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Mailed:
4/16/2013

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ruby Mine, Inc.

Serial No. 85287700

H. Michael Brucker of H. Michael Brucker Law Corp., for
Ruby Mine, Inc.

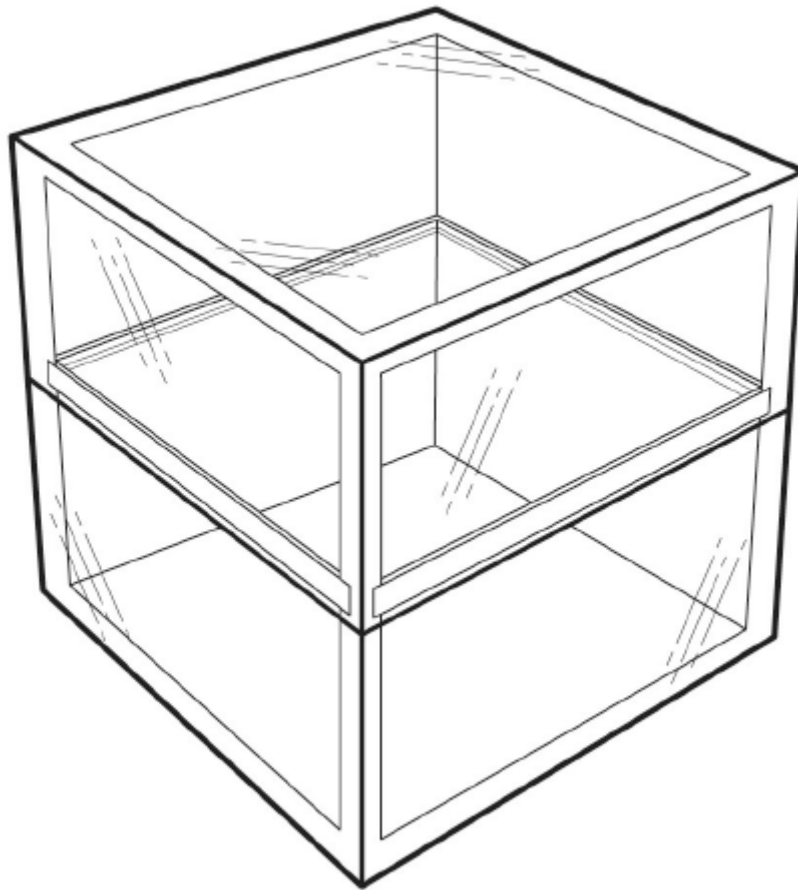
Edward Fennessy, Trademark Examining Attorney, Law Office
114 (K. Margaret Le, Managing Attorney).

Before Quinn, Ritchie, and Masiello, Administrative
Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Ruby Mine, Inc. has filed an application to register
the following mark for "parlor games" in International
Class 28:¹

¹ Serial No. 85287700, filed on April 6, 2011, pursuant to
Section 1(a) of the Trademark Act, 15 USC §1051(a), and claiming
September 10, 2004 as the date of first use anywhere and in
commerce.



Description: The mark consists of the configuration of a container for game cards comprising a two-piece, clear plastic, hollow cube having a central band where the two pieces join and walls sufficiently thick to produce an aesthetic prismatic effect at the wall ends as a function of ambient light conditions.

The trademark examining attorney has refused registration of the application on four grounds. First, the examining attorney has refused registration under Section 2(e)(5) of the Trademark Act of 1946, 15 U.S.C. § 1052(e)(5), on the ground that applicant's proposed mark is functional and thus unregistrable. Second, the examining

attorney has refused on the ground that the mark consists of a nondistinctive configuration of the goods that does not function as a mark under Trademark Act Sections 1, 2, and 45, 15 U.S.C. §§1051-1052 and 1127. Third, as to the "aesthetic prismatic effect" of applicant's package design the examining attorney has refused on the ground that "this feature, as described in the mark description and depicted in the specimen of record, is solely decorative or ornamental in nature." (examining atty's stmt., at unnumbered 22 of 26). Fourth, the examining attorney has refused on the ground that the drawing is not acceptable. Specifically, the examining attorney notes: "Elements of a mark that are functional are required to be shown in broken or dotted lines." See Trademark Act Section 2(e)(5), 15 U.S.C. 1052(e)(5); see TMEP § 1202.02(a)-(a)(ii) (2012); 37 CFR 2.52(b)(4)." (*Id.* at unnumbered 23 of 26.)

