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COMMENTARY

OH, SNAP! A SHIFT IN CONSUMER PERCEPTION SURVEYS IN GENERICNESS LITIGATIONS AFTER *SNAP INC. V. VIDAL**

*By David H. Bernstein,** Jared I. Kagan,** and
Daniel N. Cohen**** ******

I. INTRODUCTION

In what may prove to be one of the most influential judicial decisions on the issue of trademark genericness since the Supreme Court's decision in *Booking.com*,¹ the Central District of California in *Snap Inc. v. Vidal* rejected the assertion of the United States Patent and Trademark Office ("USPTO") that the term "SPECTACLES" is generic for technology-embedded augmented reality ("AR") glasses, commonly referred to as smart glasses.² In the process, the court provided a masterclass on the kind of evidence that is relevant to the assessment of genericism, including a deep dive into consumer perception surveys concerning genericness. Specifically, in finding that the USPTO failed to meet its burden of proving by clear and convincing evidence³ that Snap's

* This commentary should be cited as David H. Bernstein, Jared I. Kagan & Daniel N. Cohen, *Oh, Snap! A Shift in Consumer Perception Surveys in Genericness Litigations After Snap Inc. v. Vidal*, 115 Trademark Rep. 680 (2025).

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¹ U.S. Pat. & Trademark Off. v. *Booking.com B.V.*, 591 U.S. 549 (2020) (rejecting the USPTO *per se* rule that a generic term, when combined with the .com top-level domain, must automatically be deemed generic and consequently ineligible for trademark protection).

² *Snap Inc. v. Vidal*, 750 F. Supp. 3d 1120 (C.D. Cal. 2024).

³ Up until the parties' Hearing on Post-Trial Briefs, including throughout the entirety of the bench trial, the USPTO argued that the burden of proof should be the simple "preponderance of the evidence" standard, as adopted by the May 2022 amendment to the Trademark Manual of Examining Procedure ("TMEP"). USPTO Examination Guide 1-22: Clarification of Examination Evidentiary Standard for Marks Refused as Generic (May 2022). Snap, in response, argued that the USPTO should be required to prove

SPECTACLES trademark for AR glasses was understood by the relevant public to be a generic name for AR glasses, the court heavily criticized, and ultimately declined to rely on, the USPTO's *Teflon*-style consumer perception survey, even though courts have generally expressed a preference for *Teflon*-style surveys when assessing whether a term is generic.⁴

This commentary briefly discusses the types of consumer perception surveys used in genericness litigations, details the *Teflon* survey presented by the USPTO in the *Snap* case, discusses the court's criticisms of that survey, describes the alternative *Thermos*-style survey submitted by Snap, and outlines some practical guidance for designing surveys in future genericness disputes.

II. CONSUMER PERCEPTION SURVEYS IN GENERICNESS LITIGATION

Although courts recognize several forms of evidence as relevant to the assessment of genericness (including dictionary definitions, generic use by third parties, generic use by the mark holder, media usage, and consumer usage, which also has been referred to as “voice of the consumer” evidence⁵), consumer surveys long have carried substantial weight (when they are conducted reliably).⁶

genericness by “clear and convincing evidence,” as that standard was plainly adopted by the Federal Circuit in cases like *In re Cordua Rests., Inc.*, 823 F.3d 594, 601 (Fed. Cir. 2016), *In re Hotels.com, L.P.*, 573 F.3d 1300, 1302 (Fed. Cir. 2009), and *In re Merrill Lynch, Pierce, Fenner, and Smith, Inc.*, 828 F.2d 1567, 1571 (Fed. Cir. 1987). Furthermore, Snap argued, the USPTO cannot, through an Examination Guide or TMEP amendment, overrule the Federal Circuit. See *In re Isi, LLC*, Ser. No. 90523287, 2023 WL 4743716, at *7 (T.T.A.B. July 10, 2023) (the TMEP “does not have the force of law, is not binding, and cannot be considered a mandate”) (quoting *W. Fla. Seafood Inc. v. Jet Rests. Inc.*, 31 F.3d 1122, 1127 n.8 (Fed. Cir. 1994)).

The parties briefed the burden issue fully in their respective post-trial briefs (*Snap Inc. v. Vidal*, C.D. Cal. No. 2:22-cv-00085, ECF Nos. 143, 144) and addressed this issue at the hearing on those briefs. At that hearing, the Court noted that, if it were to accept Snap's argument, that would necessarily undermine the USPTO's position on the burden of proof in examinations before the USPTO and in cases nationwide. At that point, the Court offered the USPTO a face-saving solution, under which it would accept the clear and convincing evidence standard for this case given that the USPTO had applied that standard when Snap's SPECTACLES applications were under examination, and the TTAB had applied that standard on appeal, both of which occurred before the May 2022 amendment to the TMEP. To preserve its ability to defend the May 2022 amendments and to try to continue to apply the preponderance standard in other contexts, the USPTO agreed that the Court could apply the “clear and convincing evidence” standard in this case. See ECF No. 152 at 74:3–81:20.

⁴ E. Deborah Jay, *Genericness Surveys in Trademark Disputes: Under the Gavel* [hereinafter *Genericness Surveys*], in *Trademark & Deceptive Advertising Surveys: Law, Science, & Design* 120 (Shari Seidman Diamond & Jerre B. Swann, eds., 2d ed. 2022).

⁵ See Brief of Professor Peter N. Golder, Ph.D., and Other Marketing Academics as *Amici Curiae* in Support of Respondent at 12-14, *Booking.com*, 2020 WL 1131479 at *10-11; see also *Booking.com*, 591 U.S. at 561 n.6 (referencing amicus brief).

