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“The Customer Is Always Right”: Consumer Perception for “Generic.com” Trademarks

I. Introduction

In medieval England, trademarks were used primarily for the benefit of merchants and manufacturers.¹ By contrast, modern U.S. trademark jurisprudence has shifted from a solely producer-centric view of trademark protection to include considerations of consumer interests as well.² Indeed, from the 1980s to today, the dominant justifications of trademark law have centered upon economic analyses in which “[t]he value of a trademark is in a sense a ‘hostage’ of consumers.”³ Within this framework of producer- and consumer-centric theories of trademark protection, it is an “undisputed principle” that the element of “consumer perception” ultimately “demarcates a term’s meaning.”⁴

The use of trademarks to protect both businesses and consumers is a focus reflected within federal trademark statutes. In 1946, Congress enacted the Lanham Act⁵ to “secure to the owner of [a] mark the goodwill of his business” and to protect the consumers’ ability to distinguish between competing goods and services through trademark registration.⁶ The Lanham Act serves these goals by providing federal protection for trademarks that are “used in commerce” and registered on the “principal register” of the

1. Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1849–50 (2007) (noting that medieval production marks were used to protect members of manufacturing guilds); *see also* BARTON BEEBE, TRADEMARK LAW: AN OPEN-SOURCE CASEBOOK 12–16 (version 8, 2021), http://tmcsebook.org/wp-content/uploads/2021/07/BeebeTMLaw-v8-digital_edition.pdf (providing an abridgment and commentary on McKenna’s article).

2. *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163–64 (1995) (referencing the benefits of trademark protection for both consumers and producers); *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 767–68 (1992) (noting that trademarks protect consumers from deception and producers from unfair competition); S. REP. NO. 79-1333, at 3 (1946), *as reprinted in* 1946 U.S.C.C.A.N. 1274, 1275 (emphasizing protection of the public’s purchasing interests and the trademark owner’s product investments as the two-fold purpose of trademark law).

3. BEEBE, *supra* note 1, at 24 (quoting *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1430 (7th Cir. 1985)).

4. *USPTO v. Booking.com B.V.*, 140 S. Ct. 2298, 2304 n.3 (2020).

5. Trademark Act of 1946 (Lanham Act), ch. 540, 60 Stat. 427 (codified as amended at 15 U.S.C. §§ 1051-1127).

6. *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985) (emphasis omitted); *see also* S. REP. NO. 79-1333, at 3, 5.

United States Patent and Trademark Office (“USPTO”).⁷ A “trademark” may be “any word, name, symbol, or device, or any combination thereof” that is used “to identify and distinguish [one’s] goods . . . from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.”⁸

Registration of a mark with the USPTO is not necessary to achieve trademark rights.⁹ Common law trademark rights may be established within a geographical area solely through use of a mark within that area.¹⁰ Nevertheless, USPTO registration of trademarks provides powerful rights and advantages beyond those of common law trademarks, including constructive notice of ownership, prima facie evidence of the mark’s validity, “incontestable” status after five years on the federal register, and power “to stop the importation into the United States of articles bearing an infringing mark.”¹¹ Businesses with a registered trademark may also sue for “deceptive and misleading use of [their] marks,” which can threaten the good reputation of their businesses and create unfair competition.¹² Furthermore, the Lanham Act guards consumers against “fraud and deception . . . by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks,”¹³ thereby aiding consumers in identifying the products they wish to purchase or to avoid.¹⁴

Not all marks are eligible for this heightened federal trademark protection. Only marks that have acquired “distinctiveness” may be registered under the Lanham Act.¹⁵ Both courts and USPTO trademark examiners evaluate “distinctiveness” for trademark protection using a five-

7. 15 U.S.C. § 1051(a)(1).

8. *Id.* § 1127.

9. *See Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (“Federal law does not create trademarks.”).

10. *See Optimal Pets, Inc. v. Nutri-Vet, LLC*, 877 F. Supp. 2d 953, 958 (C.D. Cal. 2012).

11. *Tam*, 137 S. Ct. at 1753.

12. 15 U.S.C. § 1127; *see also id.* § 45; *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985) (noting that national trademark protection “secur[es] to the producer the benefits of good reputation”).

13. 15 U.S.C. § 1127.

14. *See supra* note 6 (explaining that trademarks aid consumers in distinguishing between products and services).

15. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992) (“In order to be registered, a mark must be capable of distinguishing the applicant’s goods from those of others.”).

point scale: (1) generic, (2) descriptive, (3) suggestive, (4) arbitrary, and (5) fanciful.¹⁶ Suggestive marks (such as ORANGE CRUSH for an orange-flavored beverage¹⁷), arbitrary marks (such as APPLE for computers¹⁸) and fanciful marks (such as EXXON for oil products or KODAK for photography products¹⁹), are always eligible for trademark protection due to their inherent distinctiveness.²⁰ At the other end of the spectrum, generic terms (such as “wine”²¹) are never protectable by trademark because these refer to a general class of goods.²² Generic terms are necessarily barred from federal trademark registration to prevent the creation of a monopoly on words needed to describe a species of goods and services.²³ In contrast, descriptive marks²⁴ are neither per se eligible nor ineligible for federal trademark protection. To achieve trademark registration for a descriptive mark, an applicant must demonstrate that the mark has acquired “secondary

16. *Id.*; see also *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976); TMEP § 1209.01 (USPTO, July 2021 ed.).

17. *Orange Crush Co. v. Cal. Crushed Fruit Co.*, 297 F. 892, 893 (D.C. Cir. 1924). TMEP, *supra* note 16, § 1209.01(a) (“Suggestive marks . . . require imagination, thought, or perception to reach a conclusion as to the nature of . . . goods or services.”).

18. *Katz v. Modiri*, 283 F. Supp. 2d 883, 892 (S.D.N.Y. 2003); TMEP, *supra* note 16, § 1209.01(a) (“Arbitrary marks comprise words that are in common linguistic use but . . . do not suggest or describe a significant ingredient, quality, or characteristic of the [identified] goods or services.”).

