

**This Opinion is Not a
Precedent of the TTAB**

Mailed: May 24, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Quizzit, Inc.
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Serial No. 88522349
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Ryan S. McPhee and Noam Kritzer of Bakos & Kritzer,
for Quizzit, Inc.

Ronald McMorro, Trademark Examining Attorney, Law Office 118,
Michael W. Baird, Managing Attorney.

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Before Cataldo, Lynch, and Hudis,
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

I. Background

Quizzit, Inc. (“Applicant”) seeks to register on the Principal Register the proposed mark POST. VOTE. SHOP. in standard characters for the following goods in International Class 9:

Downloadable mobile applications for conducting polls and opinion surveys; Downloadable mobile applications for allowing a user to poll an audience of other users in real time; Downloadable mobile applications for allowing users to conduct polls and opinion surveys in a social media environment; Downloadable mobile applications for public

opinion polling; Downloadable mobile applications for market and consumer surveys; Recorded computer application software for mobile phones, namely, software for use in conducting polls and opinion surveys; Recorded computer application software for mobile phones, namely, software for allowing a user to poll an audience of other users in real time; Recorded computer application software for mobile phones, namely, software for allowing users to conduct polls and opinion surveys in a social media environment; Recorded computer application software for mobile phones, namely, software for public opinion polling; Recorded computer application software for mobile phones, namely, software for market and consumer surveys.¹

The Examining Attorney refused registration on the ground that the proposed mark is merely descriptive under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1).

Applicant requested reconsideration and appealed. In the Request for Reconsideration, Applicant offered an amendment, in the alternative, to the Supplemental Register if “the Board holds, on appeal from the refusal to register, that the mark is merely descriptive.”²

The Examining Attorney denied reconsideration, the appeal proceeded and has been fully briefed. In the Examining Attorney’s Brief, he acknowledged Applicant’s amendment-in-the-alternative to the Supplemental Register, and stated that in the

¹ Application Serial No. 88522349 was filed July 18, 2019, initially based on an alleged bona fide intent to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), but Applicant submitted an amendment to allege use on November 1, 2020, amending the application to a Section 1(a) basis, 15 U.S.C. § 1051(a).

² October 19, 2020 Request for Reconsideration at 11.

event of an affirmance of the refusal, the amendment would be “accepted and will be formally entered if so directed by the Board.”³

II. Descriptiveness

The refusal rests on Section 2(e)(1) of the Trademark Act, which precludes registration of “a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive . . . of them.” 15 U.S.C. § 1052(e)(1). A term is merely descriptive within the meaning of the statute “if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used.” *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2017) (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); *see also In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015).

Descriptiveness must be assessed “in relation to the goods for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use.” *Bayer AG*, 82 USPQ2d at 1831 (citing *In re Abcor Dev.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)). The descriptiveness analysis concentrates on the goods identified in the application. *See In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1636 (Fed. Cir. 2016) (quoting *Octocom Sys., Inc. v. Houston Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)). Evidence that a term is merely descriptive to the relevant purchasing public “may be obtained

³ 8 TTABVue 3 n.1.

from any competent source, such as dictionaries, newspapers, or surveys[.]” *Bayer AG*, 82 USPQ2d at 1831; *see also Princeton Vanguard, LLC v. Frito-Lay North Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1833 (Fed. Cir. 2015), as well as “labels, packages, or in advertising material directed to the goods.” *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978). It may also be obtained from websites and publications, and an applicant’s own specimen of use and any explanatory text included therein. *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017).

In this case, the Examining Attorney contends that Applicant’s software facilitates users posting, voting, and shopping, such that the proposed mark merely describes these functions of the software. According to the Examining Attorney, “both the individual components and the composite result are descriptive of applicant’s software and do not create a unique, incongruous, or nondescriptive meaning in relation to the goods.”⁴ Applicant, on the other hand, contends that its mark is unitary and therefore non-descriptive.