Distinctiveness

We consider first the refusal based on the asserted lack of distinctiveness of the applied-for mark. We note that both applicant and the examining attorney agree that the applied-for mark qualifies as "product packaging" rather than as "product design" and thus may be shown to be inherently distinctive without a showing of acquired distinctiveness. *Wal-Mart Stores, Inc. v. Samara Bros.*,

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529 U.S. 205, 215, 54 USPQ2d 1065, 1069 (2000); *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 23 USPQ2d 1081 (1992). Indeed, applicant has not asserted that its mark has acquired distinctiveness pursuant to Section 2(f) of the Trademark Act, and thus if the mark is shown not to be inherently distinctive, this refusal will result in a finding that the applied-for mark cannot be registered.

To determine if a product is inherently distinctive, we look at the four "Seabrook factors." *Seabrook Foods, Inc. v. Bar-Well Foods, Ltd.*, 568 F.2d 1342, 1344, 196 USPQ 289, 291 (C.C.P.A. 1977). The *Seabrook* factors consider whether the packaging shape is:

- (1) a "common" basic shape or design;
- (2) unique or unusual in a particular field;
- (3) a mere refinement of a commonly adopted and well known form of ornamentation for a particular class of goods viewed by the public as a dress or ornamentation for the goods; or
- (4) capable of creating a commercial impression distinct from the accompanying words.

Id. See also *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1351, 96 USPQ2d 1681, 1684 (Fed. Cir. 2010) (stating that an abbreviated tuxedo costume consisting of wrist cuffs and a bowtie collar without a shirt "constitute[d] 'trade dress' because it was part of the 'packaging'" for exotic dancing services); *Tone Bros., Inc. v. Sysco Corp.*, 28 F.3d

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1192, 1205-07, 31 USPQ2d 1321, 1330-32 (Fed. Cir. 1994) (citing *Seabrook*) (reversing lower court's summary judgment finding that the shape and appearance of the spice container at issue was not inherently distinctive); *Yankee Candle Co. v. Bridgewater Candle Co., LLC*, 259 F.3d 25, 42-45, 59 USPQ2d 1720, 1730-32 (1st Cir. 2001) (finding trade dress for common elements of candle labels was nondistinctive product packaging for which insufficient evidence of acquired distinctiveness was shown); *In re Chevron Intellectual Prop. Grp. LLC*, 96 USPQ2d 2026, 2029 (TTAB 2010) (affirming that applicant's "'three-dimensional, six-sided beveled shape' [pole spanner design used to promote services] is a mere refinement of a commonly used form of a gasoline pump ornamentation rather than an inherently distinctive service mark for automobile service station services."); *In re Brouwerij Bosteels*, 96 USPQ2d 1414, 1421-22 (TTAB 2010) (finding that product packaging trade dress in the nature of a beer glass and stand with wording and scrollwork would be perceived as a mere refinement of a commonly known glass and stand rather than an inherently distinctive indicator of source for the goods); *In re File*, 48 USPQ2d 1363, 1367 (TTAB 1998) (stating that novel tubular lights used in connection with bowling alley services would be perceived by customers as

"simply a refinement of the commonplace decorative or ornamental lighting . . . and would not be inherently regarded as a source indicator."); *In re J. Kinderman & Sons Inc.*, 46 USPQ2d 1253, 1255 (TTAB 1998) ("while the designs [of packaging for electric lights for Christmas trees that] applicant seeks to register may be unique in the sense that we have no evidence that anyone else is using designs which are identical to them, they are nonetheless not inherently distinctive."); *In re Hudson News Co.*, 39 USPQ2d 1915, 1923 (TTAB 1996), *aff'd per curiam*, 114 F.3d 1207 (Fed. Cir. 1997) ("[f]or the 'blue motif' of a retail store to be registrable on the Principal Register without resort to Section 2(f), the trade dress would have to be immediately recognizable as a distinctive way of identifying the source of the store services.").

