path-**

## APS CLL Grow. Lead. Transform. Mini-Grants: Sensory Path to Learning

Help me give my students an opportunity to appropriately express and release their emotions by walking our school's sensory path.  
We need a Cricut die cut machine to create pictures and symbols for the path.

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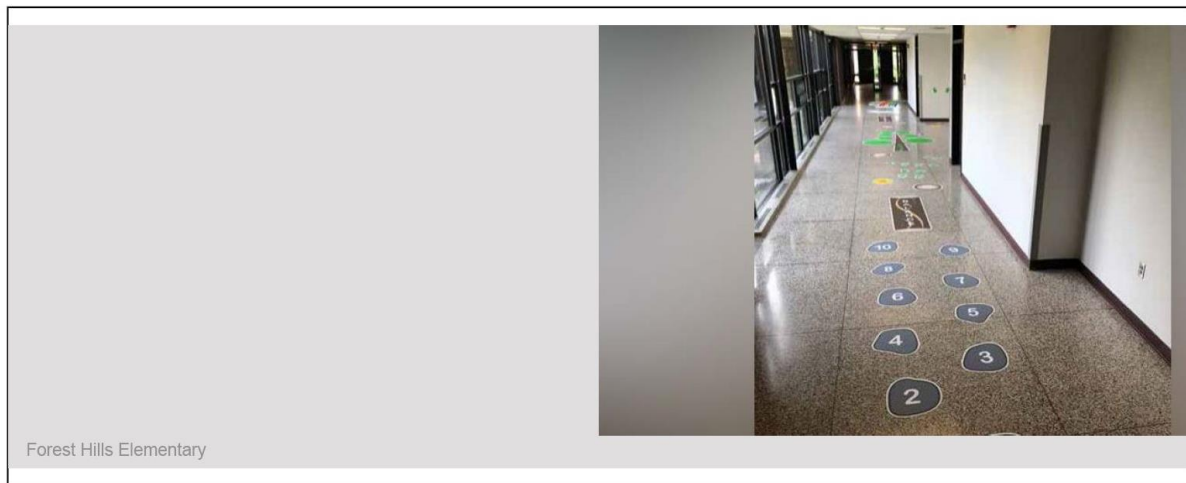
- **Elementary School adds a Sensory Path-**

*"Metro school adds sensory path to help student wellness"*

<sup>28</sup> TeachersPayTeachers.com 1/13/2020, *id.* at TSDR 13.

<sup>29</sup> DonorsChoose.org 1/13/2020, *id.* at TSDR 29.

As part of its annual school renovations over the summer, Forest Hills Elementary School in Eden Prairie added a custom sensory path designed to help students get out of their seats and stay active during the school day. The path is "an aesthetic and functional upgrade designed to give students a 'brain break,'" the school said, serving as kind of an "instant recess" to help students in kindergarten through sixth-grade calm down and refocus at school.



Forest Hills is the first of six elementary schools in the district to incorporate a sensory path and mindful wall, the school said.

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Even if Applicant was the first user of the term “sensory path” or “the sensory path,” as it claims, that does not entitle it to register the term without a disclaimer. *See KP Permanent Make-Up, Inc. v. Lasting Impressions I, Inc.*, 543 U.S. 111, 72 USPQ2d 1833, 1838 (2004) (“allowing anyone to obtain a complete monopoly on use of a descriptive term simply by grabbing it first” would “deprive commercial speakers of the ordinary utility of descriptive words”) *quoted in Sheetz of Delaware v. Doctor’s Assoc’s.*, 108 USPQ2d at 1369.

“The commercial context here demonstrates that a consumer would immediately understand the intended meaning of [THE SENSORY PATH]. In other words, the

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<sup>30</sup> KTSP.com 1/22/2020, *id.* at TSDR 63-65.



evidence shows that the mark is less an identifier of the source of goods ... and more a description of a feature or characteristic of those goods....” *In re N.C. Lottery*, 123 USPQ2d at 1710 . “[W]hen there is evidence that two or more words have been used together to form a phrase or term that forthwith conveys information regarding the goods or services set forth in the application, it is simply not necessary to engage in an analysis of each of the individual words in an effort to ascertain whether, when used together, said words forthwith convey information concerning the goods or services set forth in the application.” *In re Shiva Corp.*, 48 USPQ2d 1957, 1959 (TTAB 1998) (citing *Remington Prods. v. N. Am. Philips*, 892 F.2d 1576, 13 USPQ2d 1444 (Fed. Cir. 1990) (the term “travel care” was held to be at least descriptive based not upon a consideration of the meanings of the individual words “travel” and “care,” but rather upon the fact that the term “travel care” as a whole had been used in a descriptive or perhaps generic manner.)).

