

This Opinion is Not a
Precedent of the TTAB

Mailed: April 24, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Blaine Laboratories, Inc.

—
Serial No. 98054433

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Kirk M. Hartung and Andrew J. Morgan of McKee, Voorhees & Sease, P.L.C.,
for Blaine Laboratories, Inc.

William Verhosek, Trademark Examining Attorney, Law Office 114,
Nicole Nguyen, Managing Attorney.

—
Before Lynch, English and Bradley,
Administrative Trademark Judges.

Opinion by Bradley, Administrative Trademark Judge:

Blaine Laboratories, Inc. (“Applicant”) seeks registration on the Supplemental Register of the proposed standard-character mark HEELS for “medicated skin care cream.”¹

¹ Application Serial No. 98054433 was filed on June 22, 2023, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming first use anywhere and first use in commerce since at least as early as December 3, 2022.

Applicant originally sought registration on the Principal Register and the Examining Attorney refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that HEELS is merely descriptive of medicated skin care cream.² In addition, the Examining Attorney advised that the mark “appears to be generic” and “cannot recommend that applicant amend the application to proceed under Trademark Act Section 2(f) or on the Supplemental Register as possible response options to this refusal.”³

After the Examining Attorney made the descriptiveness refusal final, Applicant filed a request for reconsideration and sought amendment to the Supplemental Register.⁴ The Examining Attorney accepted the amendment and refused registration on the Supplemental Register under Sections 23(c) and 45 of the Trademark Act, 15 U.S.C. §§ 1091(c) and 1127, on the ground that HEELS is generic and as such incapable of identifying Applicant’s goods.⁵ When the Examining Attorney made the genericness refusal final, Applicant requested reconsideration and appealed.⁶ The

² November 14, 2023 Office Action at 4.

Page references to the application file refer are to the online database of the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system. All citations to documents contained in the TSDR database are to the downloaded .pdf versions of the documents.

³ November 14, 2023 Office Action at 4-5.

⁴ April 4, 2024 Request for Reconsideration at 1.

⁵ May 29, 2024 Office Action at 1-2.

⁶ 1 TTABVUE.

Citations in this opinion to the briefs and other materials in the appeal docket refer to TTABVUE, the Board’s online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, Opp. No. 91216455, 2020 TTAB LEXIS 199, at *4 n.1 (TTAB 2020).

As part of an internal Board pilot citation program on broadening acceptable forms of legal citation in Board cases, citations in this opinion are in a form provided in the TRADEMARK

Examining Attorney denied the request for reconsideration and the appeal proceeded.⁷ Both Applicant and the Examining Attorney filed briefs.⁸

We affirm the refusal to register.

I. Genericness

A. Applicable Law

To qualify for registration on the Supplemental Register, a proposed mark “must be capable of distinguishing the applicant’s goods or services.” 15 U.S.C. § 1091(c). Generic terms do not qualify because they are “by definition incapable of indicating source, and therefore are the antithesis of trademarks, and can never attain trademark status.” *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 1366 (Fed. Cir. 2018) (citation and quotation omitted). “The generic name of a thing is in fact the ultimate in descriptiveness.” *H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 989 (Fed. Cir. 1986).

Determining whether a term is generic “involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered or retained on the register understood by the relevant public primarily to refer to that genus of goods or services.” *Marvin Ginn*, 782 F.2d at 990; *Princeton Vanguard, LLC*

TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (2024). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals only by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this opinion cites to the Lexis legal database. Practitioners should adhere to the practice set forth in TBMP §§ 101.03 et seq.

⁷ 5 TTABVUE.

⁸ 6 TTABVUE (Applicant’s brief); 8 TTABVUE (Examining Attorney’s brief).

v. Frito-Lay N. Am., Inc., 786 F.3d 960, 966 (Fed. Cir. 2015) (“there is only one legal standard for genericness: the two-part test set forth in *Marvin Ginn*.”).

