

This Opinion is not a
Precedent of the TTAB

Mailed: September 2, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re LEGO Juris A/S.
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Serial Nos. 87886005 and 87886027
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Charles T.J. Weigell, Julia Belagorudsky and Michael Antonucci of Fross Zelnick
Lehrman & Zissu PC, for LEGO Juris A/S.

Alison Keeley,¹ Trademark Examining Attorney, Law Office 113,
Myriah Habeeb, Managing Attorney.
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Before Cataldo, Adlin and English, Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, LEGO Juris A/S, filed applications on April 20, 2018 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), seeking registration on the Principal Register of the following marks in connection with “computer game software” in International Class 9 and “construction toys; toy construction blocks and connecting

¹ The involved applications were reassigned to Examining Attorney Alison Keeley for purposes of addressing Applicant’s Requests for Reconsideration of the final refusals of registration and for briefing of the appeals.

links therefor; toy figures” in International Class 28: BRICKHEADZ (in standard

characters)² and .³

The Trademark Examining Attorney refused registration of both applications under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s marks, as used in connection with the identified goods, so resemble the mark BRICKHEADZ (in standard characters), previously registered on the Principal Register, in connection with “education services, namely, providing classes and educational children’s parties in the field of construction toys to promote, [sic] creativity, critical thinking, and social development as wells [sic] as lessons from science, technology, engineering, math, language arts and social studies,” in International Class 41,⁴ as to be likely to cause confusion, to cause mistake, or to deceive.

² Application Serial No. 87886005 recites November 30, 2016 as a date of first use in commerce for the goods in International Class 9 and July 20, 2016 as the date of first use in commerce for the goods in International Class 28.

³ Application Serial No. 87886027 asserts November 30, 2016 as a date of first use in commerce for the goods in International Class 9 and July 20, 2016 as a date of first use in commerce for the goods in International Class 28. Applicant claims a priority filing date of October 27, 2017 under Section 44(d) of the Trademark Act; 15 U.S.C. § 1126(d), based upon Republic of Korea application no. 40-2017-1359, but has not yet perfected its priority claim. The application includes this description of the mark: “The mark consists of the stylized uppercase wording ‘BRICK’ to the right of a square, which represents an animated character’s head with two circle eyes between two horizontal lines. On a second line underneath is the stylized uppercase wording ‘HEADZ’, with the letter ‘H’ directly below the square face. The ‘H’ represents the body and arms of the character.” Color is not claimed as a feature of the mark.

⁴ Registration No. 4482196 issued on February 11, 2014. Section 8 affidavit accepted; Section 15 affidavit acknowledged.

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In addition, pursuant to Section 6(a) of the Trademark Act, 15 U.S.C. § 1056(a), the Examining Attorney required Applicant to submit a disclaimer of “BRICK” in application Serial No. 87886027.

After the Examining Attorney made the refusal and requirement final, Applicant appealed. We affirm the refusal to register as to each application as well as the disclaimer requirement in application Serial No. 87886027.

I. Proceedings Consolidated

When an applicant has filed ex parte appeals to the Board in co-pending applications, and the cases involve common issues of law or fact, the Board, upon request by the applicant or examining attorney or upon its own initiative, may order the consolidation of the appeals for purposes of briefing, oral hearing, or final decision. TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1214 (2020) and authorities cited therein. *See also, e.g., In re Anderson*, 101 USPQ2d 1912, 1915 (TTAB 2012) (Board sua sponte consolidated two appeals); *In re Country Music Assoc., Inc.*, 100 USPQ2d 1824, 1827 (TTAB 2011) (same); *In re Bacardi & Co. Ltd.*, 48 USPQ2d 1031, 1033 (TTAB 1997) (Board sua sponte considered appeals in five applications together and rendered single opinion). Accordingly, because these cases involve common issues of law and fact, the Board consolidates these appeals. The evidentiary records for these applications are nearly identical. However, inasmuch as the record for Application Serial No. 87886027 includes additional materials not present in the record for the other involved

application, we will refer to the record in Serial No. 87886027 unless otherwise indicated.⁵

II. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

1. Similarity or Dissimilarity of the Marks

We address the *du Pont* likelihood of confusion factor focusing on “the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). “The proper test is not a side-by-side comparison

⁵ All citations to documents contained in the TSDR database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer. *See, e.g., In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1402 n.4 (TTAB 2018). References to the briefs on appeal refer to the Board’s TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable.

of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (quotation omitted).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). On the other hand, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Nat’l Data*, 224 USPQ at 751.