⁶ J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* [hereinafter *McCarthy*], § 12:14 (5th ed. 2025) (“Consumer surveys have become almost de rigueur in

Over the years, “[t]wo preferred models of surveys to test for genericness have been credited by the courts: The *Thermos* survey and the *Teflon* survey.”⁷

The *Teflon*-style survey, first used in *E.I. DuPont de Nemours & Co. v. Yoshida International, Inc.*⁸ to determine whether “TEFLON” was a generic name for nonstick coating, begins by educating respondents about the difference between a generic (or common) name and a brand name by defining both and providing examples of each (the so-called “mini-course”). In the *Teflon* case, the mini-course instructed respondents that “by *brand* name, [the surveyor meant] a word like *Chevrolet* which is made by one company; by *common* name, [the surveyor meant] a word like *automobile* which is made by a number of companies.”⁹

Once respondents complete the mini-course, they proceed to a “mini-test” to determine whether they understand the common name/brand name distinction.¹⁰ In the *Teflon* case, respondents were asked in the mini-test to characterize “washing machine” as either a common name or brand name.¹¹ Those who pass the mini-test proceed to the main survey, which presents the mark at issue alongside “control” terms,¹² including both common names and brand names, and asks the respondents to classify each of the marks as either a common name or brand name.¹³ In the *Teflon* case, the term “TEFLON” was presented along with the following terms: “MARGARINE,” “THERMOS,” “REFRIGERATOR,” “STP,” “JELLO,” “ASPIRIN,” and “COKE.”¹⁴ If more than half of the respondents deem the tested term to be generic, that is generally seen as powerful evidence that the term is, in fact, a generic reference for the goods at issue.¹⁵ In the *Teflon* case, 68% of

litigation over genericness. Judges are now used to survey evidence and often expect to receive evidentiary assistance by surveys in resolving genericness disputes.”).

⁷ *Id.*

⁸ 393 F. Supp. 502 (E.D.N.Y. 1975).

⁹ McCarthy, *supra* note 6, § 12:16.

¹⁰ *Id.*

¹¹ *Id.*

¹² These “control” terms serve to disguise the particular term of interest, so the respondents do not know which term is being tested. Further, these “control” terms “are used to evaluate respondents’ ability to distinguish brand names from common names, and they also provide a measure of the amount of guessing or ‘noise’ in the survey.” See Jay, *Genericness Surveys*, *supra* note 4, at 131.

¹³ McCarthy, *supra* note 6, § 12:16.

¹⁴ *Id.*

¹⁵ See Jay, *Genericness Surveys*, *supra* note 4, at 135-36 (stating that “courts have found that a properly constructed and implemented Teflon Survey in which a majority classifies a mark as a brand name supports a nongenericness finding, or helps to create a material issue of fact as to whether the name is generic,” and collecting cases); McCarthy, *supra* note 6, § 12:6 (stating that whether a term is a generic name depends on the principal significance of that term, and that, if the majority or the public or survey

respondents classified “TEFLON” as a brand name. Relying in part on this evidence, the court found that “TEFLON” was not a generic term.¹⁶

A *Thermos*-style survey provides a different way to assess whether a term is generic. That type of survey, named after the case in which it was first presented (*American Thermos Products Co. v. Aladdin Industries, Inc.*¹⁷), asks a series of open-ended questions to understand how potential consumers of the category of goods at issue would ask for or identify a product.¹⁸ For example, in the original *Thermos* survey, which assessed whether THERMOS was generic for portable containers designed to keep liquids hot or cold, one of the questions asked respondents to identify words they would use for such a container (specifically, it asked respondents what they would tell a store clerk they were looking for).¹⁹ The responses to these open-ended questions show what generic terms consumers use to refer to the goods at issue. Conversely, the absence of a particular term in response to the open-ended questions may be evidence that consumers do not use that term as a common name for the product class, which has been described as “highly relevant” toward a finding that the term is not generic.²⁰

It is worth noting the key differences between these two survey methodologies. The *Teflon* survey is aided; it presents respondents with the term at issue and asks whether it is a common name or a brand name. In contrast, the *Thermos* survey is unaided; it probes consumers’ minds to encourage them to identify the terms they consider to be generic for certain categories of goods or services.

Although courts may credit well-designed *Thermos* surveys,²¹ the *Teflon* survey has become the “preferred format for genericness surveys.”²² For example, the district court in *Booking.com* characterized the *Teflon* survey in that case as “highly relevant” to “shed[ding] light on how the [mark] is understood by consumers,”

respondents perceive a term to be a generic name, then that term should be found generic even if some smaller portion of the public recognizes the term to be a brand).

¹⁶ E.I. DuPont de Nemours & Co. v. Yoshida Int’l, Inc., 393 F. Supp. 502, 526-27 (E.D.N.Y. 1975).

¹⁷ 207 F. Supp. 9 (D. Conn. 1962).

¹⁸ McCarthy, *supra* note 6, § 12:15.

¹⁹ Am. Thermos Prods. Co. v. Aladdin Indus., Inc., 207 F. Supp. 9, 21 n.8 (D. Conn. 1962).

²⁰ Booking.com B.V. v. U.S. Pat. & Trademark Off., 915 F.3d 171, 182-83 (4th Cir. 2019), *as amended* (Feb. 27, 2019) (ruling that district court did not err in finding the “absence of evidence” that consumers frequently used the term to describe the genus to be “highly relevant” to evaluating the term’s primary significance), *judgment vacated on other grounds*, 141 S. Ct. 187 (2020).

