

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: October 20, 2026

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Brook & Whittle Limited
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Serial No. 98590492
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Alexander S. Perry and Jillian M. Taylor of Blank Rome LLP,
for Brook & Whittle Limited.

Philip Liu, Trademark Examining Attorney, Law Office 109,
Michael Kazazian, Managing Attorney.

—
Before Lykos, Elgin, and Lavache,
Administrative Trademark Judges.

Opinion by Elgin, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register of the composite mark



for goods ultimately identified as:

Opaque light blocking plastic flexible packaging film for commercial and industrial purposes sold in bulk to commercial and industrial manufacturers; light blocking plastic films used for packaging for food; heat shrinkable plastic films containing light blocking elements for use on food packaging; light blocking plastic stickers for labeling products; light blocking plastic films used for foodstuff packaging; heat shrinkable plastic films containing light blocking elements for use on foodstuff packaging; clear

light blocking plastic films used on food packaging featuring light blocking elements; clear heat shrinkable plastic films containing light blocking elements for use on food packaging featuring light blocking elements; recyclable light blocking plastic films used for foodstuff packaging; recyclable heat shrinkable plastic films containing light blocking elements for use on foodstuff packaging in International Class 16;

Light blocking adhesive-backed plastic films for use in the manufacture of durable labels; light blocking plastic films for use in the manufacture of product labels; recyclable light blocking plastic films for use in the manufacture of product labels in International Class 17; and

Heat shrinkable plastic labels containing light blocking elements for use on food packaging; light blocking plastic product labels; light blocking plastic product labels with light blocking coatings; recyclable light blocking plastic product labels in International Class 20.¹

Applicant has disclaimed “BLOCK OUT” apart from the mark as shown. Trademark Act Section 6(a), 15 U.S.C. § 1056(a).²

The Examining Attorney refused registration of Applicant’s proposed mark under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1), on the ground that it is merely descriptive as applied to the goods identified in the application. Applicant appealed

¹ Serial No. 98590492 was filed on June 7, 2024 under Trademark Act Section 1(b), 15 U.S.C. § 1051(b), based upon an allegation of a bona fide intention to use the mark in commerce. The mark is described as follows: “The mark consists of the wording ‘BLOCKOUT’ in stylized font, wherein the wording ‘BLOCK’ is inside a rectangle.” Color is not claimed as a feature of the mark.

² Although Applicant described the mark as one compound word (i.e. BLOCKOUT), the disclaimer is for two words (i.e. BLOCK OUT), in accordance with Office disclaimer practice. TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1213.05(a) (May 2026) (“If the compound word itself (with no spaces) is used descriptively, it should be disclaimed in that form. Otherwise, the disclaimed portion should appear as two or more distinct words, separated by spaces.”). Therefore, we refer to the literal element in the mark as BLOCKOUT but the terms in the disclaimer as BLOCK OUT.

and filed a request for reconsideration, which was denied. Following resumption of the appeal, Applicant and the Examining Attorney filed briefs.³ The appeal is now ready for decision.

For the reasons set forth below, we **reverse** the refusal to register.

I. Evidentiary Issue

We first address an evidentiary issue. Applicant’s arguments rest considerably on “two other pending trademark applications for BLOCKOUT design marks covering the same goods,” that is, Serial Nos. 98590484 and 98590490:⁴

Mark	Application No.	Disclaimer
	98590484	BLOCK OUT
	98590490	BLOCK OUT

Applicant claims that these applications were approved for registration on the Principal Register with a disclaimer of BLOCK OUT, and the subject application should be approved in light of the USPTO’s goal of consistency in examination.⁵

The Examining Attorney agrees that “Applicant correctly notes that all of the applications were filed on the same day and for the same goods,” but further supplies

³ Applicant’s brief and reply brief are at 6 and 9 TTABVUE. The Examining Attorney’s brief is at 8 TTABVUE. Citations in this opinion to the briefs and other materials in the case docket refer to TTABVUE, the Board’s online docketing system. Citations to the prosecution record refer to the .pdf version of the USPTO’s TSDR system. *See In re Integra Biosciences Corp.*, No. 87484450, 2022 TTAB LEXIS 17, at *6.

⁴ 6 TTABVUE 7 (Applicant’s Brief).