19. *Katz*, 283 F. Supp. at 893; TMEP, *supra* note 16, § 1209.01(a) (“Fanciful marks comprise terms that have been invented for the sole purpose of functioning as a trademark . . . Such marks comprise words that are either unknown in the language . . . or are completely out of common usage.”).

20. *Two Pesos*, 505 U.S. at 768; TMEP, *supra* note 16, § 1209.01(a).

21. *USPTO v. Booking.com B.V.*, 140 S. Ct. 2298, 2303 (2020); TMEP, *supra* note 16, § 1209.01(c) (“Generic terms are terms that the relevant purchasing public understands primarily as the common or class name for the goods or services.”).

22. *Park 'N Fly, Inc. v. Dollar Park & Fly., Inc.*, 469 U.S. 189, 194 (1985) (identifying generic marks as those that “refer[] to the genus of which the particular product is a species”); *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976).

23. See *BEEBE*, *supra* note 1, at 38 (stating that an exclusive right in generic terms “would confer a monopoly not only of the mark but of the product by rendering a competitor unable effectively to name what it was endeavoring to sell”); see also *Abercrombie*, 537 F.2d at 9 (explaining that one using a generic term to market his product “cannot deprive competing manufacturers of the product of the right to call an article by its name”).

24. TMEP, *supra* note 16, § 1209.01(a) (“[A] descriptive term . . . immediately tells something about the goods or services.”).

meaning,” such that it has become distinctive in the public’s mind.²⁵ In other words, trademark registrability for descriptive terms under the Lanham Act is grounded in consumer perception of the mark’s distinctiveness. Descriptive marks “consisting merely of words descriptive of the qualities, ingredients, or characteristics of an article of trade” cannot be registered.²⁶

The distinctiveness analysis of a “composite” mark (a mark that consists of a combination of words and designs, of “separable word elements,” or of “separable design elements”) must account for the mark’s nature as an assimilation of discernable components.²⁷ The individual components of a composite mark may not reflect the mark’s significance as a whole.²⁸ Therefore, when evaluating a composite mark for distinctiveness, the mark must be evaluated as a whole, not by its separate word or design elements.²⁹ Under this “anti-dissection rule,” a composite mark may be registrable, notwithstanding the unregistrable nature of generic components within the mark, if the mark as a whole has acquired distinctiveness to consumers.³⁰ However, a composite term must have a different meaning as a whole than its generic parts. If the generic parts “joined to form a compound have a meaning identical to the meaning common usage would ascribe to those words as a compound,”³¹ the mark is not registrable.³² For example, the

25. *Two Pesos*, 505 U.S. at 769; see also *Park 'N Fly*, 469 U.S. at 194 (defining secondary meaning as “ha[ving] become distinctive of the applicant’s goods in commerce”).

26. *Estate of P.D. Beckwith, Inc. v. Comm’r of Pats.*, 252 U.S. 538, 543 (1920) (recognizing this to be the long-standing position of trademark law); see also *Advertise.com, Inc. v. AOL Advert., Inc.*, 616 F.3d 974, 982 (9th Cir. 2010) (noting that marks which convey only “minimal information about a product or service,” such as by simply providing its common name, are ineligible for trademark protection).

27. See TMEP, *supra* note 16, § 1213.02.

28. See *In re Hotels.com, L.P.*, 573 F.3d 1300, 1304 (Fed. Cir. 2009).

29. *Estate of P.D. Beckwith*, 252 U.S. at 545–46 (noting that a mark must be considered in its entirety because “[t]he commercial impression of a trade-mark is derived from it as a whole, not from its elements separated and considered in detail”); see also *Liquid Controls Corp. v. Liquid Control Corp.*, 802 F.2d 934, 938 (7th Cir. 1986) (“Certain terms may connote more than the sum of their parts and we must take care to decide the genericness of these terms by looking to the whole.”).

30. See, e.g., *Estate of P.D. Beckwith*, 252 U.S. at 544–46 (holding that a composite mark consisting of a non-registrable descriptive phrase in association with a non-descriptive phrase as “part of an entirely fanciful and arbitrary design” was distinctive as a whole and, therefore, registrable).

31. *In re Gould Paper Corp.*, 834 F.2d 1017, 1018 (Fed. Cir. 1987).

Federal Circuit held that SCREENWIPE was unregistrable because both the composite mark and its generic components “screen” and “wipe” had an identical meaning: “wipes for cleaning computer and television screens.”³³ Nevertheless, “the principle that the validity of a mark is to be determined by looking at the mark as a whole” does not “preclude[] a court from examining the meanings of the component words in determining the meaning of the mark as a whole.”³⁴

The registrability of domain name trademarks has notable parallels to the registrability of composite marks.³⁵ In the same manner that composite marks are created by combining words and/or designs, domain names are created by the combination of a second-level domain (“SLD”), such as “Wikipedia,” with a top-level domain (“TLD”), such as “.org.” Domain names are unique identifiers and, therefore, can only be held by a single entity. In the Supreme Court’s first ruling on domain names, *United States Patent and Trademark Office v. Booking.com B.V.*, the Court addressed whether a “generic.com” term (a domain name composed of a generic SLD with a generic TLD) is per se ineligible for federal trademark registration.³⁶

This Note addresses the role that *Booking.com* has played in reinforcing the existing framework of domain name trademark jurisprudence within the U.S. trademark system. First, Part II of this Note summarizes the analyses of the BOOKING.COM mark by the USPTO, appellate courts, and Supreme Court. Secondly, Part III of this Note examines how the *Booking.com* ruling applied existing trademark analyses for mark registrability. Part IV further highlights that the Supreme Court’s emphasis on consumer perception to analyze genericism of domain names comports with applicable precedent, including *Goodyear’s Rubber Manufacturing Co. v. Goodyear Rubber Co.*,³⁷ an early trademark case analyzing the registrability of generic terms combined with a generic corporate designation. Lastly, Part V of this Note demonstrates that the holding of

32. Compare 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 12:39 (5th ed. June 2021 update) (collecting examples in footnote 20 where the combination of generic terms “create[d] a distinct commercial impression that [wa]s more than just the sum of its parts”) with *id.* (collecting examples of generic composite marks that were not eligible for trademark protection).

