

No. 19-46

**In the Supreme Court of the United States**

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UNITED STATES PATENT AND TRADEMARK OFFICE ET AL.,  
PETITIONERS,

v.

BOOKING.COM B.V.,  
RESPONDENT.

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*ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT*

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**BRIEF OF THE INTELLECTUAL PROPERTY LAW  
ASSOCIATION OF CHICAGO AS AMICUS CURIAE IN  
SUPPORT OF RESPONDENT BOOKING.COM B.V.**

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## INTEREST OF AMICUS CURIAE<sup>1</sup>

The Intellectual Property Law Association of Chicago (“IPLAC”) respectfully requests that this Court affirm the Fourth Circuit’s decision in *Booking.com B.V. v. United States Patent & Trademark Office*, 915 F.3d 171 (4th Cir. 2019).<sup>2</sup>

Founded in 1884 in Chicago, Illinois, a principal forum for U.S. technological innovation and intellectual property litigation, IPLAC is the country’s oldest bar association devoted exclusively to intellectual property matters. IPLAC has as its governing objects, *inter alia*, to aid in the development of intellectual property laws, the administration of them, and the procedures of the U.S. Patent and Trademark Office, the U.S. Copyright Office, and the U.S. courts and other officers and tribunals charged with administration. IPLAC’s about 1,000 voluntary members include attorneys in private and corporate practices in the areas of copyrights, patents, trademarks, trade secrets, and the legal issues they present before federal courts throughout the United States, as well as before the U.S. Patent and

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part and no such counsel, or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than Amicus, its members or its counsel, has made a monetary contribution to the preparation or submission of this brief.

<sup>2</sup> Pursuant to Supreme Court Rule 37.3(a), both Petitioners and Respondent have provided written consents to IPLAC’s filing of this brief.

Trademark Office and the U.S. Copyright Office.<sup>3</sup> IPLAC's members represent innovators and accused infringers in roughly equal measure and are split roughly equally between plaintiffs and defendants in litigation.

As part of its central objectives, IPLAC is dedicated to aiding in developing intellectual property law, especially in the federal courts.<sup>4</sup>

### SUMMARY OF FACTS<sup>5</sup>

Booking.com B.V. ("Booking.com")<sup>6</sup> filed four trademark applications in 2011 and 2012 involving the mark "BOOKING.COM" for, *inter alia*, services directed generally to providing information about, and

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<sup>3</sup> In addition to the statement of footnote 1, after reasonable investigation, IPLAC believes that (a) no member of its Board or Amicus Committee who voted to prepare this brief, or any attorney in the law firm or corporation of such a member, represents a party to this litigation in this matter; (b) no representative of any party to this litigation participated in the authorship of this brief; and (c) no one other than IPLAC, or its members who authored this brief and their law firms or employers, made a monetary contribution to the preparation or submission of this brief.

<sup>4</sup> Although over 30 federal judges are honorary members of IPLAC, none were consulted on, or participated in, this brief.

<sup>5</sup> See generally *Booking.com B.V. v. United States Patent and Trademark Office*, 915 F.3d 171 (4th Cir. 2019).

<sup>6</sup> For purposes of this brief, "Booking.com" refers to Respondent and "BOOKING.COM" refers to the proposed mark.

assisting with hotel, resort, and temporary accommodation reservations.<sup>7</sup>

The United States Patent and Trademark Office (“USPTO”) denied the applications, finding that BOOKING.COM was generic for the services offered or, in the alternative, that the mark was descriptive and that Booking.com had failed to show the mark had acquired distinctiveness.

The Trademark Trial and Appeal Board (“TTAB”) of the USPTO affirmed, finding that BOOKING.COM comprises a generic second-level domain (“SLD”) and “.com,” a top-level domain (“TLD”) that means a commercial website. In effect, the TTAB concluded that BOOKING.COM is generic because customers would understand the mark to “primarily [] refer to an online reservation service for travel, tours, and lodging, which is consistent with the services proposed in the applications.” *Booking.com B.V. v. Matal*, 278 F. Supp. 3d 891, 898 (E.D. Va. 2017) (internal citations omitted). In the alternative, the TTAB also found that BOOKING.COM was descriptive but lacked a showing of acquired distinctiveness.

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<sup>7</sup> See, e.g., U.S. Trademark Application Serial Nos. 85/485,097 (filed Dec. 1, 2011); 79/114,998 (filed June 5, 2012); and 79/122,365 and 79/122,366 (both filed Nov. 7, 2012). According to the USPTO’s Trademark Electronic Search System, the ’097 and ’998 applications have been abandoned. U.S. PAT. AND TRADEMARK OFF., TRADEMARK ELECTRONIC SEARCH SYSTEM, <http://tmsearch.uspto.gov/bin/gate.exe?f=tess&state=4809:9e70qe.1.1> (last visited Feb. 18, 2020).