²¹ See, e.g., Nightlight Sys., Inc. v. Nitelites Franchise Sys., Inc., No. 1:04-cv-2112, 2007 WL 4563873, at *5-7 (N.D. Ga. July 17, 2007); E.T. Browne Drug Co. v. Cococare Prods., Inc., 538 F.3d 185, 195 (3d Cir. 2008).

²² Jay, Genericness Surveys, *supra* note 4, at 120.

and as the “preferred method of proving genericness.”²³ Other courts have described the *Teflon* survey method as the “most accepted and used survey method for determining the generic name-trademark distinction,”²⁴ in part because it was originally described as “the only survey which really gets down to [the] critical element” of the genericness inquiry.²⁵ At least one court that was presented with competing *Teflon* and *Thermos* surveys, relied on the results from the *Teflon* survey alone.²⁶

Although courts have generally shown a preference for *Teflon* surveys, past performance is not indicative of future results, and *Teflon* surveys are not immune from scrutiny. Where the survey is not carefully designed to account for the particular facts of a case, courts have declined to give substantial, and in some cases any, weight to such flawed surveys.²⁷ Such scrutiny is especially appropriate in light of the Supreme Court’s caution in *Booking.com* that “[s]urveys . . . require care in their design and interpretation,”²⁸ and “[f]laws in a specific survey design . . . may limit the probative value of surveys in determining whether a particular mark is descriptive or generic.”²⁹ Indeed, as Snap’s survey expert testified at trial, when that care in design is applied, it will be evident that, in some cases, the *Thermos* methodology will be more effective at divining the terms consumers view as generic references for certain goods or services.³⁰ Moreover, as the Supreme Court recognized, “difficult questions may be presented when a term has multiple concurrent meanings to consumers or a meaning that has changed

²³ *Booking.com B.V. v. Matal*, 278 F. Supp. 3d 891, 917-18 (E.D. Va. 2017), *amended*, No. 1:16-CV-425, 2017 WL 4853755 (E.D. Va. Oct. 26, 2017), *aff’d sub nom. Booking.com B.V. v. U.S. Pat. & Trademark Off.*, 915 F.3d 171 (4th Cir. 2019), *as amended* (Feb. 27, 2019), *cert. granted, judgment vacated*, 141 S. Ct. 187 (2020).

²⁴ McCarthy, *supra* note 6, § 12:16 (collecting cases).

²⁵ *E.I. DuPont de Nemours & Co. v. Yoshida Int’l, Inc.*, 393 F. Supp. 502, 527 (E.D.N.Y. 1975).

²⁶ *Premier Nutrition, Inc. v. Organic Food Bar, Inc.*, No. 06-cv-0827, 2008 WL 1913163, at *9-11 (C.D. Cal. Mar. 27, 2008), *aff’d*, 327 F. App’x 723 (9th Cir. 2009). Although the survey at issue in *Premier Nutrition* was not explicitly characterized as a *Thermos* survey, it was undoubtedly modeled after one. Specifically, in attempting to prove that the term “organic food bar” was not generic for nutrition bars, the survey presented respondents with several nutrition bars and asked what they would ask for if they were looking for that product in a grocery store. *Id.* at *10. The court found the survey flawed, explaining that the defendant “offer[ed] no case law in support of its open-ended questions,” and that all the survey showed was that “organic food bar” might not be the *most* generic term, which, the court explained, doesn’t prove non-genericness. *Id.* at *10-11.

²⁷ *See, e.g., In re Hotels.com, L.P.*, 87 U.S.P.Q.2d 1100, 2008 WL 779325, at *10-12 (T.T.A.B. 2008), *aff’d*, 573 F.3d 1300 (Fed. Cir. 2009).

²⁸ *U.S. Patent & Trademark Office v. Booking.com B.V.*, 591 U.S. 549, 561 n.6 (2020).

²⁹ *Id.* at 564 (Sotomayor, J., concurring).

³⁰ Am. Transcript of Bench Trial [hereinafter Bench Trial Tr. Day 1] at 165, 168, 181, Snap Inc. v. Vidal, No. 2:22-cv-00085 (C.D. Cal. Apr. 10, 2024), ECF No. 138.

over time.”³¹ That “difficult question” is precisely what was at issue in *Snap*, as “SPECTACLES” has multiple concurrent meanings—it is an antiquated generic term for corrective eyewear, a description of visually striking performances or displays, and a brand name for Snap’s AR glasses.³²

III. THE USPTO’S *TEFLON* SURVEY

In *Snap*, the USPTO introduced two *Teflon* surveys (the second of which was a modified version of the first in response to criticisms against the first survey by Snap’s survey expert).³³

Both surveys used the same examples to educate respondents in the mini-course on the difference between brand names and common names, including *iPHONE*, *HERO*, and *THINKREALITY* as brand names and “smartphone,” “camera,” and “smart glasses” as common names.³⁴ Notably, the mini-course portion of the survey used one of the key generic terms for the goods at issue—“smart glasses”—which prevented the survey from being able to assess whether respondents identify that term as a generic term for the goods at issue. Additionally, the mini-course’s examples of brand names were all arbitrary or fanciful terms (i.e., made-up words or words with no relationship to smart glasses);³⁵ the mini-course did not use descriptive terms with secondary meaning as examples of brand names. These design choices may have biased respondents into believing that only arbitrary or fanciful terms should be characterized as brand names for purposes of the questions in the survey.

The first survey’s mini-test told respondents they would be shown a series of names “relating to smart glasses” and then presented respondents with two terms, “ANZU” and “DISPLAY,” and asked the respondents to classify the terms as a common name or brand name.³⁶ Respondents who said they were unsure, said “ANZU” was a common name, or said “DISPLAY” was a brand name, were terminated from the survey because they failed to demonstrate an understanding of the difference between common names and brand names.³⁷

³¹ *Booking.com*, 591 U.S. at 561 n.6 (majority decision).

