

THIS DISPOSITION IS NOT
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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re QVC, Inc.

Serial No. 75/111,554

Manny D. Pokotilow of Caesar, Rivise, Bernstein, Cohen, et
al. for QVC, Inc.

Steven R. Foster, Trademark Examining Attorney, Law Office
107 (Thomas Lamone, Managing Attorney)

Before Seeherman, Hanak and Chapman, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

QVC, Inc. has appealed from the final refusal of the
Trademark Examining Attorney to register FREESTYLE as a
trademark for "sportswear; namely, skirts, blouses, pants,
shirts, jackets, vests, shorts and anoraks sold through
home shopping services through the use of television."¹

¹ Application Serial No. 75/111,554, filed May 29, 1996, and
asserting first use and first use in commerce on May 2, 1994.

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Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark FREESTYLE, registered for "fabrics in the piece composed of man-made fibers, and fabrics in the piece, composed of blends of cotton fibers and man-made fibers,"² that, when used on applicant's identified goods, is likely to cause confusion or mistake or to deceive.

The appeal has been fully briefed, but an oral hearing was not held.³

Both applicant's and the registrant's marks are the identical word, FREESTYLE. As the Examining Attorney has pointed out, when marks are identical the relationship between the goods of the respective parties need not be as close to support a finding of likelihood of confusion.

Ancor, Inc. v. Ancor Industries, Inc., 210 USPQ 70 (TTAB 1981). See also, **In re Concordia International Forwarding Corp.**, 222 USPQ 355, 356 (TTAB 1983) ("the greater the degree of similarity in the marks, the lesser the degree of similarity that is required of the products or services on

² Registration No. 960,992, issued June 12, 1973; renewed.

³ Applicant had originally requested an oral hearing, but subsequently withdrew the request.

which they are being used in order to support a holding of likelihood of confusion").

Turning to the relationship between the goods, the registrant's goods are fabrics in the piece, composed of man-made fibers or a blend of cotton and man-made fibers, while applicant's goods are a variety of sportswear items. Obviously fabrics and clothing bear an intimate relationship, in that clothing is made of fabric. Further, the Examining Attorney has submitted evidence which shows that fabric marks are used on labels for clothing, and also that the mark for the fabric used appears in advertisements for the finished clothing. In addition, the Examining Attorney has made of record numerous third-party registrations which show that a single entity has adopted a particular mark for both fabric and for clothing. Although applicant is correct that third-party registrations are not evidence that the public is familiar with the use of the marks shown therein, nevertheless third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. **In re Albert Trostel & Sons Co.**, 29 USPQ2d 1783 (TTAB 1993); **In re Mucky Duck Mustard Co. Inc.**, 6 USPQ2d 1467 (TTAB 1988). The third-party

registrations submitted by the Examining Attorney, all of which are based on use in commerce, thus indicate that a single source may use the same mark for both fabric and clothing.

Moreover, the Examining Attorney has cited, at page 3 of his brief, a number of ex parte cases decided by both this Board and the predecessor of our primary reviewing Court in which fabric and clothing have been found to be related goods. See, for example, **In re Mangel Stores Corp.**, 165 USPQ 22 (TTAB 1970) (PRESSCOTT for sweaters, sport and dress shirts, etc. likely to cause confusion with PRESCOTT for cotton piece goods; "there is an obvious intimate commercial relationship between piece goods and articles of apparel which may be made therefrom, and there can be no question but that the sale of such goods under the similar marks here involved would be likely to cause confusion or mistake or to deceive").

Applicant has attempted to interpose a new requirement for establishing that clothing and fabric are related, pointing to certain inter partes cases which noted the presence or absence of a fabric mark appearing on the label or hangtag of the clothing item in discussing whether or not confusion was likely. However, a careful reading of these cases reveals that no such requirement exists. For

example, in **E.I. du Pont de Nemours and Co. v. Sunlyra International Inc.**, 35 USPQ2d 1787 (TTAB 1995), the Board pointed out that opposer's fabric mark appeared on finished clothing items, and was promoted to the purchasers of clothing, in response to the applicant's argument that opposer's goods were sold only to fabric mills and clothing manufacturers, and that purchasers of the finished clothing would never see opposer's mark. In the case now before us, because there are no restrictions on the channels or trade or purchasers of registrant's goods, we must assume that they travel in all channels appropriate for fabric. **In re Elbaum**, 211 USPQ 639 (TTAB 1981). This would necessarily include retail stores in which fabric is sold to the general public. The other cases cited by applicant are also distinguishable on their facts.