A proposed mark is generic “if the relevant public primarily uses or understands the mark to refer to the category or class of goods in question.” *In re Nordic Naturals, Inc.*, 755 F.3d 1340, 1342 (Fed. Cir. 2014). *See also USPTO v. Booking.com B.V.*, 591 U.S. 549, 551 (2020) (a generic term is “the name of a class of products or services”). Additionally, a term that names the “key aspect” or “central focus” of the goods can be generic for the goods themselves. *See Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 980-81 (Fed. Cir. 2018) (citation omitted) (“A term can be generic for a genus of goods . . . if the relevant public understands the term to refer to a key aspect of that genus.”); *In re ActiveVideo Networks, Inc.*, Ser. No. 77967395, 2014 TTAB LEXIS 283, at *60 (TTAB 2014) (“a term that names the ‘central focus’ or ‘key aspect’ of goods and/or services is generic for the goods/service themselves”).⁹

The Examining Attorney has the burden of proving genericness by a preponderance of the evidence. *See In re Uman Diagnostics AB*, Ser. No. 88960633,

⁹ Applicant asserts that the Examining Attorney applied the wrong test in determining genericness that “conflate[s] the concept of genericness with the concept of descriptiveness.” 6 TTABVUE 8. In support Applicant points to the Examining Attorney’s statement in the July 19, 2024 Subsequent Final Office Action (at 7) that consumers “would immediately perceive the wording ‘heels’ to pertain to a type of skin care remedy.” The Examining Attorney cited and applied the correct test. *Id.* at 3; 8 TTABVUE 3-6. In the same Office Action, the Examining Attorney concluded that “[t]he wording ‘HEELS’ in the applied-for mark means a type of skin care creams that help to repair dry and cracked heels.” July 19, 2024 Subsequent Final Office Action at 3. And the Examining Attorney’s arguments are consistent with the applicable law in concluding that “the mark is generic because it identifies a central focus or feature of the skin cream, namely, for use on heels, and thus names a type of skin cream.” 8 TTABVUE 6.

2023 TTAB LEXIS 77, at *36 (TTAB 2023) (applying preponderance of the evidence standard).

B. Genus of the Goods

“[A] proper genericness inquiry focuses on the description of services [or goods] set forth in the [application or] certificate of registration.” *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 640 (Fed. Cir. 1991). We agree with the Applicant and Examining Attorney that the genus in this case is set forth by the identification of goods in the application: “medicated skin care cream.”¹⁰

C. Relevant Public

“The relevant public for a genericness determination is the purchasing or consuming public for the identified goods.” *Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC*, 2017 TTAB LEXIS 300, at *9 (TTAB 2017) (citing *Magic Wand*, 940 F.2d at 641). We agree with the Examining Attorney that here the relevant public is ordinary consumers who purchase medicated skin care cream given that the application does not contain any restrictions or limitation on the channels of trade or classes of consumers.¹¹ See *In re Twenty-Two Desserts, LLC*, Ser. No. 86586833, 2019 TTAB LEXIS 269, at *6 (TTAB 2019) (“Because there are no restrictions or limitations to the channels of trade or classes of consumers for the goods, the relevant consuming public consists of the public at large, namely ordinary consumers who purchase [applicant’s identified goods]”).

¹⁰ 6 TTABVUE 11; 8 TTABVUE 4.

¹¹ 8 TTABVUE 4. Applicant did not address the relevant public in its brief.

D. Public Perception of HEELS

“Evidence informing th[e] [genericness] inquiry 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*, 591 U.S. at 561 n.6.