33. *In re Gould Paper Corp.*, 834 F.2d at 1018–19.

34. *Liquid Controls*, 802 F.2d at 938.

35. See *In re Hotels.com, L.P.*, 573 F.3d 1300, 1304 (Fed. Cir. 2009) (referencing HOTELS.COM as a “composite term”).

36. See USPTO v. *Booking.com B.V.*, 140 S. Ct. 2298, 2301 (2020).

37. 128 U.S. 598 (1888).

Booking.com serves a key objective of federal trademark registration—protection of both businesses and consumers.

II. *BOOKING.COM to the Supreme Court*

In 2011, *Booking.com B.V.* (“*Booking.com*”), an online travel booking organization incorporated in Amsterdam, attempted to register the mark *BOOKING.COM* with the USPTO.³⁸ *Booking.com* stipulated that while “booking” by itself was purportedly generic, the addition of “.com” to the mark made it protectable.³⁹ Although the USPTO later did not contest that there was consumer recognition of the *BOOKING.COM* mark in the United States, the USPTO rejected the mark for registration.⁴⁰ The rejecting examiner asserted that combining the generic term “booking” with the generic TLD “.com” formed a generic domain name that referred only to a class of online booking websites, or alternatively, that the domain name was merely descriptive and had not acquired distinctiveness through secondary meaning.⁴¹

Upon appeal by *Booking.com*, the USPTO’s Trademark Trial and Appeal Board (“TTAB”) held that *BOOKING.COM* was a generic term and, therefore, could never merit federal trademark protection.⁴² Alternatively, the TTAB determined that even if *BOOKING.COM* were descriptive rather than generic, the term lacked secondary meaning and was still unregistrable.⁴³ In subsequent appeals from the TTAB to the Eastern District of Virginia,⁴⁴ the Fourth Circuit,⁴⁵ and Supreme Court,⁴⁶ the

38. Complaint at 2, 4, *Booking.com B.V. v. Matal*, 278 F. Supp. 3d 891 (E.D. Va. 2017) (No. 1:16-CV-00425).

39. See *Booking.com B.V. v. Matal*, 278 F. Supp. 3d 891, 906 (E.D. Va. 2017) (evaluating *Booking.com*’s assertion that combining “booking” with “.com” created a “unique identifier” eligible for trademark protection).

40. See *USPTO v. Booking.com B.V.*, 140 S. Ct. 2298, 2305 (2020) (noting the USPTO argued at the Supreme Court level “only that a consumer-perception inquiry was unnecessary, not that the lower courts’ consumer-perception determination was wrong”); *id.* at 2303 (stating the USPTO examining attorney found *BOOKING.COM* to be unregistrable).

41. *Booking.com B.V. v. Matal*, 278 F. Supp. 3d at 897.

42. See *USPTO v. Booking.com B.V.*, 140 S. Ct. at 2303.

43. *Id.*

44. *Booking.com B.V. v. Matal*, 278 F. Supp. 3d at 909–10. Decisions from the TTAB may be appealed to either a United States district court or the Federal Circuit. *Booking.com* appealed to the Eastern District of Virginia rather than the Federal Circuit due to a difference in standards of review. While district courts review a TTAB decision *de novo*, the Federal

USPTO continued to argue BOOKING.COM was unregistrable as generic, relying heavily on the early U.S. trademark case *Goodyear*.⁴⁷ *Goodyear* held that the addition of a generic corporate designation (such as “Company,” “Corp.,” or “Inc.”) to a generic term could not produce a distinctive, protectable trademark because it was incapable of distinguishing one provider’s services.⁴⁸ The Eastern District of Virginia rejected the USPTO’s application of *Goodyear*, ruling both that BOOKING.COM was descriptive and that it had acquired secondary meaning through consumer recognition.⁴⁹ Upon review at the Fourth Circuit, the USPTO pressed for recognition of a rule that the combination of a generic term with the generic TLD “.com” is per se generic.⁵⁰ The Fourth Circuit rejected this USPTO proposal, noting that other circuits had previously declined to adopt such a per se rule.⁵¹

On June 30, 2020, the U.S. Supreme Court affirmed the Fourth Circuit’s decision, holding that a domain name comprised of generic components (a “generic.com” term) is neither automatically generic nor automatically non-generic.⁵² Rather, the generic.com term must be subjected to the traditional trademark analysis for genericism, which the Court characterized as “depend[ing] 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.”⁵³ The Supreme Court further affirmed the Fourth Circuit ruling that BOOKING.COM was a descriptive mark that had gained

Circuit gives greater deference to the TTAB by “reviewing factual findings for substantial evidence.” *Booking.com B.V. v. USPTO*, 915 F.3d 171, 186 n.12 (4th Cir. 2019).

45. *Booking.com B.V. v. USPTO*, 915 F.3d at 184.

46. *USPTO v. Booking.com B.V.*, 140 S. Ct. at 2305–07.

47. *Goodyear’s Rubber Mfg. Co. v. Goodyear Rubber Co.*, 128 U.S. 598 (1888).

48. *See Goodyear*, 128 U.S. at 602–03 (stating “the word ‘Company’ only indicates that parties have formed an association or partnership” and cannot be combined with a generic term, “without other specification,” to create a protectable mark).

49. *Booking.com B.V. v. Matal*, 278 F. Supp. 3d at 923. At the Fourth Circuit, the USPTO did not challenge “the district court’s finding that BOOKING.COM has acquired secondary meaning where the mark is deemed descriptive.” *Booking.com B.V. v. USPTO*, 915 F.3d at 187.

50. *Booking.com B.V. v. USPTO*, 915 F.3d at 184.

51. *Id.* at 186 (“We therefore decline to adopt a per se rule and conclude that when ‘.com’ is combined with an SLD, even a generic SLD, the resulting composite may be non-generic where evidence demonstrates that the mark’s primary significance to the public as a whole is the source, not the product.”).

