

This Opinion is Not a
Precedent of the TTAB

Mailed: November 16, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Brand Design Company, Inc.
d/b/a DBA House Industries
—

Serial No. 87658330
—

Rex A. Donnelly of RatnerPrestia,
for Brand Design Company, Inc.
d/b/a DBA House Industries.

Tracy Fletcher, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.

—

Before Goodman, Lynch and Hudis,
Administrative Trademark Judges.

Opinion by Hudis, Administrative Trademark Judge:

The Application at issue in this appeal has a long and tortured history. We do not here recount all of the historical facts of the Application's prosecution except as necessary to explain this decision. Brand Design Company, Inc. d/b/a DBA House Industries ("Applicant") seeks registration on the Supplemental Register of the standard character mark LETTERS & NUMBERS for:

“Downloadable electronic publications in the nature of manuals, hand-outs, brochures, booklets, educational learning cards, activity cards, and educational booklets in the field of educational and entertainment materials targeted to children on the topic of alphanumeric characters and symbols” in International Class 9; and

“Printed publications, namely, books, manuals, hand-outs, brochures, booklets, educational learning cards, activity cards, workbooks, activity books, posters and educational booklets in the field of educational and entertainment materials targeted to children on the topic of alphanumeric characters and symbols” in International Class 16.¹

The Trademark Examining Attorney refused registration under Trademark Act Sections 1, 2, and 45, 15 U.S.C. §§ 1051, 1052, 1127, on the ground that Applicant’s proposed mark is generic as applied to the goods identified in the Application. After the Examining Attorney made the refusal final, Applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. We affirm the refusal to register.

¹ Application Serial No. 87658330 was filed on October 24, 2017, under Trademark Act Section 1(b), 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce. Applicant filed Amendments to Allege Use, with specimens, under Trademark Act Section 1(c), 15 U.S.C. § 1051(c), on August 19, 2019 and April 20, 2020, respectively, which ultimately were accepted. Prior to being divided, the Application sought registration under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere and first use in commerce since at least as early as August 18, 2019 (for the goods and services in Classes 16, 35 and 41) and at least as early as March 20, 2020 (for the goods in Class 9).

As originally filed, Application Serial No. 87658330 sought registration of the proposed mark LETTERS & NUMBERS for goods and services in Classes 9, 16, 35 and 41. On May 16, 2021, Applicant filed a request to divide out the services in Classes 35 and 41 from the Application. The USPTO had not yet acted upon Applicant’s Request to Divide during the briefing of this Appeal. Nonetheless, Applicant and the Examining Attorney only briefed the applicability of the refusal to register based upon the goods in Classes 9 and 16. Eventually, on September 16, 2021, the USPTO acted upon Applicant’s Request to Divide, processing it as follows: (1) Parent (original) Application Serial No. 87658330 contains the goods in Classes 9 and 16; and (2) Child Application Serial No. 87983996 contains the services in Classes 35 and 41. The issues decided in this decision pertain only to the goods in the Parent Application (that is, the goods in Classes 9 and 16).

I. Applicable Law

“At the lowest end of the distinctiveness scale [of marks and terms] is the ‘generic name for the goods or services. ... The name of the good itself ... is incapable of ‘distinguish[ing] one producer’s goods from the goods ... of others’ and is therefore ineligible for registration. ... Indeed, generic terms are ordinarily ineligible for protection as trademarks at all.” *U. S. Patent & Trademark Office v. Booking.com B.V.*, 140 S. Ct. 2298, 2020 USPQ2d 10729, at *3-4 (2020). Such terms can never attain trademark status because “[t]o allow trademark protection for generic terms, i.e., names which describe the genus of goods being sold ... would grant the owner of the mark a monopoly, since a competitor could not describe his goods as what they are.” *In re Merrill Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1142 (Fed. Cir. 1987) (quoting *CES Publ’g Corp. v. St. Regis Publ’ns, Inc.*, 531 F.2d 11, 188 USPQ 612, 615 (2d Cir. 1975)).

“A generic term is one that refers to the genus of which the particular product is a species.” *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 329 (1985). Alternative definitions are: a “generic name [is] the name of a class of products ... or “the name of the good itself[.]” and a “‘generic’ term names a ‘class’ of goods ..., rather than any particular feature or exemplification of the class.” *Booking.com*, 2020 USPQ2d 10729, at *3-5; see also *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1810 (Fed. Cir. 2001) (“Generic terms are common names that the relevant purchasing public understands primarily as describing the genus of goods ... being sold.”) (citing *In re Merrill Lynch*, 4 USPQ2d at 1142, and *H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 228

USPQ 528, 532 (Fed. Cir. 1986)); *In re 1800Mattress.com IP LLC*, 586 F.3d 1359, 92 USPQ2d 1682, 1685 (Fed. Cir. 2009) (“The test is not only whether the relevant public would itself use the term to describe the genus, but also whether the relevant public would understand the term to be generic.”).

