

Hearing:  
March 17, 1999

Paper No.  
HANAK/md

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB NOV. 1,99  
U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Reebok International Limited and Reebok Sports Limited  
v.  
Antoine R. Konstantin and Geraldine S. Konstantin

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Opposition No. 91,238  
to application Serial No. 74/286,573  
filed on June 12, 1992.

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Larry C. Jones of Alston & Bird LLP for Reebok International  
Limited and Reebok Sports Limited.

Antoine R. Konstantin and Geraldine S. Konstantin, pro se.

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Before Hanak, Wendel and Bucher, Administrative Trademark  
Judges.

Opinion by Hanak, Administrative Trademark Judge:

Antoine R. Konstantin and Geraldine S. Konstantin  
(hereinafter referred to collectively as "applicant") seek  
to register REEBA and design in the form shown below for a  
card game. The application was filed on June 12, 1992 with  
a claimed first use date of December 19, 1991, and claimed  
first use date in commerce of February 24, 1992.

Reebok International Limited and Reebok Sports Limited (hereinafter referred to collectively as "opposer") have opposed the application on the basis that it has made continuous use of the mark REEBOK in the United States since 1965, and that over the years its use of this mark has expanded from footwear to a wide variety of goods and services. In the notice of opposition opposer pled ownership of numerous registrations for REEBOK covering a wide variety of goods and services. Finally, opposer alleged that applicant's "REEBA mark so nearly resembles opposer's REEBOK mark, that applicant's registration and use of this mark on a card game" would be likely to cause confusion and mistake. (Notice of opposition paragraph 11).

Applicant filed an answer which denied the pertinent allegations of the notice of opposition. Moreover,

applicant set forth "affirmative defenses" which essentially argued the merits of the issue of likelihood of confusion.

The record in this case includes the discovery deposition of Geraldine S. Konstantin and the testimony deposition of Mary Ann Alford, a former vice president and assistant general counsel of opposer.

Both parties filed briefs. An oral hearing was held on March 17, 1999 at which only counsel for opposer was present.

At the outset, we note that both parties have raised numerous evidentiary objections, the vast majority of which are without merit or pertain to evidence which is irrelevant to the issues in this proceeding. Suffice it to say, our decision is based upon evidence which is properly of record and which is pertinent to the issues at hand.

The record demonstrates that opposer has used and registered its mark REEBOK on a wide array of goods and services. Opposer has properly made of record certified status and title copies of registrations for the mark REEBOK appearing in typed drawing form for the following goods and services: Shoes for use in athletic sports (Registration No. 1,133,740); sport bags, sweatpants, shorts, sweaters, polo shirts, hats, visors, headbands, sweatbands, t-shirts

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and sweatshirts (Registration No. 1,390,793); socks, shirts, sweater-vests, dresses and performance bodywear (Registration No. 1,534,383); watches (Registration No. 1,740,828); retail store and outlet services in the field of clothing, shoes, bags and related accessories, sports accessories and audio and videotapes (Registration No. 1,728,475); sunglasses and pre-recorded videotapes in the areas of fitness, exercise and athletics (Registration No. 1,736,143); and basketballs, hockey skates, in-line roller skates, baseball gloves, softball gloves and weightlifting belts (Registration No. 1,871,428). In addition, opposer has made of record certified status and title copies of other marks including the term REEBOK, such as SLIDE REEBOK and STEP REEBOK. However, because these marks are not as close to applicant's mark REEBA and design as is REEBOK per se, we have not considered them in our likelihood of confusion analysis.

Because opposer properly made of record the aforementioned registrations, priority as to the goods or services set forth in those registrations rests with opposer. See King Candy Co. v. Eunice King's Kitchen, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Moreover, the record demonstrates that long before applicant's first use of REEBA in December 1991, opposer had made extensive use in this country of its REEBOK mark. Opposer commenced sales of

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REEBOK athletic shoes in the United States in the 1960's. (Alford deposition page 6). To say the least, opposer's sales of REEBOK brand products have been massive. During the years 1986 to 1997, opposer sold in the United States almost 15 billion dollars worth of REEBOK athletic shoes representing nearly 600 million pairs of shoes. (Alford deposition page 9). In addition, for those same years, opposer's United States sales of other types of apparel and non-apparel items bearing the REEBOK mark came to almost 1.5 billion dollars. (Alford deposition page 10). Finally, for the same time period, opposer's advertising expenditures in the United States for its REEBOK brand products exceeded 700 million dollars. (Alford deposition page 12).