Where a proposed mark such as this one consists of multiple words, the mere combination of descriptive words does not necessarily create a nondescriptive expression. *In re Associated Theatre Clubs Co.*, 9 USPQ2d 1660, 1662 (TTAB 1988) (GROUP SALES BOX OFFICE unregistrable for theater ticket sales services); *In re Phoseon Tech. Inc.*, 103 USPQ2d 1822, 1826 (TTAB 2012) (SEMICONDUCTOR LIGHT MATRIX merely descriptive for light curing systems and UV curing systems).

⁴ 8 TTABVUE 4 (Examining Attorney’s Brief).

If each component retains its merely descriptive significance in relation to the goods or services, the combination results in a composite that is itself merely descriptive and unregistrable. *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004). On the other hand, if, a proposed mark comprising a combination of merely descriptive components creates a unitary phrase with a unique, nondescriptive meaning, or if the composite has an incongruous meaning as applied to the goods or services, or forms a double entendre, the mark may be registrable. *See In re Colonial Stores Inc.*, 394 F.2d 549, 55 C.C.P.A. 1049, 157 USPQ 382, 385 (CCPA 1968) (SUGAR & SPICE for bakery products); *In re Shutts*, 217 USPQ 363, 364-65 (TTAB 1983) (SNO-RAKE for a snow removal hand tool having a handle with a snow-removing head at one end, the head being of solid uninterrupted construction without prongs”); *see also EBS Data*, 212 USPQ at 966 (explaining composite versus unitary mark in context of disclaimer requirements).

Even where the unitary nature of a phrase is established, it still can be merely descriptive as a whole. *In re Wanstrath*, 7 USPQ2d 1412, 1413 (Comm’r Pats. 1987) (GLASS TECHNOLOGY is “a unitary, descriptive term”); *In re Medical Disposables Co.*, 25 USPQ2d 1801, 1804 (TTAB 1992) (MEDICAL DISPOSABLES is a unitary expression that must be disclaimed in its entirety); *Am. Speech-Language-Hearing Ass’n v. Nat’l Hearing Aid Soc.*, 224 USPQ 798, 804 n.3 (TTAB 1984) (CERTIFIED HEARING AID AUDIOLOGIST found to be “a unitary expression that should be disclaimed in its entirety”). For such a unitary phrase to avoid descriptiveness, “it must be shown that in combination the descriptiveness of the individual words has

been diminished, that the combination creates a term so incongruous or unusual as to possess no definitive meaning or significance other than that of an identifying mark for the goods.” *Medical Disposables*, 25 USPQ2d at 1804. Thus, the unitary nature of a phrase alone does not render an expression non-descriptive.

Turning to POST. VOTE. SHOP., the Examining Attorney submitted dictionary definitions of these terms,⁵ and maintains that “post,” “vote,” and “shop” refer to actions that applicant’s software allows a user to perform. “In considering a mark as a whole, the Board may weigh the individual components of the mark to determine the overall impression or the descriptiveness of the mark and its various components.” *Oppedahl & Larson*, 71 USPQ2d at 1372. We find it “useful to consider the public’s understanding of the individual words.” *Princeton Vanguard*, 114 USPQ2d at 1832-33. Applicant acknowledges that “[u]sers of [its] application software can post and vote, with both actions earning points for the user, eventually leading to special discounts and offers.”⁶ Applicant’s specimen of use, its promotion on the Apple App Store, includes the following language:

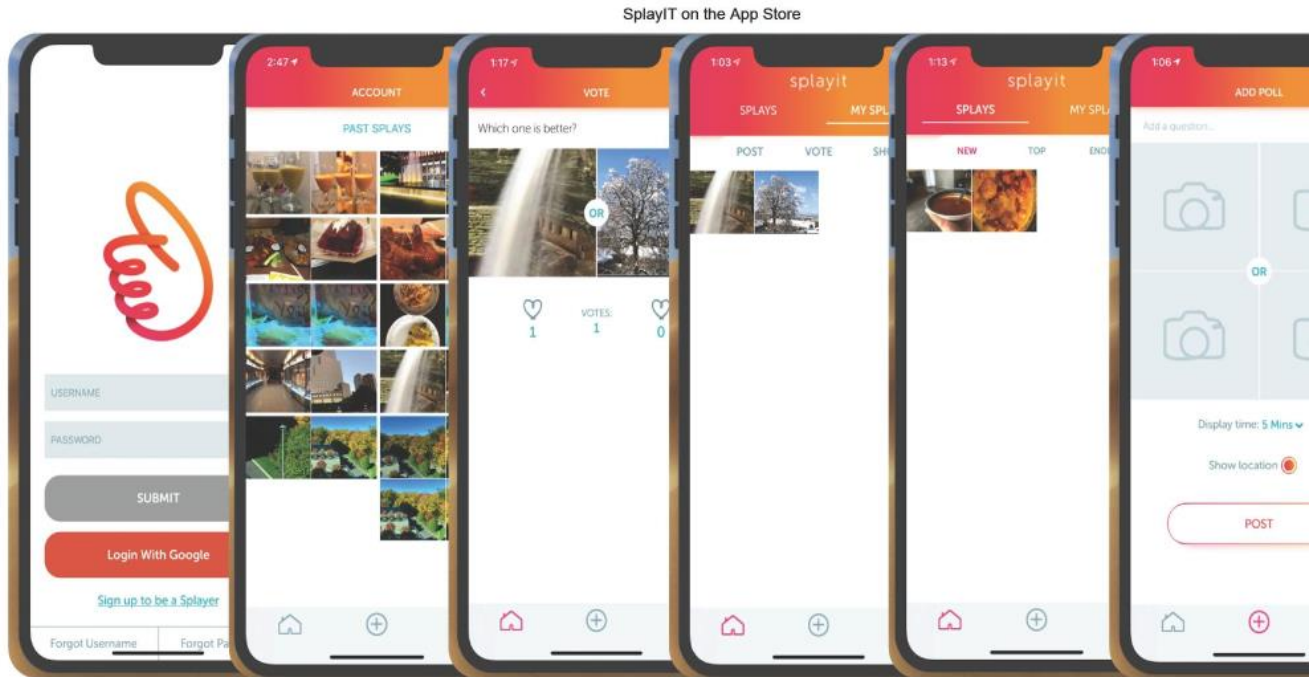
Post. Vote. Shop.

Splayit allows you to submit image-based posts and crowdsource objective and anonymous feedback on a timetable you define. All Splayers get to post and vote, and both posters and voters earn points when they do! After earning enough points, you will ultimately get access to special discounts and offers. The Splayit community invites you to post, vote, and shop!

⁵ TSDR October 8, 2019 Office Action at 2-14.

⁶ 6 TTABVUE 5 (Applicant’s Brief).

The following illustrative page from Applicant’s November 1, 2020 specimen contains the above-quoted language.



Post. Vote. Shop.
Splayit allows you to submit image-based posts and crowdsource objective and anonymous feedback on a timetable you define. All Splayers get to post and vote, and both posters and voters earn points when they do! After earning enough points, you will ultimately get access to special discounts and offers. The Splayit community invites you to post, vote, and shop!

Information

Seller	Quizzit Inc.
Size	14.3 MB
Category	Social Networking
Compatibility	Requires iOS 11.0 or later. Compatible with iPhone, iPad, and iPod touch.
Languages	English
Age Rating	12+ Frequent/Intense Cartoon or Fantasy Violence Infrequent/Mild Mature/Suggestive Themes
Copyright	© Quizzit Inc
Price	Free

s.apple.com/us/app/splayit/id1503554189

The following close-up excerpt of a portion of the specimen page above depicts part of a screenshot of Applicant’s app showing “POST” “VOTE” and the partially-obscured word “SHOP,” presumably, where each word is spatially separated and no periods

appear between them, and where the words appear to be menu options that the app user may select.



See Empire Tech. Dev. LLC, 123 USPQ2d at 1549 (“[T]he way an applicant uses an alleged mark (or a component term in a mark), ... in promotional materials or packaging, is relevant to whether consumers will perceive the mark as an indicator of source or instead as descriptive or generic.”); *see also In re Reed Elsevier Props.*, 482 F.3d 1376, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007) (appropriate to consider the applicant’s website to provide context for and inform the understanding of the identification); *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420 (Fed. Cir. 2005) (examining the subject website in order to understand the meaning of terms).