“[A] term [also] can be generic for a genus of goods or services” if the relevant public “understands the term to refer to a key aspect of that genus.” *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1637 (Fed. Cir. 2016); *see also Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1047 (Fed. Cir. 2018). In this regard, if the proposed mark defines “an integral, if not the paramount, aspect of ... [the] [goods,] as [the Applicant] defines ... [them,]” the term or phrase sought for registration may be found generic for those goods. *See In re Reed Elsevier Props. Inc.*, 482 F.3d 1376, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007) (affirming refusal of LAWYERS.COM as generic for an online database featuring an information exchange of law, legal news, and legal services).

To be found generic, a term does not need to be the one and only name of a specific product. There can be more than one generic term. *See In re 1800Mattress.com*, 92 USPQ2d at 1685 (“We ... disagree with Dial-A-Mattress’s assertion that there can only be one generic term, which is ‘online mattress stores.’ Instead, any term that the relevant public understands to refer to the genus of ‘online retail store services in the field of mattresses, beds, and bedding’ is generic.”); *Roselux Chem. Co. v. Parsons Ammonia Co.*, 299 F.2d 855, 132 USPQ 627, 632 (CCPA 1962) (“[I]n considering whether ‘sudsy ammonia’ is a **common** descriptive name of the product we cannot

fail to take into consideration the class of people who will commonly be using it and what they will commonly call it.”); *Clairol, Inc. v. Roux Distrib. Co.*, 280 F.2d 863, 865, 126 USPQ 397, 398 (CCPA 1960) (“The same merchandise may, and often does, have more than one generic name.”).

Whether a particular term is generic is a question of fact. *In re Hotels.com LP*, 573 F.3d 1300, 91 USPQ2d 1532, 1533 (Fed. Cir. 2009). Resolution of that question depends on the primary significance of the term to the relevant public. *Booking.com*, 2020 USPQ2d 10729, at *5 (“[T]he relevant meaning of a term is its meaning to consumers.”). “The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of [the] goods ... in question.” *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1830 (Fed. Cir. 2015) (quoting *Marvin Ginn*, 228 USPQ at 530).

The genericness inquiry is a two-part test: “First, what is the genus of goods or services at issue? Second, is the term sought to be registered ... understood by the relevant public primarily to refer to that genus of goods or services?” *In re Reed Elsevier*, 82 USPQ2d at 1380 (quoting *Marvin Ginn*, 228 USPQ at 530).

A. Genus of the Goods

“[A] proper genericness inquiry ... [is informed by] the description of ... [goods] set forth in the [application or] certificate of registration.” *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991). Here, Applicant and the Examining Attorney agree that the proper genus to be considered for the genericness inquiry is may be demarcated by a shortened version of the identification of goods in

the Application as “downloadable and printed children’s educational publications on the topic of alphanumeric characters and symbols.”² See e.g, *In re Empire Tech. Dev. LLC*, 123 USPQ2d 1544, 1548 (TTAB 2017) (“We find that ‘flour made from coffee cherry skins, pulp and pectin,’ a modified version of Applicant's suggested genus, is more succinct and useful in our analysis under the second *Marvin Ginn* inquiry than is the entire identification of the goods in the application, which also includes language specifying how the goods are made and used.”); *In re ActiveVideo Networks, Inc.*, 111 USPQ2d 1581, 1600 (TTAB 2014) (“in determining the genus of Applicant’s goods and services, we need to consider the central focus of Applicant's products and services without the confusion of a verbose recitation of the entire listing of goods and services”).

B. Perception of the Proposed Mark by the Relevant Public

1. The Relevant Public

Once the genus of the goods is determined, we next must determine whether the relevant public understands the proposed mark primarily to refer to “downloadable and printed children’s educational publications on the topic of alphanumeric characters and symbols.” Applicant and the Examining Attorney agree that the relevant public consists of ordinary consumers of these goods.³ This is consistent with

² Applicant’s Brief, 14 TTABVUE 9; Examining Attorney’s Brief, 16 TTABVUE 7.