Applicant contends that commonly used terms are not automatically descriptive, pointing to Ohio State’s registration of the single word “THE” for baseball caps and hats.<sup>31</sup> Applicant bases this argument on a URL hyperlink to a news article about the Ohio State registration, as well as “the USPTO’s own databases.”<sup>32</sup> But Applicant’s contention fails for several reasons. First, as the Examining Attorney rightly observes, web addresses or hyperlinks are insufficient to make the underlying webpages of record, *In re ADCO Indus. – Technologies, L.P.*, 2020 USPQ2d 53786, at \*2 (TTAB 2020), and the Board does not take judicial notice of USPTO records. *Flame &*

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<sup>31</sup> 20 TTABVUE 14.

<sup>32</sup> *Id.*

*Wax, Inc. v. Laguna Candles, LLC*, 2022 USPQ2d 714, at \*31 n.57 (TTAB 2022). Second, each application must be considered on its own record to determine the proposed mark's eligibility to register. *In re Nat'l Concessions Grp., Inc.*, 2023 USPQ2d 527, at \*6 (TTAB 2023). And third, Applicant's proposed mark, unlike Ohio State's, adds "THE" to modify "SENSORY PATH," a phrase commonly used to describe the same sort of goods Applicant identifies.

Applicant's addition of "THE" does not transform the otherwise merely descriptive "SENSORY PATH" into a distinctive mark. *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009) ("The addition of the word 'The' at the beginning of the registered mark does not have any trademark significance. 'The' is a definite article.") (citing *inter alia The Conde Nast Pubs. Inc. v. The Redbook Pub. Co.*, 217 USPQ 356, 357 (TTAB 1983) ("[T]he slogan [THE MAGAZINE FOR YOUNG WOMEN] is merely descriptive of applicant's magazines which the record clearly shows are directed to young women. The fact that the slogan also includes the article 'The' is insignificant. This word cannot serve as an indication of origin, even if applicant's magazine were the only magazine for young women.")); *see also In re Consumer Prot. Firm PLLC*, 2021 USPQ2d 238, at \*18 (TTAB 2021) (holding THE CONSUMER PROTECTION FIRM generic for legal services; adding the definite article "the" did not affect the term's genericness).

Thus, taking the entire proposed mark into consideration, THE SENSORY PATH describes the product, not a single producer. It fails to identify and distinguish Applicant's goods from those of others, absent a showing of acquired distinctiveness.

### C. Acquired Distinctiveness

Applicant contends that “[i]n the alternative, Applicant is entitled to registration of its mark pursuant to Trademark Act § 2(f), on the basis that the mark has acquired secondary meaning.”<sup>33</sup>

“To establish acquired distinctiveness, an applicant must demonstrate that relevant consumers perceive the subject matter sought to be registered as identifying the producer or source of the product.” *In re GJ & AM*, 2021 USPQ2d 617, at \*38 (TTAB 2021) (citing *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 54 USPQ2d 1065, 1068 (2000)).

Section 2(f) provides, in pertinent part, that an applicant may establish that its proposed mark has become distinctive, as used on or in connection with its goods in commerce, based on “proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years before the date on which the claim of distinctiveness is made.” 15 U.S.C. § 1052(f). Trademark Rule 2.41 echoes this provision, adding “however, further evidence may be required” and providing for “other appropriate evidence of distinctiveness.” 37 C.F.R. § 2.41(a)(1)(2) *quoted in Schlafly v. Saint Louis Brewery, LLC*, 909 F.3d 420, 128 USPQ2d 1739, 1742-43 (Fed. Cir. 2018).

Such evidence may address (1) association of the trade[mark] with a particular source by actual purchasers (typically measured by customer surveys); (2) length, degree, and exclusivity of use; (3) amount and manner of advertising; (4) amount of

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<sup>33</sup> Applicant’s brief, 20 TTABVUE 6.

sales and number of customers; (5) intentional copying; and (6) unsolicited media coverage of the product embodying the mark. “[T]hese considerations are substantially interrelated and should be evaluated together. All six factors are to be weighed together in determining the existence of secondary meaning.” *Converse, Inc. v. Int’l Trade Comm’n*, 909 F.3d 1110, 128 USPQ2d 1538, 1546 (Fed. Cir. 2018) *cited in GJ & AM*, 2021 USPQ2d 617, at \*39.

