

WHAT IF . . . THE STUD DOES NOT FUNCTION?

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Granting such a claim in these circumstances would amount to recreating a monopoly contrary to basic policies of the laws and legal principles which inform the various forms of intellectual property in our legal system. The appellant is no longer entitled to protection against competition in respect of its product. It must now face the rigours of a free market and its process of creative destruction.

—Kirkbi AG v. Ritvik Holdings Inc., [2005] 3 S.C.R. 302, 342 (Can.)

Trademark law is normally associated with “marks,” such as logos and slogans that readily identify a brand.¹ The distinctive *appearance* of wares,² recognizable to a brand, is usually protected by industrial design registra-

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1. The English Trade Marks Act of 1994 is typical. Section 1(1) defines a trademark as “any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings.” Trade Marks Act of 1994, c. 26, § 1(1) (Eng.).

2. “Wares” is the term historically used in Canadian trademark law for products or goods, as distinguished from services.

tion.³ Trademark protection for appearance of wares is limited to those exceptional cases where use⁴ of shape or packaging speaks to trade source. This short Article highlights a recent Supreme Court of Canada decision that poignantly illustrates a lesser-known principle of trademark law, namely, that no one may obtain trademark protection for merely functional elements of one's wares.

I. LIMITED PROTECTION OF APPEARANCE IN TRADEMARK LAW

Distinctive appearance of wares is protected by the domestic trademark legislation of most western industrial countries. In the United States, trade dress refers to the total image of wares, including their size, shape, color, packaging, and labels. The trade dress concept continues to challenge the courts because "the line between identifier and product often is hard to discern."⁵ The U.S. Supreme Court granted immediate trademark protection for the trade dress of a restaurant chain, without the owner's need to prove secondary meaning,⁶ although it retreated from trademark protectionism in *Wal-Mart Stores, Inc. v. Samara Bros.*,⁷ a children's clothing design case. The Court's latest view is that product designs are usually incorporated to enhance the product itself, not to identify the source. Accordingly, trade dress should not attract protection because it does not generate inherent distinctiveness according to source.⁸

"Trade dress" is called "distinguishing guise" in Canadian law. The Canadian Trade-marks Act⁹ defines such a "distinguishing guise" as

(a) a shaping of wares or their containers, or

(b) a mode of wrapping or packaging wares

the appearance of which is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others[.]¹⁰

3. Mass-produced design features of "shape, configuration, pattern or ornament" applied to most useful wares can be legally protected only by registration under the Industrial Design Act, R.S.C., ch. I-9 (1985) (Can.). Wares purchased and used for their appearance, such as household ornaments, will be registered as designs, not as trademarks. Lord Diplock accepted that design registration and trademark registration were not mutually exclusive in England. *Smith Kline & French Labs. Ltd. v. Sterling-Winthrop Group Ltd.*, [1976] R.P.C. 511 (H.L.) (Eng.).

4. Trade-marks Act, R.S.C., ch. T-13, § 13(1)(a) (1985) (Can.).

5. LEE B. BURGUNDER, *LEGAL ASPECTS OF MANAGING TECHNOLOGY* 392 (2d ed. 2001). He cites the example of "a stylish new chair with a very tall back. Does the tall back serve as a trademark for the chair?" *Id.*

6. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992).

7. 529 U.S. 205 (2000).

8. *Id.*

9. R.S.C., ch. T-13 (1985) (Can.).

Specially-shaped soft drink or perfume bottles are common examples of registrable distinguishing guises,¹¹ although Canadian courts have declined protection for packaging that is integrated into the wares.¹²

The tenuous claim that distinguishing guises make for protection is found in over-arching rules that these guises cannot “unreasonably . . . limit the development of any art or industry.”¹³ If the shape results from ornamentation¹⁴ to merely making the wares more attractive and valuable,¹⁵ or arises from the nature of the wares, or is technically necessary, trademark protection will not issue.¹⁶ Trademarks cannot substitute for time-limited patents, because their practical, useful features must remain open for use by all.¹⁷

II. THE FUNCTIONALITY DOCTRINE

While the threshold availability of trade dress and distinguishing guise registration is itself uncertain in any given case, that uncertainty is magnified by the functionality exception.¹⁸ Functional or utilitarian elements, in the realm of patents “of discovery” and invention,¹⁹ are not registrable under

10. *Id.* § 2.