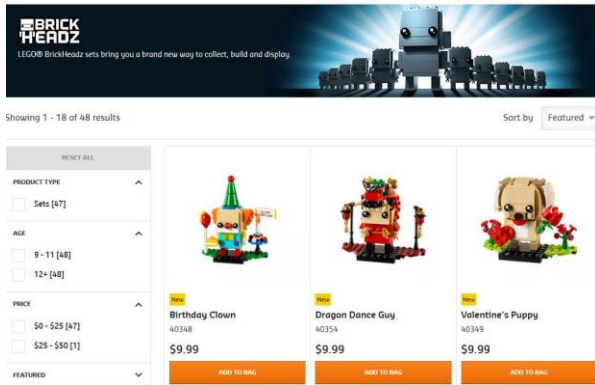
The cited BRICKHEADZ mark in standard characters is identical in all respects to the BRICKHEADZ mark in standard characters in Application Serial No. 87886005. Applicant argues that its mark

BRICKHEADZ for toys and software references the goods, suggesting features and aspects thereof. BRICKHEADZ for the named services in the registration is akin to a nickname, and refers to those rendering the services.⁶

⁶ Applicant’s brief (Ser. No. 87886005) 11 TTABVUE 5.

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Specifically, Applicant argues that “BRICKHEADZ refers to Applicant’s particular toy figures and suggests their shapes and qualities.”⁷ In support of this contention, Applicant relies upon the following screenshot from its website.⁸



Applicant goes on to argue:

In contrast, BRICKHEADZ [in the cited mark] in the context of educational services using construction toys gives the impression of referring to the tutors, teachers and mentors offering and administrating the services, *i.e.*, they are aficionados, like “gearheads” are enthusiasts for new technology, or for motoring, “wireheads” are hardware hackers/experts, “deadheads” are fans of the Grateful Dead. *See Exhibit A: online dictionary definitions of said terms.*⁹ The nickname evident in the registered mark is at odds with the impression created by Applicant’s use which relates to features of the actual goods themselves. As such, the registered mark creates a very different impression which identifies those who are offering the educational services, whereas Applicant’s mark points to the toys themselves (and to the subject of the software games).¹⁰

⁷ Applicant’s brief (Ser. No. 87886005) 11 TTABVUE 6.

⁸ September 6, 2019 Request for Reconsideration at 14.

⁹ Applicant’s brief (Ser. No. 87886005) 11 TTABVUE 27-32; Applicant’s brief (Ser. No. 87886027) 10 TTABVUE 27-34; 37-44. We hereby exercise our discretion to take judicial notice of these dictionary definitions. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format, definitions in technical dictionaries, translation dictionaries and online dictionaries, and we elect to do so here. *See In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n. 23 (TTAB 2013).

¹⁰ Applicant’s brief (Ser. No. 87886005) 11 TTABVUE 7.

However, Applicant cites to no evidence beyond dictionary definitions to support its speculative claim that the registered mark will connote those offering the services identified thereby. Simply put, there is no evidence that the providers of Registrant's services refer to themselves as "brick heads," or, more importantly, that consumers of Registrant's services so perceive or identify them. Indeed, there is no evidence of the term "brick heads" being used to identify or describe anyone. We thus disagree with Applicant's contention that it "has set out good reasons supported by evidence why consumers would readily perceive that the marks have different connotations."¹¹ Further, even if the evidence of record supported a finding that the marks are dissimilar in connotation, their identity in appearance and sound is sufficient here to find them confusingly similar for purposes of our likelihood of confusion determination. Similarity in any one of the elements of sound, appearance, meaning, or commercial impression is sufficient to support a determination of likelihood of confusion. *See Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion"); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988) ("In appropriate cases, a finding of similarity as to any one factor (sight, sound or meaning) alone 'may be sufficient to support a holding that the marks are confusingly similar'") (citations omitted)). Therefore, even if the marks had different meanings to some consumers, it would not be enough given the other similarities to avoid a likelihood of confusion.