Thus, the record reflects – and Applicant seems to concede – that the individual words “post,” “vote,” and “shop” describe its goods because they refer to what the user does with the software.⁷

Applicant focuses its argument against descriptiveness on unitariness. First, Applicant alleges that “[t]he non-standard presentation of POST. VOTE. SHOP. as three verbs separated by periods creates a unique impression in the minds of consumers,” and that the “use of verbs and the use of punctuation in the applied-for mark in fact unite the mark.”⁸ Applicant also stresses the importance of the order of the three verbs in its mark signifying “a particular order of operations,” indicating that a user of its mobile applications and software would post, then vote, then shop.⁹ Next, Applicant points to third-party registrations that it contends reflect “[t]he practice of the Trademark Office with respect to similar marks,” allowing them on the Principal Register.¹⁰ Applicant states that the Register “is replete with marks in

⁷ During prosecution, Applicant argued that “shop” was not descriptive, but Applicant did not make that argument in its Brief. The Examining Attorney notes that Applicant’s specimen refers to accumulating points leading to special discounts and offers, and includes the designation that users can make “In-App Purchases.” The Examining Attorney also introduced some third-party registration evidence relating to software for marks that include disclaimers of SHOP (and the other terms in the mark). TSDR April 28, 2020 Office Action at 2-32. These can be used to demonstrate “the sense in which the word is used in ordinary parlance and may show that a particular term has descriptive significance as applied to certain goods or services.” *Institut National Des Appellations D’Origine v. Vintners Int’l Co.*, 958 F.2d 1574, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992). The Examining Attorney also made of record third-party use evidence of SHOP in connection with software. TSDR April 18, 2020 Office Action at 2-7, 18-29. We find this evidence persuasive to corroborate that “SHOP” can have a descriptive significance in relation to software that facilitates shopping.

⁸ 6 TTABVUE 7 (Applicant’s Brief).

⁹ 6 TTABVUE 8 (Applicant’s Brief).

¹⁰ 6 TTABVUE 9 (Applicant’s Brief); *see also* TSDR October 19, 2019 Request for Reconsideration at 28-48 (third-party registrations).

which individual words with periods were allowed without disclaimers of clearly descriptive terms.”¹¹

As the Examining Attorney points out, Applicant’s argument that POST. VOTE. SHOP. is unitary misses the mark. Typically, the argument that a mark is unitary in nature is invoked to avoid a disclaimer of a non-distinctive component of a mark that includes other distinctive matter. *See* TMEP § 1213.05 (Oct. 2018); *see also In re EBS Data Processing*, 212 USPQ 964, 966 (TTAB 1981). The unitary nature of a mark or phrase excuses a disclaimer because the components of the mark are not separable when “a descriptive term is combined with a non-descriptive term so as to form a mark which has a distinct non-descriptive meaning of its own as a whole.” *EBS Data*, 212 USPQ at 966, *quoted in Dena Corp. v. Belvedere Int’l Inc.*, 212 USPQ2d 1047, 1050 (Fed. Cir. 1991).

The proposed mark involved in this case, POST. VOTE. SHOP., is not subject to a disclaimer requirement because none of the individual components of Applicant’s mark is distinctive. Therefore, here, where we have a full descriptiveness refusal, Applicant’s arguments and evidence directed only to a showing that its components should be deemed inseparable does not suffice. Instead, Applicant also must establish that the allegedly unitary whole is so different than the sum of its parts – so incongruous or unusual – that it no longer merely describes the goods, and instead “possess[es] no definitive meaning or significance other than that of an identifying mark for the goods.” *Medical Disposables*, 25 USPQ2d at 1804. However, if

¹¹ 6 TTABVUE 10 (Applicant’s Brief).

Applicant's proposed POST. VOTE. SHOP. mark retains the descriptive significance of the individual words, the combination remains merely descriptive. *See, e.g., In re Petroglyph Games Inc.*, 91 USPQ2d 1332, 1337 (TTAB 2009) (BATTLECAM merely descriptive for computer game software); *In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1823 (TTAB 2012) (holding SEMICONDUCTOR LIGHT MATRIX merely descriptive of light and UV curing systems composed primarily of light-emitting diodes for industrial and commercial applications).