11. *Source Perrier v. Canada Dry Ltd.*, [1982] 36 O.R.2d 695, 700 (Can.) held that the tort of passing off can embrace distinguishing guises. *Cf. Reckitt & Colman Prods. Ltd. v. Borden Inc.*, [1990] 1 All E.R. 873 (H.L.) (Eng.).

12. For example, the colored coating of a medical tablet was part of the item and not protected in trademark. *Smith Kline & French Canada Ltd. v. Registrar of Trade Marks*, [1987] 2 F.C. 628 (Can.).

13. Trade-marks Act, R.S.C., ch. T-13, § 13(1)(b) (1985) (Can.).

14. These are subjective considerations, and occasionally an ornamental feature is granted protection. *See, e.g., Santana Jeans Ltd. v. Manager Clothing Inc.*, [1993] 52 C.P.R.3d 472, 478 (Fed. Ct.) (Can.) (giving an example of ten X's cross-stitched on jeans).

15. *W.J. Hughes & Sons “Corn Flower” Ltd. v. Morawiec*, [1970] 62 C.P.R. 21 (Fed. Ct.) (Can.) (giving the example of a pattern on drinking glasses); *Trail-Rite Flatdecks Ltd. v. Larcon Int'l Inc.*, [1988] 69 Sask. R. 57 (Can.) (giving the example of a stripe around grain storage bin). *See generally* DAVID VAVER, *INTELLECTUAL PROPERTY LAW: COPYRIGHTS, PATENTS, TRADE-MARKS* 192 (1997).

16. An unregistered, or common law, trademark (®) is acquired through use, protected locally, and enforced by the tort of passing off. A registered trademark (™) is effective across Canada and is presumptively valid. *See VAVER, supra* note 15, at 177-79.

17. *Registrar of Trade Marks v. Brewers Ass'n of Can.*, [1982] 2 F.C. 622 (Fed. Ct.) (Can.).

18. “The law appears to be well settled that if what is sought to be registered as a trade mark has a functional use or characteristic, it cannot be the subject of a trade mark.” *Parke, Davis & Co. v. Empire Labs. Ltd.*, [1964] S.C.R. 351, 354 (Can.).

19. Patent Act, R.S.C., ch. P-4, § 2 (1985) (Can.).

trademark law.²⁰ This doctrine ensures that market access to unpatented products is not hindered by trademark protection.²¹

American trademark law recently has incorporated the doctrine of functionality. Congress added this exception to the Lanham Act.²² The U.S. Supreme Court had held that functional features may not be protected in the law of trademarks.²³ Other American courts have gone further and have carved out three subdivisions of functionality: utility supply, utility demand, and aesthetic.²⁴

III. THE LEGO STORY

The LEGO Group, a private company headquartered in Denmark, designs and manufactures a creative play system of LEGO toys.²⁵ The flagship product is the brightly-colored interlocking plastic brick that can be playfully connected and assembled in infinite constructions. The plastic brick concept, interlocking versus mere stacking, was taken in 1949 from the British Kiddicraft company and improved over the next fifteen years to

20. Or under any other aspect of trademark. An example is the Philips shaver triple-head where MacGuigan, J.A., in *Remington Rand Corp. v. Philips Elecs. N.V.*, [1995] 64 C.P.R.3d 467, 478 (Fed. Ct.) (Can.), wrote:

The distinguishing guise in the case at bar is in my opinion invalid as extending to the functional aspects of the Philip shaver. A mark which goes beyond distinguishing the wares of its owner to the functional structure of the wares themselves is transgressing the legitimate bounds of a trade mark.

The same conclusion was reached in England. See *Philips Electronics N.V. v. Remington Consumer Prods. Ltd.*, [1999] R.P.C. 809 (C.A. Civ. Div.) (Eng.). See also *Pizza Pizza Ltd. v. Registrar of Trade Marks*, [1989] 3 F.C. 379, 381 (Fed. Ct.) (Can.); *Thomas & Betts, Ltd. v. Panduit Corp.*, [2000] 3 F.C. 3, 14-15 (Fed. Ct.) (Can.).