Here, the examining attorney has submitted evidence to show that the applied-for mark is indeed a common design that is, rather than being unique in the field of "parlor games," a mere refinement of a commonly adopted and well

known form of trade dress for such goods.² In particular, the examining attorney submitted evidence of

i) cube-shaped parlor games, including specifically card games such as those offered by applicant (although not necessarily clear plastic); ii) clear plastic card holders (including some cube-shaped, not necessarily for games); iii) cube-shaped clear plastic display cases (not necessarily for cards or games, but for example for displaying trophy golf balls or baseballs, to show that transparency and cube shape are common and desirable generally); iv) general cube packaging (to show that cube packaging is common and desirable); and finally v) examples of clear plastic parlor games, some cube-shaped, exactly as offered by applicant.

Examples of each of these categories include the following:

1. Cube-shaped parlor games;

Disney's Cars 2-Scavenger Hunt Party Game.
www.birthdayexpress.com. Attached to December 8, 2011
Office Action, p. 84.

² Although the examining attorney made arguments regarding the fourth *Seabrook* factor, we do not find it relevant, since the drawing submitted by applicant contains no words, and therefore there can be no commercial impression "apart from the accompanying words." Furthermore, although the evidence *infra* shows various types of packaging, we limit our analysis to those that fit into these four categories.

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<http://www.birthdayexpress.com/Disneys-Cars-2-Scavenger-Hunt-Party-Game/73839/PartyItemDetail.aspx>
12/07/2011 05:57:48 PM

BIRTHDAY EXPRESS
The Original Children's Party Source

CLOSEOUT UP TO 92% OFF!
Get an extra 50% off with coupon: [CLOSE](#) [details](#)

Search: [GO](#) [Chat with a specialist: 1-800-Birthday](#)

Disney's Cars 2 - Scavenger Hunt Party Game

Overall Rating: [★★★★★](#) [Read all reviews](#) | [Write a review](#)

Get ready... get set... go! Kids will enjoy hiding and finding items in this fun scavenger game. Kids pick a card to see which 4 cars they get to collect, then race to find the matching token cars as fast as they can. Includes (6) square game cards (4"x4"), (32) round token cards (3.25" diameter) and box (4.25"x4"). Made of cardstock paper. For 8 players. Ages 3+.

[Share](#) [Tweet](#) [Like](#) [Send](#) Sign Up to see what your friends like.

ITEM DESCRIPTION	STATUS	QTY	PRICE
Disney's Cars 2 - Scavenger Hunt Party Game Item # 200638	In stock	0	\$7.99

[ADD TO CART](#)

USA ONLY This item cannot be shipped outside the USA. [View FAQ](#)

Eligible for FREE 2-Day Shipping [Learn more](#) | [sign in](#)

You Might Also Like:

- [Sports Car Photo Print](#) \$6.99
- [Disney's Cars 2 - Square Corner Plates](#) \$3.49
- [Disney's Cars 2 - Square Napkins](#) \$3.49
- [Disney's Cars 2 - Paper Mats](#) \$3.39
- [Disney's Cars 2 - Party Favor Box](#) \$4.99

Bring Personalized M&M'S® To Your Birthday Party!

Party Packs Start at \$1.75/ea!

Perfect for Goodie Bags! [GO](#)

2. Clear-plastic card holders (some cube shaped);

Gartner Studios Clear Favor Box (set of 50): Clear Favor Box Kit, 50/pk. Enjoy the perfect Clear Favor Box Kit, 50/pk for your special occasion. www.google.com. Attached to December 8, 2011 Office Action, p.100.