Considering Applicant's mark in its entirety, we find that the combination of individually descriptive terms, with periods after each, does not result in a whole that is greater than the sum of its parts, so that the mark is not merely descriptive. While we find that the individual words of the mark, separated by periods and spaces, are separable rather than unitary, even if we considered the mark unitary, it still remains merely descriptive. Overall, the evidence convinces us that consumers would understand POST. VOTE. SHOP. as describing what the consumer can do through Applicant's software. This is consistent with the definitions of the individual words, their appearance on Applicant's software app as functions available to the user (as reflected on the specimen), and the statement on Applicant's specimen that "The Splayit community invites you to post, vote, and shop!" Although the use of periods after each word may emphasize each component, nothing about the punctuation,¹² or

¹² We find Applicant's grammar-related evidence not particularly persuasive; user-generated content on reddit.com, quora.com, and English.stackexchange.com, giving the views of users who identify their credentials as "Proof-read papers for friends in university; paid in beer" and "knows English." TSDR October 19, 2020 Request for Reconsideration at 22.

about the order of the three words in the mark, changes their meaning to create a non-descriptive combination. Indeed, Applicant has not even offered up any argument as to what this non-descriptive meaning might be, and instead merely contends that the mark as a whole is “evocative and concise.”¹³

Applicant’s third-party registration evidence does not convince us that its mark is not merely descriptive. Applicant submitted registrations covering a variety of goods and services where the marks consist of three words separated by periods, supposedly showing a USPTO practice of registering marks in this format. Examples include:

- PLAY. CONNECT. ENJOY. for various wireless earphones and accessories;¹⁴
- HAPPY. HEALTHY. SAFE. for electronic sensors and software for tracking various information about domestic dogs;¹⁵
- POWER. SAFETY. LIFE. for batteries and energy storage products;¹⁶

Unlike Applicant’s mark, many of the registrations include both distinctive and non-distinctive matter, such that a unitariness determination by the assigned examining attorney in the case would have avoided a disclaimer requirement for the non-distinctive matter. So, for instance, when Applicant points out in its Brief that in the last example above, “[n]o disclaimer was required for POWER even though the goods are batteries and energy storage products,”¹⁷ Applicant implicitly acknowledges that

¹³ 6 TTABVUE 10 (Applicant’s Brief).

¹⁴ TSDR April 13, 2020 Response to Office Action at 17.

¹⁵ TSDR April 13, 2020 Response to Office Action at 17.

¹⁶ TSDR October 19, 2020 Request for Reconsideration at 32.

¹⁷ 6 TTABVUE 12 (Applicant’s Brief).

the other terms are not descriptive. In contrast to such third-party registrations, as discussed above, Applicant's mark does not include distinctive matter and even if its formulation of three verbs separated by periods were deemed unitary, it remains descriptive as a whole, and so is not analogous to the third-party marks. Because some of the wording in these third-party marks is distinctive, we reject Applicant's contention that they reflect recognition by the USPTO that "the **format** lends distinctiveness to a mark."¹⁸

Turning to any third-party registrations that arguably may be more analogous to Applicant's mark, "[e]ven if some [of these] prior registrations had some characteristics similar to ... [the subject] application, the [US]PTO's allowance of such prior registrations does not bind the Board" *In re Nett Designs, Inc.*, 236 F.3d 1339, 1342, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).¹⁹ Prior registrations "are not conclusive on the question of descriptiveness ... [e]ach case must stand on its own merits." *In re theDot Commc'ns Network LLC*, 101 USPQ2d 1062, 1067 (TTAB 2011) (citations omitted).

¹⁸ 6 TTABVUE 18 (Applicant's Brief) (emphasis added).

¹⁹ As Applicant acknowledges, "the Board is not bound by the Office's registration of other marks with similar characteristics." 6 TTABVUE 18 (Applicant's Brief).

Decision: We affirm the refusal to register Applicant's proposed mark on the Principal Register on grounds of mere descriptiveness. Pursuant to Applicant's amendment-in-the-alternative to the Supplemental Register, which the Examining Attorney deemed acceptable, the application will be so amended and proceed in due course.