21. Trade-marks Act, R.S.C., ch. T-13, § 13(2) (1985) states that “[n]o registration of a distinguishing guise interferes with the use of any utilitarian feature embodied in the distinguishing guise.”

22. 15 U.S.C. § 1052(e)(5) (2000) (“No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it . . . [c]onsists of a mark which . . . comprises any matter that, as a whole, is functional.”).

23. See, e.g., *TraFFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 34 (2001); *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 211 (2000).

24. BURGUNDER, *supra* note 5, at 396-97. See also *W.T. Rogers Co. v. Keene*, 778 F.2d 334 (7th Cir. 1985).

25. The company name LEGO emerged from the Danish phrase “*LEG GODT*, meaning ‘play well.’” COMPANY PROFILE, AN INTRODUCTION TO THE LEGO® GROUP 3 (2007), available at http://cache.lego.com/downloads/aboutus/LEGO_company_profile_U-K.pdf. “LEGO” is intentionally written in uppercase letters. *Id.* at 19. To protect its trademark, the company insists that LEGO always be used as part of a noun, as in “LEGO set” or “LEGO products.” *Id.* These corporate entreaties are frequently ignored, and LEGO is today used not only as a noun, but also as a generic term referring to any interlocking brick toy.

the round “studs” and “tubes” atop the hollow rectangle form that this brick has today.

The LEGO system consists of plastic toy building blocks where each new toy set is compatible with the rest of the building system. These plastic blocks can be assembled by an interlocking mechanism provided by studs and tubes. Each block has one or more cylindrical studs on the upper surface and a hollow underside with one or more tubes or other projections. The studs and the tubes, respectively, enable the blocks to be assembled but not so tightly that they cannot be disassembled. The idea is to assemble the blocks together so as to form stable structures and figures.

Available in various sizes, LEGO blocks have unlimited capability to allow people to build different structures, models, and figures. The blocks are available in many different colors to enable the builder to use accurate colors when building structures and figures based on real life. The most common colors of basic LEGO blocks are red, yellow, blue, black, white, and light gray.

The popular bricks²⁶ and other elements in the LEGO system are manufactured to precise tolerances using strong, specially-tested plastic. The pieces must integrate the correct “clutch power”²⁷ when snapped together.

The LEGO trademark has been so dominant and successful that the company has found it necessary to post a message on its website warning the public against dilution of its trademark.²⁸ The corporate name has become synonymous with its brick toy so that many call these bricks, and presumably even competitor toy bricks, “Lego” or “Legos.” This corporate trademark dilution concern can be traced back to LEGO catalogues in the 1970s and 1980s.²⁹

26. The LEGO corporate website claims to still enjoy an annual production of approximately 19 billion bricks, which is about 600 pieces per second. *Id.* at 7. “On average there are 62 LEGO bricks for every person on earth.” *Id.* at 18.

27. The studs of a LEGO brick may be connected to all or some part of the underside of another LEGO brick. The “clutch power” between connecting pieces is the friction developed between the studs on one piece and the tubes or walls of the underside of the other piece. This “clutch power” enables the assembly of complex constructions.

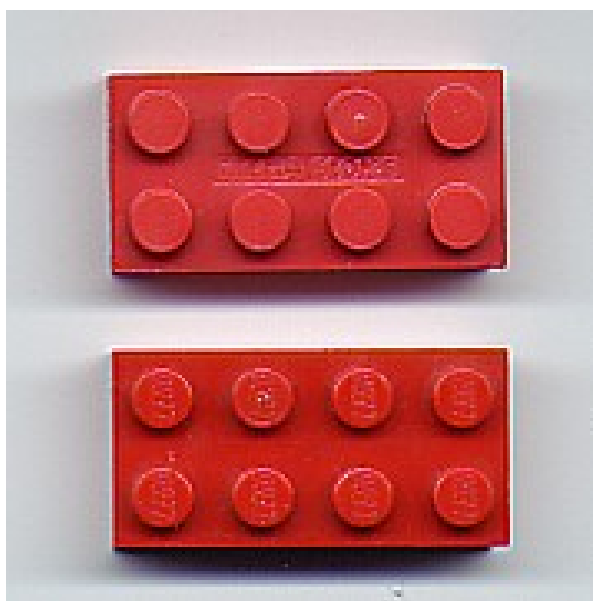
28. LEGO, About Us—Corporate Information, Legal Notice, ¶ 5, <http://www.lego.com/eng/info/legal.asp> (last visited May 15, 2008).