⁵ *Id.* at 9, 11-12; *see also* 9 TTABVUE 8-9 (Applicant’s Reply Brief).

that “the co-pending applications are not registered. Both of the co-pending applications are currently pending in the Statement of Use stage of the trademark prosecution process.”⁶

Unfortunately, neither Applicant nor the Examining Attorney made these co-pending applications of record. Generally, “[t]he record in the application should be complete prior to the filing of an appeal.” *In re Seminole Tribe of Fla.*, No. 87890892, 2023 TTAB LEXIS 184, at *8 (quoting Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d)) (internal quotation marks omitted). The Board also typically does not take judicial notice of USPTO records. *Id.* at *8-9.

However, because the Examining Attorney responded substantively and without objection to Applicant’s arguments regarding the co-pending applications during prosecution and in the Examining Attorney’s brief, we consider the facts about the applications provided in the briefs as having been stipulated into the record. *Cf. In re Mayweather Promotions, LLC*, No. 86753084, 2020 TTAB LEXIS 467, at *12-13 n.17 (failure to advise applicant of insufficiency of list of registrations when proffered during examination, which examining attorney discussed in next office action, waived objection); *In re Broyhill Furniture Indus.*, No. 75473959, 2001 TTAB LEXIS 612, at *6 n.3 (considering list of third-party registrations for its probative value).

⁶ 8 TTABVUE 9, 10 (Examining Attorney’s Brief); *see also id.* at 11 n.2 (“Applicant submitted a Statement of Use on March 13, 2026, for both of the copending applications”).

II. Applicable Law

Section 2(e) of the Trademark Act excludes from registration any “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 mark is “merely descriptive” within the meaning of Section 2(e)(1) “if it immediately conveys information concerning a feature, quality, or characteristic of the goods or services for which registration is sought.” *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 975 (Fed. Cir. 2018) (citing *In re N.C. Lottery*, 866 F.3d 1363, 1367 (Fed. Cir. 2017)); *see also In re Chamber of Com. of the U.S.*, 675 F.3d 1297, 1300 (Fed. Cir. 2012). “A mark need not immediately convey an idea of each and every specific feature of the goods in order to be considered merely descriptive; it is enough if it describes one significant attribute, function or property of the goods.” *In re Fat Boys Water Sports LLC*, No. 86490930, 2016 TTAB LEXIS 150, at *4 (citing *In re Gyulay*, 820 F.2d 1216, 1218 (Fed. Cir. 1987)).

Descriptiveness is not considered in the abstract; it is analyzed in relation to an applicant’s identified goods or services, “the context in which the [term] 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.” *In re NextGen Mgmt., LLC*, No. 88098031, 2023 TTAB LEXIS 1, at *7-8 (quoting *In re Bayer AG*, 488 F.3d 960, 963-64 (Fed. Cir. 2007)); *see also Chamber of Com.*, 675 F.3d at 1300; *Fat Boys*, 2016 TTAB LEXIS 150, at *4. We ask “whether someone who knows what the goods and services are will understand the mark to convey information about them.” *Real*

Foods, 906 F.3d at 974 (quoting *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1254 (Fed. Cir. 2012) (internal quotation omitted)). A mark is suggestive, and not merely descriptive, if it requires imagination, thought, and perception on the part of someone who knows what the goods or services are to reach a conclusion about their nature from the mark. *See, e.g., Fat Boys*, 2016 TTAB LEXIS 150, at *11.

Thus, refusals for mere descriptiveness, like other refusals, are based on evidence bearing on public perception of the mark. The determination whether the stylization and design of an otherwise unregistrable designation are sufficiently distinctive is “a necessarily subjective one” based on a viewer’s first impression. *See In re Bonni Keller Collections, Ltd.*, No. 73446902, 1987 TTAB LEXIS 12, at *9; *In re Sadoru Grp., Ltd.*, No. 77941164, 2012 TTAB LEXIS 325, at *4. We “consider the commercial impression of a mark as a whole ... viewed through the eyes of a consumer.” *Real Foods*, 906 F.3d at 974 (cleaned up, quoting *DuoProSS*, 695 F.3d at 1253) (emphasis in original omitted); *In re Nett Designs, Inc.*, 236 F.3d 1339, 1341 (Fed. Cir. 2001) (“The perception of the relevant purchasing public sets the standard for determining descriptiveness.”).