¹¹ Applicant's brief (Ser. No. 87886005) 11 TTABVUE 8-9.

On this record, the marks are identical in sound and appearance, and the evidence of record is insufficient to support a finding that the marks differ in meaning or connotation. Overall the marks appear to be identical in commercial impression.

The cited BRICKHEADZ mark in standard characters is similar to Applicant's



mark in Application Serial No. 87886027 inasmuch as the most prominent feature of Applicant's mark is the nearly identical term "BRICK HEADZ" in stylized form. The presence or absence of a space between virtually the same words is not a significant difference. *Stockpot, Inc. v. Stock Pot Rest., Inc.*, 220 USPQ 52, 54 (TTAB 1983), *aff'd*, 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984) ("There is no question that the marks of the parties [STOCKPOT and STOCK POT] are confusingly similar. The word marks are phonetically identical and visually almost identical"); *In re Best Western Family Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) ("There can be little doubt that the marks [BEEFMASTER and BEEF MASTER] are practically identical").

Thus, the word portion of Applicant's mark is essentially identical to the cited, registered mark. With regard to the stylized figure of "an animated character's head" to the left of the term "BRICK" and whose body consists in large part of the letter "H" in "HEADZ," the block or brick-headed figure does not create a commercial impression that is separate from the wording, but rather appears to be a pictorial representation of Applicant's construction block toys and the wording in its mark, and draws more attention thereto. It further is settled that in a mark consisting of

wording and a design, the design tends to make a less significant contribution to the mark's overall commercial impression. *See, e.g., In re Viterra Inc.*, 671 F.2d 1358, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012) (“the verbal portion of a word and design mark likely will be the dominant portion”). The word portion of Applicant's mark is nearly identical in appearance and sound to the cited, registered BRICKHEADZ mark, and the evidence of record is insufficient to support Applicant's contention that the terms differ in connotation or meaning.

We find, therefore, that the cited mark BRICKHEADZ and Applicant's mark



are much more similar than dissimilar in appearance, sound and connotation and, overall, convey highly similar commercial impressions.

2. *Relatedness of the Goods and Services, Trade Channels and Consumers*

We next consider the *du Pont* factors addressing the similarity of the goods and services, the channels of trade in which they may be encountered and the purchasers to whom they are marketed. We are mindful that the test is not whether consumers would be likely to confuse the goods and services, but rather whether they would be likely to be confused as to their source. *In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012). Therefore, to support a finding of likelihood of confusion, it is not necessary that the goods and services be identical or even competitive. It is sufficient that the goods and services are related in some manner, or that the circumstances surrounding their marketing are such that they would be encountered by the same persons in situations that would give rise, because of the marks, to a mistaken belief

that they originate from the same source or that there is an association or connection between the sources of the goods. *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009).

We must look to the goods and services as identified in the involved applications and cited registration, not to any extrinsic evidence of actual use. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014). Because there are no limitations as to channels of trade or classes of purchasers in the recitation of goods in the involved applications or the services in the cited registration, we must presume that the identified goods and services move in all channels of trade normal for such goods and services and are available to all potential classes of ordinary consumers thereof. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

Applicant's goods in both applications are "computer game software" and "construction toys; toy construction blocks and connecting links therefor; toy figures" and the services in the cited registration are "education services, namely, providing classes and educational children's parties in the field of construction toys to promote, [sic] creativity, critical thinking, and social development as wells [sic] as lessons from science, technology, engineering, math, language arts and social studies." The Examining Attorney introduced evidence with the August 16, 2018 First Office

Action¹² in the form of screenshots from Lego.com and Download.cnet.com showing that Applicant itself offers, under its LEGO mark, educational services to early learning, primary and secondary students in the fields of social and emotional development, science, technology, language, engineering and math in addition to its construction toy blocks and construction toys and computer game software. In further support of the refusal of registration, the Examining Attorney introduced with the August 16, 2018 First Office Action,¹³ March 11, 2019 Final Office Action¹⁴ and October 8, 2019 Denial of Applicant's Request for Reconsideration¹⁵ printouts from the following third-party websites offering under the same mark both computer game software and building toys as well as educational services related to the toys and software.