“[A]pplicant’s burden of showing acquired distinctiveness increases with the level of descriptiveness; a more descriptive term requires more evidence of secondary meaning. ... [T]he greater the degree of descriptiveness the term has, the heavier the burden to prove it has attained secondary meaning.” *Royal Crown. v. Coca-Cola*, 127 USPQ2d at 1047. *See also In re Boston Beer Co. L.P.*, 198 F.3d 1370, 53 USPQ2d 1056, 1058 (Fed. Cir. 1999) (“[T]he greater the degree of descriptiveness the term has, the heavier the burden to prove it has attained secondary meaning.” (quoting *In re Bongrain Int’l (Am.) Corp.*, 894 F.2d 1316, 13 USPQ2d 1727, 1728 n.4 (Fed. Cir. 1990))).

In this case, where those in the field of primary education so frequently refer to a sensory path as the name of a category of goods, the term borders on the generic, and is at least highly descriptive.<sup>34</sup> *See, e.g., In re La. Fish Fry Prods.*, 116 USPQ2d at 1265 (“On appeal, Louisiana Fish Fry does not challenge the Board’s finding that the term FISH FRY PRODUCTS is highly descriptive [of marinade; sauce mixes, namely barbecue shrimp sauce mix; remoulade dressing; cocktail sauce, seafood sauce; tartar

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<sup>34</sup> *See supra* text accompanying notes 8-12, 26-30.

sauce; gumbo file; and cayenne pepper].”).

Applicant thus bears a commensurately high burden of proving that THE SENSORY PATH has acquired distinctiveness. *See Filipino Yellow Pages, Inc. v. Asian Journal Publ'ns, Inc.*, 198 F.3d 1143, 53 USPQ2d 1001, 1007 (9th Cir. 1999) (holding that a descriptive mark that fell “perilously close to the generic line . . . could be a valid trademark only with a strong showing of strong secondary meaning”) *quoted in Royal Crown v. Coca-Cola*, 127 USPQ2d at 1047. *See also In re Greenliant Sys. Ltd.*, 97 USPQ2d 1078, 1085 (TTAB 2010) (“Highly descriptive terms, for example, are less likely to be perceived as trademarks and more likely to be useful to competing sellers than are less descriptive terms. More substantial evidence of acquired distinctiveness thus will ordinarily be required to establish that such terms truly function as source indicators.”) *quoted in GJ & AM*, 2021 USPQ2d 617, at \*37.

Bearing in mind this burden of proof and the applicable factors, we assess the evidence of record.

Notably, Applicant has failed to demonstrate that its use of “the sensory path” has been substantially exclusive, as required by Section 2(f) and Trademark Rule 2.41. Applicant did not submit a declaration attesting to five years of substantially exclusive use. Rather, the evidence indicates quite the opposite, with elementary education teachers, administrators, and suppliers using the term commonly to describe paths marked by decals.<sup>35</sup> “The nature and number of third-party descriptive uses in the record indicate that use by Applicant has not been ‘substantially exclusive’ as is required for a showing of acquired distinctiveness under Section 2(f). Non-

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<sup>35</sup> *See supra* text accompanying notes 8-12, 26-30.



exclusive use presents a serious problem for Applicant in obtaining trademark rights in a designation that is not inherently distinctive, because it interferes with the relevant public's perception of the designation as an indicator of a single source.” *Apollo Medical Extrusion Techs., Inc. v. Medical Extrusion Techs., Inc.*, 123 USPQ2d 1844, 1853 (TTAB 2017) (citing *Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 222 USPQ 939, 940-41 (Fed. Cir. 1984) (“When the record shows that purchasers are confronted with more than one (let alone numerous) independent users of a term or device, an application for registration under Section 2(f) cannot be successful, for distinctiveness on which purchasers may rely is lacking under such circumstances.”)).

In view of the highly descriptive nature of THE SENSORY PATH, and its widespread use by others, Applicant's length of use of the term since 2018 does not suffice to establish acquired distinctiveness. *See In re La. Fish Fry Prods.*, 116 USPQ2d at 1265 (“[p]articularly for a mark that is as highly descriptive like FISH FRY PRODUCTS, the Board was within its discretion not to accept Louisiana Fish Fry's alleged five years of substantially exclusive and continuous use as prima facie evidence of acquired distinctiveness.”) *quoted in Real Foods Pty Ltd. v. Frito-Lay North America, Inc.*, 906 F.3d 965, 128 USPQ2d 1370 (Fed. Cir. 2018).