III. Arguments

We start by recognizing that Applicant has entered a disclaimer of the literal element BLOCKOUT in the mark.⁷ The disclaimer reflects a concession that the term

⁷ Applicant contends that “[t]he Examining Attorney also rejected Applicant’s proffered disclaimer of the term BLOCKOUT,” 6 TTABVue 5 (Applicant’s Brief), but this is not correct

is not inherently distinctive as applied to Applicant's goods. *See, e.g., In re Six Continents Ltd.*, No. 88430142, 2022 TTAB LEXIS 35, at *23 (disclaimer of SUITES in mark ATWELL SUITES "is a concession that 'Suites' is not inherently distinctive") (citing *In re DNI Holdings Ltd.*, No. 76331011, 2005 TTAB LEXIS 515, at *25 ("[I]t has long been held that the disclaimer of a term constitutes an admission of the merely descriptive nature of that term ... at the time of the disclaimer.")). In sum, it is Applicant's position that its composite mark is registrable with the disclaimer.⁸

The question before us, therefore, revolves around the other elements in the proposed mark and whether they render the mark inherently distinctive as a whole.

The Examining Attorney frames the issue before us as follows:

Also, by providing a disclaimer, applicant is relying on the simple common rectangular background for registration on the Principal Register. If descriptive or generic wording is in fact presented in a distinctive display or design, the mark as a whole may be registered with a disclaimer of the unregistrable component. *See In re Sadoru Grp., Ltd.*, [2012 TTAB LEXIS 325, at *4]. In this case, however, the rectangular background is a basic design that is not distinctive in any way and does not change or add anything to the overall commercial impression of the mark apart from the term BLOCKOUT.⁹

because the disclaimer is of record. *See* December 17, 2025 Trademark Snap Shot Amendment & Mail Processing Stylesheet (entering disclaimer of "BLOCK OUT"). The Examining Attorney's argument is that, even with a disclaimer, the mark as a whole is not inherently distinctive.

⁸ 6 TTABVUE 5 (Applicant's Brief).

⁹ 8 TTABVUE 7 (Examining Attorney's Brief).

Thus, according to the Examining Attorney, “[t]he common rectangular geometric shape or background is not sufficiently distinctive to create a commercial impression separate from the word with which they are used, are not regarded as indicators of origin absent evidence of distinctiveness of the design alone.”¹⁰

Applicant counters that its mark is more than just the literal element BLOCKOUT in a mere geometric carrier design. In addition to “stylized lettering”:

The interplay between the inner filled rectangle containing BLOCK, the absence of any rectangle around OUT, and the contrasting use of positive and negative space creates a cohesive design that communicates meaning beyond the literal wording. This deliberate visual metaphor – where the design elements echo and reinforce the semantic content of the words – demonstrates the type of sufficient substance or distinctiveness over and above the disclaimed matter that warrants registration with a disclaimer.¹¹

Although the Examining Attorney argues Applicant “provides no evidence to support the claim that the design alone is distinctive or that consumers would perceive this alleged metaphor,”¹² Applicant argues that such evidence is not required because “[t]he Board is well equipped to assess, from the face of the mark itself,

¹⁰ See *id.* at 8 (citing, inter alia, *In re Benetton Grp. S.p.A.*, No. 74325713, 1998 TTAB LEXIS 219, at *5-6 (holding green rectangular background design not inherently distinctive)).

¹¹ 6 TTABVUE 11 (Applicant’s Brief). We acknowledge Applicant’s complaint that the Examining Attorney rejected Applicant’s original mark description (referencing positive and negative backgrounds and terms but omitting the rectangle shape) and then based the “assertion of a common geometric shape” on the modified current description. *Id.* The Examining Attorney counters that Applicant’s provided mark description, in omitting the shape, was imprecise. 8 TTABVUE 11 n.1 (Examining Attorney’s Brief). Notwithstanding this dispute, in defining the mark that Applicant seeks to register, we consider “all elements, including those described in the application as well as those shown in the drawing page ... but we are not bound by what Applicant describes its mark to be in its application or in its brief.” *Kohler Co. v. Honda Giken Kogyo K.K.*, No. 91200146, 2017 TTAB LEXIS 450, at *57 n.48 (cleaned up; citations omitted).