³ Applicant’s Brief, 14 TTABVUE 9; Examining Attorney’s Brief, 16 TTABVUE 7.

the evidence made of record.⁴ *In re Empire Tech. Dev. LLC*, 123 USPQ2d 1544, 1548 (TTAB 2017).

2. Assessing the Relevant Public's Perception

“Evidence informing [the] ... inquiry [whether a term is generic] can include not only consumer surveys, but also dictionaries, usage by consumers and competitors, and any other source of evidence bearing on how consumers perceive a term's meaning.” *Booking.com*, 2020 USPQ2d 10729, at *7 n.6; *see also In re Cordua*, 118 USPQ2d at 1634 (citing *Princeton Vanguard*, 114 USPQ2d at 1830 (quoting *In re Northland Aluminum Prods., Inc.*, 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985) (“Evidence of the public's understanding of the mark may be obtained from ‘any competent source, such as consumer surveys, dictionaries, newspapers and other publications.’”)); *Cont'l Airlines Inc. v. United Air Lines Inc.*, 53 USPQ2d 1385, 1395 (TTAB 1999) (use of term “e-ticket” by media and competitors indicates term is generic for electronic tickets).

In assessing the primary significance of Applicant's proposed marks to the relevant public, we also may consider Applicant's use thereof. *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1112 (Fed. Cir. 1987) (“Gould's own submissions provided the most damaging evidence that its alleged mark is generic and would be perceived by the purchasing public as merely a common name for its goods rather than a mark identifying the good's source.”); *In re Empire Tech.*, 123

⁴ Website evidence provided with Office Action of February 18, 2019 at TSDR 6-26; Office Action of May 30, 2020 at TSDR 5-36; and Office Action of November 17, 2020 at TSDR 5-68.

USPQ2d at 1553 (“While [Applicant] uses ‘coffee flour’ in prominent stylized lettering, in the position and manner of a trademark, no separate generic term for the product accompanies the putative mark.”).

Assessing the relevant public’s perception of Applicant’s proposed marks is the crux of the disagreement between Applicant and the Examining Attorney. On the one hand, Applicant criticizes the pertinence of the Examining Attorney’s evidence of genericness, which comprises numerous uses of “Letters and Numbers,” and equivalent terms, by parties other than Applicant.⁵ On the other hand, the Examining Attorney asserts “the evidence of record includes a variety of sources all showing that the wording ‘letters & numbers’ or the equivalent is commonly used to identify a subcategory of publications that feature instruction for learning the letters of the alphabet and numbers.”⁶ Except for its specimens of use, answering the Examining Attorney’s Requirement for Information and providing the definition of “alphanumeric,”⁷ Applicant did not make of record any other evidence on the question of genericness during the prosecution of the Application. We consider the totality of the evidence and what it demonstrates about the primary significance of Applicant’s proposed mark to the relevant public.

⁵ Applicant’s Brief, 14 TTABVUE 12-25.

⁶ Examining Attorney’s Brief, 16 TTABVUE 9.

⁷ See Amendment to Allege Use of August 19, 2019 at TSDR 4, 17-18; Amendment to Allege Use of April 10, 2020 at TSDR 2, 6; and Office Action Response of February 13, 2019 at TSDR 1, 11.

II. Evidence on the Question of Genericness

A. Dictionary Definitions and Applicant's Response to the Examining Attorney's Requirement for Information

The Examining Attorney provided definitions of "Letter" (the singular of "Letters") as follows:

- LETTER – a symbol written or printed representing a speech sound and constituting a unit of an alphabet.⁸
- LETTER – a written symbol or character representing a speech sound and being a component of an alphabet; a written symbol or character used in the graphemic representation of a word⁹

The Examining Attorney also provided a definition of "Number" (the singular of "Numbers"):

- NUMBER – a member of the set of positive integers; one of a series of symbols of unique meaning in a fixed order that can be derived by counting.¹⁰

Applicant supplied the definition of "Alphanumeric" as:

- ALPHANUMERIC – consisting of both **letters and numbers** and often other symbols (such as punctuation marks and mathematical symbols); capable of using or displaying alphanumeric characters. (Emphasis added).¹¹

This definition of "Alphanumeric" takes on added importance in view of Applicant's response to the Examining Attorney's Requirement for Information:

⁸ Definition of LETTER from MERRIAM-WEBSTER online. Office Action of February 8, 2018 at TSDR 15-16.

⁹ Definition of LETTER from THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE online. Office Action of August 13, 2018 at TSDR 8-9.

¹⁰ Definition of NUMBER from THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE online. *Id.* at TSDR 10-11.