³² *Snap Inc. v. Vidal*, 750 F. Supp. 3d 1120, 1153-54 (C.D. Cal. 2024).

³³ *Id.* at 1144. *See also* USPTO’s Post-Trial Brief, Exhibit C, Part 10 [hereinafter Anderson Expert Report 1] at 91-434, *Snap Inc. v. Vidal*, No. 2:22-cv-00085 (C.D. Cal. May 1, 2024), ECF No. 144-12 (Plaintiff’s Exhibit 271, containing expert report with Anderson’s first *Teflon* survey); USPTO’s Post Trial Brief, Exhibit C, Part 11 [hereinafter Anderson Expert Report 2] at 1-169, *Snap Inc. v. Vidal*, No. 2:22-cv-00085 (C.D. Cal. May 1, 2024), ECF No. 144-13 (Plaintiff’s Exhibit 272, containing expert report with Anderson’s second *Teflon* survey).

³⁴ *Id.* at 1147.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Am. Transcript of Bench Trial [hereinafter Bench Trial Tr. Day 2] at 141-42, *Snap Inc. v. Vidal*, No. 2:22-cv-00085 (C.D. Cal. Apr. 10, 2024), ECF No. 139.

Respondents who classified both terms correctly moved onto the main survey where they were shown the following seven terms and asked to classify the terms as common names or brand names: “MOVERIO,” “NREAL,” “SOLOS,” “SPECTACLES,” “MICROPHONE,” “PHOTOGRAPH,” and “SCREEN.”³⁸ Importantly, when respondents were shown these terms, they were not reminded to consider them in the context of “smart glasses”—an instruction that was presented only prior to the mini-test, and several questions before these terms were displayed.³⁹ That may have led some respondents to characterize “MICROPHONE,” “SCREEN,” “PHOTOGRAPH,” and “SPECTACLES” as words that can be generic depending on the goods with which they are used (even if they are not generic terms for smart glasses).⁴⁰ As shown in the chart below, of the respondents that completed this survey, 82.4% classified “SPECTACLES” as a generic name.⁴¹

Do you think that [NAME] is a brand name that refers to a product that is made by only one company, a generic name that refers to a type of product that may be made by more than one company, or you don't know?	Percent Who Classified the Term as a Generic Name	Percent Who Classified the Term as a Brand Name	Percent Who Did Not Know How to Classify the Term
SPECTACLES	82.4%	15.2%	2.4%
Average of generic controls	94.2%	4.6%	1.3%
MICROPHONE	95.4%	4.0%	0.6%
SCREEN	94.3%	4.4%	1.4%
PHOTOGRAPH	92.9%	5.3%	1.8%
Average of brand controls	4.1%	93.4%	2.6%
MOVERIO	3.2%	93.9%	3.0%
SOLOS	5.0%	93.1%	2.0%
NREAL	4.2%	93.1%	2.8%

Excerpt from Anderson Expert Report 1⁴²

³⁸ *Snap Inc.*, 750 F. Supp. 3d at 1147.

³⁹ Bench Trial Tr. Day 2, *supra* note 37, at 143-44; Am. Transcript of Bench Trial [hereinafter Bench Trial Tr. Day 3] at 153-54, *Snap Inc. v. Vidal*, No. 2:22-cv-00085 (C.D. Cal. Apr. 10, 2024), ECF No. 140.

⁴⁰ Bench Trial Tr. Day 3, *supra* note 39, at 154-56.

⁴¹ *Snap Inc.*, 750 F. Supp. 3d at 1145.

⁴² Anderson Expert Report 1 at 107. *See supra* note 33.

The second survey’s mini-test presented respondents with two new terms, “STORIES” and “EYEWEAR,” as potential common or brand names “relating to smart glasses,” and utilized six new control terms, alongside “SPECTACLES” in the main survey: “VISION PRO,” “ECHO FRAMES,” “BLADE,” “CAMERA GLASSES,” “WIFI GLASSES,” and “LENSES.”⁴³ In this survey, the instruction to think about the names as “relating to smart glasses” was included with each question (as opposed to only before the mini-test), and 72.9% of respondents classified “SPECTACLES” as a generic name for “smart glasses.”⁴⁴

Do you think that [NAME] is a brand name that refers to a product that is made by only one company, a generic name that refers to a type of product that may be made by more than one company, or you don't know?	Percent Who Classified the Term as a Generic Name	Percent Who Classified the Term as a Brand Name	Percent Who Did Not Know How to Classify the Term
SPECTACLES	72.9%	23.8%	3.3%
Average of generic controls	86.0%	10.6%	3.3%
CAMERA GLASSES	90.5%	6.2%	3.3%
WIFI GLASSES	87.1%	10.5%	2.4%
LENSES	80.5%	15.2%	4.3%
Average of brand controls	5.5%	92.7%	1.7%
VISION PRO	4.3%	95.7%	0.0%
ECHO FRAMES	5.2%	91.4%	3.3%
BLADE	7.1%	91.0%	1.9%

Excerpt from Anderson Expert Report 2⁴⁵

IV. SNAP’S *THERMOS* SURVEY

Snap’s survey expert testified that the *Teflon*-style survey was a poor methodology for the facts of the case because (i) “SPECTACLES” has multiple meanings, which made challenging the use of the *Teflon* survey format, in which respondents were given a binary choice to classify a term as either brand or generic; (ii) the fact that most brand names in the relevant category were arbitrary or fanciful made selection of appropriate control names difficult; and (iii) given that most common names in the relevant category were plural (much like “SPECTACLES”), selection of appropriate control names compounded the challenge (since

⁴³ *Id.* at 1146.