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http://www.google.com/products/catalog?rlz=1T4GGIH_enUS249US249&q=clear*boxes&gs_l=00518048511103&um=1&e=UTF-8&itrm=shop&cid=13617416388701864441&sa=X&ei=vPTTpm6N5ILOGG1JCaBw&ved=0CIkBEPMCMAI#12/07/2011 06:22:01 PM

Web Images Videos Maps News Shopping Gmail More + Sign in

Google product search clear boxes

Gartner Studios Clear Favor Box (Set of 50)

\$16 online

Recommend this on Google

Clear Favor Box Kit, 50/pk in stock and available for \$24.70. Enjoy the perfect Clear Favor Box Kit, 50/pk for your special occasion.

Add to Shopping List

Online stores Related items Details

Online stores ☐ Google Checkout ☐ Free shipping ☐ New items Your location: Alexandria, VA 22301 - Change

Relevance	Seller rating	Condition	Tax and shipping (estimated)	Total price	Base price
Bed Bath & Beyond	★★★★★ 65 seller ratings	New	Tax: \$1.00 + Shipping: \$5.99	\$26.98	\$19.99
Opentip.com	★★★★★ 417 seller ratings	New	No tax + Shipping: \$11.29	\$27.54	\$16.25
BridesVillage	No rating	New			\$24.70

1 - 3 of 3

Favor Boxes - IN STOCK
www.papermart.com/Favor_Boxes
Wholesale Prices on Over 600 Styles of Empty Favor Boxes - Ships Today!

gartner studios favor box
www.target.com
Find Favor Box Online. Free Shipping \$50 on 100,000 items!

Paper Mart; Clear P.V.C. Boxes: Clear Favor Box with Bows.
www.papermart.com. Attached to December 8, 2011 Office
Action, p. 103.

http://www.papermart.com/Product%20Pages/Product.aspx?GroupID=38447&ParentGroupID=1899612/07/2011 06:23:01 PM

PaperMart.Com My Account Recently Viewed Guaranteed Lowest Prices Catalog Contact Us About Us Help

Search Box Size Search Log In View Cart: 0 Item \$0.00 Chat

Home >> Boxes >> Plastic Boxes >> Clear P.V.C. Boxes

Clear P.V.C. Boxes

Print On It Bags Boxes Cans, Jars, Bottles Tubes Soft Vinyl Pouches Baskets Ribbons, Bows, Ties Cushioning & Fills Papers Plastic & Films Supplies & Shipping

Similar Items

Colored & Frosted Boxes

P.E.T. And P.P. Boxes

Printed Pattern Boxes

Plastic Top, Paper Bottom Boxes

Tuck Top, Tab-4 Lock Bottom Boxes

Clear Favor Box With Bows

Full Flaps Tuck Top Boxes W/Gold Card Bottom

Tuck Top Boxes With Gold Bottom

Silver Bottom P.E.T. Tuck Top Box

Side Tuck Box

Hexagon Shaped Favor Boxes

Hexagonal Boxes With Gold Bottoms

Heart Shaped Plastic Boxes

Large Round Display Cylinders

Die Cut Handle Clear PVC Boxes

Butterfly Top Boxes

3. Cube-shaped, clear-plastic display cases;

Baseball Display Case: www.amazon.com. Attached to December 8, 2011 Office Action, p. 37.

<http://www.amazon.com/mainstream-collectors-Baseballs-autographed-baseballs/dp/B005JDYF90>
12/05/2011 06:06:55 PM