Applicant's founder's Facebook video showing a child using the product may have had over 43 million views and nearly a million shares, and a video posted by the Oxford School District may have had over five million views,<sup>36</sup> but that shows, at most, the popularity of sensory paths, not of a particular brand. Applicant has not furnished evidence of its advertising expenditures and sales figures. But even if its

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<sup>36</sup> Aug. 6, 2020 Response to Office Action at TSDR 8-9, 11-12.

sales figures were high, like its social media figures, that would tend to show nothing more than the popularity of sensory path products, not recognition of its applied-for mark. *See Goodyear Tire and Rubber Co. v. Interco Tire Corp.*, 49 USPQ2d 1705, 1720 (TTAB 1998) (sales figures may demonstrate popularity or commercial success as opposed to public recognition of a trademark). Moreover, even significant advertising and sales would be unlikely to overcome the highly descriptive nature of Applicant's proposed mark. *See, e.g., In re Boston Beer Co.* 0, 53 USPQ2d at (\$85 million in annual sales revenue and \$2 million in annual advertising expenditures insufficient to establish distinctiveness, in view of the highly descriptive nature of proposed mark THE BEST BEER IN AMERICA).

As shown above, the third-party use of "sensory path" or "the sensory path" does not appear to be intentional copying; it appears to be common use of a term in the public domain, "free for use by all who can truthfully employ them to describe their goods." *Hoover Co. v. Royal Appliance Mfg. Co.*, 238 F.3d 1357, 57 USPQ2d 1720, 1722 (Fed. Cir. 2001) (citing *Estate of P.D. Beckwith, Inc. v. Comm'r of Patents*, 252 U.S. 538, 543-44 (1920)). "Under these circumstances, we do not find ... use by others to be 'copying' sufficient to prove that [THE SENSORY PATH] has acquired distinctiveness." *Sheetz of Delaware, Inc. v. Doctor's Assoc's. Inc.*, 108 USPQ2d 1341, 1370 (TTAB 2013).

Applicant asserts that "[a] Google news search reveals over 300 unsolicited news articles about [Applicant's founder] Ms. Clay, her product, and her business."<sup>37</sup> The record, however, shows only one Google search results page, with ten such results—

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<sup>37</sup> Aug. 6, 2020 Response to Office Action at TSDR 12.

not the full articles.<sup>38</sup> “A list of Internet search results generally has little probative value, because such a list often does not contain sufficient surrounding text to show the context in which the term is used on the listed web pages.” *Luxco, Inc. v. Consejo Regulador del Tequila, A.C.*, 121 USPQ2d 1477, 1488 n.59 (TTAB 2017) (citing *Bayer*, 82 USPQ2d at 1833 (deeming Google® search results that provided very little context of the use of ASPIRINA to be “of little value in assessing the consumer public perception of the ASPIRINA mark”); *In re Tea and Sympathy, Inc.*, 88 USPQ2d 1062, 1064 n.3 (TTAB 2008) (finding truncated Google® search results entitled to little probative weight without additional evidence of how the searched term is used)). The search results, each showing a few lines of text, show mixed uses of “sensory path” or “the sensory path” but are ultimately of little probative value, and insufficient to overcome the highly descriptive nature of the term.

Applicant must rely, then, on its surveys in its effort to show inherent or acquired distinctiveness.

#### **D. Applicant’s Surveys**

In January 2021, Applicant retained James Berger (principal of strategic marketing communications and consulting firm James T. Berger/Market Strategies, and a faculty member at Roosevelt University in Chicago) as an expert to conduct surveys regarding SENSORY PATH’s distinctiveness “within the scheme of gene[r]ic, descriptive, or suggestive.”<sup>39</sup> Mr. Berger, using Russell Research Group of Rutherford

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<sup>38</sup> *Id.* at TSDR 27.

<sup>39</sup> Applicant’s Request to Suspend and Remand, 16 TTABVUE 4, 9; *see* Berger Curriculum Vitae, Exhibit A, 16 TTABVUE 17 *et seq.*

New Jersey as his field research general contractor, conducted a pilot survey, sent to 53 respondents, all of whom were kindergarten through eighth grade schoolteachers.<sup>40</sup> The results were:

### **SENSORY PATH**

Generic - 9%

Descriptive – 43%

Suggestive – 30%

Don't Know – 17%

In his memorandum setting forth the pilot survey results, Mr. Berger stated that “[w]ith a sample so small it is difficult to reach definitive conclusions. However, the preliminary results indicate that the SENSORY PATH is clearly NOT considered to be a generic mark and falls between descriptive and suggestive. It is my recommendation that survey be rolled out to approximately 250 respondents.”<sup>41</sup>

Based on the results from the pilot survey, Mr. Berger and Russell Research conducted a larger “Teflon” survey of 255 respondents, all in the Kindergarten through 8<sup>th</sup> grade range.<sup>42</sup> According to Mr. Berger, “This protocol attempts to educate respondents as to the differences between generic, descriptive and suggestive brands.

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<sup>40</sup> Berger memorandum re pilot survey, 16 TTABVUE 48.