⁴⁴ *Id.*

⁴⁵ Anderson Expert Report 2 at 47. *See supra* note 33.

respondents, upon seeing only plural terms as examples of generic terms, might have incorrectly drawn the conclusion that plural terms are generic).⁴⁶ Instead, Snap's expert testified, the *Thermos* approach was a more appropriate methodology given the descriptive nature of "SPECTACLES," which can have multiple concurrent meanings.⁴⁷

Snap's *Thermos* survey⁴⁸ was designed to "empty the mind[s]"⁴⁹ of relevant consumers to understand the generic terms they would use to refer to the category of the products at issue. Specifically, the *Thermos* survey asked respondents questions like, "[w]hat word or words would you use to identify or describe eyeglasses that can connect to your smartphone via Bluetooth or Wi-Fi to provide features such as photo and audio/video capture?" or, if you wanted to purchase such a product, "what would you tell the salesperson you wanted, or what would you type into a search bar online?"⁵⁰ The results of Snap's *Thermos* survey demonstrated that, of the 273 respondents, only 4 (or 1.5% of total respondents) used "spectacles" as a generic term to refer to these goods.⁵¹ The terms that were most commonly identified as generic references for these types of goods were "smart glasses" (60.1%), "Bluetooth/Wi-Fi/Wireless glasses" (47.6%), and other "smart" mentions (e.g., "smart tech," "smart device," and "smart design") (27.1%).⁵²

V. THE COURT'S CRITIQUES OF THE USPTO'S *TEFLON* SURVEYS

Looking only at the results, and not at the methodology, the USPTO's surveys on their face would appear to provide evidence that consumers understand "SPECTACLES" to be a generic term for smart glasses. But the court identified several significant flaws in the USPTO's survey designs that rendered them unreliable for assessing genericness in this context.

The court identified four design flaws as the most significant: (1) the USPTO's *Teflon* surveys could not account for respondents who, while not recognizing "SPECTACLES" as a brand designation, did not think "SPECTACLES" was a generic name for smart glasses;

⁴⁶ Bench Trial Tr. Day 3, *supra* note 39, at 153-55, 171-73.

⁴⁷ Bench Trial Tr. Day 1, *supra* note 30, at 179-80.

⁴⁸ See Plaintiff's Admitted Exhibits, Volume 2 at 2-29, Snap Inc. v. Vidal, No. 2:22-cv-00085 (C.D. Cal. Apr. 2, 2024), ECF No. 136-2 (Plaintiff's Trial Exhibit 13, which contains Expert Report of Brian Sowers [hereinafter, Sowers Expert Report], without appendices).

⁴⁹ Bench Trial Tr. Day 1, *supra* note 30, at 165.

⁵⁰ Bench Trial Tr. Day 1, *supra* note 30, at 170-72.

⁵¹ *Id.* at 174-75, 185 (testimony from Snap's expert, Brian Sowers, about the results of his *Thermos* survey); see also Sowers Expert Report, *supra* note 48, at 26.

⁵² *Id.*

(2) the USPTO's *Teflon* surveys conditioned respondents to believe that fanciful and arbitrary terms for smart glasses are brand names while common vernacular words for technology products are generic names; (3) the USPTO's *Teflon* surveys utilized mini-test control names that likely biased the representativeness of each of the relevant consumer samples; and (4) the results of the USPTO's *Teflon* surveys were riddled with uncertainty due to improper question design.⁵³ Because of these design flaws, described in greater detail below, the court concluded that "this consumer survey evidence cannot carry the PTO's burden."⁵⁴

***A. Failure to Account for Respondents' Deeming
"SPECTACLES" Descriptive, Rather than Generic***

First, the court explained, the USPTO's *Teflon* surveys took for granted an unproven assumption that ran throughout the USPTO's entire case: that any terms consumers may associate with eyewear, including smart glasses, can only be unprotectible generic terms and never registrable descriptive marks.⁵⁵ Prior to trial, when the court denied the USPTO's motion for summary judgment, it specifically criticized this unproven assumption.⁵⁶ The court explained that it viewed the USPTO's argument as relying on three logical steps: (i) "spectacles" is generic for "eyeglasses," (ii) "eyeglasses" is a "portion" or "part" of "smart glasses," and therefore, (iii) "spectacles" is generic for "smart glasses."⁵⁷ The court explained that just because "spectacles" is generic for one component of the product (i.e., "smart glasses"), it is not necessarily the case that "spectacles" is itself generic for the same product.⁵⁸ The court explained that there is a reasonable scenario in which "smart glasses" and "eyeglasses" could be placed in separate, though at times overlapping, categories.⁵⁹ In such a scenario, the USPTO's proffered reasoning fails, since even if "spectacles" is a generic term for eyeglasses, that would not necessarily mean it is a generic term for smart glasses, a product in a separate, distinct category.⁶⁰

Because the USPTO's survey expert relied on this unsupported assumption in designing the *Teflon* surveys, the court was skeptical of the seemingly high percentage of respondents classifying

⁵³ Snap Inc. v. Vidal, 750 F. Supp. 3d 1120, 1146-51 (C.D. Cal. 2024).

⁵⁴ *Id.* at 1151.

⁵⁵ *Id.* at 1146-48.

⁵⁶ Snap Inc. v. Vidal, 721 F. Supp. 3d 1070, 1075-77 (C.D. Cal. 2024).