1. Third Party Websites

The Examining Attorney provided evidence from a variety of third party websites showing products that use the term “heel” or “heels” to refer to a category of skin care cream for heels including the following:

- “Almond Beauty Foot & Heels Cream”¹²
- “Cooper Pharma Cracked Heels Cream”¹³
- “Timodore Cracked Heels Cream”¹⁴
- “Pennoyer MD Skin Science™ Super Charged Moisturizing Cream for Heels + Elbows”¹⁵
- “Dermal Care Research Heels Cream”¹⁶
- “Cracked Heels Cream
Blue Star Ointment is the Solution for Cracked, Dry and Painful Heels”¹⁷
- “WALK THE WALK - Propolis Foot & Heel Cream
A highly effective foot balm that helps to restore cracked heels and dry feet after just one use.”¹⁸
- “CUTIBase® Cracked Heels Cream”¹⁹

¹² July 19, 2024 Subsequent Final Office Action at 122.

¹³ July 19, 2024 Subsequent Final Office Action at 131.

¹⁴ July 19, 2024 Subsequent Final Office Action at 128.

¹⁵ February 29, 2024 Final Office Action at 8.

¹⁶ July 19, 2024 Subsequent Final Office Action at 141.

¹⁷ July 19, 2024 Subsequent Final Office Action at 136.

¹⁸ February 29, 2024 Final Office Action at 31-32.

¹⁹ July 19, 2024 Subsequent Final Office Action at 151.

- “Footopia Super-softening foot & heel cream”²⁰
- “Cracked Heel Cream
Repairs and conditions dry cracked heels”²¹
- “Smooth Heel Cream for cracked heels!”²²
- “Neutrogena® Cracked Heel Cream deeply treats cracked heels, providing immediate relief.”²³
- “Pro Heel Cream . . . Treats dry heels”²⁴
- “Rich in protective natural herbs and vitamins, Cracked Heel Cream helps to quickly heal deep cracks, as well as remove dead cells from the upper layer of the skin and prevent crack formation.”²⁵
- “Intense Foot & Heel Cream . . . This fabulous ultra thick cream is packed full of nourishing Shea, and Cocoa Butters to repair, soften and protect rough cracked heels.”²⁶
- “DermAid Cracked Heel Cream”²⁷
- “Calluses, cracked heels and extremely dry feet are common. Naturalize’s Callus & Cracked Heel Cream is a powerful weapon against these ailments.”²⁸
- “Heal + Protect Intense Heel Cream”²⁹
- “Footlogix provides the best-cracked heel solutions with our Cracked Heel Formula. It is more than just a cracked heel cream. An effective and results-oriented mousse formula, this is the perfect cracked heel remedy to eliminate those deeply split, cracked heels with calluses. Use this as a cracked heel prevention solution.”³⁰

²⁰ July 19, 2024 Subsequent Final Office Action at 41.

²¹ February 29, 2024 Final Office Action at 16.

²² July 19, 2024 Subsequent Final Office Action at 51.

²³ July 19, 2024 Subsequent Final Office Action at 145.

²⁴ July 19, 2024 Subsequent Final Office Action at 85.

²⁵ July 19, 2024 Subsequent Final Office Action at 45.

²⁶ July 19, 2024 Subsequent Final Office Action at 88.

²⁷ July 19, 2024 Subsequent Final Office Action at 56.

²⁸ July 19, 2024 Subsequent Final Office Action at 91.

²⁹ July 19, 2024 Subsequent Final Office Action at 98.

³⁰ July 19, 2024 Subsequent Final Office Action at 97.

- “Treat your feet to a spa-like experience at home. This Eucalyptus heel cream from Danielle Creations works hard to provide deep nourishment to skin that needs extra attention.”³¹
- “Earth Girl - Organic Cracked Heel Cream --- Your Answer to Dry Skin Woes”³²
- “Aiken Cracked Heel Cream . . . How to use:
 - Massage cream onto clean heels, concentrating on affected areas, 2-3 times daily
 - Use regularly to prevent cracked heels”³³



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³¹ July 19, 2024 Subsequent Final Office Action at 110.

³² July 19, 2024 Subsequent Final Office Action at 115.

³³ July 19, 2024 Subsequent Final Office Action at 68-69.

³⁴ July 19, 2024 Subsequent Final Office Action at 156.