The screenshot shows the Amazon.com website interface. At the top, there's a navigation bar with the Amazon logo, a greeting, and links for 'Today's Deals', 'Gifts & Wish Lists', and 'Gift Cards'. Below this is a search bar and a category menu. The main content area features a product listing for a 'Signed Ultra Pro UV Protected Square Baseball Cube Ball Holder Display'. The product image shows a baseball inside a clear plastic cube. The description states it's a mainstream collector's choice for storing Major League Baseballs. The price is listed as \$4.50, with a 'You Save' of \$214.50 (98%). The product is 'In Stock' and ships from Bud's Sports Cards. On the right side, there's a 'Quantity' selector set to 1, an 'Add to Cart' button, and a 'Sign in' link. Below the product listing, there's a 'More Buying Choices' section showing a '2 new' item for \$4.50. At the bottom, there's a 'Holiday Flurry Deals' banner and a link to 'Customers Who Viewed This Item Also Viewed'.

amazon.com Hello, Edward Fennessy. We have recommendations for you (Not Edward?)
Edward's Amazon.com Today's Deals Gifts & Wish Lists Gift Cards Your Digital Items Your Account Help

Shop All Departments Search Sports & Outdoors Sports & Outdoors Athletic & Outdoor Clothing Bikes & Scooters Boating & Water Sports Exercise & Fitness Fan Shop Golf Outdoor Recreation Shoes Team Sports Sales & Deals

Signed Ultra Pro UV Protected Square Baseball Cube Ball Holder Display This is mainstream collector's choice for storage of Major League Baseballs. This ball cube features a built in stand to keep the baseball straight with the autograph aligned in front and centered. It has two equal u-shaped plastic pieces that slide together to form a precision fit. It's the perfect baseball display case for all your autographed baseballs. This baseball holder is made by Powers Collectibles.
[Be the first to review this item](#) | [Like](#) (0)

List Price: ~~\$219.00~~
Price: **\$4.50**
You Save: **\$214.50 (98%)**

In Stock.
Ships from and sold by **Bud's Sports Cards**.
Only 8 left in stock--order soon.

Ordering for Christmas? Based on the shipping schedule of Bud's Sports Cards, choose **Standard** at checkout for delivery by December 24. See [Bud's Sports Cards](#) shipping details.

2 new from \$4.50

Holiday Flurry Deals **Holiday Flurry Deals Week in Sports & Outdoors**
Stock up on great deals for the Holidays with [Holiday Flurry Deals Week in Sports & Outdoors](#). [Shop now.](#)

Quantity: 1
\$4.50 + \$8.99 shipping
In Stock. Sold by **Bud's Sports Cards**
[Add to Cart](#)
OR
[Sign in](#) to turn on 1-Click ordering.
[Add to Wish List](#)

More Buying Choices
Powers Collectibles [Add to Cart](#)
\$219.00 + \$8.99 shipping
2 new from \$4.50
Have one to sell? [Sell on Amazon](#)
[Share](#) [Email](#) [Facebook](#) [Twitter](#)

[Share your own customer images](#)

Customers Who Viewed This Item Also Viewed Page 1 of 3

The Container Store: Small Ball & Puck Display Cubes. www.containerstore.com. Attached to December 8 Office Action, p. 119.

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<http://www.containerstore.com/shop/collections/display/cubesCases?productid=10000577>
12/08/2011 03:50:38 PM

The screenshot shows the 'The Container Store' website. The header includes navigation links like 'SIGN IN', 'REGISTRY', 'WISH LIST', 'BASKET', 'CUSTOMER SERVICE', and 'HOME'. A search bar is present. Below the header, there are links for 'SHOP NOW', 'ORGANIZE WITH elfa', 'EXPERT TIPS & VIDEOS', 'OUR BLOG', 'LOCATIONS', and 'EMAIL SIGN UP'. The main content area features a product titled 'Small Ball & Puck Display Cubes'. It includes a description: 'We've yet to find a better way to proudly and securely display precious memorabilia. Our plastic Display Cubes keep your treasures completely visible, dust-free, and away from curious hands. The cubes fit together seamlessly, creating a magical space that preserves and protects your valuable collections.' It also lists features: 'Archival-quality, acid-free' and 'Made in the USA'. There are buttons for 'Email a Friend', 'Questions?', 'Print This Page', and 'Get Product Alerts'. A rating of 5 stars is shown. Below this, there is a table with product details:

Item	Availability	Quantity	Price
Golf Ball Display Cube 2" sq. x 2" h. 44010	Available for Shipping	0	\$1.59 ea
Baseball Display Cube 3-1/8" sq. x 5-1/8" h. 44029	Available for Shipping	0	\$2.99 ea
Hockey Puck Display Cube	Backordered. Will Ship When Available.	0	

On the right side, there is a 'YOU MAY ALSO LIKE' section with images of other products like 'Our Sweater Boxes', 'Animal Storage Stool', and 'Our Shoe Boxes'.