On April 15, 2016, Booking.com sued the USPTO under 15 U.S.C. § 1071(b) in the U.S. District Court for the Eastern District of Virginia. Both sides moved for summary judgment, and in 2017, the district court found that BOOKING.COM was descriptive. The district court further found that the record evidence, including a consumer survey “reveal[ing] that 74.8 percent of [survey] respondents identified BOOKING.COM as a brand name,” showed that the mark had acquired distinctiveness for the relevant services. *Id.* at 915. The district court then ordered the USPTO to register BOOKING.COM for two of the four applications and remanded for further administrative proceedings on the other two.

The USPTO appealed to the U.S. Court of Appeals for the Fourth Circuit, challenging whether BOOKING.COM can be protected as a mark. The Fourth Circuit applied the fact-specific “primary significance” test and affirmed the district court’s holding, finding 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.” *Booking.com B.V.*, 915 F.3d at 186.

Petitioners appeal.

### **ISSUES PRESENTED**

Under the Lanham Act, 15 U.S.C. § 1051 *et seq.*, generic terms may not be registered as trademarks. This case questions whether the addition by an online business of a generic top-level domain (“.com”) to an

otherwise generic term can create a protectable trademark.

IPLAC respectfully submits that the answer to this question depends on the proper test for determining whether a proposed trademark or service mark, including a domain name comprising a TLD (*e.g.*, “.com” or hundreds of other possible choices) and a generic SLD, *when taken as a whole*, is generic and can never serve as a source identifier for particular goods or services.

### **SUMMARY OF ARGUMENT**

The Court should affirm the Fourth Circuit’s decision and find that the test for determining whether a proposed trademark or service mark, including a domain name, is generic and can never be protected as a source identifier for particular goods or services is the fact-specific “primary significance” test set forth in 15 U.S.C. § 1064(3), which can involve source-identifying evidence such as consumer surveys.

The USPTO’s concerns regarding monopoly power are misplaced. First, a domain name such as BOOKING.COM does not provide monopoly power, but rather is simply a unique online address for a user to locate information (*e.g.*, regarding a particular company’s goods or services) on the Internet. Second, courts have addressed monopoly concerns regarding descriptive marks for decades by granting them a narrower scope of protection than stronger marks, such as fanciful, arbitrary or suggestive marks.

## ARGUMENT

### I. WHETHER A TERM IS GENERIC SHOULD BE DETERMINED BY THE FACT-SPECIFIC “PRIMARY SIGNIFICANCE” TEST.

The Court should affirm the Fourth Circuit’s decision and hold that the test for whether a trademark or service mark, including a domain name, is generic is the fact-specific “primary-significance” test set forth in 15 U.S.C. § 1064(3). It should reject a rule that a domain name comprising a generic term or terms, when taken as a whole, for particular goods or services, is *per se* generic and therefore cannot be registered as a trademark or service mark.

Both the Fourth and Federal Circuits have adopted the “primary significance” test to determine if a mark is generic in registration proceedings.<sup>8</sup> *See, e.g., Booking.com B.V.*, 915 F.3d at 180 n.6; *In re 1800Mattress.com IP, LLC*, 586 F.3d 1359, 1362-63 (Fed. Cir. 2009); *In re Reed Elsevier Props.*, 482 F.3d 1376, 1378 (Fed. Cir. 2007). Indeed, the Seventh

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<sup>8</sup> Other circuits have also adopted the fact-specific “primary significance” test to determine if a mark is generic. 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 12:6, at 12-27, n.2 (5th ed. 2019) (collecting cases). As Respondent’s brief observes, “[c]ourts and the [US]PTO consistently interpret section 1064(3) as mandating application of the primary-significance test in the registration context.” Resp’t Br. at 20, 20 n.4. For the sake of conciseness and for the convenience of the Court, this brief incorporates by reference those cites.

Circuit has also recognized that “the legal test of genericness is ‘primary significance.’” *Ty Inc. v. Softbelly’s Inc.*, 353 F.3d 528, 530-31 (7th Cir. 2003) (quoting *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 118-19 (1938)). This test is flexible and requires evidence showing that “the primary significance of the term in the minds of the consuming public is not the product but the producer.” *Kellogg*, 305 U.S. at 118.

The USPTO contends that, under *Goodyear’s India Rubber Glove Mfg. v. Goodyear Rubber Co.*, 128 U.S. 598 (1888), a generic SLD plus a TLD necessarily results in a generic composite as a matter of law. But as the Fourth Circuit found, “[n]o circuit has adopted the bright line rule for which the USPTO advocates.” *Booking.com B.V.*, 915 F.3d at 184. Other amici also have highlighted that the USPTO’s own Trademark Manual of Examining Procedure (“TMEP”) states that “there is no *per se* rule that the addition of a non-source-identifying [generic TLD] to an otherwise generic term can never under any circumstances operate to create a registrable mark.” TMEP § 1215.05 (Oct. 2018).