29. *Id.* The website reported at this time that the following note was published: The word LEGO® is a brand name and is very special to all of us in the LEGO Group Companies. We would sincerely like your help in keeping it special. Please always refer to our bricks as “LEGO Bricks or Toys” and not “LEGOS.” By doing so, you will be helping to protect and preserve a brand of which we are very proud and that stands for quality the world over.

Id. See also Wikipedia, The Free Encyclopedia, Lego, <http://en.wikipedia.org/wiki/Lego> (last visited May 15, 2008).

IV. THE NEW COMPETITOR: MEGA BLOKS

MEGA Bloks, Inc.³⁰ was formed in 1967, also as a family business, in Montreal, Canada.³¹ Its most popular toy, the plastic building block—an exact copy of the LEGO block—likewise shared the corporate name of its creator. The founder saw an opportunity to take market share from LEGO through two competitive advantages—by (1) producing blocks large and sturdy enough for toddlers, and by (2) producing blocks at a lower cost than LEGO. MEGA Bloks, despite quality control problems, grew fast, especially in North America, largely due to the production and sale of its virtually indistinguishable copy of the well-known interlocking brick.³² All relevant LEGO patents on the classic brick toy had already expired.³³ The MEGA Bloks toy was designed and constructed to be completely compatible with the LEGO toy.



30. The corporate name changed in 2002 from Ritvik Holdings Inc. to MEGA Bloks Inc., and again in 2006, due to acquisition of the current MEGA Brands, Inc.

31. *Kirkbi AG v. Ritvik Holdings Inc.*, [2005] 3 S.C.R. 302, 308-10 (Can.).

32. See MEGA Bloks Company—About Us, www.megabloks.com (follow “About Us” hyperlink) (speaking of its rapid growth generally). As to the similarity of the MEGA and LEGO products, this is common knowledge held by people familiar with the toy, is the basis of this case (copying) and is evident in the photo that follows just below. We don’t see how we can reference any better outside authority that they are similar products.

33. *Kirkbi AG*, 3 S.C.R. at 309 (“In Canada, the last patent expired in 1988.”).

MEGA Bloks building block (top) with LEGO building block (bottom)³⁴

V. LEGO VERSUS MEGA BLOKS³⁵

Patent protection has expired on the legendary LEGO interlocking toy building blocks, still the most valuable wares in the LEGO inventory.³⁶ The battle between LEGO and MEGA Bloks started in the early 1990s when MEGA Bloks started selling its “Micro” line, aimed at older children, after several years of selling blocks intended for very young children.³⁷ These “Micro” blocks were the same size and shape as LEGO’s and were interchangeable with the older brand’s sets. MEGA Bloks’s “Micro” building blocks quickly represented one-half of MEGA Bloks’s global sales.³⁸

Faced with the reality of intense competition to produce and internationally market an essentially identical product, LEGO attempted to extend its monopoly rights through trademark protection on a design element of the wares, referred to as “the LEGO indicia,” or the upper surface of the block where eight studs are distributed in a regular geometric pattern. The Registrar of Trade-marks refused registration,³⁹ which would have conferred infinitely renewable trademark protection.⁴⁰ LEGO claimed the LEGO indicia as an unregistered mark⁴¹ and sought a declaration that it had been infringed

34. Wikipedia, The Free Encyclopedia, MEGA Bloks, http://en.wikipedia.org/wiki/MEGA_Bloks (last visited May 15, 2008).

35. The case was styled as *Kirkbi AG v. Ritvik Holdings Inc.*, [2005] 3 S.C.R. 302.

36. In 1957, the basic LEGO block was patented in Canada (Patent No. 629,732), but the patent expired in 1988. See *Kirkbi AG*, 3 S.C.R. at 309-10.