- Kidinventor.com offers an electronic construction kit and educational services.
- Modrobotics.com offers building block toys, educational services, and game software.
- Kumon.com and Itunes.apple.com offers computer game software and educational services.
- Lakeshorelearning.com offers construction toys, computer game software, and educational services.
- Roblox.com offers educational toys, computer game software, and educational services.
- Twentyonetoys.com offers educational toys and educational services.

¹² At 12-38.

¹³ At 12-154.

¹⁴ At 12-175.

¹⁵ At 5-31.

- Kinderlabrobotics.com offers educational toys, including construction toys, and educational services.
- Clicstoys.com offers building toys and educational services.
- Robowunderkind.com offers construction toys and computer software as well as integration of these goods in rendering educational services.
- Acceleratekid.com, Anaheim.net, IDTech.com, Kidsstemstudio.com, Madscience.org and Roblox.com offer educational services in the field of construction and building toys and computer software as well as integration of these goods in rendering educational programs and services.

This evidence demonstrates that at least sixteen third parties identify certain of Applicant's goods and the services in the cited registration or goods and services of a type similar to those identified in the involved applications and cited registration under the same mark, and is probative of the relatedness of these goods and services for likelihood of confusion purposes. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009). We note that some of these third parties appear to provide educational instruction or training to teachers and instructors in addition to or in place of educational classes to students. We find, nonetheless, that at least half of them offer educational services to students on a variety of subjects in addition to goods.

The Examining Attorney further introduced into the record with the August 16, 2018 First Office Action¹⁶ and March 11, 2019 Final Office Action¹⁷ copies of fourteen

¹⁶ At 89-126.

¹⁷ At 127-152.

use-based, third-party registrations for marks identifying, *inter alia*, goods and services similar to Applicant's goods and the services identified in the cited registration. The following examples are illustrative:¹⁸

Registration No. 3874375 for the mark MATH INFINITY and design, identifying "video and computer game programs; video game software; educational construction toy sets; educational toys, namely, toy construction blocks; educational services, namely, providing tutoring centers in the field of mathematics; educational services, namely, providing after-school tutoring centers; educational services, namely, providing on-line computer games;"

Registration No. 4250305 for the mark BRIARWOOD (in standard characters) identifying "downloadable educational products and educational toys, including blocks, designed to be manipulated by children for purposes of teaching phonics, reading and math; providing online computer games; educational services for pre-school, primary school, secondary school and high school on numerous subjects;" and

Registration No. 4735499 for the mark ANYTHING IS POSSIBLE (in standard characters) identifying "video game software; electronic learning toys and electronic games for the teaching of children; providing computer games and information in the field of children's education and entertainment; conducting classes and seminars in the field of children's education."

As a general proposition, although use-based, third-party registrations alone are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless may have some probative value to the extent they may serve to suggest that the goods and services at issue are of a kind that emanate from a single source. *See In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018); *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *see also Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (evidence that "a

¹⁸ At 7-74.

single company sells the goods and services of both parties, if presented, is relevant to the relatedness analysis”). In this case, we recognize that consumers are able to distinguish Applicant’s goods from the services in the cited registration; however, that is not the standard. *See, e.g., Hydra Mac, Inc. v. Mack Trucks, Inc.*, 507 F.2d 1399, 184 USPQ 351 (CCPA 1975) (“the confusion found to be likely is not as to the products but as to their source”) (citation omitted); *In re Anderson*, 101 USPQ2d at 1919.

Applicant criticizes these third-party registrations on the basis that they identify “long laundry lists of goods and services in numerous classes.”¹⁹ However, the goods and services identified in the third-party registrations of record are considerably more concise than those found to include a broad array of goods, many of which are wholly unrelated to the goods and services at issue. *Cf. 7-Eleven Inc. v. HEB Grocery Co. LP*, 83 USPQ2d 1257, 1262 (TTAB 2007). In any event, consumers of the types of goods and services identified in the involved application and cited registration will be focused on those markets, rather than the goods and services in the rest of any “long laundry lists” which identify goods and services they are not interested in purchasing.

Applicant argues

Where, as here, the relatedness of the goods and services is not evident, well known, or generally recognized, “something more” than the mere fact that the goods and services are used together must be shown.²⁰

¹⁹ 11 TTAVUE 17.