52. *USPTO v. Booking.com B.V.*, 140 S. Ct. 2298, 2307 (2020).

53. *Id.* (emphasis added).

secondary meaning to consumers and was, therefore, eligible for federal trademark registration.⁵⁴

In October 2020, the USPTO issued an updated guide to outline the examination procedures for “generic.com” terms in light of *Booking.com*.⁵⁵ The guide specified that examining attorneys must consider in their registrability analysis whether a generic.com term is being used “in a trademark or service marker manner” rather than “solely as a website address.”⁵⁶ Although the Supreme Court rejected a per se rule against the registrability of generic.com terms, the USPTO stated that generic.com terms may still be rejected for registration based upon the evidence of the record.⁵⁷ Each generic.com term must be evaluated on a “case-by-case basis” to determine whether the term is descriptive and whether it has acquired secondary meaning to become distinctive.⁵⁸

III. *Booking.com Comports with Existing Precedent*

The USPTO notes that *Booking.com* has not significantly altered its evaluation procedures for genericism.⁵⁹ Nevertheless, the Supreme Court’s rejection of a per se rule against “generic.com” registration has reinforced the eligibility of certain generic.com domain names—those that are descriptive and have acquired secondary meaning—for federal protection. Furthermore, the district court and Fourth Circuit analyses of BOOKING.COM provide a framework for determining registrability of “generic.com” terms that is consistent with existing precedent for the evaluation of composite marks and for the registration of a domain name mark.

54. *Id.* at 2308–09.

55. EXAMINATION GUIDE 3-20: GENERIC.COM TERMS AFTER *USPTO V. BOOKING.COM* (USPTO 2020), <https://www.uspto.gov/sites/default/files/documents/TM-ExamGuide-3-20.pdf>.

56. *See id.* at 5.

57. *Id.* at 2–3. The USPTO provides examples for what evidence the examiner may use to reject a generic.com term for registration, based upon consumer understanding of the term as being generic as a whole. *Id.* at 3. The Examination Guide also notes that the evidentiary burden for demonstrating that a generic.com term has acquired secondary meaning is necessarily heightened because these terms are typically highly descriptive in nature. *Id.*

58. *Id.* at 2.

59. *See id.*

A. No Previous Per Se Bar from the Courts or USPTO

In the decades preceding *Booking.com*, the Federal Circuit had several occasions to address registrability disputes for generic.com terms. In the Federal Circuit cases of *In re Oppedahl & Larson LLP* and *In re Hotels.com*, the generic.com terms PATENTS.COM and HOTELS.COM, respectively, were deemed ineligible for trademark registration.⁶⁰ These cases reflect the commonplace occurrence of rejection for the registration of generic.com marks due to their highly descriptive nature.⁶¹ Despite the rejections of PATENTS.COM and HOTELS.COM for trademark registration, the Federal Circuit in *Oppedahl & Larson* explicitly declined to create a per se rule regarding the registrability of generic.com marks.⁶² Furthermore, as noted by the Ninth Circuit in *Advertise.com, Inc. v. AOL Advertising Inc.*, in no other cases has the Federal Circuit recognized a per se rule against the registrability of generic.com trademarks.⁶³

Consistent with the Federal Circuit's approach, the USPTO did not apply a per se rule against the registration of generic.com trademarks prior to *Booking.com*. Although the USPTO advocated for rigid exclusion before the Supreme Court, examiners had previously granted registration to roughly eight hundred marks that would not have qualified under such a per se rule.⁶⁴ Examples of generic.com marks that were registered prior to *Booking.com* include ART.COM (Reg. No. 3,601,346), DATING.COM (Reg. No. 2,580,467), and WEATHER.COM (Reg. No. 2,699,088).⁶⁵

60. *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1177 (Fed. Cir. 2004) (finding PATENTS.COM to be merely descriptive); *In re Hotels.com, L.P.*, 573 F.3d 1300, 1306 (Fed. Cir. 2009) (finding HOTELS.COM to be generic).

61. See *In re Steelbuilding.com*, 415 F.3d 1293, 1297 (Fed. Cir. 2005) (noting the rarity of a generic.com mark that is eligible for trademark registration).

62. *Oppedahl & Larson*, 373 F.3d at 1177 (“Thus, this court declines to adopt a per se rule that would extend trademark protection to all Internet domain names regardless of their use. Trademark law requires evaluation of a proposed mark to ascertain the commercial impression conveyed in light of the goods or services associated with the mark . . .”).

63. *Advertise.com, Inc. v. AOL Advert., Inc.*, 616 F.3d 974, 980 (9th Cir. 2010). Likewise, the Ninth Circuit did not recognize a per se rule that generic.com terms are unregistrable. *Id.* at 982.

64. See Brief for the Respondent at 1a–62a app., *USPTO v. Booking.com B.V.*, 140 S. Ct. 2298 (2020) (No. 19-46).

65. *Id.*

B. Evaluation of Composite Marks and Domain Names as a Whole

Although no per se rule against “generic.com” terms had been established prior to *Booking.com*, the Federal Circuit noted that only “in rare circumstances” would the addition of “.com” to a generic term result in a distinctive, protectable mark.⁶⁶ A generic.com term must be at least descriptive to qualify for trademark registration. Generic.com terms that are merely generic can never be registered, regardless of whether the terms have acquired secondary meaning.⁶⁷

The analysis for whether a generic.com term is generic or descriptive mirrors the evaluation of genericism for composite marks comprised of generic components. As noted in Part I, composite marks are structurally similar to domain names in that the two are both comprised of discernable components.⁶⁸ The process for evaluating composite marks with generic components is twofold: (1) consider “the impression conveyed” separately by the generic components, then (2) evaluate the mark as a whole, rather than by its parts.⁶⁹ In several cases prior to *Booking.com*, the Federal Circuit applied a similar framework to evaluate genericism of domain name trademarks, with an emphasis on evaluating the mark as a whole.⁷⁰ In the analysis of BOOKING.COM, the Supreme Court affirmed the use of this framework by the district court and Fourth Circuit,⁷¹ as discussed further in Section IV.A.