¹² 8 TTABVUE 7 (Examining Attorney’s Brief).

whether a design creates a commercial impression that goes beyond a mere simple rectangular background carrier.”¹³ Moreover, Applicant criticizes the Examining Attorney’s argument that Applicant must show the rectangular “design alone is distinctive,” which Applicant argues would render the disclaimer requirement “a nullity.”¹⁴ Applicant also asserts that the “background carrier” caselaw as set forth in *Benetton* is the wrong standard because it is not seeking to register a background design apart from the disclaimed literal element in its proposed mark.¹⁵

IV. Do the Design Elements and Stylization of Applicant’s Mark Render It Inherently Distinctive?

Components of the proposed mark  include the word BLOCKOUT in a sans serif font, with the text BLOCK inside a rectangular shape in contrasting text. The mark is not limited to any color or colors, and thus the drawing is presumed to contemplate the use of the mark in any colors, without limitation. *Bd. of Trs. of Univ. of Ala. v. Pitts*, No. 91187103, 2013 TTAB LEXIS 370, at *68-69 (citing *In re Data Packaging Corp.*, 453 F.2d 1300, 1302 (CCPA 1972) and TMEP § 807.14(e)(i) (2012)); *see also In re Ala. Tourism Dep’t*, No. 87599292, 2020 TTAB LEXIS 191, at *11 (“We note, however, that merely because Applicant has not claimed that color is a feature of the mark does not mean that Applicant could not depict the

¹³ 9 TTABVUE 7 (Applicant’s Reply Brief).

¹⁴ *Id.* at 6 (citing 8 TTABVUE 7 (Examining Attorney’s Brief)).

¹⁵ 6 TTABVUE 5-6 (Applicant’s Brief).

flag design in the mark in its black-and-white drawing in any color or combination of colors.”).

There is no dispute that the literal element BLOCKOUT is not inherently distinctive because it has been disclaimed. *See In re Omaha Nat’l Corp.*, 819 F.2d 1117, 1119-20 (Fed. Cir. 1987) (affirming refusal to register FIRSTIER and design for banking services in the absence of a disclaimer of “FIRST TIER,” in view of evidence that the term describes a class of banks). “A display of descriptive or otherwise unregistrable matter is not registrable on the Principal Register unless the design features of the asserted mark create an impression on the purchasers separate and apart from the impression made by the words themselves” *In re Cordua Rests., Inc.*, 823 F.3d 594, 606 (Fed. Cir. 2016) (quoting *Sadoru*, 2012 TTAB LEXIS 325, at *4). Thus, “where the literal components of a mark are combined in a distinctive design or display it is possible to disclaim those literal components and still have a mark which is registrable as a whole.” *Sadoru*, 2012 TTAB LEXIS 325, at *4. In this case, Applicant has not made a claim of acquired distinctiveness, and therefore the stylization of BLOCKOUT and the design must create a separate and inherently distinctive impression. *Id.*

There is no evidence of record from either the Examining Attorney or Applicant as to the commercial impression of the stylized lettering or design, such as how Applicant uses or intends to use its proposed mark. Nonetheless, “[w]hether or not the disclaimed literal components of a designation sought to be registered are displayed in an inherently distinctive fashion is necessarily a subjective matter which

must be determined based on a viewer's first impression." *Id.* (citations omitted); *see also Bonni Keller*, 1987 TTAB LEXIS 12, at *9 (the "determination of whether the stylization of an otherwise unregistrable designation is sufficiently distinctive in character to 'rescue the designation as a whole is a necessarily subjective one"). Although we consider Applicant's revised description of the mark, "[a] mark's meaning is based on the impression actually created by the mark in the minds of consumers, not on the impression that the applicant states the mark is intended to convey." *In re Dimarzio, Inc.*, No. 87213400, 2021 TTAB LEXIS 457, at *22 (quoting TMEP § 808.02 (July 2021)).