37. *Id.* (noting that LEGO’s patent in Canada expired in 1988).

38. In 1991, LEGO complained to MEGA Bloks about using the phrase “works with LEGO or DUPLO” on MEGA Bloks’s packaging without LEGO’s approval. When MEGA Bloks received this complaint, it made quick changes to its packaging to remove the phrase “works with LEGO or DUPLO,” replacing it with the phrase “works with other leading brands.” See news.lugnet.com/off-topic/clone-brands/?n=281. Today, many secondary internet sellers of MEGA Bloks still advertise the interchangeability of MEGA and LEGO blocks.

39. The basic LEGO brick had been granted trademark registration in France and Switzerland. Those registrations, however, were later challenged in the courts. French Cour de Cassation, Paris, Oct. 18, 2000, D. 2001. Jur. 850 (Fr.); see also *Kirkbi AG*, 3 S.C.R. at 335.

40. Trade-marks Act, R.S.C., ch. T-13, § 46 (1985) (Can.).

41. The LEGO indicia trademark was described in paragraph 9 of the Statement of Claim in the following terms:

LEGO Components have a distinctive “look”, which makes them immediately identifiable to purchasers and users, and which exclusively identifies LEGO Goods as made by or under the authority of a single source. This distinctive “look” is attributable to, and defined by:

a rectilinear array of uniform, smooth-sided, flat-topped, cylindrical, co-planar protuberances, the proportions of height, diameter and center-to-center spacing of

by MEGA Bloks pursuant to section 7(b) of the Canadian Trade-marks Act, which creates a civil cause of action essentially codifying the common law tort of passing off,⁴² and the common law doctrine of passing off. LEGO could, and did, make a claim under the statute and at common law.

VI. LEGO'S EUROPEAN LEGAL CAMPAIGN

The European law of trademarks applies the functionality doctrine.⁴³ LEGO had registered its indicia as a community trademark under European law. When MEGA Bloks applied for cancellation, the Cancellation Division of the Office for Harmonization in the Internal Market (Trade-marks and Designs) applied the *Philips Electronics* principles⁴⁴ and voided the mark.⁴⁵ It concluded that LEGO's studs served a purely technical function and that the EU directive barred registration.

The functionality doctrine in European law, as in North American intellectual property law, is zealous to avoid overextending monopoly rights on the wares *per se* and to avoid impeding competition, for wares sharing the same technical characteristics. In two different legal systems, a judge of the English High Court and a French Court of Appeal raised the same concerns and came to similar conclusions when they judged attempts by LEGO to protect its indicia by relying on trademark law.⁴⁶

In the English case,⁴⁷ LEGO appealed to the High Court the Registrar of Trade Marks's refusal to register the LEGO indicia as marks under British trademark law. Justice Neuberger decided that the functional features of

which are approximately 2 : 5 : 8. Where there is more than one row of protuberances, they are arranged in mutually orthogonal rows and columns.

See *Kirkbi AG*, 3 S.C.R. at 330.

42. The provision reads:

7. No person shall . . . (b) direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business and the wares, services or business of another.

Trade-marks Act, R.S.C., ch. T-13, § 7(b) (1985) (Can.).

43. A directive of the Council of the European Communities disallows registration of purely functional trademarks, especially where a shape is necessary to obtain a technical result: Council Directive 89/104, art. 3(1)(e), 1989 O.J. (L 40) 3 (EC). See also LIONEL BENTLY AND BRAD SHERMAN, *INTELLECTUAL PROPERTY LAW* 794-96 (2d ed. 2004).

44. *Koninklijke Philips Elecs. N.V. v. Remington Consumer Prods. Ltd.*, 2002 E.C.R. I-5475, ¶ 79.

45. A detailed description and history of the 3D LEGO brick trademark with the European Union is available at http://oami.europa.eu/CTMOnline/RequestManager/en_Detail_NoReg (enter "107029" in the field for "Trade mark No." and click "Search") (last visited May 15, 2008).