³⁵ July 19, 2024 Subsequent Final Office Action at 154.

³⁶ February 29, 2024 Final Office Action at 43.



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These websites of other companies in the skin care industry are “competent sources” of the relevant public’s understanding of the term HEELS. *In re Reed*

³⁷ February 29, 2024 Final Office Action at 58.

³⁸ July 19, 2024 Subsequent Final Office Action at 70.

³⁹ July 19, 2024 Subsequent Final Office Action at 118.

⁴⁰ July 19, 2024 Subsequent Final Office Action at 120.

⁴¹ February 29, 2024 Final Office Action at 12.

Elsevier Props., 482 F.3d 1376, 1380 (Fed. Cir. 2007) (evidence from eight websites provided substantial evidence to support the board’s finding that term was generic); *BellSouth Corp. v. DataNational Corp.*, 60 F.3d 1565, 1570 (Fed. Cir. 1995) (“The cases have recognized that competitor use is evidence of genericness.”). *See also ActiveVideo Networks*, 2014 TTAB LEXIS 283, at *59-60 (“examples of industry writers using the term ‘cloud TV’ as a discrete category of goods and services are persuasive evidence that the relevant consumers perceive the term as generic”). The websites and featured product trade dress demonstrate the widespread use of “heel cream” and “heels cream” in the industry to refer to a category of medicated skin care cream. The evidence shows that the relevant public uses or understands the term “heels” or “heel” to refer to a subcategory of medicated skin care cream focused on the heels of the feet, the key aspect of these goods. *See In re Cordua Rests., Inc.*, 823 F.3d 594, 605 (Fed. Cir. 2016) (“a term is generic if the relevant public understands the term to refer to part of the claimed genus of goods or services, even if the public does not understand the term to refer to the broad genus as a whole”); *Twenty-Two Desserts, LLC*, 2019 TTAB LEXIS 269, at *17-18 (“relevant public would understand MALAI [a type of cream] primarily to refer to a key aspect or a type of ‘ice cream, gelato, dairy-free ice cream, frozen yogurt, frozen desserts, ice cream sandwiches, sorbet, freezer pops, [or] ice cream sundaes”).

Applicant contends that the webpages are irrelevant because they do not relate to medicated skin care cream, but rather, “[n]umerous entries are clearly non-medicated

lotions while others leave doubt.”⁴² Yet, Applicant does not identify which of the uses it contends are for non-medicated skin care cream. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1371 (Fed. Cir. 2018) (citation omitted) (“Attorney argument is no substitute for evidence.”). We find ample evidence of use in connection with what appear to be medicated skin care cream. Most of the evidence promotes use of the products to treat the ailment of cracked heels, and many examples include other indicia that the cream is medicated, such as references to therapy, dermal care, or treatment. Regardless, Applicant does not provide any evidence or explanation that a distinction between medicated and non-mediated skin care cream is meaningful, such as that the meaning of the term “heels” is different in this context. Accordingly, we find that the third party uses reflected in the websites are relevant to the genericness inquiry.⁴³

Applicant also asserts that the uses on these websites do not demonstrate genericness because they “use the term ‘heel(s)’ as an adjective to modify one or more nouns to describe the product.”⁴⁴ “But Applicant’s distinction between nouns and adjectives is unavailing, as both can be generic.” *In re Serial Podcast, LLC*, Ser. No. 86454420, 2018 TTAB LEXIS 94, at *15 (TTAB 2018). *See also* TRADEMARK MANUAL

⁴² 6 TTABVUE 11.

⁴³ Applicant also argues that, “several examples such as “Heel Rescue® Foot Cream”, use the disputed term as a part of a registered mark,” and accordingly do not support that its proposed mark HEELS is generic. 6 TTABVUE 11. Registered marks may not consist solely of generic terms, but, as in the example above, they can include generic terms, which typically are disclaimed. *See* TMEP § 1213.03(b). Nonetheless, the third-party use evidence in this case is so robust that we easily would reach the same result without relying on examples where the term “heels” is used as part of a trademark in our analysis.

