

Hearing:
October 21, 1999

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB APRIL 11, 00
U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re QVC, Inc.

Serial No. 75/118,932

Manny Pokotilow of Caesar, Rivise, Bernstein, Cohen & Pokotilow
for applicant.

Elizabeth A. Dunn, Trademark Senior Attorney, Law Office 102
(Thomas V. Shaw, Managing Attorney).

Before Simms, Bucher and McLeod, Administrative Trademark
Judges.

Opinion by McLeod, Administrative Trademark Judge:

An application has been filed by QVC, Inc. to register the
mark QVC MUSEUM TOUR and design shown below for "home shopping
services featuring museum tours through the use of television."¹

The Trademark Senior Attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used in connection with the identified services, so resembles the previously registered mark MUSEUM TOUR for "retail catalog and online electronic retail services featuring gifts, toys, games, books, puzzles, CD-ROMs, videos, software, and apparel"² as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the Senior Attorney have filed briefs. An oral hearing was held. We affirm.

Applicant contends that confusion is unlikely because the overall commercial impression of the involved marks is dissimilar. According to applicant, the "famous" QVC mark, coupled with the stylized words MUSEUM TOUR and design, create a composite mark which is distinguishable from the registered mark. Applicant submits that the design creates an artistic effect which is at least as prominent as the literal portion of applicant's mark. Even if the literal portion is accorded greater weight, applicant maintains that the words MUSEUM TOUR

¹ Application Serial No. 75/118,932, filed June 14, 1996, alleging dates of first use of June 3, 1996. The words "MUSEUM TOUR" are disclaimed apart from the mark as shown.

² Registration No. 2,058,385, issued to Informal Education Products Ltd. on April 29, 1997, setting forth dates of first use of August 1985, and first use in commerce of September 1985.

are merely descriptive, and thus the addition of applicant's house mark QVC is sufficient to avoid confusion. Applicant also asserts, among other things, that the respective services of the applicant and the registrant are offered through different channels of trade.

The Senior Attorney, on the other hand, contends that the marks are similar in overall commercial impression because both marks contain the words MUSEUM TOUR. The Senior Attorney maintains that registrant is entitled to display its mark in the same lettering style as the applied-for mark. The Senior Attorney also asserts that the addition of a geometric background design does not alter the commercial impression of applicant's mark. According to the Senior Attorney, the word portion of applicant's mark is of greater importance, and the addition of applicant's QVC house mark does not distinguish the literal portion of applicant's mark from the cited registered mark. With respect to the involved services, the Senior Attorney argues that both the applicant and the registrant perform retail services, and that applicant's recitation of services is broad enough to include the same products sold by registrant.

The evidence of record consists of a glossary dictionary definition, catalog excerpts, and articles from the Nexis database.³

In determining whether there is likelihood of confusion between two marks, we must consider all relevant factors as set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973). In this case, we have focused on the likelihood of confusion factors discussed in the appeal briefs, including the similarities between the marks, the relatedness of the services, and the channels of trade.

Applicant does not seriously contest the fact that both the applicant and the registrant offer retail services targeted to home shoppers. (Applicant's Reply Br. at 2 & 4). We recognize that the services are offered through different media.

Applicant's recitation of services is limited to television, whereas registrant's recitation is limited to online and catalogs. Contrary to applicant's contention, however, applicant's recitation is not restricted to applicant's own cable television network or to any specific type of retail

³ Although the glossary evidence was not submitted prior to appeal, the Board may take judicial notice of such definitions. See Trademark Rule 2.142(d); *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 U.S.P.Q. 594, 596 (T.T.A.B. 1982), *aff'd*, 703 F.2d 1372, 217 U.S.P.Q. 505 (Fed. Cir. 1983). Applicant also submitted a printout from the Internet with its reply brief. We decline to take judicial notice of Internet evidence. In view thereof, and inasmuch as the Internet evidence is untimely filed, it has been given no consideration. See Trademark Rule 2.142(d).

products. Applicant's broad recitation of services is assumed to encompass all forms of television, as well as retail gifts, toys, games, books, puzzles, CD-ROMs, videos, software, and apparel similar to registrant. See *In re Elbaum*, 211 U.S.P.Q. 639, 640 (T.T.A.B. 1981). Moreover, the average consumer may purchase these types of retail products online, by catalog or by television. Accordingly, we conclude that the services are sufficiently related for purposes of likelihood of confusion.