In addition to the goods and services covered by opposer's aforementioned registrations, the record demonstrates that prior to December 1991, opposer made use of its mark REEBOK on many additional items including backpacks, pencils, stationery, binders, pens, key chains, umbrellas, duffel bags and toy radios. (Alford deposition exhibit nos. 27, 28 and 31).

Based on the foregoing, we find that REEBOK is an extremely famous mark. Simply by way of comparison, we note that our primary reviewing Court found the mark PLAY-DOH to be famous based, in part, on 1988 sales exceeding \$30

million and 1988 advertising and promotion expenditures exceeding \$2 million. Kenner Parker Toys Inc. v. Rose Art Industries Inc., 963 F.2d 350, 22 USPQ2d 1453, 1455 (Fed. Cir. 1992). In contrast, average annual sales of REEBOK products in the twelve year period from 1986 to 1997 exceeded the 1988 sales of PLAY-DOH by a factor of over 45, and average annual advertising expenditures for REEBOK products in the same twelve year period exceeded the 1988 advertising and promotional expenditures for PLAY-DOH by a factor of over 29.<sup>1</sup>

In commencing our likelihood of confusion analysis, we begin with the proposition set forth by our primary reviewing Court that "the fifth duPont factor, fame of the prior mark, plays a dominant role in cases featuring a famous or strong mark. Famous or strong marks enjoy a wide latitude of legal protection." Kenner Parker Toys, 22 USPQ2d at 1456 (emphasis added). Indeed, not only is REEBOK a very famous mark, but in addition, it is also a very strong mark in the sense that it is totally arbitrary as applied to the various goods or services on which opposer has used it. The record is devoid of any evidence showing that even a very small number of American consumers would

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<sup>1</sup> We do not mean to suggest that fame for a mark can be achieved only through massive sales and advertising expenditures. However, such massive sales and advertising expenditures are very

understand the word "reebok" to refer to an African antelope. Indeed, the preferred spelling for this antelope is "rhebok," and not "reebok." Moreover, both words "rhebok" and "reebok" are listed only in very comprehensive dictionaries such as Webster's Third New International Dictionary Unabridged (1976). Less extensive dictionaries, which are more commonly used by most American consumers, list only "rhebok" and define it as "a rare South African antelope." See Webster's New World Dictionary (1970). In short, the mark REEBOK is a very famous, highly arbitrary mark entitled to a very broad scope of protection. Indeed, it is our opinion that most Americans would view REEBOK not as a word found naturally in the English language, but rather as a coined trademark. See 1 J. McCarthy, McCarthy on Trademarks and Unfair Competition Section 11:5 at page 11-11 (4<sup>th</sup> ed. 1999).

Taking into account the fact that the fame of opposer's REEBOK mark plays a dominant role in this case, we now turn to a comparison of this mark with applicant's mark REEBA and design. At the outset, we note that in appropriate cases, similarity as to one factor (visual appearance, pronunciation or connotation) may be sufficient for finding

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objective guidelines to determine whether a mark has achieved fame.

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of likelihood of confusion. Krim-Ko Corp. v. Coca-Cola Co., 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968).

In this case, the two marks are slightly similar in appearance in that the first four letters of each are the same. The card design in applicant's mark is highly descriptive of applicant's goods (a card game) and hence is of more limited importance in distinguishing applicant's mark from REEBOK.

As for connotation or meaning, the two marks are similar only to the extent that neither mark has any known meaning to American consumers. With regard to this latter point, we have already exhaustively discussed the coined nature of the REEBOK mark. As for applicant's mark REEBA and design, we note that Mrs. Konstantin testified that REEBA "has absolutely no meaning in any language that I know" and that REEBA "doesn't appear in any English, French, Italian, Greek, German, no dictionaries." (Konstantin deposition page 10). Thus, REEBA is also a coined mark.