⁵⁷ *Id.* at 1075-76.

⁵⁸ *Id.* at 1076-77.

⁵⁹ *Id.*

⁶⁰ *Id.*

“SPECTACLES” as a generic name for “smart glasses.”⁶¹ Specifically, the court pointed out that the *Teflon* surveys proffered by the USPTO forced the respondents to select between “generic name” and “brand name,” despite being presented with terms that could arguably be deemed descriptive (and therefore neither generic nor a brand name).⁶² Because “generic” was the only option other than “brand,” the court reasoned that, when presented with terms such as “LENSES,” “SCREEN,” or “EYEWEAR,” respondents who otherwise might have deemed those terms descriptive of “smart glasses” classified them as “generic,” simply because they did not recognize them as brand names. As a result, the court explained, it could not determine what proportion of those respondents who classified “SPECTACLES” as generic did so because they actually thought “SPECTACLES” was generic, as opposed to thinking “SPECTACLES” simply was not a brand name and therefore chose the only other available option.⁶³ Because descriptive marks are eligible for trademark protection upon a showing of secondary meaning, this flaw was significant, and the court recognized that a critical mass of respondents may very well have selected “generic” only because they did not believe “SPECTACLES” was a brand name (but would have categorized it as descriptive if given that option).⁶⁴

B. Improper Selection of Control Names

Second, the court criticized the selection of control names in the USPTO’s *Teflon* surveys. Specifically, the court highlighted the “stark contrast in the corresponding pairs of control brand and generic names.”⁶⁵ As noted above, as part of the initial mini-course, respondents were affirmatively instructed that words like “HERO,” “ANZU,” and “THINKREALITY” were brand names for smart glasses, and words like “CAMERA,” “DISPLAY,” and “SMART GLASSES” were generic names for smart glasses.⁶⁶ The court criticized the use of these names because they could result in a demand effect⁶⁷—that is, respondents may have taken the use of

⁶¹ Snap Inc. v. Vidal, 750 F. Supp. 3d 1120, 1146-47 (C.D. Cal. 2024).

⁶² *Id.*

⁶³ *Id.* at 1147.

⁶⁴ *Id.* (“[T]he percentages of consumers who classified SPECTACLES as a generic name strictly according to Anderson’s survey design cannot differentiate those who, while they may not have recognized the mark as a brand designation, still may have thought the mark was only descriptive of smart glasses rather than a generic name for the product.”).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ McCarthy, *supra* note 6, § 32:172 (“‘Demand Effects’ in a survey are produced when respondents use cues from the survey procedures and questions to infer the purpose of the survey and identify the ‘correct’ answers.”).

these names as a cue that the survey was seeking to have them categorize all descriptive terms as common names and all fanciful or arbitrary terms as brand names.⁶⁸ The court explained that, given the nature of the terms selected to instruct respondents on the distinction between common names and brand names, it was no surprise that many respondents classified “SPECTACLES” as generic.⁶⁹ In other words, respondents were essentially trained to believe a brand name must be arbitrary or fanciful (along the lines of ANZU or THINKREALITY), and because “SPECTACLES” did not align with those examples, respondents were pushed toward characterizing it as generic.⁷⁰ Further contributing to this “demand effect” was what the court characterized as the “conceptual closeness” between “SPECTACLES” and the generic examples provided (“LENSES,” “SCREEN,” and “EYEWEAR”).⁷¹ Because “SPECTACLES” led the respondents to conjure up a product that was closer to the generic examples provided than the fanciful brand examples provided, respondents were biased into categorizing “SPECTACLES” as generic.⁷²

C. Biased Respondent Pool Due to Improper Screening Criteria

Third, the court concluded that the control names used in the mini-test biased the ultimate respondent pool because it only allowed respondents to proceed beyond the mini-test if they believed that dictionary words describing some element of smart glasses (“DISPLAY” and “EYEWEAR”) are common terms (even though neither is technically a generic term for smart glasses).⁷³

Specifically, in the mini-tests for both surveys, the only respondents who were allowed to take the survey were those who classified “DISPLAY” (for the first survey) and “EYEWEAR” (for the second survey) as generic names for smart glasses.⁷⁴ However, as the court recognized, those terms, at best, *describe* an aspect of smart glasses and are not themselves generic terms for smart glasses.⁷⁵ Accordingly, respondents who passed the mini-test and advanced to the main survey were those with an incorrect

⁶⁸ *Snap Inc.*, 750 F. Supp. 3d at 1147-48.

⁶⁹ *Id.* at 1148.

⁷⁰ *Id.*

⁷¹ *Id.* (“[T]he conceptual closeness between SPECTACLES and the inherently nondistinctive generic names is impossible to miss: two have ‘GLASSES’ in the names while the third, LENSES, is the name of an object probably most associated with eyewear.”).

⁷² *Id.*

⁷³ *Id.* at 1148-49.