²⁰ 11 TTABVUE 12.

We disagree. Unlike the circumstances in *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1087 (Fed. Cir. 2014) in which the Federal Circuit found that the relatedness of hospital-based weight and lifestyle services and printed materials on the subject of physical activity and fitness was not clearly evident, the relatedness of construction toys, educational services in the field of construction toys, and broadly identified computer game software, which may include games featuring construction games and toys, is much more apparent. Conceptually, these goods and services all feature construction toys and thus appear to be facially related. As a result, the relatedness of these goods and services is far from obscure or generally unrecognized. *See In re Country Oven, Inc.*, 2019 USPQ2d 443903 [*13] (TTAB 2019). Furthermore, the Examining Attorney's evidence shows that consumers would readily expect these goods and services are produced and marketed under the same trademarks by common sources. We find no support for Applicant's speculative argument, belied by the record, that the relatedness of these goods and services is not readily apparent.

Neither the identification of goods in the involved applications nor the recitation of services in the cited registration recites any limitations as to the channels of trade in which Applicant's goods or Registrant's services are or will be offered. In the absence of trade channel limitations in the goods identified in the applications or the services offered under the registered mark, we must presume that the goods and services are offered in all customary trade channels, to all the usual purchasers thereof. *See Citigroup Inc.*, 98 USPQ2d at 1261; *Jump Designs*, 80 USPQ2d at 1374; *Elbaum*, 211 USPQ at 640. As noted above, the Examining Attorney has introduced

evidence that both the goods and services are offered for sale on the same webpages. This evidence supports a finding that these goods and services are offered in at least one common channel of trade, that is, commercial websites and, where applicable, physical locations of these third parties, often under the same house marks or trademarks.

3. *Summary*

Considering all the evidence of record, including any evidence not specifically discussed herein, we find that the marks in their entireties are, respectively, identical or far more similar than dissimilar, and that the identified goods and services are related and travel in common trade channels to the same consumers. We conclude, therefore, that Applicant's marks are likely to cause confusion with the mark in the cited registration when used in association with Applicant's identified goods.

III. Disclaimer of "BRICK" in application Serial No. 87886027

A requirement under Trademark Act Section 6, 15 U.S.C. § 1056(a), for a disclaimer of unregistrable matter in a mark is appropriate when that matter is merely descriptive of the goods or services at issue. *See In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005). Merely descriptive or generic terms are unregistrable under Trademark Act Section 2(e)(1), and therefore are subject to a disclaimer requirement if the mark is otherwise registrable. Failure to comply with a disclaimer requirement is a ground for refusal of registration. *See In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262, 1266 (Fed. Cir. 2015); *In re RiseSmart Inc.*, 104 USPQ2d 1931, 1933 (TTAB 2012).

A term is merely descriptive within the meaning of Section 2(e)(1) if it immediately conveys knowledge of an ingredient, quality, characteristic, function, feature, purpose, or use of the goods or services with which it is used. *See, e.g., In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). Whether a particular term is merely descriptive must be determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which the mark is used, and the possible significance that the mark is likely to have to the average purchaser encountering the goods or services in the marketplace. *See In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1818, 1831 (Fed. Cir. 2007); *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1473 (TTAB 2014); *In re Remacle*, 66 USPQ2d 1222, 1224 (TTAB 2002). In other words, the issue is whether someone who knows what the goods or services are will understand the mark to convey information about them. *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1512 (TTAB 2016).

1. Whether “BRICK” Is Descriptive

The Examining Attorney contends that the term “BRICK” in Applicant’s mark



merely describes a characteristic or feature of Applicant’s goods.

Applicant’s specimen of record submitted with its application Serial No. 87886027 states:

The Flash LEGO BrickHeadz construction character is fun to build using colorful LEGO bricks that recreate all of his iconic details, including buildable golden ear wings and lightning chest logo.

The Examining Attorney submitted with the August 26, 2018 First Office Action²¹ and March 11, 2019 Final Office Action,²² pages from Applicant's website as well as third-party websites, describing Applicant's goods and related goods as consisting in part of "bricks."