However, in terms of pronunciation or sound, we find that the two marks are similar enough such that if they were used on related goods, there would be a likelihood of confusion. Both marks consist of two syllables, with the first syllable being identical in terms of pronunciation (and for that matter, appearance). In addition, the

beginning sound of the second syllable of both marks is identical. The only difference in terms of sound between the two marks is that opposer's famous REEBOK mark has a final "k" consonant sound which, obviously, does not appear in applicant's mark. However, applicant has conceded that its mark is also pronounced with a final consonant sound, although the consonant is the letter "h" and not the letter "k." In this regard, Mrs. Konstantin testified that REEBA is pronounced "Ree-bah." (Konstantin deposition page 11). Indeed, applicant distributed to customers a letter which begins with the following sentence: "REEBA (pronounced Ree-bah) utilizes many of the principles of Rummy..." (Konstantin deposition exhibit 1).

It is long been recognized that "there is no correct pronunciation of a trademark." In re Belgrade Shoe, 411 F.2d 1352, 162 USPQ 227 (CCPA 1969). We believe that a significant number of consumers would pronounce opposer's mark and applicant's mark in manners such that there is no discernible difference. Indeed, even Mrs. Konstantin recognized that "you cannot control how people are going to pronounce things," including the mark REEBA. (Konstantin deposition page 11).

Thus, even if we assume that opposer's mark and applicant's mark are only slightly similar in terms of

visual appearance and absence of connotation, we believe that this is an appropriate case for basing a finding of likelihood of confusion simply upon the fact that both marks are subject to being pronounced in very similar manners. This focus on one factor (pronunciation or sound) is appropriate for three reasons.

First, opposer has a very famous, coined mark. Under such circumstances, similarity as to any one factor (sight, sound or meaning) is more likely to lead to a finding of confusion. Specialty Brands, Inc. v. Coffee Bean Distributors, Inc., 748 F.2d 669, 223 USPQ 1281, 1282-84 (Fed. Cir. 1984).

Second, it is also appropriate to focus on the sound or pronunciation of the two marks given the fact that applicant has repeatedly testified that the REEBA card game is sold primarily by "word of mouth." (Konstantin deposition pages 29 and 22).

Finally, because both REEBOK and REEBA are coined terms which lack any meaning, not only are consumers more prone to mispronounce the two marks, but in addition, consumers lack a basis to differentiate the two marks in terms of meaning

or connotation since neither has any meaning or connotation.<sup>2</sup>

Turning to a consideration of the goods and services of the parties, we note at the outset that opposer has never used its famous REEBOK mark on card games. However, prior to applicant's first use of its mark REEBA and design, opposer made use of its mark REEBOK on a wide array of goods and services which have been previously specified. Subsequent to applicant's first use of REEBA, opposer has only further expanded its use of its mark REEBOK to include additional goods and services. Moreover, in 1990 Reebok prepared prototypes of two different board games bearing the REEBOK mark. (Alford deposition pages 18-19, Alford deposition exhibit 66).

Given the wide array of goods and services on which opposer used its REEBOK mark prior to December 1991 (applicant's first use date), we find that consumers, upon hearing applicant's mark REEBA (which applicant hopes will be pronounced as Ree-bah) in connection with a card game, will mistakenly assume that it is yet another one of the many products marketed under the very famous REEBOK mark. In particular, we find that card games are quite similar to

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<sup>2</sup> The chances for mispronouncing a coined mark -- such as REEBA - which has not previously been seen by consumers are far greater

both stationery (for which opposer was the prior user) and to sports items such as basketballs, baseball gloves and skates (for which opposer has an existing registration, Registration No. 1,871,428). With regard to this latter point, we note that the predecessor to our primary reviewing Court has previously held that there is a relationship between bowling balls and playing cards in that both "comprise recreational equipment [whose] purchasers thereof may be the same." Columbia Industries, Inc. v. Tiffany & Co., 497 F.2d 1358, 182 USPQ 205, 206 (CCPA 1974). If bowling balls and playing cards are related, we believe that basketballs and card games are likewise related.