<sup>41</sup> Berger memorandum re pilot survey, 16 TTABVUE 49-50.

<sup>42</sup> Berger report, 16 TTABVUE 13-14; Survey questionnaire, 20 TTABVUE 45. Details concerning Applicant's surveys, such as the questionnaire used for screening the 255 respondents in the Teflon survey, were not attached to Applicant's Request for Suspension and Remand, 16 TTABVUE, and did not appear in the application file. Ordinarily, “[t]he record should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal.” Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d). In this case, however, absent an objection, we consider Applicant's survey materials in order to better analyze their probative value.

The survey then presents a variety of brands and asks the respondent to place each brand into one of the three categories.”<sup>43</sup> Specifically, the questionnaire stated:

This survey focuses on generic, description and suggestive brand names.

There are several ways trademarks can be distinguished from one another. Generic trademarks are common names of goods and/or services or a category of goods and/or services. Examples of trademarks that are considered to be generic are:

SCHOOL SUPPLIES  
COMPUTER LEARNING CENTER  
WORKBOOK  
MARKERS  
BLACKBOARD CHALK

On the other hand, descriptive trademarks describe the qualities or characteristics of the goods and/or services for which the trademark is used. Examples of trademarks that are considered to be descriptive are:

NO. 2 PENCIL  
ADJUSTABLE LITERATURE ORGANIZER  
SAFETY SIZZORS  
COMPUTER PRIVACY SHIELD  
THREE-RING BINDER

FINALLY, suggestive trademarks suggest a quality or characteristic of the goods or services. In doing so, suggestive trademarks require some imagination, thought or perception to reach a conclusion as to the nature of the goods or services. The following trademarks can be considered suggestive:

BRAIN GYM  
RECORDABLE ANSWER BUZZER  
LITTLE GENIUS STARTER KIT  
ASTROBRIGHT COLOR PAPER  
SLEEPYMOON LAP BLANKET

With these definitions and examples in mind, here are some names or trademarks that pertain to educational products and programs. For each of them, do you believe them to be GENERIC, DESCRIPTIVE or SUGGESTIVE.

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<sup>43</sup> Berger report, 16 TTABVUE 14; 20 TTABVUE 112.

## SENSORY PATH

{Type of trademark – SENSORY PATH}

1f. Do you believe this is a... (ALLOW ONE ANSWER.)

Generic trademark	( )1
	...123
Descriptive trademark	( )2
Suggestive trademark	( )3
Don't Know	( )4 <sup>44</sup>

Mr. Berger's Teflon survey yielded the following pertinent results:<sup>45</sup>

### SENSORY PATH

Generic – 18%

Descriptive – 38%

Suggestive – 23%

Don't Know – 21%

“Based on this sample,” Mr. Berger opined, “I conclude that SENSORY PATH is clearly NOT considered to be a generic mark and falls between descriptive and suggestive.”<sup>46</sup>

As the U.S. Supreme Court has observed, “[s]urveys can be helpful evidence of consumer perception but require care in their design and interpretation.” *USPTO v. Booking.com, B.V.*, 591 U.S. \_\_\_, 140 S. Ct. 2298, 2020 USPQ2d 10729, at \*7 n.6 (2020). A “Teflon” survey refers to the format of a survey used in *E. I. du Pont de Nemours & Co. v. Yoshida Int’l, Inc.*, 393 F. Supp. 502, 185 USPQ 597 (EDNY 1975) to demonstrate that the fanciful term “Teflon” had not become generic. *Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC*, 124 USPQ2d 1184, 1195 n.32 (TTAB 2017). It

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<sup>44</sup> Teflon survey questionnaire, 20 TTABVUE 47, 50.

<sup>45</sup> Berger report, 16 TTABVUE 14; 20 TTABVUE 67, 113.

<sup>46</sup> Berger report, 16 TTABVUE 14.

consists essentially of a mini-course instructing respondents in the difference between generic terms and trademarks, followed by a mini-test to confirm their comprehension. *Id.* at 1195-96. “In designing a TEFLON-type survey, both the initial ‘mini-test’ and the other marks and generic names in the list must be carefully constructed and tailored to the facts of a particular case.” 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 12:16 (5th ed. March 2023) (“McCarthy”).

In this case, we perceive several problems in this “Teflon” survey’s design and interpretation that undermine its probative value. First, the “mini-course” was not very instructive. It lumps generic terms in with “brand names,” and even refers to them as “generic trademarks.”<sup>47</sup> A generic term is not a brand or a trademark. *In re Merrill Lynch, Pierce, Fenner, and Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1142 (Fed. Cir. 1987) (“Generic terms, by definition incapable of indicating source, are the antithesis of trademarks, and can never attain trademark status.”) *accord Sheetz of Delaware, Inc. v. Doctor’s Assoc’s. Inc.*, 108 USPQ2d at 1362 (“By definition, a generic term for a product can never function as a trademark for that product.”).

