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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91187033
Party	Defendant Key Curriculum Press, Inc.
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Submission	Motion to Dismiss - Rule 12(b)
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

<p>DAVID C. McGOWAN.</p> <p>Opposer,</p> <p>v.</p> <p>KEY CURRICULUM PRESS, INC.</p> <p>Applicant.</p>	<p><b>Opposition No. 91187033</b></p> <p><b>MOTION TO DISMISS; OR IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT</b></p>
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**INTRODUCTION**

Applicant Key Curriculum Press, Inc. (“KCP”), owner of Application Serial No. 77279192 (the “Application”) for the mark SKETCHPAD (the “Mark”), hereby moves to dismiss the Notice of Opposition filed by David C. McGowan. (“Opposer”), or in the alternative moves for a more definite statement.

**FACTS**

Applicant KCP is a leading provider of software and publications in the field of education. KCP was founded in the 1970s by brothers Peter and Steven Rasmussen, who drew from their teaching experience to create workbooks that would help students who were struggling in mathematics learn the basics and build a foundation for success. KCP has since become a leader in its field, and its SKETCHPAD products have become recognized in the industry and received numerous awards and accolades. KCP’s products are the most widely used school software in any subject in grades 6-12, its SKETCHPAD products are the best-selling education software across all subject areas for these grades according to The Complete K-12 Report by Open Book Publishing (2004). KCP has sold its software to more than 50% of the

grades 6-12 schools in the United States, and has had over 750,000 visits to its "Sketchpad Resource Center" website in the last two years.

KCP began using the SKETCHPAD mark in or about 1991 and has obtained registration for marks containing the term "SKETCHPAD."<sup>1</sup> KCP filed its Application for the SKETCHPAD mark on September 13, 2007, claiming a first use date in 1991. KCP sought registration of the Mark in class 16 for "prints and publications, namely, books and manuals on the subject of mathematics, geometry, and mathematical visualization."<sup>1</sup> The United States Patent & Trademark Office ("PTO") approved the application and published it on August 19, 2008.

Opposer David McGowan filed its Notice of Opposition on October 18, 2008 asserting a single ground for its opposition, namely, that the Mark is allegedly a generic term for the class 16 goods. The Notice of Opposition is a bare-bones document. It consists of a single unnumbered paragraph stating:

?Sketchpad? opened the field of computer graphics in 1963. The Plaintiff is a graphic artist since 1984, and launched his Sketchpad.com website in 1997 for the purpose of income from the sale of his graphic works and other online services.

See Notice of Opposition. No exhibits were attached to the Notice of Opposition, and Applicant has not received any communication from Opposer regarding his Notice of Opposition.

### ARGUMENT

#### **I. THE OPPOSITION SHOULD BE DISMISSED UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6) FOR FAILURE TO STATE A CLAIM.**

Procedure and practice in *inter partes* proceedings before the Trademark Trial and Appeal Board ("TTAB") are governed by the Federal Rules of Civil Procedure. 37 C.F.R. § 2.116. A motion to dismiss a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) should be granted when a plaintiff has failed to allege any facts which would support the ground for opposition in question. *Space Base Inc. v. Stadis Corp.*, 17 USPQ2d 1216, 1218 (TTAB 1990);

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<sup>1</sup> Applicant also sought registration in class 9, but the Opposition only applies to the class 16 goods, not the class 9 goods.

TBMP § 503.02. A claim must make more than a “mere conclusory allegation” to withstand a motion to dismiss under Rule 12(b)(6). *Intellimedia Sports Inc. v. Intellimedia Corp.*, 43 USPQ2d 1203, 1207 (TTAB 1997). Any claim must also be dismissed under Federal Rule of Civil Procedure 12(b)(6) if it is “fatally flawed in [its] legal premises and destined to fail...thus to spare litigants the burdens of unnecessary pretrial and trial activities.” *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993).

Opposer has failed to allege any facts which support its single claim for genericness, and this claim must be dismissed under FRCP 12(b)(6). As noted above, Opposer simply states that “‘Sketchpad’ opened the field of computer graphics in 1963. The Plaintiff is a graphic artist since 1984, and launched his Sketchpad.com website in 1997 for the purpose of income from the sale of his graphic works and other online services.” That is the entire text of the Opposition. The Opposition is wholly devoid of any allegations supporting the claim of genericness. Nothing in the above statement suggests or indicates that “SKETCHPAD” is a generic term for “prints and publications, namely, books and manuals on the subject of mathematics, geometry, and mathematical visualization.” Opposer’s claim must be dismissed.

Moreover, Opposer’s claim of genericness is fatally flawed because there is no possible set of allegations that Opposer could plead to show that SKETCHPAD is a generic term for books and manuals about math. The term “SKETCHPAD” is not a generic term for such books and manuals. The claim should be dismissed with prejudice.

In addition, Opposer’s claim must also be dismissed because Opposer lacks standing. Opposer simply states that he is a graphic artist who launched a website at [www.sketchpad.com](http://www.sketchpad.com) “for the purpose of income from the sale of his graphic works and other online services.” There is no allegation indicating how this gives him standing to challenge the Mark on the grounds that it is generic for books and manuals about math, geometry and mathematical visualization. It does not appear that Opposer even produces any books or manuals, let alone the type of books and manuals described in Applicant’s Application. Rather,

he is a graphic artist who runs a website selling his graphics works and online services. This gives him no standing whatsoever.

Opposer's claim should be dismissed with prejudice.

**II. OPPOSER SHOULD PROVIDE A MORE DEFINITE STATEMENT.**

Opposer's allegations are so vague and ambiguous that applicant cannot reasonably be required to frame a responsive pleading. Accordingly, in the alternative, should the Board not grant Applicant's Motion to Dismiss, Applicant hereby moves pursuant to Federal Rule of Civil Procedure 12(e) and Trademark Rule 2.116(e) for a more definite statement. Opposer should be required to identify and allege facts as to genericness, if any, and identify and describe the vague reference to "?Sketchpad?". Applicant should also specify the "graphic works and other online services" referenced in the Opposition.

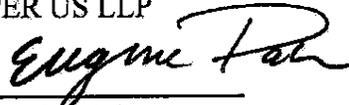
**CONCLUSION**

For the foregoing reasons, Applicant respectfully requests that the Board dismiss Applicant's claim (genericness) without leave to amend. In the alternative, should the Board not grant the motion to dismiss (with or without leave to amend), Applicant requests that the Board grant its motion for a more definite statement.

Dated: November 26, 2008

Respectfully submitted,

DLA PIPER US LLP

By:   
Eugene M. Pak

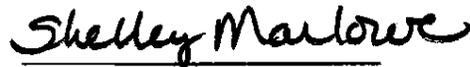
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that one copy of the foregoing MOTION TO DISMISS; OR IN THE ALTERNATIVE MOTION FOR MORE DEFINITE STATEMENT was served on Opposer David C. McGowan by depositing the same in the United States mail, First Class Mail, postage prepaid, addressed to Opposer's counsel of record as follows:

David C. McGowan  
Sketchpad.com  
2415 Garth Run Road  
Madison, VA 22727-3314  
dcmcgowan@sketchpad.com

this 26th day of November 2008.

  
Shelley Marlowe  
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