In short, given the phonetic similarities of the marks REEBOK and REEBA and the fact that the former has been previously used (or registered) on a wide array of goods, including recreational equipment (which encompasses card games), we find that there exists a likelihood of confusion resulting from the contemporaneous use of opposer's famous mark REEBOK and applicant's mark REEBA on a card game.

If there were any doubts on this issue of likelihood of confusion, we simply note that every other duPont factor either favors opposer's position, or is neutral. Because there are no restrictions on channels of trade in

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than are the chances for mispronouncing marks consisting of pre-

applicant's application, we must presume that applicant's goods could travel in all normal channels of trade including those types of stores which carry the various REEBOK products. Indeed, in actuality, applicant acknowledged that it attempted to market its REEBA card game in gift shops and toy stores, and that it may have attempted to market its REEBA card game in department stores. (Konstantin deposition pages 40-41).

As to the class of purchasers, it is obvious that the same individuals purchase both card games and the wide array of goods marketed under the famous REEBOK mark. Not unexpectedly, applicant conceded this very point. (Konstantin deposition page 44). Moreover, not only are the purchasers the same, but in addition they are ordinary purchasers, and not sophisticated professional purchasers. Indeed, applicant conceded that its REEBA card game could be purchased by children, who, obviously, would likewise purchase the athletic shoes, basketballs and numerous other products marketed under the famous REEBOK mark. (Konstantin deposition page 32). Children, like many adults, are not prone to exercising a high degree of care in their purchases.

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existing words, such as ARROW shirts and UNITED airlines.

In addition, none of the goods in question are expensive, and many of the goods in question are quite inexpensive. For example, applicant acknowledged that the typical retail price of its REEBA card game is about \$10. (Konstantin deposition page 33). The record reflects that some of opposer's REEBOK products, such as the pencil and stationery set, retail for as low as \$3.50. (Alford deposition exhibit 28). Normal purchasers exercise an even lesser degree of care when purchasing inexpensive items.

These factors of "inexpensive products purchased by diverse buyers without exercising much care ... accentuate the significance of a famous mark." Kenner Parker Toys, 22 USPQ2d at 1458.

Another factor favoring opposer's position is that both parties acknowledge that there are no marks similar to either REEBOK or REEBA in use on any similar goods. See applicant's brief page 28 and opposer's brief page 25.

As for the presence or absence of actual confusion, we find this to be a neutral factor because applicant was quite vague in describing its sales figures for its REEBA card game. Thus, we are not in a position to judge whether there has been a meaningful chance for actual confusion to have occurred.

Finally, while there is no indication that applicant adopted the mark REEBA and design in bad faith, bad faith adoption is not a prerequisite to a finding of likelihood of confusion. However, applicant acknowledged that originally it intended to call its card game BIRIBA, but it discontinued this plan because there was "difficulty in pronouncing BIRIBA." (Konstantin deposition pages 8-9). We simply note that as a purely coined word, REEBA is likewise subject to mispronunciation such that it may well be pronounced in a manner quite similar to the very famous mark REEBOK.

In conclusion, we note that our primary reviewing Court has repeatedly stated that "all doubt as to whether confusion, mistake, or deception is likely is to be resolved against the newcomer, especially where the established mark is one which is famous." Kenner Parker Toys, 22 USPQ2d at 1456 (emphasis added); Nina Ricci v. E.T.F. Enterprises, 899 F.2d 1070, 12 USPQ2d 1901, 1904 (Fed. Cir. 1989).

Given the close similarity in sound between REEBOK and REEBA (Ree-bah) and the fact that opposer has registered REEBOK for a wide array of goods including recreational equipment, a category which encompasses card games, we find that when the two marks are spoken, a not insignificant number of consumers will confuse them. However, to the

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extent that there are any doubts whatsoever on the issue of likelihood of confusion, these doubts must be resolved in favor of opposer whose mark REEBOK not only is very famous, but also is -- to almost all American consumers -- a coined mark.

Decision: The opposition is sustained.

E. W. Hanak

D. E. Bucher

Administrative  
Trademark Judges,  
Trademark Trial and  
Appeal Board