66. *Steelbuilding.com*, 415 F.3d at 1297 (citing *Oppedahl & Larson*, 373 F.3d at 1175).

67. *See* *Earnhardt v. Kerry Earnhardt, Inc.*, 864 F.3d 1374, 1378 (Fed. Cir. 2017) (citing *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992)) (stating that generic terms are not registrable as trademarks).

68. *See supra* Part I.

69. *Advertise.com, Inc. v. AOL Advert., Inc.*, 616 F.3d 974, 977–78 (9th Cir. 2010); *see also* *Estate of P.D. Beckwith, Inc. v. Comm’r of Pats.*, 252 U.S. 538, 545–46 (1920) (“The commercial impression of a trade-mark is derived from it as a whole, not from its elements separated and considered in detail. For this reason it should be considered in its entirety . . .”).

70. *See, e.g., Steelbuilding.com*, 415 F.3d at 1297 (emphasizing that the public’s understanding is determined from evaluating the mark as a whole); *In re Hotels.com, L.P.*, 573 F.3d 1300, 1304 (Fed. Cir. 2009) (comparing the meaning communicated by the individual components of a composite term with that of the composite term as a whole).

71. *USPTO v. Booking.com*, 140 S. Ct. 2298, 2304 (2020).

IV. Analysis of Trademark Registrability for BOOKING.COM

A. Consumer Perception: The Key to Escaping Genericism

In a distinctiveness analysis, a generic.com term (like a composite mark) must be evaluated as a whole, rather than by its parts.⁷² Generic.com terms are comprised from a generic SLD with a generic TLD, such as “.com,” “.biz,” and “.info.”⁷³ The addition of a generic TLD to an otherwise unregistrable mark does not typically transform the whole into a registrable mark.⁷⁴ For example, the mere recognition by consumers that “.com” denotes use of a commercial website, without more, is insufficient to make a generic.com term registrable.⁷⁵ In *Advertising.com, Inc. v. AOL Advertising, Inc.*, the Ninth Circuit recognized TLDs such as “.com” to be generic references to businesses that operate through the internet.⁷⁶ The Ninth Circuit determined that the combination of “.com” with the generic SLD “advertising” to create the mark ADVERTISING.COM resulted in nothing more than a reference to a class of advertising services through the internet, generally, when the mark was viewed as a whole.⁷⁷ Therefore, the proposed mark was generic.⁷⁸ Other generic.com terms that have been denied registration by the TTAB due to genericism include HOTELS.COM, MATTRESS.COM, LAWYERS.COM, BLINDSANDDRAPERY.COM, CONTAINER.COM, BONDS.COM, and SPORTSBETTING.COM.⁷⁹

Though uncommon, in some instances, the addition of “.com” may “convey[] a unique and unexpected character of the services related to the internet,” such that the TLD “expand[s] the meaning of the mark.”⁸⁰ For example, *Steelbuilding.com* was a “rare instance” in which a generic TLD expanded the meaning of an otherwise generic mark.⁸¹ The Federal Circuit

72. *See id.*

73. *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1174 (Fed. Cir. 2004).

74. *Id.*

75. *See Hotels.com*, 573 F.3d at 1304.

76. *Advertise.com, Inc. v. AOL Advert., Inc.*, 616 F.3d 974, 978 (9th Cir. 2010) (noting that the term “.com” is a TLD that “reflects an online commercial organization or refers generically to almost anything connected to business on the internet” (internal quotation marks omitted)).

77. *Id.* at 982.

78. *Id.* at 981–82.

79. *Id.* at 978–79, 979 n.3.

80. *Id.* at 979 (quoting *In re Steelbuilding.com*, 415 F.3d 1293, 1298–99 (Fed. Cir. 2005)).

81. *Id.*

found that the combination of the generic term “steelbuilding” with “.com” transformed the mark from a reference to a class of internet services for “the mere sale of steel buildings” into a singular reference to a specific internet service that “allow[ed] the consumer to use an interactive online feature to design, determine the price of, and then purchase the building.”⁸² Consequently, the mark STEELBUILDING.COM was descriptive, rather than generic.⁸³

In the *Booking.com* litigation, the courts faithfully followed this established framework for analyzing genericism, requiring that BOOKING.COM be analyzed as a whole, rather than merely by its parts. The USPTO argued that BOOKING.COM was generic and, therefore, wholly ineligible for federal registration.⁸⁴ In this argument, the USPTO asserted that the combination of the term’s generic components—“booking” and the TLD “.com”—resulted in nothing more than a reference to a class of “online reservation service[s] for travel, tours, and lodgings,” rather than a reference to a member of that class.⁸⁵ The Supreme Court rejected this assertion, affirming the findings of the district court and Fourth Circuit.⁸⁶ Booking.com presented Teflon survey evidence⁸⁷ indicating that “74.8 percent of respondents identified BOOKING.COM as a brand name” and not as “a generic name for online booking services.”⁸⁸ The district court found that the survey methodology was sound and that the survey results were representative of consumer understanding of BOOKING.COM.⁸⁹ The Fourth Circuit also rejected the USPTO’s assertion that this Teflon survey was inappropriate evidence of consumer perception.⁹⁰ Because consumers viewed BOOKING.COM as a reference to one specific online reservation

82. *Id.* (discussing the Federal Circuit’s analysis in *Steelbuilding.com*).

83. *Steelbuilding.com*, 415 F.3d at 1301. Despite this holding, the Federal Circuit determined that STEELBUILDING.COM was merely descriptive and, therefore, lacked distinctiveness for trademark registration. *Id.*

84. *USPTO v. Booking.com B.V.*, 140 S. Ct. 2298, 2305 (2020).

85. *Id.* at 2303.

86. *Id.* at 2304.

87. The “Teflon survey method” was used to survey for genericism of the trademark TEFLON in *E.I. DuPont de Nemours & Co. v. Yoshida International, Inc.*, 393 F. Supp. 502 (E.D.N.Y. 1975). See BEEBE, *supra* note 1, at 91–93 for a general discussion of this method.