Second, the survey “failed to conduct a mini-test to determine whether the respondents understood the difference between a common name and a brand name.” *Id.* at 1361. Because the survey “did not perform a mini-test to determine whether survey participants understand or can identify a trademark, we cannot determine whether participants even perceived the intended nature or purpose of the applied-for ... mark.” *In re The Ride, LLC*, 2020 USPQ2d 39644, at \*9 (TTAB 2020).

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<sup>47</sup> 20 TTABVUE 47, 50, 62, 67.



Third, if we combine the 18% of responses finding “sensory path” generic with the 38% of responses finding it descriptive, that comes to 56% of respondents finding “sensory path” nondistinctive. It is entirely appropriate to combine the two, as genericness is the ultimate in descriptiveness. *H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986) and both warrant a disclaimer of the key wording. *See In re Am. Furniture Warehouse Co.*, 126 USPQ2d 1400, 1407 (TTAB 2018) (“[W]e agree with the Examining Attorney that FURNITURE WAREHOUSE constitutes a generic term for retail furniture stores, and therefore it must be disclaimed.”). And it is entirely appropriate to find, in consequence, that the combined responses finding “sensory path” nondistinctive outnumber the 23% suggestive responses by more than double.

Applicant’s **second survey** fares no better. In Mr. Berger’s words:

The purpose of the second survey was to gauge whether SENSORY PATH should be classified as DESCRIPTIVE or SUGGESTIVE based on consumers’ impression of the term. For purposes of cost efficiency, [Applicant’s law firm] McDavid and Associates, PC assisted in facilitating this survey using Qualtrics, a web-based survey tool used to conduct the research evaluation and other data collection activities. The survey was distributed via email to a list of 48,475 email addresses.<sup>48</sup>

There were 494 qualified respondents. The survey asked them to “select the choice which most closely matches your impression of what ‘Sensory Path’ is.” The potential choices included the following:

1. A chain of neurons, from receptor organ to cerebral cortex, that are responsible for the perception of sensations.

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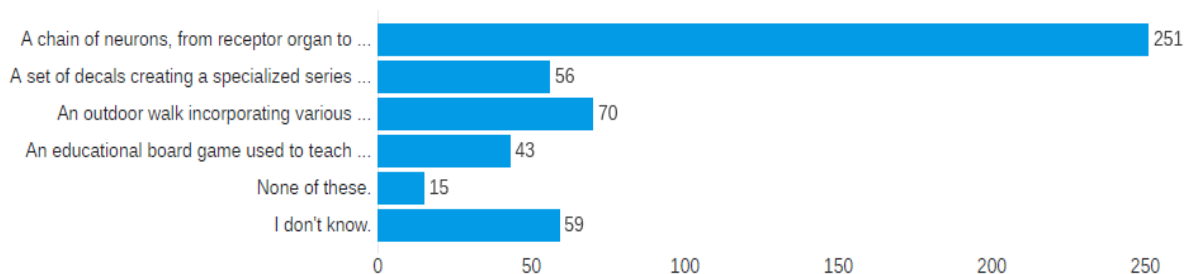
<sup>48</sup> Berger report, 16 TTABVUE 14.

2. A set of decals creating a specialized series of guided movements specifically designed help reduce a child's sensory seeking behaviors.
3. An outdoor walk incorporating various textures, smells, and sounds specifically designed to stimulate the senses.
4. An educational board game used to teach children the five senses by providing sensory stimulating activities as they move around the board.
5. None of these.
6. I don't know.<sup>49</sup>

The survey received the following results:

Q9 - Select the choice which most closely matches your impression of what "Sensory Path" is:

494 Responses



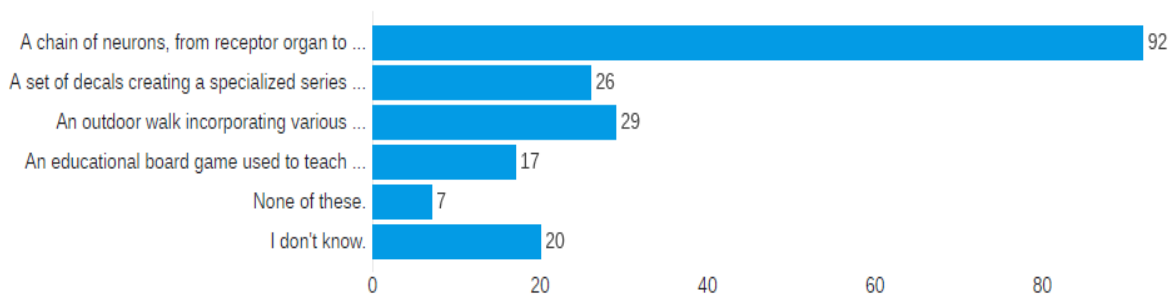
Choice Count

50

Of this universe of respondents, 191 had experience teaching K-12 students. Their responses were:

Q9 - Select the choice which most closely matches your impression of what "Sensory Path" is:

191 Responses



Choice Count

51

<sup>49</sup> *Id.* at 15.