46. French Cour de Cassation, Paris, Oct. 18, 2000, D. 2001. Jur. 850 (Fr.); *Koninklijke Philips Elecs. N.V.*, 2002 E.C.R. I-5475.

47. *INTERLEGO AG's Trade Mark Applications*, [1998] R.P.C. 69 (Ch. Div.).

the brick could not be a trademark because granting trademark rights would perpetuate a monopoly on the product itself.⁴⁸

The French Cour de Cassation found no cause in delict of “*concurrency déloyale ou parasitaire*” (unfair competition or passing off).⁴⁹ The Cour d’appel de Paris dismissed all LEGO claims and permitted MEGA Bloks to use the processes that had been formerly patented by its competitor.⁵⁰ The court concluded that in deciding whether to register the trademark, the Registrar or court must balance the substantial benefit accruing to the owner of the trademark with the public interest against monopolies in wares, as compared with monopolies in marks.

VII. THE CANADIAN LITIGATION

In the lawsuit launched in 1996, LEGO alleged that its bricks and blocks enjoy a distinguishing guise (the LEGO indicia trademark), which makes them immediately identifiable to purchasers and users.⁵¹ It further alleged that since 1991, MEGA Bloks produced and advertised its building bricks with the same size, color, and shape of LEGO bricks.⁵² The similarity caused public confusion for customers in distinguishing the products. LEGO requested a permanent injunction to prevent MEGA Bloks from marketing infringing products and sought \$25 million in damages.

48. The judge wrote:

Interlego are not so much seeking to protect a mark on an item of commerce, but are attempting to protect the item of commerce as such. In other words, they are not so much seeking a permanent monopoly in their mark, but more a permanent monopoly in their bricks. This is, at least in general, contrary to principle and objectionable in practice. A trade mark is, after all, the mark which enables the public to identify the source or origin of the article so marked. The function of the trade mark legislation is not to enable the manufacturer of the article to have a monopoly in the article itself. In the present case there is no special reason to conclude that the general approach should not apply.

Id. at 110.

49. French Cour de Cassation, Paris, October 18, 2000, D. 2001. Jur. 850 (Fr.).

50. [Translation]

But whereas the simple fact of copying the product of the efforts of another does not as such constitute wrongful competition, the principle being that a product of the efforts of another to which no rights of intellectual property apply or to which such rights have ceased to apply may be freely reproduced; whereas the person who so reuses the product of the efforts of another necessarily makes savings that cannot in themselves be considered wrongful without draining of all substance the principle referred to above (which is itself closely linked to the fundamental principle of freedom of competition) . . .

(Paris, Oct. 18, 2000, D. 2001. Jur. 850 (note J. Passa), at 851).

51. *Id.*

52. *Id.*

The trial took place in May 2002.⁵³ The judge accepted the evidence of one of MEGA Bloks's expert witnesses, who said,

All the features of the so-called Lego Indicia Mark are basic, rudimentary and functional. . . . The Lego Indicia mark embodies the simplest and most basic geometrical shape to achieve the desired functional result. Cylinders are the obvious engineering choice for the connecting knobs and are the first shapes that come to mind to a competent engineer.⁵⁴

The judge also accepted the witnesses' evaluation that "all [the Lego Indicia Mark's] features are dictated by functional considerations and [t]he shape of the top surface of the Lego basic brick is purely utilitarian," concluding that purely functional features, such as the LEGO indicia, could not become the basis of a distinguishing guise, whether registered or unregistered.⁵⁵ The majority of the Court of Appeal (2-1) upheld that decision in 2003.⁵⁶ Leave to appeal was granted by the Supreme Court of Canada in April 2004.⁵⁷ This "What If ...?" story now turns to the application of the law by the Supreme Court of Canada.

In the approximately five years leading up to late 2005, the Supreme Court of Canada and other appellate courts took numerous occasions to tilt the balance from creators' rights toward users' rights in intellectual property.⁵⁸ On November 17, 2005, in a pivotal legal battle between the world's two largest toy manufacturers, the Supreme Court of Canada upheld MEGA Bloks's right to continue making and selling its imitator product in Canada.