Applicant's proposed mark can be seen as more than mere non-stylized text superimposed on a geometric background design. *Cf. In re Serial Podcast, LLC*, No. 86454424, 2018 TTAB LEXIS 94, at *34 (finding design elements, the sans serif typeface and color of the letters, and the rounded rectangular backdrops for each

letter of the marks  and , each for "entertainment in the nature of an ongoing audio program featuring investigative reporting, interviews, and documentary storytelling," not inherently distinctive).¹⁶

Arguably, the differently colored rectangle and contrasting superimposed text create a commercial impression separate and apart from the disclaimed wording. The

¹⁶ The Board described the marks as "light-colored letters superimposed upon contrasting dark rectangles with rounded corners, as in a crossword puzzle or tiles on a board game." *Serial Podcast*, 2018 TTAB LEXIS 94, at *46. But, unlike this case, the Board did not find that the design had any particular meaning as applied to the identified entertainment services.

concept of positive and negative space is apparent in the mark and would remain so even when rendered in colors other than black and white. The placement of the word BLOCK within the rectangle (i.e., a block) can evoke the act of blocking light. The rectangular design is more than a mere background carrier for the contrasting superimposed block text.

We recognize that the Examining Attorney's evidence demonstrates that both the wording BLOCKOUT and the light-blocking function of the goods are described in the trade.¹⁷ But that evidence bears on the descriptiveness of the wording, which Applicant has conceded through its disclaimer; it does not establish that the design and stylization immediately convey the light-blocking characteristic of the goods.

To the contrary, discerning the interplay of positive and negative space, and connecting that visual treatment of the design and text to the light-blocking nature of the films and labels, arguably requires imagination, thought, and perception on the part of someone who knows what the goods are to reach a conclusion about their nature, even when combined with the disclaimed matter. *Cf. In re Swatch Grp. Mgmt. Servs. AG*, No. 85485359, 2014 TTAB LEXIS 131, at *12-13 (“[I]f the design suggests information about the goods in a way that requires imagination, thought, or perception to reach a conclusion as to the nature of the goods, it is not merely descriptive within the meaning of Section 2(e)(1) and may be registered”; Board found

¹⁷ See 8 TTABVue 4-6 (Examining Attorney's Brief) (summarizing evidence).

an accurate pictorial representation of the mark merely descriptive), *aff'd per curiam*, 599 Fed. App'x 959 (Fed. Cir. 2015).¹⁸

Reasonable minds can differ on the distinctiveness of the design and the question of whether the mark as a whole is merely descriptive of the goods in the application. We have doubt about that question and resolve that doubt in favor of Applicant. *See In re Berkeley Lights, Inc.*, No. 88895703, 2022 TTAB LEXIS 382, at *30 (“To be sure, when the Board has doubt on the issue of descriptiveness, it resolves such doubt in favor of the applicant.”) (citing *In re MBNA Am. Bank, N.A.*, 340 F.3d 1328, 1336 (Fed. Cir. 2003); *In re Zuma Array Ltd.*, No. 79288888, 2022 TTAB LEXIS 281, at *10).

For the reasons discussed above, we find that the proposed mark



as a whole is not merely descriptive of the goods identified in the subject application.¹⁹

¹⁸ In *Swatch*, the Board was presented with a composite mark (TOURBILLON & design) that included a pictorial representation of the goods – i.e., a watch tourbillon. That is not the case here. Applicant’s design does not pictorially depict the films and labels identified in the application.

¹⁹ We have considered Applicant’s argument that it is inconsistent to refuse registration of the proposed mark in light of the Office’s allowance of its co-pending applications for similar composite marks for the same goods, also with disclaimers of BLOCK OUT. *See supra* Section I. “[C]onsistency in examination is not itself a substantive rule of trademark law, and a desire for consistency with the decisions of prior examining attorneys must yield to proper determinations under the Trademark Act and rules,” *In re Korn Ferry*, No. 90890949, 2024 TTAB LEXIS 224, at *13 n.13 (internal punctuation and citation omitted). We agree with the Examining Attorney that Applicant’s co-pending applications, although approved for publication, are not yet registered, and that we are not bound by the decisions of examining attorneys in other applications, even decisions of registrability. *See, e.g., Cordua*, 823 F.3d at 600 (the USPTO must “examine all trademark applications for compliance with each and every eligibility requirement” regardless of the prior treatment of applications involving

Decision

The refusal to register the mark is **reversed**. Because Applicant consented to entry of a disclaimer of “BLOCK OUT,” the application will proceed to publication in due course with the disclaimer of record.

similar marks). We reached our decision here based on our evaluation of the mark and record in this application under the applicable law. The result may promote the Office’s interest in consistent examination of comparable marks but is not driven by that interest.