4. General cube packaging (some also clear);

Advertisement for "crystal cube" www.alibaba.com. Attached to May 25, 2011 Office action, p. 5.

<http://www.alibaba.com/product-detail/214028478/crystal-cube.html> 05/25/2011 11:08:23 AM

The screenshot shows the Alibaba.com product page for 'crystal cube'. The header includes 'Welcome to Alibaba.com. Join Free | Sign In' and navigation links like 'Buy', 'Sell', 'Community', 'My Alibaba', 'My Favorites', and 'Help'. There are tabs for 'Products', 'Suppliers', and 'Buyers'. A search bar is present. The main content area features a product titled 'crystal cube'. It includes a description: 'chrcrystalen.alibaba.com'. It also lists details: 'FOB Price: Get Latest Price', 'Port: nmgbo', 'Minimum Order Quantity: 50 Piece/Pieces', 'Supply Ability: 100000 Piece/Pieces per Week', and 'Payment Terms: L/C,T/T'. On the right side, there is a 'Supplier Details' section for 'Pujiang Minghuang Crystal Arts and Crafts Manufactory [Zhejiang, China (Mainland)]'. It lists 'Business Type: Manufacturer', 'Contact Details', 'Gold Supplier [3rd Year]', and 'A&V Checked'. Below this, there is a 'Product Details' section with 'Quick Details' and 'Specifications'. The 'Quick Details' section lists: 'Place of Origin: Zhejiang China (Mainland)', 'Brand Name: crystal cube', 'Model Number: MH-4015', 'weight: crystal ornament', 'packing: crystal cosmetic', 'Design: Carved', 'Type: crystal cube', 'shape: crystal gift', 'size: crystal decoration', and 'color: crystal animal'. The 'Specifications' section lists: 'crystal cube is made with K9 material laser image can be design upon your request packed with nice gift box'.

Nooka Modern Home: "Package redesign was focused on efficiency and modernizing ancient time-telling. Cube-shaped boxes serve as both eye-catching in-store pieces and functional containers." <http://dannyyirgou.com>. Attached to May 25, 2011 Office action, p.4.

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Intriguing Facts About Packaging Boxes: Standard storage boxes in many cases are cube shaped. www.excelteacher.com. Attached to May 25, 2011 Office action, p. 8.

Teach Engineering: Summary Boxed In and Wrapped Up: "students discover that the cubical box has less surface area than the original, and thus, a cube is a more efficient way to package things." www.teachengineering.org. Attached to May 25, 2011 Office action, p. 10.

Minimising Packaging [sic]: Many plastic milk jugs are now cube-shaped, which lowers packaging expenses by 10 to 20 cents per jug. www.sustainbusper.com. Attached to May 25, 2011 Office action, p. 13.

5. Clear-plastic parlor games (some cube-shaped)

Chat Pack For Kids: Fun Questions. www.amazon.com. Attached to December 8, 2011 Office Action, p.10.

http://www.amazon.com/Chat-Pack-Kids-Fun-Questions/dp/0975580159/ref=pd_sim_b_4
12/05/2011 05:46:52 PM