88. *Booking.com B.V. v. Matal*, 278 F. Supp. 3d 891, 915 (E.D. Va. 2017).

89. *Id.* at 918; *Booking.com B.V. v. USPTO*, 915 F.3d 171, 183 (4th Cir. 2019), *aff’d*, *USPTO v. Booking.com B.V.*, 140 S. Ct. at 2304.

90. *Booking.com B.V. v. USPTO*, 915 F.3d at 183.

service, rather than as a reference to the class as a whole, the term was descriptive rather than generic.⁹¹

B. Secondary Meaning for “Generic.com” Trademarks

Descriptive terms are only eligible for trademark registration if they have acquired distinctiveness, or secondary meaning, with consumers.⁹² Therefore, a descriptive mark must do “more than convey the genus of the services offered under the mark” to be eligible for federal registration.⁹³ An applicant must demonstrate secondary meaning through “a rigorous evidentiary showing”⁹⁴ that “in the minds of the public, the primary significance of a . . . term is to identify the source of the product rather than the product itself.”⁹⁵ In other words, a showing of secondary meaning typically requires that consumers associate the term with a single entity, not with the product provided.

Within the domain-name system, every domain name is a unique identifier that can only be held by a single entity. Therefore, courts have rejected that the mere association between a domain name and one entity demonstrates distinctiveness.⁹⁶ The artificial monopoly on a generic.com term in the domain name system cannot, on its own, establish secondary meaning.⁹⁷ Other evidence must be submitted to demonstrate “how the mark is understood by the purchasing public.”⁹⁸ Courts consider six factors for a showing of consumer perception for secondary meaning: “(1) advertising expenditures; (2) consumer studies linking the mark to a source; (3) sales success; (4) unsolicited media coverage of the product; (5) attempts to plagiarize the mark; and (6) the length and exclusivity of the

91. *See id.*

92. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985); *see also In re Hotels.com, L.P.*, 573 F.3d 1300, 1302–03 (Fed. Cir. 2009) (“Whether a term is entitled to trademark status turns on how the mark is understood by the purchasing public.”).

93. *See Advertise.com, Inc. v. AOL Advert., Inc.*, 616 F.3d 974, 982 (9th Cir. 2010).

94. *Booking.com B.V. v. Matal*, 278 F. Supp. 3d at 919.

95. *Id.* at 910 (omission in original) (quoting *Inwood Lab’ys, Inc. v. Ives Lab’ys*, 456 U.S. 844, 851 n.11 (1982)).

96. *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1176–77 (Fed. Cir. 2004) (“The simple fact that domain names can only be owned by one entity does not of itself make them distinctive or source identifying. Telephone numbers and street addresses are also unique, but they do not by themselves convey to the public the source of specific goods or services.”).

97. *Id.*; *Booking.com B.V. v. Matal*, 278 F. Supp. 3d at 906.

98. *See In re Hotels.com, L.P.*, 573 F.3d 1300, 1302–03 (Fed. Cir. 2009) (quoting *In re Montrachet S.A.*, 878 F.2d 375, 376 (Fed. Cir. 1989)).

mark's use."⁹⁹ Therefore, evidence of secondary meaning may include "print and Internet advertising, declarations from competitors and the applicant's own officers, sales data, web site traffic data, . . . customer communications," and surveys.¹⁰⁰ However, the value of survey tools to determine consumer perception of a proposed mark may be limited depending on factors such as whether an Internet survey prevents visitors of the site from voting more than once.¹⁰¹

Highly descriptive terms must overcome a heightened evidentiary burden to show the secondary meaning required for registration.¹⁰² In *Steelbuilding.com*, the term STEELBUILDING.COM was not generic, but the term's highly descriptive nature created a burden for the applicant to demonstrate a heightened level of secondary meaning.¹⁰³ The court found that the competitor declarations, customer letters, and survey results presented by the applicant were insufficient to meet this heightened burden for consumer perception, due in part to the survey "lack[ing] sufficient signs of reliability" from its methodology.¹⁰⁴

In the *Booking.com* litigation, the USPTO did not appeal the distinctiveness issue to the Fourth Circuit or Supreme Court, thereby conceding that if BOOKING.COM was descriptive, the term had the requisite secondary meaning for registration.¹⁰⁵ At the district court level, the court examined Booking.com's extensive advertising expenditures, records of sales success, unsolicited media coverage, social media presence, and two surveys as evidence of secondary meaning for BOOKING.COM.¹⁰⁶ The court determined that a survey measuring a product's popularity is "not probative of secondary meaning" and carries only "minimal weight."¹⁰⁷ However, the court determined that Booking.com's Teflon survey—which had been primarily aimed to determine whether BOOKING.COM was

99. *Booking.com B.V. v. Matal*, 278 F. Supp. 3d at 919 (quoting *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 125 (4th Cir. 1990)).

100. *In re Steelbuilding.com*, 415 F.3d 1293, 1300 (Fed. Cir. 2005).

101. *Id.*

102. *Id.*

103. *Id.* at 1301; *see also Perini Corp.*, 915 F.2d at 125 ("Secondary meaning is the consuming public's understanding that the mark, when used in context, refers, not to what the descriptive word ordinarily describes, but to the particular business that the mark is meant to identify.").

104. *Steelbuilding.com*, 415 F.3d at 1300.

105. *Booking.com B.V. v. USPTO*, 915 F.3d 171, 187 (4th Cir. 2019).

106. *Booking.com B.V. v. Matal*, 278 F. Supp. 3d 891, 919–21 (E.D. Va. 2017).