<sup>50</sup> 16 TTABVUE 15, 69; 20 TTABVUE 74.

<sup>51</sup> 16 TTABVUE 75; 20 TTABVUE 80.

According to Mr. Berger, “Survey Two clearly shows Sensory Path is suggestive as it does not immediately convey an association with indoor decals.”<sup>52</sup> Mr. Berger subsequently suffered an illness, so Applicant retained other expert witness, Gary Myers (Professor of Law at the University of Missouri School of Law, in Columbia, Missouri) who attested to the validity of the second survey.<sup>53</sup>

Applicant argues that the Examining Attorney misapprehends the differing purposes of the surveys, as the first was designed to determine whether consumers viewed SENSORY PATH as generic, and the second was designed to drill down further, to determine whether SENSORY PATH fell between merely descriptive and suggestive.<sup>54</sup>

We agree with the Examining Attorney, however, that neither survey achieved its purpose. As with the first survey, there are problems with the second survey’s design and interpretation that undermine its probative value. To begin with, we have some misgivings about the administration of the survey and its universe of respondents.

“Survey evidence is subject to review for its probative value, based on factors including the design of the survey, the questions asked, and the experience of the surveyor. *In re Hotels.com LP*, 573 F.3d 1300, 91 USPQ2d 1532, 1536 (Fed. Cir. 2009).” *Kohler Co. v. Honda Giken Kogyo K.K.*, 125 USPQ2d 1468, 1509 (TTAB 2017).

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<sup>52</sup> 16 TTABVUE 16.

<sup>53</sup> 16 TTABVUE 5, 52-64; 20 TTABVUE 26-31. Myers Curriculum Vitae, 20 TTABVUE 33-123. Applicant also attaches the report of Justin A. DeSimone (associate professor of Management in the Culverhouse College of Business at the University of Alabama) who attested to the appropriateness of the two surveys. 20 TTABVUE 83-91. DeSimone Curriculum Vitae, 20 TTABVUE 93-110.

<sup>54</sup> Applicant’s brief, 20 TTABVUE 8-10.

According to McCarthy, “The only relevant limitations are: (1) that the attorneys do not design the survey on their own without the assistance of a survey professional; and (2) that the attorneys do not themselves conduct the survey. Once the relevant universe and relevant questions are defined between the attorneys and the survey director, the attorneys should then step aside and allow the expert survey director to carry out independently the survey in accordance with accepted survey methodology.”

6 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:166 (5th ed. March 2023). Here, it appears that the second survey was designed by Mr. Berger and administered by Applicant’s counsel. While we look askance at this mode of administration, we nonetheless consider the second survey for what it is worth, in view of the expert opinions proffered regarding its appropriateness.

The second survey’s universe of respondents also appeared to be overbroad. A proposed mark’s distinctiveness is determined from the viewpoint of the relevant prospective purchasing or consuming public for the identified goods. *See, e.g., In re Bed & Breakfast Registry*, 791 F.2d 157, 160, 229 USPQ 818, 819 (Fed. Cir. 1986); *In re Gyulay*, 820 F.2d 1216, 1217, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987). In this case, the relevant purchasing or consuming public is kindergarten through elementary school teachers and administrators. But the survey’s initial universe of 494 respondents was not so limited, and “[t]he evidence of record does not elaborate on the study’s methodology with sufficient detail to address this concern.” *Promark Brands Inc. and H.J. Heinz Co. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1246 (TTAB 2015). Nonetheless, the study narrowed its focus to 191 respondents who had experience teaching students in the K-12<sup>th</sup> grade range. That narrowing of the

universe of respondents—despite including teachers of high school students, whose use of sensory paths has not been demonstrated—at least approximates the relevant public, and allows us to consider the survey, again for what it is worth.