There is no reason to adopt a bright line rule for domain names. As the Federal Circuit has recognized, in rare instances, “the addition of a TLD indicator to a descriptive term operate[s] to create a distinctive mark” that may be eligible for trademark protection. *In re Steelbuilding.com*, 415 F.3d 1293, 1297 (Fed. Cir. 2005). Adopting a bright line rule would condemn those marks to genericness as a matter of law and deprive them forever of any trademark or service mark protection regardless of any evidence concerning their source-identifying significance.

In addition, “[c]ertain terms may connote more than the sum of their parts,” and courts should “take care to decide the genericness of these terms by looking to the whole.” *Liquid Controls Corp. v. Liquid Control Corp.*, 802 F.2d 934, 938 (7th Cir. 1986). That applies equally to domain names. “Because the evaluation of a mark proposed for registration requires consideration of the mark as a whole, the distinctiveness derived from a connection to the Internet, as indicated by the TLD indicator, is a part of the calculus for registration.” *In re Steelbuilding.com*, 415 F.3d at 1297. A flexible test best permits those considerations and should be adopted by this Court.

The USPTO also challenges the relevance of Booking.com’s consumer survey evidence, arguing that the survey conflates the distinction between generic and descriptive marks. But genericness is a question of fact. *See, e.g., Booking.com B.V.*, 915 F.3d at 181; *Advertise.com, Inc. v. AOL Advert., Inc.*, 616 F.3d 974, 977 (9th Cir. 2010); *In re Hotels.com, L.P.*, 573 F.3d 1300, 1301 (Fed. Cir. 2009); *Door Sys., Inc. v. Pro-Line Door Sys., Inc.*, 83 F.3d 169, 171 (7th Cir. 1996).

“More precisely, the question of genericness is one of linguistic usage, and can be approached by a variety of routes.” *Door Sys.*, 83 F.3d at 171. One commonly accepted route is consumer surveys. *See, e.g., Princeton Vanguard, LLC v. Frito-Lay North America, Inc.*, 786 F.3d 960, 965 (Fed. Cir. 2015) (involving two surveys finding that 41% and 55% of respondents thought that PRETZEL CRISPS was a brand name); *Ty Inc.*, 353 F.3d at 530-31 (involving a

survey finding that 60% of respondents thought that “Beanies” was a brand name); *see also* MCCARTHY, *supra*, § 12:14, at 12-58 (“Consumer surveys have become almost de rigueur in litigation over genericness.”).

Fourth Circuit precedent provides that “the district court, as the trier of fact, is accorded great deference” on factual findings. *Booking.com B.V.*, 915 F.3d at 181 (citing *Swatch AG v. Beehive Wholesale, LLC*, 739 F.3d 150, 155 (4th Cir. 2014)). The district court’s factual finding that BOOKING.COM is descriptive based on the record evidence should thus be accorded great deference. Although “there is no need for a survey if other evidence overwhelmingly proves that the disputed designation is a generic name,” several judges are “used to survey evidence and often expect to receive evidentiary assistance by surveys in resolving generic disputes.” MCCARTHY, *supra*, § 12:14, at 12-58 to 12-59.

Against this backdrop, there is no reason to fault the district court’s consideration of Booking.com’s survey “reveal[ing] that 74.8 percent of [survey] respondents identified BOOKING.COM as a brand name.” *Booking.com B.V.*, 278 F. Supp. 3d at 915.

## **II. THE USPTO’S CONCERNS REGARDING MONOPOLY POWER ARE MISPLACED.**

The USPTO also raises concerns that registration of BOOKING.COM as a protectable mark will give Booking.com an “effective monopoly on language, to the detriment of competition and consumers.” *Pets. Br.* at 15. Where trademark or service mark protection

has been sought for a generic term, the concern is that “a competitor could not describe his goods [or services] as what they are.” *Id.* at 34 (quoting *CES Publ’g Corp. v. St. Regis Publ’ns, Inc.*, 531 F.2d 11, 13 (2d Cir. 1975)). But that concern has no application here.

“When the line between generic and descriptive terms is indistinct . . . it is helpful to ask whether one firm’s exclusive use of the phrase will prevent a rival from naming itself and describing its product.” *Te-Ta-Ma Truth Found.—Family of URI, Inc. v. World Church of the Creator*, 297 F.3d 662, 666-67 (7th Cir. 2002). Here, the services Booking.com offers include, *inter alia*, providing hotel, resort and temporary accommodation reservation services and information. Competitors offering the same services might describe themselves as offering bookings, or even more likely as hotel reservation services, but they would not describe themselves as a “booking.com.” The combination of these two terms (“booking” and “.com”) does not *per se* yield a generic composite.