107. *Id.* at 920.

generic—was also a “generally accepted way of measuring secondary meaning.”¹⁰⁸ In other words, the court accepted the Teflon survey as a reliable measurement for consumer perception of BOOKING.COM. Because 74.8 percent of respondents identified BOOKING.COM to have acquired secondary meaning, the mark was deemed eligible for federal trademark protection.¹⁰⁹

C. *Post-Booking.com Role of Survey Evidence*

The *Booking.com* litigation highlighted survey evidence as a tool for demonstrating both non-genericism and secondary meaning of a generic.com term. Nevertheless, *Booking.com* did not establish surveys as the sole means for determining consumer perception of a generic.com term.¹¹⁰ In affirming the district court, the Fourth Circuit found no error in “placing greater weight on the consumer survey over other evidence, like dictionary definitions, in assessing the primary significance to the public.”¹¹¹ However, other forms of evidence (such as “purchaser testimony . . . listings and dictionaries, trade journals, newspapers, and other publications”¹¹²) continue to have some value in the distinctiveness analysis for generic.com terms.

D. *Post-Booking.com Survival of the Goodyear Precedent*

In its arguments for a per se rule against registration of a generic.com term, notwithstanding secondary meaning, the USPTO relied heavily on *Goodyear’s Rubber Manufacturing Co. v. Goodyear Rubber Co.*¹¹³ This early U.S. trademark case stated that the addition of a generic corporate designation, such as “Company” or “Corporation,” to an otherwise generic term cannot transform the whole into a distinctive mark.¹¹⁴ Based upon *Goodyear*, the USPTO argued that adding the TLD “.com,” like the commercial designation “Corp.,” could not render an otherwise generic

108. *Id.* (noting that the Fourth Circuit generally considers survey evidence to be “the most direct and persuasive way of establishing secondary meaning”).

109. *See id.*

110. An in-depth discussion of the merits of survey evidence is beyond the scope of this Note.

111. *Booking.com B.V. v. USPTO*, 915 F.3d 171, 184 (4th Cir. 2019).

112. *Id.* at 181 (quoting *Glover v. Ampak, Inc.*, 74 F.3d 57, 59 (4th Cir. 1996)).

113. 128 U.S. 598 (1888); *see Booking.com B.V. v. Matal*, 278 F. Supp. 3d at 909–10; *Booking.com B.V. v. USPTO*, 915 F.3d 171, 184 (4th Cir. 2019); *USPTO v. Booking.com B.V.*, 140 S. Ct. 2298, 2305–07 (2020).

114. *Goodyear*, 128 U.S. at 602–03.

mark distinctive.¹¹⁵ The Supreme Court rejected this argument, returning its analysis of trademark eligibility to the paramount importance of consumer perception.¹¹⁶ Notwithstanding the *Goodyear* precedent, the Court asserted that the Lanham Act is wholly “incompatible with an unyielding legal rule that entirely disregards consumer perception,” such as the proposed per se rule against generic.com registrability.¹¹⁷

Despite the rejection of a new per se rule based on *Goodyear*, the Supreme Court did not abrogate the *Goodyear* precedent through *Booking.com*. The dissimilarities between generic corporate designations and generic TLDs permit harmonization of the two cases. As the Federal Circuit previously noted, “the per se rule in *Goodyear* that ‘Corp.’, etc. never possess source-indicating significance does not operate as a per se rule, but more as a general rule, with respect to TLDs” because “TLDs immediately suggest a relationship to the Internet.”¹¹⁸ In keeping with the Federal Circuit, the Supreme Court distinguished the BOOKING.COM mark from “Goodyear, Co.” based on the exclusive nature of internet domains.¹¹⁹

The Supreme Court also rejected the USPTO’s framing of the *Goodyear* precedent.¹²⁰ As noted by amici in *Booking.com*, the *Goodyear* principle substantially predates the Lanham Act’s offering of trademark protection for descriptive terms, as well as the emergence of internet companies and domain name branding.¹²¹ In light of these new areas of trademark law, the Supreme Court clarified *Goodyear* as a “modest principle” existing in harmony with the Lanham Act.¹²² Specifically, the modest *Goodyear* principle is that “[a] compound of generic elements is generic if the combination yields no additional meaning to consumers capable of distinguishing the goods or services.”¹²³ Therefore, contrary to the USPTO’s argument, *Goodyear* created no overarching per se rule against

115. See *Booking.com B.V. v. Matal*, 278 F. Supp. 3d at 910; *Booking.com B.V. v. USPTO*, 915 F.3d at 184; *USPTO v. Booking.com B.V.*, 140 S. Ct. at 2305–06.

116. *USPTO v. Booking.com B.V.*, 140 S. Ct. at 2306 (noting that a consumer-centered analysis for whether a term is generic is a “bedrock principle of the Lanham Act”).

117. *Id.*

118. *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1175 (Fed. Cir. 2004).

119. *USPTO v. Booking.com B.V.*, 140 S. Ct. at 2306.

120. *Id.*

121. See, e.g., Brief of Coalition of .Com Brand Owners as Amici Curiae in Support of Respondent at 36–37, *USPTO v. Booking.com B.V.*, 140 S. Ct. 2298 (No. 19-46).

122. *USPTO v. Booking.com B.V.*, 140 S. Ct. at 2306.

123. *Id.*

the registrability of all marks composed of generic elements. Because the Court has framed *Goodyear* in such a nuanced manner post-*Booking.com*, the case should not be considered abrogated.

V. Looking Forward from *Booking.com*

A. Producer-Centric and Consumer-Centric Benefits of *Booking.com*

Booking.com fits comfortably into the preexisting producer-centric and consumer-centric justifications for trademark protection. Under the Lanham Act, businesses that create consumer recognition of a descriptive mark, such that it has acquired secondary meaning, should benefit from the rights endowed by federal registration.¹²⁴ Similarly, consumers who wish to purchase goods and services from a particular source benefit from a robust system in which deceptive trademark practices are discouraged.¹²⁵ These theories of trademark protection extend logically to the growing field of domain name trademarks. The USPTO's proposed per se rule against generic.com marks would have precluded the registration of descriptive terms that had acquired secondary meaning. Such a rule would have deprived businesses of valuable federal rights that would normally follow from the cultivation of consumer recognition in a descriptive mark. Notwithstanding federal trademark registration, businesses with generic.com branding may benefit from the exclusivity of the domain name system, such as by choosing domain names with terms commonly searched by online consumers. However, this phenomenon should not preclude these businesses from enjoying rights that the U.S. trademark system would otherwise offer to qualifying descriptive marks. The Lanham Act supports a framework that allows producers who foster commercial goodwill under a mark to reap the benefits of that investment.¹²⁶ The USPTO's per se rule would also have undermined the paramount importance of consumer perception in dictating a term's meaning and registrability¹²⁷ by entirely circumventing this element in the registrability analysis.