That said, it is apparent that the second survey is not worth much, due to fundamental flaws in its phrasing. It asked respondents to “Select the choice which most closely matches your impression of what ‘Sensory Path’ is” from six options, and purported to determine the term’s suggestiveness versus descriptiveness based on the number of responses for each option, one of which was Applicant’s identification of goods. That, however, is not the standard:

Whether a mark is merely descriptive is evaluated in relation to the particular goods for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use, ... and **not in the abstract or on the basis of guesswork.**

*In re Fallon*, 2020 USPQ2d 11249, at \*7 (TTAB 2020) (quoting *Chamber of Commerce*, 102 USPQ2d at 1219 and *Fat Boys Water Sports*, 118 USPQ2d at 1513 (internal punctuation omitted, emphasis added)).

If we apply the correct standard, we ask “whether someone **who knows what the goods and services are** will understand the mark to convey information about them.” *Id.* (quoting *Real Foods v. Frito-Lay*, 128 USPQ2d at 1374 and *DuoProSS*, 103 USPQ2d at 1757) (internal punctuation omitted, emphasis added). *Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 2021 USPQ2d 1069, \*12 (Fed. Cir. 2021) (“We have explained that ‘the question [for whether a mark is descriptive] is whether [a

consumer] who knows what the goods and services are will understand the mark to convey information about them.”) (quoting *DuoPross*).

In any event, it is well settled that “[s]o long as **any one of the meanings of a term is descriptive**, the term may be considered to be merely descriptive.” *In re UST Glob. (Singapore) Pte. Ltd.*, 2020 USPQ2d 10435, at \*5 (TTAB 2020) (emphasis added). So the fact that there may be additional definitions of the term “sensory path” is of no consequence. In short, given their methodological flaws, Applicant’s surveys carry little, if any, probative value, and fail to overcome the evidence establishing that SENSORY PATH or THE SENSORY PATH is at least highly descriptive, without acquired distinctiveness.

Applicant argues that “[t]he USPTO is again at risk of misinterpreting nearly one hundred years of Supreme Court precedent—from *Kellogg* to *Booking.com*.”<sup>55</sup> But these decisions offer it little succor. In *Kellogg Co. v. Nat’l Biscuit Co.*, 305 U.S. 1111, 39 USPQ 296 (1939), the National Biscuit Company (later, Nabisco) once owned a patent for its SHREDDED WHEAT cereal, but upon its expiration, the name of the patented article passed into the public domain:

The plaintiff has no exclusive right to the use of the term “Shredded Wheat” as a trade name. For that is the generic term of the article, which describes it with a fair degree of accuracy; and is the term by which the biscuit in pillow-shaped form is generally known by the public. Since the term is generic, the original maker of the product acquired no exclusive right to use it. As Kellogg Company had the right to make the article, it had, also, the right to use the term by which the public knows it.

*Id.* at 298.

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<sup>55</sup> Applicant’s brief, 20 TTABVUE 10.

So too here. Applicant had to “show that the primary significance of the term in the minds of the consuming public is not the product but the producer. This it has not done.” *Id.* at 299. The relevant public of kindergarten through elementary school teachers and administrators has come to refer to it as the name of the path formed by decals, not as a trademark.

The Supreme Court’s *Booking.com* decision did not address whether “booking” alone, like “the sensory path” alone, would be perceived as generic. The Court made clear that “[a] generic name—the name of a class of products or services—is ineligible for federal trademark registration. The word ‘booking,’ the parties do not dispute, is generic for hotel-reservation services.” *USPTO v. Booking.com, B.V.*, 591 U.S. \_\_\_, 140 S. Ct. 2298, 2020 USPQ2d 10729, at \*2 (2020). Rather, the issue there was “whether that term [“Booking.com”], taken as a whole, signifies to consumers the class of online hotel-reservation services.” *Id.* at \*5. “A ‘generic.com’ term might also convey to consumers a source-identifying characteristic: an association with a particular website,” it held. *Id.* at \*6. “Whether any given ‘generic.com’ term is generic, we hold, depends on whether consumers in fact perceive that term as the name of a class or, instead, as a term capable of distinguishing among members of the class.” *Id.* at \*7.

Thus, neither Applicant’s cited authorities nor its surveys support its claim of distinctiveness.

### **III. Conclusion**

Based on the weight of the evidence, we find that THE SENSORY PATH is at least highly descriptive of Applicant’s goods, and has not acquired distinctiveness. 15 U.S.C. §§ 1052(e)(1), (f).



**Decision:** The refusal to register Applicant's mark absent a disclaimer of the literal portion Applicant's mark is affirmed. However, if Applicant submits a disclaimer of "THE SENSORY PATH" to the Board within thirty days, the requirement for disclaimer will have been met and this application will proceed. Trademark Rule 2.142(g), 37 C.F.R. § 2.142(g); TBMP § 1218 (2022). The disclaimer should read as follows: "No claim is made to the exclusive right to use THE SENSORY PATH apart from the mark as shown."