Applicant also asserts that the trade channels of the goods are different, and that this, too, militates against a finding of likelihood of confusion. We are not persuaded by this argument. Although applicant has restricted the trade channel for its clothing items to "home shopping services through the use of television," there is no restriction on the trade channels for the registrant's goods. There is no inherent reason why fabric cannot be sold through the same trade channel used by applicant for

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the sale of its goods. More importantly, purchasers of fabric in retail stores could still encounter clothing sold through "home shopping services through the use of television," or vice versa. As a result, consumers familiar with registrant's fabric sold under the mark FREESTYLE would be likely to believe, upon seeing FREESTYLE clothing items offered for sale through "home shopping services through the use of television," that the fabric and clothing emanate from or are sponsored by the same source.

In reaching this conclusion, we have considered applicant's arguments regarding the weakness of registrant's mark, but do not find them persuasive. Applicant has made of record a declaration by a private investigator, Yet Mui, in which Mr. Mui stated that in 1987 he purchased a pair of women's REEBOK FREE STYLE sneakers in New York; that in November 1995 he was informed by a "Reebok employee" that Reebok International, Ltd. "has used the mark FREE STYLE" with women's aerobic sneakers since approximately 1984, and that the mark was being used at the time of the call; and that in November 1995 he was informed by a salesman in a New York City shoe store that the store sells a sneaker made by Reebok under the name FREE STYLE. The declaration also states that Mr. Mui spoke by telephone

with an office manager for Dionysian, Inc., Jacobs Division, who stated that, "based upon his recollection, Jacobs once used the mark FREESTYLE in connection with a line of children's ski wear and also that Jacobs used the mark FREESTYLE in connection with a children's jacket." That person also said that Jacobs was not presently using the mark FREESTYLE for any purpose.⁴

Evidence of third-party use of a mark may be used to show that, because the public is aware that multiple parties use the same mark for similar goods, consumers will realize that not all goods bearing the mark emanate from the same source. In the present case, however, the only evidence of third-party use is that of Reebok International, Ltd.'s use of FREESTYLE on sneakers. The vague information regarding Jacob's use at some time in the past, without any information about when the use occurred, or the extent of the use or advertising, is not sufficient

⁴ The Examining Attorney has objected to the reports of the telephone conversations as hearsay. To the extent that applicant is using the declaration as evidence, not just of Mr. Mui's activities, but to prove the truth of the statements related to him by those he called or interviewed, those reported statements are hearsay. However, the Federal Rules of Evidence do not apply to ex parte proceedings, and therefore the Examining Operation and the Board are more lenient about considering evidence in such proceedings. We have therefore considered all of the information in the declaration, and note that the information obtained from the "Reebok employee" is supported to some extent by Mr. Mui's personal knowledge.

to show that the public was or is now aware of such use. Even the evidence of Reebok's use is of limited value, since there is no indication about the extent of sales or advertising from which we can ascertain public exposure to the mark. Further, even if we were to assume widespread use by this single party, there are greater differences between sneakers and fabric than there are between fabric and clothing.

Applicant has also relied on certain third-party registrations for marks containing the word FREESTYLE. Third-party registrations can be used in the same manner as dictionary definitions, to show that a term has a particular significance when used in connection with the goods. **Mead Johnson & Company v. Peter Eckes**, 195 USPQ 187 (TTAB 1977). In this case, the word FREESTYLE in three of these registrations, for WORLD FREESTYLE ASSOCIATION and design for shirts and hats, and FREESTYLE and FREESTYLE PLUS for, inter alia, swimsuits, suggests a swimming stroke, and therefore has a different significance from FREESTYLE when it is used in connection with fabric or the sportswear identified in applicant's application. Two other registrations owned by the same entity for FREE STYLE marks are for wrist watches and watch bands and for luggage. Besides the fact that the latter registration was

cancelled, neither of these registrations are for goods which are similar to fabric or clothing.⁵ Accordingly, applicant has failed to show that registrant's mark FREESTYLE is a weak mark for fabric, and that it is entitled to only a narrow scope of protection.

Decision: The refusal of registration is affirmed.

E. J. Seeherman

E. W. Hanak

B. A. Chapman
Administrative Trademark Judges
Trademark Trial and Appeal Board

⁵ Applicant refers in its reply brief to an application which was filed by Reebok for FREE STYLE, which application was submitted by the Examining Attorney with his brief. Although the submission of the application by the Examining Attorney was untimely, because applicant has treated it of record we will deem it to have been stipulated into the record. This third-party application has no evidentiary value, however, in that it is not, as contended by applicant, evidence of the use of the mark by Reebok, nor can an application be considered to be a third-party registration.