The benefits of federal registration for generic.com marks, both to producers and consumers, outweigh the convenience of a one-size-fits-all

124. See S. REP. NO. 79-1333, at 3 (1946), as reprinted in 1946 U.S.C.C.A.N. 1274, 1275.

125. *Id.*

126. See, e.g., *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985); *Matal v. Tam*, 137 S. Ct. 1744, 1751–52 (2017).

127. *USPTO v. Booking.com B.V.*, 140 S. Ct. at 2304 n.3.

rule regarding generic.com registrability. For producers, federal registration provides greater protection to generic.com marks than unfair competition law, which merely requires competitors to “make more of an effort” to reduce confusion between marks. For example, federal trademark registrants can actively prevent competitors from marketing products under their registered marks.¹²⁸ Federal registration also aids producers in using private dispute resolution rather than litigation to stop domain name abuse.¹²⁹ By rejecting the USPTO’s proposed per se rule, the Supreme Court protected distinctive generic.com terms from receiving a blanket rejection for these, and other, valuable federal protections.

Consumers also benefit when deceptive uses of domain names can be efficiently confronted. The *Booking.com* ruling supports preexisting frameworks for domain name protection. Due to the prima facie proof of trademark rights from registration, businesses with domain name trademarks may more easily remove domain names that are being used to mislead consumers as to the source of goods and services. For example, the Anticybersquatting Consumer Protection Act (“ACPA”) prevents “the bad faith, abusive registration and use of the distinctive trademarks of others as Internet domain names, with the intent to profit from the goodwill associated with those trademarks.”¹³⁰ Although holders of unregistered, common-law trademarks for a domain name may still benefit from ACPA protections, the presumed validity of a domain name mark by federal registration makes it easier to prove rights in the mark and obtain swift legal remedies, such as a court order for cancellation of the bad-faith domain name.¹³¹ The ability to quickly respond to deceptive, bad-faith trademark uses such as these provides greater security for the consumer when making purchasing decisions.

B. Low Anti-Competitive Threat of “Generic.com” Trademarks

The protections of generic.com mark registration pose a minimal anti-competitive threat. During the *Booking.com* litigation, the USPTO stipulated that registration of BOOKING.COM would be used to prevent competitors from registering similar domain name trademarks, such as

128. See *Genesee Brewing Co. v. Stroh Brewing Co.*, 124 F.3d 137, 151 (2d Cir. 1997).

129. See Brief of Coalition of .Com Brand Owners as Amici Curiae in Support of Respondent, *supra* note 121, at 14–19.

130. *Shields v. Zuccarini*, 254 F.3d 476, 481 (3d Cir. 2001); see also 15 U.S.C. § 1125(d).

131. 15 U.S.C. § 1125(d).

“EBOOKING.COM” or “HOTEL-BOOKING.COM.”¹³² The Supreme Court accepted the assurances of Booking.com that it recognized its generic.com mark would provide a very limited scope of protection.¹³³ However, the concern remains that other registrants of generic.com trademarks might aim to exercise a wider scope of protection than Booking.com. Because no two businesses can hold the same domain name online, regardless of trademark registration,¹³⁴ the mere exclusivity that federal registration creates in a mark provides no new value to the registrant. Consequently, *Booking.com* opponents have claimed that federal rights in a generic.com trademark will inevitably be exercised broadly against non-identical domain names.¹³⁵

These concerns are not new. The Federal Circuit has previously considered the risk that generic.com trademark holders might exercise their rights against users of non-identical variations of their domain names.¹³⁶ However, the risks cited for overreaching uses of generic.com trademarks are common to the class of all descriptive marks that are permitted federal registration. Under the Lanham Act, the current U.S. trademark system has found that the benefits of registration for descriptive marks with secondary meaning outweigh these concerns of scope. As such, the preexisting safeguards for constraining the scope of registered descriptive marks need not be reimagined to respond to the registration of generic.com marks.

VI. Conclusion

The *Booking.com* decision has not significantly altered the examination procedures for evaluating genericism. However, the Supreme Court’s rejection of a per se rule against “generic.com” trademarks reinforces both

132. USPTO v. Booking.com B.V., 140 S. Ct. at 2307.

133. *Id.* at 2308.

134. *Advertise.com, Inc. v. AOL Advert., Inc.*, 616 F.3d 974, 980 (9th Cir. 2010) (“[O]nly a single entity can hold a domain name at any given time . . .”).

135. *See, e.g.*, Brief of Amicus Curiae Electronic Frontier Foundation in Support of Petitioners at 10, USPTO v. Booking.com B.V., 140 S. Ct. at 2298 (No. 19-46) (asserting that a mark such as BOOKING.COM might be used to exclude similar domain names, such as “ebooking.com, bookings.com, or booker.com”).

136. *Advertise.com*, 616 F.3d at 980–81 (“[G]ranted trademark rights over a domain name composed of a generic term and a TLD grants the trademark holder rights over far more intellectual property than the domain name itself. In addition to potentially covering all combinations of the generic term with any TLD (e.g., “.com”; “.biz”; “.org”), such trademark protection would potentially reach almost any use of the generic term in a domain name.”).

producer- and consumer-centric benefits for the protection of these marks. The rejection of the USPTO's proposed per se rule also builds consistently upon existing trademark precedent for domain names, emphasizing the paramount importance of consumer perception in the genericism analysis. Therefore, by green-lighting registration of descriptive, consumer-recognized generic.com marks, the Supreme Court has provided a path for generic.com trademark registration that is consistently based upon both policy and precedent.

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