¹¹ Definition of ALPHANUMERIC from MERRIAM-WEBSTER online. Office Action Response of February 13, 2019 at 11.

Applicant hereby responds to the requirement for information by stating that the wording in the mark “LETTERS & NUMBERS,” as a whole, has no specific meaning or significance in the trade or industry in which applicant’s goods and/or services are manufactured or provided, nor is such wording a term of art within applicant’s industry, **aside from the separate meanings of the terms “letters” and “numbers” in reference to alphanumeric characters.**

The Office also inquires **whether the identified goods and/or services “on the topic of alphanumeric characters and symbols” concerns letters and numbers.** Applicant responds in the affirmative. **“Alphanumeric characters,” by definition** (see ... [attached]), **concerns [sic] letters and numbers** (as well as other symbols, such as punctuation marks or mathematical operators). (Emphasis added).¹²

B. Applicant’s Specimens of Use in support of Registration of the Proposed LETTERS & NUMBERS Mark

Applicant made of record “screenshots of [its] website[] with [a] ‘Download’ button on screen and [a] downloaded copy of lettering tips” (Class 9 specimen):

¹² *Id.* at 1.

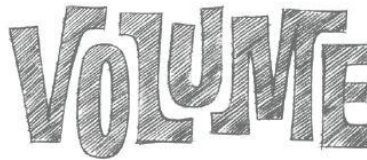
Letters & Numbers

Lettering Tips

LETTERING TIPS

DRAWING BASICS

Color, or volume, is the most critical element of lettering. Both positive and negative shapes are of equal importance.



The negative space inside letterforms and the space between letterforms should be consistent and visually equivalent.



Variation of stroke thickness, also known as contrast, affects color or volume. Even monoweight letters should have contrast.



Proportion refers to the letterforms' relative size. Scaling or vertically shifting letters can add an animated quality.

GETTING STARTED

Exaggerating the various features that define the appearance of letters (such as weight, width, contrast, etc.) is a favorite technique among professionals.

Begin with a simple, familiar style that is suitable to serve as lettering reference.



Emphasize one factor as you interpret the original. We added weight in this example.



Try altering the structure of the form. One way is to change serif construction.



Soften the edges of the letters to add more charisma, charm and warmth.



You can also explore different typographic styles. We applied a split-serif here.



Extend parts of the letter above and below the guidelines to add even more flavor.



Try some ornamentation to add personality and an illustrative flair to the letterforms.



Finalize key details before adding effects such as drop shadows, outlines and inlines.



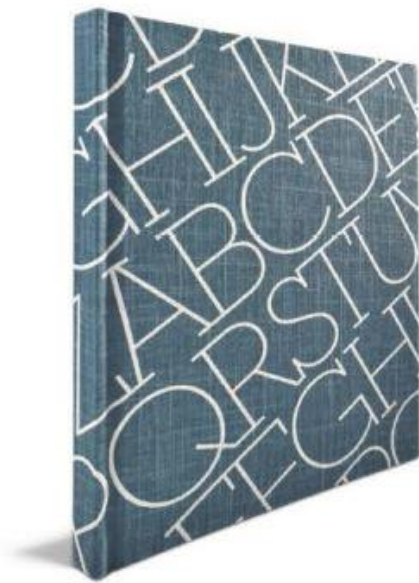
[DOWNLOAD](#)

[Click to download Lettering Guide](#)

¹³ Amendment to Allege Use of April 10, 2020 at TSDR 2, 6 – for Class 9 goods.

Applicant also made of record a copy of its “website offering goods for sale and displaying the mark”:

Letters & Numbers



ALPHABET JOURNALS

\$20.00

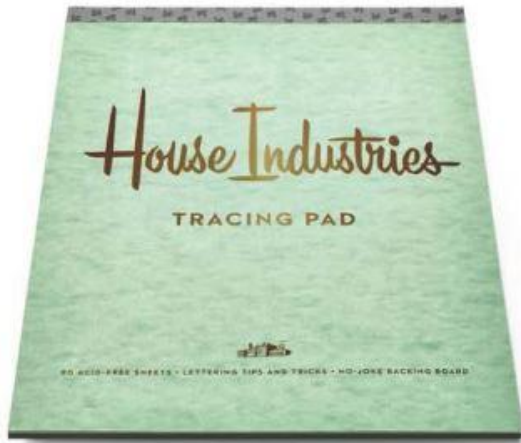
ADD TO CART

- 160 Pages
- Dot-grid (copper version)
- Graph paper (Indigo version)
- Printed linen cover
- 7.25" × 9.25" (40c9.839 × 52c0.967)

These human-powered thought-cloud-based data storage units feature a universal neuro-mechanical interface that is backward- and forward-compatible with all known pictograph- and glyph-based inscription systems.