The district court therefore rightly characterized the USPTO’s “suggest[ion] that [Booking.com’s] competitors need to be able to describe themselves as ‘booking.coms’” to compete effectively as illogical. *Booking.com B.V.*, 278 F. Supp. 3d at 912. “[C]ompetitors, such as Expedia and Travelocity, have no incentive to describe themselves as ‘booking.coms’ because this risks diverting customers to the website of their competitor.” *Id.* at 913.

Nor does the uniqueness of online addresses create a concern over monopolization of language. Indeed, in the online environment, Congress has adopted the

Anti-Cybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d), to address concerns that customers seeking information online about a brand they recognize will be taken to the wrong website.

For example, “when a trademarked name is used as a company’s address in cyberspace, customers know where to go online to conduct business with that company,” benefitting both consumers and merchants. 106 CONG. REC. S10,513, S10,516-17 (daily ed. Aug. 5, 1999) (statement of Sen. Leahy). Because “consumers have come to rely heavily on familiar brand names when engaging in online commerce,” if a competitor “operat[es] a web site under another brand owner’s trademark . . . consumers bear a significant risk of being deceived and defrauded, or at a minimum, confused,” which may result in “the erosion of consumer confidence in brand name identifiers and in electronic commerce generally.” S. REP. NO. 106-140, at 5 (1999).

Nothing in the Anti-Cybersquatting Consumer Protection Act suggests that Congress intended to withhold its remedies from a domain name that serves as a source identifier and has become recognized as a brand, even if the domain name comprises a generic SLD and a TLD.

The district court properly recognized these policy considerations: “granting trademarks to producers who primarily offer goods and services online and brand themselves based on their domain name favors the interest of consumers by limiting the prospect of deception and confusion” and “protects the good will generated by producers, often at great effort and

expense, and thereby incentivizes brand development.” *Booking.com B.V.*, 278 F. Supp. 3d at 913.

But this does not mean that a domain name that is descriptive necessarily would receive the same scope of protection as a fanciful, arbitrary or suggestive mark. “Not all marks are equal.” MCCARTHY, *supra*, § 11:73, at 11-239. “Some trademarks are very ‘strong,’ in the sense they are widely known and recognized.”<sup>9</sup> *Id.* Other “relatively weak marks are given a relatively narrow range of protection both as to products and format variations.” *Id.* at 11-242.

Courts have addressed monopoly concerns regarding descriptive marks for decades by granting them a narrower scope of protection than fanciful, arbitrary or suggestive. *See, e.g., Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1339 (Fed. Cir. 2015) (“Marks that are descriptive . . . are entitled to a narrower scope of protection, *i.e.*, are less likely to generate confusion over source identification, than their more fanciful counterparts.”); *Henri’s Food Prods. Co. v. Tasty Snacks, Inc.*, 817 F.2d 1303, 1305 (7th Cir. 1987) (“Trademarks run the gamut from the fanciful or arbitrary (which are fully protected), to the suggestive, to the ‘merely descriptive’ (which require for protection a showing of secondary meaning).”); *In re Hunke & Jochheim*, 185 U.S.P.Q. 188, 189 (T.T.A.B. 1975) (“[I]t is well established that the scope

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<sup>9</sup> For example, these marks include “APPLE for computers and mobile phones, GOOGLE for a search engine, COCA-COLA for beverages and TOYOTA for vehicles.” *Id.*

of protection afforded a merely descriptive . . . term is less than that accorded an arbitrary or coined mark.”).

As recognized during the early years of the Lanham Act, “the merchant who chooses as a mark a term that is descriptive and has not achieved a strong presence in the marketplace cannot be surprised that the mark has only a limited scope of protection.” MCCARTHY, *supra*, § 11:76, at 11-253. The same principle applies here. Accordingly, even if BOOKING.COM is found descriptive and protectable, that does not mean that Booking.com would necessarily receive the same scope of protection as a fanciful, arbitrary or suggestive mark, let alone a monopoly.

For these reasons, the USPTO’s monopoly concerns are misplaced.

### CONCLUSION

Because the fact-specific “primary significance” test provides both the TTAB and courts with flexibility for all situations and the USPTO’s monopoly concerns are unfounded, the Court should affirm the Fourth Circuit’s decision and hold that the test for whether a proposed trademark or service mark, including a domain name, is generic is the “primary-significance” test as set forth in 15 U.S.C. § 1064(3).

Respectfully submitted,

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