LEGO Education Solutions for primary school provide the engaging, hands-on experiences students need to explore core STEM concepts and link them to real-life phenomenon. LEGO bricks, programming tools, and supporting lesson plans for teachers, ignite students' natural curiosity ...

With the free Digital Designer software you can build absolutely anything with virtual LEGO bricks right on your computer. Then you can buy the real bricks to build your creation online in Lego Factory, or you can print out an inventory of bricks and take it to any Legoland theme park or Lego Store.

Building with Bricks.

Builders rejoice! Cubelets Brick Adapters let you pair with Lego and other brick-based constructions to add new levels of detail and artistry to your robots.

Building Bricks – 1,100 Pieces Compatible Toys by Brickyard
100% compatible with all major brands – Mix and build with your existing LEGO bricks.

Play Platoon Building Bricks – Regular Colors – 1,000 Pieces Classic Bricks – Compatible with all Major Brands.

Burgkidz 1000 PCS Classic Building Bricks Blocks Comes with Storage Box and Building ...

Candy Brick Building Set

Bring your ideas to life with 200 candy-colored building bricks!

²¹ At 17-53, 134-144.

²² At 164-168.

Bring your ideas to life with this big building set of 200 construction bricks!

Considering all the evidence of record, we agree that the term “BRICK” in Applicant’s mark is merely descriptive of, at least, Applicant’s “construction toys, toy construction blocks and connecting links therefor.”

2. Whether Applicant’s Mark Is Unitary

Applicant argues that its mark consists of two terms connected by the design of a figure that creates a unitary whole such that no disclaimer is necessary.²³ Specifically, Applicant contends that no disclaimer of the term “BRICK” is required because “the terms are linked by the design feature and would be considered therefor to be compound.”²⁴

In order to be considered unitary, the elements of a mark must be so integrated or merged together that they cannot be regarded as separable. *See In re Slokevage*, 441 F.3d 957, 78 USPQ2d 1395, 1399 (Fed. Cir. 2006); *In re Kraft, Inc.*, 218 USPQ 571, 573 (TTAB 1983); *In re EBS Data Processing*, 212 USPQ 964, 966 (TTAB 1981). Although the brick design is integrated into the word “HEADZ” in Applicant’s mark

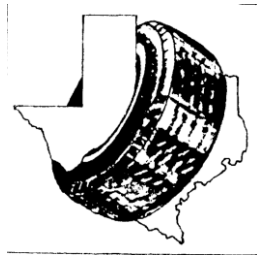


we find that consumers would not view the term “BRICK” as inseparable from the remainder of the mark. Rather, “BRICK” appears on a separate line from “HEADZ” and does not form part of the character head or body as does the

²³ 10 TTABVUE 23.

²⁴ 10 TTABVUE 23.

latter term. Thus, while the term “HEADZ” is integrated into the character design by virtue of the letter “H” forming the character’s body, “BRICK” is separable both from the design and the term “HEADZ.” Applicant’s mark thus is readily distinguishable from the marks found to be unitary in both *In re Texsun Tire & Battery Stores, Inc.*, 229 USPQ 227, 229 (TTAB 1986), with a drawing of a tire encircling a depiction of



the entire state of Texas: and *Anheuser-Busch, Inc. v. Holt*, 92 USPQ2d 1101, 1107 (TTAB 2009), in which the Board found that the complex design shown below, comprising several elements, was evocative of a crest overall.



We find that the term “BRICK” is descriptive and Applicant’s mark is not unitary. Therefore, the term “BRICK” is subject to the disclaimer requirement.

Decision: The refusal to register Applicant’s marks on the ground of likelihood of confusion is affirmed as to both applications.

The requirement for a disclaimer of “BRICK” in application Serial No. 87886027 and the refusal of registration based on Applicant’s failure to submit such

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disclaimer, are affirmed. However, in the event that Applicant submits the required disclaimer within thirty days from the date of this decision, this requirement will be met, and the disclaimer will be entered.²⁵

²⁵ Trademark Rule 2.142(g), 37 C.F.R. § 2.142(g). If the disclaimer is submitted, the wording will read as follows: No claim is made to the exclusive right to use “BRICK” apart from the mark as shown.

Applicant should note that compliance with the disclaimer requirement will not obviate the refusal of registration under Section 2(d).