⁴⁴ 6 TTABVUE 12.

OF EXAMINING PROCEDURE § 1209.01(c)(ii) (2024) (TMEP) and cases cited therein (“The expression ‘generic name for the goods or services’ is not limited to noun forms but also includes ‘generic adjectives,’ that is, adjectives that refer to a genus, species, category, or class of goods or services.”). Applicant points to the fact that a “vast majority” of the third party uses “comprise some formative of ‘heel cream’” and asserts that in those uses “the term ‘heel’ is modifying, or describing, the term ‘cream’ to indicate that such creams are meant to be used on ones’ heel” which is descriptive. However, we find that this usage supports genericness because while cream may name the broad category, heel cream or heels cream names the subcategory of cream used specifically on heels.

Applicant further asserts that the website evidence does not show generic use based on “the fact that the evidence was recycled from that put forth to support the Examining Attorney’s contention that Applicant’s mark was merely descriptive prior to the amendment to seek registration on the Principal Register.”⁴⁵ However, the fact that some of the evidence was first used to support a descriptiveness refusal does not make it irrelevant to a determination of genericness, especially considering that a generic term is the “ultimate in descriptiveness.” *Royal Crown*, 892 F.3d at 1366 (citation omitted); *Bullshine Distillery LLC v. Sazerac Brands, LLC*, 130 F.4th 1025 (Fed. Cir. 2025) (“The term ‘descriptive’ encompasses generic terms because a generic term is the ‘ultimate in descriptiveness’”) (citation omitted). *See also In re Am. Online, Inc.*, Ser. No. 75460305, 2006 TTAB LEXIS 19, at *4 (TTAB 2006) (“[T]he

⁴⁵ 6 TTABVUE 13.

examining attorney's evidence that the mark is generic . . . is also relevant to the other issues of descriptiveness and acquired distinctiveness."); *ActiveVideo Networks*, 2014 TTAB LEXIS 283, at *67 ("implicit in our holding that the evidence before us establishes that CLOUDTV is generic for [a]pplicant's goods and services is a finding that CLOUDTV is at least merely descriptive of [a]pplicant's goods under Section 2(e)(1)").

Finally, Applicant contends that this "smattering of webpages" is an insufficient amount of evidence to support the genericness refusal.⁴⁶ The two cases Applicant relies upon for this argument are inapposite. In *Country Music Ass'n.*, the Board found the third party website evidence did not support genericness based on the fact that the uses were indicative of use as a trade name or brand name, and the applicant submitted evidence of website traffic demonstrating that the uses were "comparatively obscure." *In re Country Music Ass'n.*, Ser. No. 78906900, 2011 TTAB LEXIS 343, at *13-16 (TTAB 2011). Further, the applicant submitted two expert reports, including a survey supporting that its proposed mark was not generic. *Id.* at *25. In *Tennis Indus. Ass'n.*, the Board found that the "mere three unambiguous examples of generic usage" was "insufficient to support the genericness refusal" and also the applicant there "submitted a voluminous number of articles from the Westlaw database, all discussing applicant and displaying the applied-for designation in initial typed capital letters." *In re Tennis Indus. Ass'n.*, Ser. No. 77836610, 2012 TTAB LEXIS 76, at *22, 33 (TTAB 2012).

⁴⁶ 6 TTABVUE 10, 12-13.

“Genericness is a fact-intensive determination and the Board’s conclusion must be governed by the record which is presented to it.” *Tennis Indus.*, 2012 TTAB LEXIS 76, at *30 (TTAB 2012). *See also In re Nett Designs, Inc.*, 236 F.3d 1339, 1342 (Fed. Cir. 2001) (“The Board must decide each case on its own merits.”). Here, the thirty different third party uses reflected in the website excerpts submitted by the Examining Attorney are sufficient to establish that Applicant’s proposed mark HEELS is generic. Additionally, as discussed below, other evidence in this record further supports the refusal. Applicant has not submitted any countervailing evidence like that submitted by the applicants in *Country Music Ass’n* or *Tennis Indus. Ass’n*.