⁷⁴ *Id.*

⁷⁵ *Id.* at 1149.

understanding that a term that describes an aspect of the product at issue is a generic term.⁷⁶ As Snap's expert explained in his rebuttal testimony, that meant that the survey was biased to include only those respondents who were likely to characterize "SPECTACLES" as generic as well since "SPECTACLES" is also a term that could describe an aspect of smart glasses.⁷⁷

D. Improper Question Design in Main Survey

The fourth flaw identified by the court was that the questions in the USPTO's surveys were improperly phrased. Respondents in the USPTO's surveys were instructed to think about the terms used in the questionnaires as they "relat[e]" to smart glasses.⁷⁸ When viewing each term, respondents were asked whether the terms are brand names that "refer[]" to a product that is made by one company or are generic names that "refer[]" to a type of product made by more than one company.⁷⁹ However, as the court rightly explained, merely relating or referring to a product category is not enough to make a term a generic name for that product.⁸⁰ For example, a word like "CAMERA" or "HIGH-TECH" might *refer* to a product such as smart glasses, but that does not make either a generic term *for* "smart glasses." In the court's view, the way in which the USPTO's surveys asked the questions was "misleading and incorrect" and "smear[ed] the critical line between a generic name and a descriptive word."⁸¹

The court held that this improper question design, combined with the improper selection of control names, compounded the flaws in the survey.⁸² In particular, respondents were provided with generic examples such as "DISPLAY," "SCREEN," "MICROPHONE," "EYEWEAR," and "LENSES," each of which is a common word relating to ordinary eyewear (or some feature/component of smart glasses), but none of which are *themselves* actually generic for the product category at issue.⁸³ With that understanding, and the instruction that merely *referring to a*

⁷⁶ *Id.*

⁷⁷ Bench Trial Tr. Day 1, *supra* note 30 at 180; Bench Trial Tr. Day 3, *supra* note 39-40 at 171-73.

⁷⁸ *Snap Inc.*, 750 F. Supp. 3d at 1147-48.

⁷⁹ *Id.* Specifically, the question for each control and test name read as follows: "Thinking about names **relating** to smart glasses, do you think that [TERM] is a brand name that **refers** to a product that is made by only one company, a generic name that **refers** to a type of product that may be made by more than one company, or you don't know?" Anderson Expert Report 2, *supra* note 33 at 44 (emphases added).

⁸⁰ *Snap Inc.*, 750 F. Supp. 3d at 1150.

⁸¹ *Id.* (internal quotation marks omitted).

⁸² *Id.* at 1150-51.

⁸³ *Id.*

product was sufficient for classification, it is no surprise respondents likewise characterized “SPECTACLES,” another common ordinary eyewear term, as generic.⁸⁴

As the court rightly asked, “[i]f respondents were asked to think[] of names relating to smart glasses and told that it is enough if the word refers to a product, is there much chance that most wouldn’t classify SPECTACLES alongside the generic control names in the right-hand column?”⁸⁵ (referencing the table below, which is quoted from *Snap*⁸⁶).

Distinctive Names	Disputed Name	Nondistinctive Names
HERO	<i>SPECTACLES</i>	<i>CAMERA</i>
ANZU		<i>DISPLAY</i>
STORIES		<i>EYEWEAR</i>
SOLOS		<i>MICROPHONE</i>
MOVERIO		<i>PHOTOGRAPH</i>
NREAL		<i>SCREEN</i>
<i>VISION PRO</i>		<i>CAMERA GLASSES</i>
<i>ECHO FRAMES</i>		<i>WIFI GLASSES</i>
BLADE		<i>LENSES</i>

VI. THE COURT’S COMMENTS ON
SNAP’S *THERMOS* SURVEY

The court ultimately did not reach the question of whether Snap’s *Thermos* survey was sufficient to prove that the mark was not generic, given that the USPTO bore the burden of proving that “SPECTACLES” was generic and failed to do so. The court did note, however, that, had it more fulsomely considered Snap’s *Thermos* survey, the results would have prevented the USPTO from meeting its burden of proving that “SPECTACLES” was generic.⁸⁷ The court further commented that, although it was skeptical of the usefulness of some of the *Thermos* survey questions, one question was particularly relevant: namely, what would respondents tell a salesperson they wanted, or what they would type into a search bar

⁸⁴ *Id.*
⁸⁵ *Id.* at 1150 (internal quotation marks omitted).
⁸⁶ *Id.* (italics and boldface in original).
⁸⁷ *Id.* at 1151 n.17 (“There is no need, as a result, to weigh the Teflon surveys against Snap’s Thermos survey[.] If the court were to consider that evidence, though, it would prevent the PTO from carrying its burden even by a preponderance of the evidence.”).

online, if they wanted to purchase smart glasses.⁸⁸ The court highlighted that only 1 out of 273 respondents said “spectacles” in response to this question.⁸⁹ The court’s acknowledgement that Snap’s *Thermos* survey would have been sufficient to rebut the USPTO’s evidence that “SPECTACTLES” was a generic term indicates that the court believed the *Thermos* results to be probative to establish that “SPECTACTLES” is not a generic term for AR glasses.

VII. PRACTICAL GUIDANCE FOR FUTURE GENERICNESS LITIGATIONS

The *Snap* opinion underscores the importance of thoughtful design choices when crafting genericness surveys, whether in the context of prosecutions before the USPTO, registration, opposition and cancellations challenges in the TTAB or federal courts, or infringement litigations. As the opinion makes clear, when designing genericness surveys, it is crucial to select the appropriate methodology and carefully tailor the survey to the specific circumstances of the case. Although both *Teflon* and *Thermos* surveys are accepted by the USPTO, TTAB, and federal courts, the context and characteristics of the term at issue—such as its descriptiveness and the availability of suitable control names—can influence which approach is more reliable. Survey designers should avoid introducing bias, consider adapting standard formats to address descriptive terms (including, when appropriate, by designing modified versions of the standard *Teflon* and *Thermos* surveys), and ensure that questions are focused solely on the core inquiry of genericness. Properly crafted questions are essential to elicit relevant, unambiguous responses and produce reliable results. Additional guidance for designing genericness surveys post-*Snap* is described in more detail below:

- **Where the term at issue is arguably highly descriptive, a *Thermos* survey may be more probative than a *Teflon* survey.** It is important to recognize that both survey methodologies are accepted by federal courts, and although *Teflon* surveys have received some preferential treatment, context is key. As seen in *Snap*, there are some factual circumstances that a *Teflon* survey may not be well suited to address, and rather than pushing the *Teflon* survey past its capabilities, it may be a smart choice to consider alternative methodologies.
- **Consider the availability of appropriate control names.** When considering a mark that makes selection of

⁸⁸ *Id.*

⁸⁹ *Id.*

effective control names difficult, the *Thermos* survey may be preferable because it does not require the selection of control names at all, thus eliminating the potential bias that can be caused by use of specific control names and avoiding doubts about the reliability of the answers. For example, in *Snap*, almost all the available brand names in the relevant product category were arbitrary or fanciful, and almost all the available common names were plural, which led to the demand effects discussed above, ultimately making the *Teflon* survey results unreliable. In designing genericness surveys, it may be advisable to adjust the survey format, rather than pursuing a *Teflon* survey that may result in biased responses.

- **Avoid introducing demand effects (e.g., through leading questions) when selecting control names.** Where the term being tested is neither arbitrary nor fanciful, selection of highly arbitrary or fanciful names for brand control terms risks implicitly and misleadingly educating respondents that brand names must be arbitrary or fanciful, and anything else, even a descriptive, non-generic mark, must then be a common name (which of course, is incorrect).
- **Consider adapting the *Teflon* survey to the circumstances at hand.** If using a *Teflon* survey for a term that may be considered descriptive, consider educating respondents in the mini-course and mini-test on brand names that are descriptive but have secondary meaning (e.g., American Airlines). Another approach may be to modify the standard *Teflon* survey to provide three categories: generic terms, descriptive terms, and brand names. Another modification that may be worth considering would be to include in the survey an option for respondents to indicate that, although they do not believe the term is a brand name, they also do not believe the term is a generic name. Allowing respondents to select “descriptive” as a third option (or neither a generic term nor a brand name) would clarify the percentage of respondents who truly believe the term is generic, bolstering the reliability of the ultimate survey results. Such deviations from the industry-standard *Teflon* survey are not unprecedented.⁹⁰

⁹⁰ See, e.g., *vonRosenberg v. Lawrence*, 413 F. Supp. 3d 437, 448 (D.S.C. 2019) (explaining that the *Teflon* survey presented should have been adapted to ask if the mark at issue “refer[red] to an organization or a religion” as opposed to a “trademark name versus a category name”); *Zipee Corp. v. U.S. Postal Serv.*, 140 F. Supp. 2d 1084, 1087 (D. Or. 2000) (explaining that “[a]sking consumers to choose between a ‘common name’ or a ‘brand name’ when describing ‘postal service’ is simply too narrow since it fails to give the consumer the option of identifying the phrase as a reference to an organization”); see also Jay, *Genericness Surveys*, *supra* note 4, at 128-29.

- **Carefully tailor questions to the core inquiry only.** For genericness surveys, the questions should all be directed at the core inquiry: whether respondents consider the term being tested to be a generic name for the relevant product category. Questions that go beyond that core inquiry by asking about whether the term is a brand (which could be an arbitrary term or a fanciful term or a suggestive term or a descriptive term with secondary meaning) run the risk of skewing results and rendering them unreliable. Specifically, since there is such a broad range of marks that can be a brand, from the utterly arbitrary to the obviously descriptive, and everything in between, bringing that range into a respondent's mind when their sole task should be determining whether a mark is generic or not may cause confusion. Although *Teflon* surveys have long asked respondents whether the terms presented are generic names or brand names, perhaps it is time to consider whether the respondents should merely be asked if the marks presented are generic names or *not* generic names. In support of this change, it should not be forgotten that *Teflon* surveys are *genericness* surveys, not secondary meaning surveys, and ultimately, whether a consumer classifies the mark at issue as a *brand* is ancillary to an inquiry that focuses on whether a term is generic.
- **Ensure that survey questions are drafted to elicit a relevant response.** In designing survey questions for genericness surveys, be sure to elicit answers that are responsive to the inquiry at issue. In the *Snap* case, due to the design of the questions in the USPTO's *Teflon* surveys, it was impossible to tell how many respondents classified "SPECTACLES" as a generic term only because they believed it *related or referred to* smart glasses. In particular, because *Teflon* surveys do not generally include open-ended questions, there is no opportunity for respondents to indicate *why* they have characterized a term as a common name or brand name. As a result, if the way the questions are crafted allows for ambiguous responses (i.e., a respondent that characterized a mark as generic either (i) thought it was generic full stop or (ii) thought it was generic merely because it related to smart glasses), then the ultimate answer may not be helpful, and therefore deemed not relevant. In other words, if all the responses that characterized "SPECTACLES" as generic did so merely because they thought "SPECTACLES" *refers to* smart glasses in some way, and not because it was in fact a generic term, then the survey provided no helpful information on the issue of genericness. Because here, the questions were not carefully

crafted to elicit responses that answer the inquiry at issue (because they allowed for that ambiguity), the survey results were unpersuasive and unreliable.

- **Consider the Appropriate Burden of Proof.** In examinations, the USPTO will likely continue to follow USPTO Examination Guide 1-22: Clarification of Examination Evidentiary Standard for Marks Refused as Generic (May 2022), which provides that the USPTO need only prove that a mark is generic by a preponderance of the evidence. In close cases, applicants should consider challenging that Examination Guide on the ground that the USPTO cannot overturn controlling Federal Circuit precedent through an examination guide, and that the USPTO must meet a heightened burden of proving a mark generic by clear and convincing evidence. *See, generally, note 3, supra.*
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