The screenshot shows the Amazon.com product page for 'Chat Pack For Kids: Fun Questions' by Chat Pack. The product is a cube-shaped box with a colorful design. The price is \$11.38, and it is eligible for FREE Super Saver Shipping on orders over \$25. The product is in stock and sold by LearnRight Toys and Fulfilled by Amazon. The page also features a 'Holiday Flurry Week Deals in Toys & Games' banner, a 'More Buying Choices' section with links to Sensory Smart, Special Needs Toy Store, Indoobest, and School Depot, and a 'Customers Who Bought This Item Also Bought' section with links to Chat Pack: Fun Questions to Spark Fun, More Chat Pack: New Questions to Spark Fun, Table Topics Conversation Cards, and Kid Talk: Conversation Cards for the E... by U.S.

amazon.com Hello, Edward Fennessy. We have recommendations for you (Not Edward?)
Edward's Amazon.com Today's Deals Gifts & Wish Lists Gift Cards Your Digital Items Your Account Help

Shop All Departments Search Toys & Games Cart Your Lists

Best Sellers New Releases Preschool Toys Boys' Toys Girls' Toys Games & Puzzles Hobby Models & Trains Toys Outlet

Chat Pack For Kids: Fun Questions
by Chat Pack
★★★★☆ (2 customer reviews) | Like (0)

Price: **\$11.38** & eligible for **FREE Super Saver Shipping** on orders over \$25. [Details](#)

In Stock.
Sold by **LearnRight Toys** and **Fulfilled by Amazon**. Gift-wrap available.

Want it delivered Tuesday, December 6? Order it in the next **1 hour and 13 minutes**, and choose **One-Day Shipping** at checkout. [Details](#)

Ordering for Christmas? To ensure delivery by December 24, choose **FREE Super Saver Shipping** at checkout. [Read more about holiday shipping.](#)

14 new from \$6.92 **1 collectible** from \$6.92

Holiday Flurry Week Deals in Toys & Games
Huge savings and Lightning Deals all week on [hot holiday toys and games](#) from top brands like Fisher-Price, Crayola, NERF and more.
[Learn more](#)

Quantity: 1
[Add to Cart](#)
or
[Sign in](#) to turn on 1-Click ordering.
or
[Add to Cart with FREE Two-Day Shipping](#)
Amazon Prime Free Trial required. Sign up when you check out. [Learn More](#)
[Add to Wish List](#)

More Buying Choices
[Add to Cart](#)
Sensory Smart - Special Needs Toy Store
\$7.50 + \$4.13 shipping
[Add to Cart](#)
Indoobest...
\$6.92
[Add to Cart](#)
School Depot
\$8.75 + \$4.32 shipping
15 used & new from \$6.92
Have one to sell? [Sell on Amazon](#)
[Share](#)

Customers Who Bought This Item Also Bought

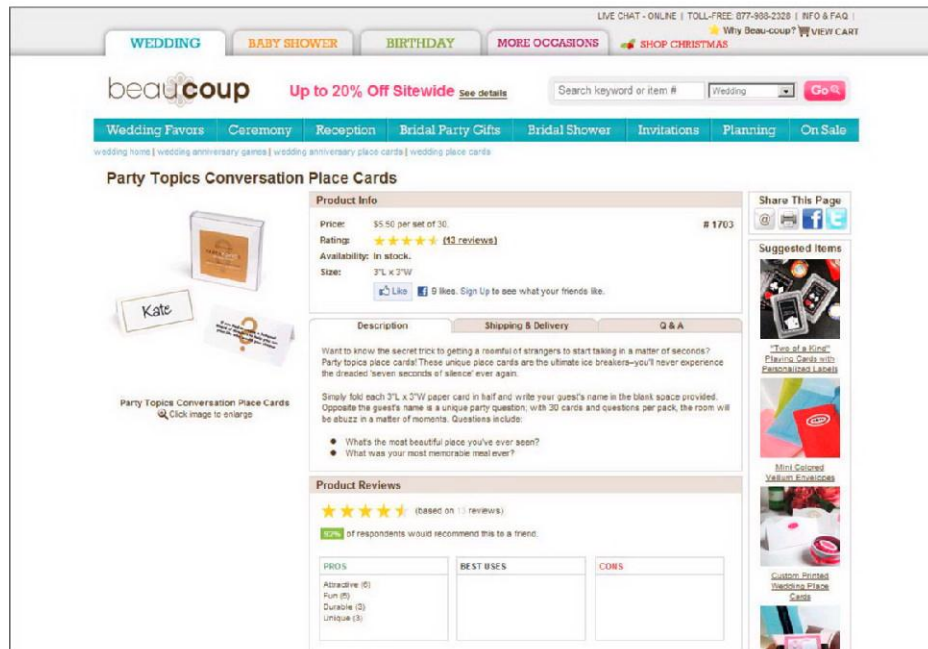
Chat Pack: Fun Questions to Spark Fun
More Chat Pack: New Questions to Spark Fun
Table Topics Conversation Cards -
Kid Talk: Conversation Cards for the E... by U.S.