2. Dictionary Definition

The Examining Attorney also relies on a dictionary definition of “heel” as “the back of the human foot below the ankle and behind the arch.”⁴⁷ Applicant contends that since the definition does not reference “medicated skin care cream,” it does not support that its proposed mark HEELS is generic, but rather “indicates that Applicant’s mark is descriptive and thus registrable on the Supplemental Register.”⁴⁸ We find that the dictionary definition supports that Applicant’s proposed mark is generic in reinforcing that Applicant’s medicated skin care cream is for a sub-category focused on a specific area of the foot.

⁴⁷ November 14, 2023 Office Action at 11; 8 TTABVUE 4.

⁴⁸ 6 TTABVUE 11.

3. Applicant's Use

Applicant's own use including its specimen and website also provide relevant evidence. *Reed Elsevier Props.*, 482 F.3d at 1379 (“board appropriately reviewed the [applicant's] website for context, to inform its understanding of the term”); *In re Mecca Grade Growers, LLC*, Ser. No. 86358219, 2018 TTAB LEXIS 64, at *28 (TTAB 2018) (“an applicant's own website or marketing materials may be probative, or even, as in *Gould*, ‘the most damaging evidence,’ in indicating how the relevant public perceives a term”) (citing *In re Gould Paper Corp.*, 834 F.2d 1017, 1019 (Fed. Cir. 1987)). Applicant uses the term HEELS to convey to consumers the type of medicated skin care cream it provides. Its specimen, depicting Applicant's product packaging, states that HEELS is a “foot cream” “for dry cracked heels”:⁴⁹



⁴⁹ June 22, 2023 Specimen.

Applicant’s website confirms that “heels” are the focus for its medicated skin care cream stating that its medicated skin care cream “[e]liminates: dry hardened heels” and depicting heels with the instructions for use of its product:⁵⁰

Heels Foot Cream

- Infused with urea, aloe vera, tea tree oil, and chamomile.
- Eliminates dry, cracked, built-up skin and promotes maximum hydration to restore skin's healthy feel and appearance.
- Each unit includes a pumice stone and brush to aid in dead skin removal.

Gently removes dead skin and restores healthy feel and appearance

Eliminates:

- Dry, hardened heels
- Cracking, built-up skin



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Category: Skin Care

Heels Foot Cream

- Infused with urea, aloe vera, tea tree oil, and chamomile.
- Eliminates dry, cracked, built-up skin and promotes maximum hydration to restore skin's healthy feel and appearance.
- Each unit includes a pumice stone and brush to aid in dead skin removal.



Best results if applied after a shower or before bedtime. Apply Heels Foot Cream onto the affected area and allow the skin to absorb. Use the pumice stone and brush to help scrub off dead skin.

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Add to cart

Category: Skin Care

⁵⁰ February 14, 2024 Response to Office Action at 219, 221-222.

Heels Foot Cream

- Infused with urea, aloe vera, tea tree oil, and chamomile.
- Eliminates dry, cracked, built-up skin and promotes maximum hydration to restore skin's healthy feel and appearance.
- Each unit includes a pumice stone and brush to aid in dead skin removal.

Eliminate dead, built-up skin and restore smooth, hydration



\$29.95

Interested in adding vité20 to your shelves?
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1

Add to cart

Category: Skin Care

II. Conclusion

After carefully considering all of the arguments and evidence of record, we find that ordinary consumers who purchase medicated skin care cream understand the term “heels” to refer to a subcategory of medicated skin care cream directed to the heels of feet. Accordingly, Applicant’s proposed mark is generic.

Decision: We affirm the refusal to register Applicant’s proposed mark on the ground that it is a generic designation of the identified goods.