[SHARE](#) [TWEET](#) [PIN IT](#)

Letters & Numbers



Tracing Pads

\$13.00

ADD TO CART

- Page of tips and tricks
- 40 highly-engineered sheets
- Cover made in New Jersey
- No joke thick backing board
- 8.5" × 11" (119 × 154 Agates)

Creative media designed to parse cerebral and neuromuscular impulses channeled through an anthromorphic five-pronged interface connected to a wide range of mineral- and pigment-based output systems.

[SHARE](#) [TWEET](#) [PIN IT](#)



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Applicant's specimens are a particular source for review in our consideration of whether the proposed mark LETTERS & NUMBERS is generic for Applicant's identified goods. *In re Gould Paper*, 5 USPQ2d at 1112.

C. Third-Party Uses of LETTERS & NUMBERS, and Equivalent Terms

The Examining Attorney made of record the following third-party uses of the wording "LETTERS & NUMBERS":

¹⁴ Amendment to Allege Use of August 19, 2019 at TSDR 4, 17-18 – for Class 16 goods.

Office Action of February 18, 2019:

- Webpage from www.amazon.com offers “Magtimes ABC Letters & Numbers” for educating kids in fun-educational alphabet refrigerator magnets (TSDR 6).
- Webpage from www.amazon.com shows Spectrum Letters & Numbers Flash Cards (TSDR 7). (*See also* November 17, 2020 Office Action at TSDR 14-15).
- Webpages from verywellfamily.com comprise an article titled “Toys for Learning Letters and Numbers,” reviewing “many great toys for learning letters and numbers, [which] make it more motivating and rewarding than relying on flashcards.” The types of products reviewed include magnetic tiles, a handheld plastic toy, a light-operated multi-choice game, a timed matching game, a phonics toy, a stylus activated game book, and a play mat (TSDR 8-12).
- Webpages from www.lwtears.com advertise Letters and Numbers For Me workbook “for kindergarten students or those working at that level” (TSDR 9-11).
- Webpages from www.microsoft.com advertise “Kids Learn to Write Letters and Draw Numbers and Words.” The product description says: “This app is a completing learning system for young children that helps to teach them to draw the letters of the alphabet and the numbers” (TSDR 16-17).
- Webpage from www.educationalappstore.com advertises a “Letterschool – Learn to Write Letters and Numbers” tracing app (with the purchase price in British pounds) (TSDR 18).
- Webpages from giftofcuriosity.com comprise an article titled “My Favorite Tools for Teaching Letters and Numbers,” reviewing “favorite tools for teaching letters and numbers. These books are multi-sensory, and ... make up the backbone of ... letter ... and number learning curriculums” (TSDR 19-20).
- Webpages from www.teacherspayteachers.com advertise multiple print and downloadable digital publications:
 - “Rainbow Writing Letters and Numbers” “Children love to rainbow write letters and numbers. They trace each character” (TSDR 21).
 - “Rainbow Write Letters and Numbers Bundle” (TSDR 21).
 - “Roll and Write: Letters and Numbers” “This packet is a fun way to have students practice writing letters and numbers” (TSDR 21).
 - “Rainbow Write Letters & Numbers” “Uppercase, lowercase, and numbers up to 30!” (TSDR 22).
 - “Recognize, Build, and Write: Letters and Numbers Cards” “You can use these cards with mini erasers... The numbers to 10 and all letters uppercase and lowercase.” (TSDR 23).

- “Handwriting Bundle – Kindergarten Letters & Numbers” “Handwriting practice” workbooks (TSDR 24).

Office Action of May 30, 2020:

- Webpages from www.verywellfamily.com comprise an article titled “The 14 Best Toys for Learning Letters and Numbers of 2020,” reviewing “toys for learning letters and numbers that make the process more motivating and rewarding than relying on flashcards” (TSDR 5-12).
- Webpage from www.amazon.com offers “ABC 123 Tracing for Toddlers” “Learn Alphabet letters and Numbers” (TSDR 13).
- Webpages from www.makeuseof.com comprise an article titled “10 Interactive Games to Teach Your Kids Letters and Numbers” reviewing “interactive websites and apps which lay the foundation for early word and number skills” (TSDR 14-23).
- Webpage from www.youtube.com offering “TuTiTu Compilation | Numbers & Letters | Fun Learning Videos for Children,” part of “a 3D animated video series for toddlers” (TSDR 24).
- Webpage from www.helpme2learn.com advertises a “Letters & Numbers” computer program. “This content packed interactive program builds the foundation for success in reading and math” (TSDR 25-26).
- Webpage from www.play.google.com advertises “Kids Learn Letters & Numbers Free” “Hours of educational fun with the free Kids Letters & Numbers game” (TSDR 27-29).
- Webpage from www.stpgoods.com advertises “Masha and the Bear Letters & Numbers Card Set” (TSDR 30).
- Webpage from www.amazon.com advertises a “DDI Coloring Book – Letters & Numbers Case Pack” (TSDR 31).
- Webpages from www.allposters.com feature a variety of posters under the heading “Letters & Numbers” (TSDR 32-34).
- Webpage from thinkingtoys.ie reference a “Print Letter and Number Poster” (the domain name for this site incorporates the top level domain for Ireland, and the purchase price listed is in Euros) (TSDR 35-36).

Office Action of November 17, 2020:

- Webpages from www.fishpond.com offer “Letters and Numbers Books” and list numerous workbooks, activity books, coloring books, writing practice books, and worksheets for tracing and learning letters and numbers (TSDR at 5-9).

- Webpages from www.getepic.com advertise books and flashcards under the collection category “Letters and Numbers” (TSDR at 10-11).
- Webpages from www.getreadyforschoolaustralia.com advertise clear plastic erasable pocket-like cover for use with “letters and numbers books” whereby the child is able to practice tracing letters and numbers (TSDR at 12-13).
- Webpages from www.teacherspayteachers.com advertise downloadable digital “Disney Inspired Word Wall Letter & Number cards.” “This set includes all letters & numbers 0-20.... These cards are ideal for word walls, bulletin boards, centers, flash cards, word building, and small group games. Just print and cut!” (TSDR 16-17).
- Webpages from www.abcjesuslovesme.com discuss “Tactile Letters & Numbers” cards “Because many 3-year-olds do not have the level of fine and gross motor skills required for handwriting activities, the curricula emphasize tracing the letters and numbers with the child’s finger” (TSDR 18-28).
- Webpages from www.play.google.com advertise downloadable digital “Letters and Numbers Toddlers” flashcards (TSDR 29-31).
- Webpage from www.brattlepublishing.com advertises “The LEAP Into School!® Letters and Numbers Learning App is a fun and interactive way for your children to practice learning letters, numbers, and play fun and educational games” (TSDR 32-33).
- Webpage from www.tools4teaching.biz advertises a “Home Sweet Classroom Letters and Numbers” printed wall chart (TSDR 34-35).
- Webpage from www.amazon.com advertises downloadable digital “Letters and Numbers Preschool Worksheets” (TSDR 36).
- Webpage from www.amazon.com advertises printed “Awesome Preschool Letters and Numbers” coloring workbook (TSDR 37-38).
- Webpages from www.raisingourkids.com offer “Worksheets – Learning letters and numbers!” “Enjoy learning letters and numbers with these free, printable worksheets” (TSDR 39-40).
- Webpages from www.teacherspayteachers.com advertise downloadable digital “Letters and Numbers Tracing Worksheet” (TSDR 41-43).
- Webpage from dreamteamtherapy.com advertises downloadable digital “Letter and Number Tracing Worksheets” and “Letter & Number Sheets Build-Find-Trace” “Enjoy learning new skills with these letter and number tracing worksheets!” (TSDR 44-50).
- Webpage from takingcareofmonkeybusiness.com advertises digital downloadable “Letters and Numbers Tracing Sheets” (TSDR 51-57).
- Webpages from rebeccareid.com comprise a blog that, on the date of capture, posted a review of several “books about letters and numbers.” The blog post

ends with the question: “What letters and numbers books have you and your kids enjoyed this year?” (TSDR 58-61).

- Webpages from www.cambridge.org feature “Super Safari” that is “a three-level pre-primary course that welcomes very young children to English through stories, songs and plenty of playtime while supporting their cognitive, motor-sensory and social development.” Content on the site states: “Children can grow into confidence in literacy and numeracy thanks to the Letters and Numbers books” (TSDR 62-68).