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Party Topics Conversation Place Cards from [beaucoup](http://www.beau-coup.com).
www.beau-coup.com. Attached to December 8, 2011 Office
Action, p.21.

<http://www.beau-coup.com/party-topics-placecards.htm> 12/05/2011 05:50:04 PM



Family Road Trip Box of Questions. www.amazon.com. Attached
to December 8, 2011 Office Action, p. 29.

http://www.amazon.com/Family-Road-Trip-Box-Questions/dp/B001V03E0C/ref=pd_sim_t_7
12/05/2011 05:58:56 PM



The Family Game night Box of questions [sic].
www.google.com. Attached to December 8, 2011 Office
Action, p. 137.

14

We find that with this evidence, the examining attorney has convincingly shown that a cube shape is a common shape for packaging of games and is a mere refinement on the ubiquitous, rectangular, box-shaped packaging. The examining attorney has also shown that it is considered desirable for consumers to see the inside of the packaging, and the "clear plastic" aspect of applied-for mark is common as well.

We find these described aspects of the applied-for mark to be at best mere refinements of common attributes of parlor games. The "aesthetic prismatic effect" created by the thick walls of the container is merely incidental to the use of transparent plastic, and is not likely to create a commercial impression apart from the other features of the package. We note that the description itself describes this as occurring "as a function of ambient light conditions." In its brief, applicant admits that the prismatic effect is "an unavoidable effect of the overall design." (appl's brief at 21). Accordingly, it is apparent, as both applicant and the examining attorney agree, that the described prismatic effect occurs as a result of the other named features of the description, upon the implementation of certain light conditions. We therefore find that the examining attorney has shown that

the overall description of the applied-for mark is one of a common, nondistinctive design.

Applicant has attempted to rebut this showing by submitting a declaration from its president and founder, Cristy Clarke, dated November 8, 2011, which states in relevant part:

"[G]ame cards are commonly packaged in inexpensive paper containers that fit closely around the cards" (Para 4)

"The cost of one [of applicant's] cube is approximately 85 times the cost of a paper container and adds to the overall weight, making shipping more expensive." (Para. 7)

"In the more than seven years that [applicant] has been selling its game cards in the 'cube,' I have not seen any game card packaging (including that of competitors) even remotely similar to [applicant's] cube." (Para. 8)

While we accept all of Ms. Clarke's declarative statements at face value, they do not rebut the conclusions established by the examining attorney. Specifically, although Ms. Clarke may not be aware of competitors or others using similar designs, the examining attorney has shown that some do. Furthermore, although it may be most common for game makers to package their cards in inexpensive, paper containers, the examining attorney has shown that it is also common for companies to package cards in clear and/or plastic containers, and for such containers to be cube-shaped.

As such, we find that the examining attorney has established that the applied-for mark is not distinctive, that applicant has not made any offer to demonstrate that the mark has acquired distinctiveness, and that applicant has not rebutted the evidence establishing that the mark is not inherently distinctive.³

Decision: The refusal to register is affirmed on the ground that the applied-for mark is not inherently distinctive and has not acquired distinctiveness.

³ Since we affirm on this ground, we do not find it necessary to address the other grounds raised by the examining attorney.