The unanimous Supreme Court of Canada wrote,

the [Trade-marks] Act clearly recognizes that it does not protect the utilitarian features of a distinguishing guise. In this manner . . . a doctrine of long standing in the law of trade-marks. . . . recognizes that trade-marks law is not intended to prevent the competitive use of utilitarian features of products, but that it fulfills a source-distinguishing function. This doctrine of functionality goes to the essence of what is a trade-mark.⁵⁹ . . . In the law of intellectual property, it prevents abuses

53. Kirkbi AG v. Ritvik Holdings Inc., [2002] 20 C.P.R. (4th) 224 (Fed. Ct.) (Can.).

54. *Id.* ¶ 48.

55. *Id.*

56. Kirkbi AG v. Ritvik Holdings Inc., [2004] 26 C.P.R. (4th) 1.

57. In the Supreme Court of Canada, MEGA Bloks challenged the constitutionality of section 7(b), arguing that the provision was *ultra vires* the legislative competence of Parliament under section 91(2) of the Constitution Act (1867). The constitutional challenge was unsuccessful, but that analysis is not included in this short Article.

58. Evidence of the trend to shift from creators' rights to users' rights includes Law Soc'y of Upper Can. v. CCH Canadian Ltd., [2004] 1 S.C.R. 339 (Can.); Comm'r of Patents v. President & Fellows of Harvard Coll., [2002] 4 S.C.R. 45 (Can.); Apotex Inc. v. Wellcome Found. Ltd., [2002] 4 S.C.R. 153 (Can.); Free World Trust v. Électro Santé Inc., [2000] 2 S.C.R. 1024 (Can.); *cf.* Mattel, Inc. v. 3894207 Can. Inc., [2006] 1 S.C.R. 772 (Can.) (trademark—no confusion between well-known doll and barbeque restaurant); Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée, [2006] 1 S.C.R. 824 (Can.) (trademark); Monsanto Can. Inc. v. Schmeiser, [2004] 1 S.C.R. 902 (Can.) (patent).

59. Trade-marks Act, R.S.C., ch. T-13, § 43 (1985) (Can.).

of monopoly positions in respect of products and processes. Once, for example, patents have expired, it discourages attempts to bring them back in another guise.⁶⁰

LEGO had conceded that its system of studs and tubes were functional. Ultimately, the court concluded, LEGO's complaint was against competition with its wares, which were now in the public domain so that there was no more intellectual property protection. The court pronounced, "the monopoly on the bricks is over, and MEGA BLOKS and LEGO bricks may be interchangeable in the bins of the playrooms of the nation—dragons, castles and knights may be designed with them, without any distinction."⁶¹

CONCLUSION

The Supreme Court of Canada observed, "[t]he vast and expanding domain of the law of intellectual property is going through a period of major and rapid changes. The pressures of globalization and technological change challenge its institutions, its classifications and sometimes settled doctrines."⁶² Thus, another legal chapter in the story of a very familiar little toy block came to an end in the country of LEGO's chief competitor,⁶³ and LEGO, having exhausted its legal recourse, had to cope with the new reality.⁶⁴ In this case, the facts were straightforward, and the legal issue was easy and unanimous.

What if the studs did not function? We would have gone without competition in the children's brick toy industry, as well as a wonderful teaching case illustrating the expiry of intellectual property rights, public domain, the legal difference between function and appearance, and the social value of new competitive creation. In short, to paraphrase the Supreme Court of Canada, such a case demonstrates "the essence of what is" intellectual property.⁶⁵

60. *Kirkbi AG v. Ritvik Holdings Inc.*, [2005] 3 S.C.R. 302, 331 (Can.).

61. *Id.* at 339.

62. *Id.* at 327.

63. Shares of MEGA Bloks rose over twelve percent on the day that the Supreme Court of Canada's decision was released.

64. Ivar Ekman, *LEGO Braces for Big Changes*, INT'L HERALD TRIB., July 2, 2005, available at <http://www.iht.com/articles/2005/07/01/business/wblego.php>.

65. *Kirkbi AG*, 3 S.C.R. at 331.