We find that some of the third-party website evidence made of record by the Examining attorney is not probative of U.S. consumer perception, because these websites are directed to foreign audiences and there is no proof that U.S. consumers would be exposed to them. *In re TracFone Wireless, Inc.*, 2019 USPQ2d 222983, at *3 n.7 (TTAB 2019) (foreign websites, although in English, not considered because directed to local foreign consumers and no basis to conclude U.S. consumers likely to have been exposed to them); *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1265 n.9 (TTAB 2011) (website for Australian brewery not considered because no basis to conclude U.S. consumers exposed to it). This evidence consists of: the content published on the Educational App Store site (with purchase prices in British pounds – submitted with the February 18, 2019 Office Action); the Thinking Toys site (originating in Ireland with the purchase price in Euros – submitted with the May 30, 2020 Office Action); and the Get Ready for School Australia site (submitted with the November 17, 2020 Office Action).

III. Discussion and Analysis

As noted and found above, Applicant and the Examining Attorney agree on two aspects of the genericness test of *Marvin Ginn*, 228 USPQ at 530, as applied to this appeal. The genus of the services is “downloadable and printed children’s educational

publications on the topic of alphanumeric characters and symbols” as informed by Applicant’s identification of goods. The relevant public consists of ordinary consumers of these goods. This leaves us to consider whether ordinary consumers of downloadable and printed children’s educational publications on the topic of alphanumeric characters and symbols understand LETTERS & NUMBERS primarily to refer to those goods rather than a particular source of those goods.

The Examining Attorney acknowledges that “the evidence of record must show that the composite mark, when viewed as a whole, would be perceived by the relevant purchasing public as generic when used in connection with the relevant goods,” *citing In re Dial-A-Mattress*, 57 USPQ2d at 1810-11 (citing *In re Am. Fertility Soc’y*, 188 F.3d 1341, 51 USPQ2d 1832, 1837 (Fed. Cir. 1999)).¹⁵ Applicant argues that “any conclusion that ‘Letters & Numbers’ taken as a whole, signifies to consumers a class of goods, is unsupported by the record[,]” and that “the Office has not met its requisite burden” of proving genericness by clear evidence, citing *In re Trek 2000 Int’l Ltd.*, 97 USPQ2d 1106, 1108 (TTAB 2010).

We begin our analysis with the dictionary definitions made of record. While we consider the mark as a whole, we first find it “useful to consider the public’s understanding of the individual words.” *Princeton Vanguard*, 114 USPQ2d at 1832-33. For our purposes, the term LETTER (the singular of LETTERS) denotes a written or printed symbol (such as A-Z) constituting a unit of the alphabet; the term NUMBER (the singular of NUMBERS) denotes one of a series of symbols of unique

¹⁵ Examining Attorney’s Brief, 16 TTABVUE 8.

meaning (such as 0-9 and combinations thereof) in a fixed order that can be derived by counting.

In response to the Examining Attorney's inquiries, Applicant stated that (i) the wording in the proposed mark LETTERS & NUMBERS takes on the separate meanings of the terms "letters" and "numbers" in reference to alphanumeric characters; confirmed that (ii) the identified goods on the topic of alphanumeric characters and symbols concerns letters and numbers; and acknowledged that (iii) by definition alphanumeric characters concern letters and numbers. Applicant cannot therefore seriously argue against the notion that the terms "Letters" and "Numbers" are generic, class-identifying (or subclass-identifying) terms defining a key aspect of its "downloadable and printed children's educational publications ... targeted to children on the topic of alphanumeric characters and symbols." The question then becomes whether the combination, LETTERS & NUMBERS, provides any further significance to purchasers indicating the source of Applicant's goods than the terms "Letters" and "Numbers" do by themselves. We find it does not.

As noted by the Supreme Court, "[a] compound of generic elements is [also] generic if the combination yields no additional meaning to consumers capable of distinguishing the goods or services." *Booking.com*, 2020 USPQ2d 10729, at *7. The U.S. Court of Appeals for the Federal Circuit more specifically states on this point: "where the [proposed] mark in its entirety has exactly the same meaning as the individual words, ... 'the [US]PTO has satisfied its evidentiary burden if ... it produces evidence ... that the separate words joined to form a compound [or a phrase]

have a meaning identical to the meaning common usage would ascribe to those words as a compound [or phrase].” *Princeton Vanguard*, 114 USPQ2d at 1831-32 (citing *In re Gould Paper*, 5 USPQ2d at 1111-12, and noting that the genericness test for phrases is the same as for compound marks).

Thus, we may consider, and have considered, the understood meanings of the individual portions of Applicant’s proposed mark as a step in the process towards our ultimate finding of whether LETTERS & NUMBERS, as a whole, is generic for Applicant’s identified goods. Based on the dictionary definitions of record and Applicant’s responses to the Examining Attorney’s inquiries, we find that the combination LETTERS & NUMBERS yields no additional meaning to consumers in distinguishing the source of Applicant’s goods than do the terms “Letters” and “Numbers” individually.

Applicant’s specimens submitted in support of its Application consist of a download-capable copy of Lettering Tips (Class 9 goods), an Alphabet Journal, and a Tracing Pad (Class 16 goods). The Lettering Tips’ content discusses techniques for drawing letters in various font styles. The Alphabet Journal contains either dot-grid or graph paper pages, and is described as follows: “These human-powered thought-cloud-based data storage units feature a universal neuro-mechanical interface that is backward- and forward-compatible with all known pictograph- and glyph-based inscription systems.” The Tracing Pad contains a page of tips and tricks, tracing sheets, a thick backing board, and is described thus: “Creative media designed to parse cerebral and neuromuscular impulses channeled through an anthropomorphic

[sic] five-pronged interface connect to a wide range of mineral- and pigment-based output systems.”

Stripped down to their essence, Applicant’s Lettering Tips is a guide for drawing letters, and its Alphabet Journal and Tracing Pad are implements for drawing or tracing letters and numbers. LETTERS & NUMBERS says nothing about the source or origin of these goods, and says everything about the name of a class or sub-class of the products, *Booking.com*, 2020 USPQ2d 10729, at *3, or a key aspect of the genus or sub-genus of those products. *In re Cordua Rests.*, 118 USPQ2d at 1637; *Royal Crown*, 127 USPQ2d at 1047.

Regarding the third-party usage evidence made of record, the Examining Attorney argues:

[T]he evidence of record shows ... [that] the wording “letters and numbers” names a category of worksheets, workbooks, hand-outs, flash cards, books, and activity cards. ... The **sine qua non** of these goods are the letters and numbers, themselves, and this wording is used when calling for the goods to identify the goods as being a set of letters and numbers flashcards or a letters and numbers workbook as opposed to a different kind or type of workbook or set of flashcards.¹⁶

Applicant, naturally, takes a different view of this third-party evidence:

None of the evidence provided by the Office clearly shows the applied-for mark “Letters & Numbers” used in a generic manner for the class of printed or downloaded children’s educational publications (i.e. none show that relevant consumers would refer to these publications as “a Letters & Numbers”).

* * *

In summary, all of the evidence cited by the Office uses terms other the “letters and numbers” as the relevant generic terms for the genus of the goods, most use the term “Letters & Numbers” in a title, and some use

¹⁶ Examining Attorney’s Brief, 16 TTABVUE 11.

the term to refer to subject matter or to otherwise convey the character of the advertised goods. However, none of the evidence supports the Office's contention that the applied-for mark is generic for the goods of goods. ... [T]he Office has submitted no evidence – let alone evidence that is clear and convincing -- that consumers generally perceive the applied-for mark as the name of (1) the class or subclass of downloadable electronic children's educational publications or (2) the class or subclass of printed children's educational publications. ... At best, the evidence supplied by the Office is probative to show that the terms "letters" and "numbers," alone or in combination, may be *merely descriptive* of relevant topics for, or used descriptively in titles of, educational publications and programs, making its registration appropriate for the Supplemental Register.¹⁷

We disagree with Applicant's characterization of the third-party usage evidence. The Examining Attorney provided numerous examples showing that educational product companies and the relevant purchasing public refer to LETTERS & NUMBERS as a type of learning tool or a key aspect of learning tools – including flash cards, toys, games, instructional books, software apps, wall charts, worksheets, workbooks, tracing sheets, posters, interactive videos – for the understanding and formation of alphanumeric units of the alphabet and numerical integers. We find the third-party examples of LETTERS & NUMBERS, and equivalent terms, do not simply designate the purpose or use these items, but rather define the type of good (e.g., "letters and numbers books"), or the integral, paramount or key aspect of the featured items.

IV. Conclusion

Taken together, the dictionary definitions, Applicant's responses to the Examining Attorney's inquiries, Applicant's specimens of use and the third-party

¹⁷ Applicant's Brief, 14 TTABVue 13, 25.

usage examples made of record combine to clearly show that LETTERS & NUMBERS is generic for Applicant's identified goods in Classes 9 and 16.

Decision:

The refusal to register Applicant's proposed mark LETTERS & NUMBERS on the Supplemental Register, on the ground that it is generic as applied to its Class 9 and 16 goods under Trademark Act Sections 1, 2, and 45 is affirmed.