Turning to the involved marks, it is true that the marks must be considered in their entireties and that the design portion of applicant's mark cannot be ignored. However, there is nothing improper in giving more weight to a dominant feature of a mark. See *In re National Data Corp.*, 753 F.2d 1056, 1058, 224 U.S.P.Q. 749, 751 (Fed. Cir. 1985). In this regard, we note that applicant's design element is a geometric backdrop for the word portion of applicant's mark. It is our opinion that the design element is not as prominent as the word portion of applicant's mark. See *In re Dixie Restaurants, Inc.*, 105 F.3d 1405, 1407, 41 U.S.P.Q.2d 1531, 1534 (Fed. Cir. 1997). The literal portion of applicant's mark is considered dominant because it is more likely to be remembered and used by consumers in requesting the services. See *In re Appetito Provisions Co.*, 3 U.S.P.Q.2d 1553, 1554 (T.T.A.B. 1987).

With respect to the word portion of the involved marks, applicant's mark QVC MUSEUM TOUR has incorporated registrant's entire mark MUSEUM TOUR. The incorporation of the entire registered trademark into a composite mark sought to be registered will increase the likelihood of confusion. See *In re Hyper Shoppes, Inc.*, 837 F.2d 463, 464-65, 6 U.S.P.Q.2d 1025, 1026 (Fed. Cir. 1988); *Wella Corp. v. California Concept Corp.*, 558 F.2d 1019, 1022, 194 U.S.P.Q. 419, 422 (C.C.P.A. 1977).

We are not convinced that the addition of applicant's house mark QVC avoids confusion. As a general rule, the addition of a house mark to an otherwise confusingly similar mark will not serve to avoid confusion. *In re Christian Dior, S.A.*, 225 U.S.P.Q. 533, 535 (T.T.A.B. 1985); *In re C. F. Hathaway, Co.*, 190 U.S.P.Q. 343, 344 (T.T.A.B. 1976). An exception to this general rule may occur when the marks are merely descriptive, and the addition of the house mark is then sufficient to render the marks as a whole distinguishable. *Christian Dior, supra.*; 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, §22:43 (4th ed. 1999).

Contrary to applicant's contention, however, this case does not fall within the exception. While applicant concedes that the words MUSEUM TOUR are descriptive of applicant's services, there is simply no compelling evidence that the words are also merely descriptive of registrant's services. Thus, contrary to

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applicant's argument, this situation is not parallel to that in *Food Specialty Co., Inc. v. Kal Kan Foods, Inc.*, 487 F.2d 1389, 1391, 180 U.S.P.Q. 136, 138 (C.C.P.A. 1973)(no likelihood of confusion between KAL KAN KITTY STEW and KITTY both for cat food) or *In re Merchandising Motivation, Inc.*, 184 U.S.P.Q. 364, 365 (T.T.A.B. 1974)(no likelihood of confusion between MMI MENSWEAR for clothing services and MEN'S WEAR for magazine).

Rather, the addition of applicant's house mark QVC to the registered mark MUSEUM TOUR may increase likelihood of confusion. It is not unreasonable to conclude that consumers familiar with applicant's "famous" QVC house mark may mistakenly believe that registrant's MUSEUM TOUR retail services are affiliated with applicant's home shopping services --in the sense of reverse likelihood of confusion. See *K2 Corp. v. Philip Morris Inc.*, 192 U.S.P.Q. 174, 178 (T.T.A.B. 1976), *aff'd*, 555 F.2d 815, 194 U.S.P.Q. 81 (CCPA 1977); *American Hygienic Laboratories v. Tiffany & Co.*, 12 U.S.P.Q.2d 1979, 1983 (T.T.A.B. 1989).

Decision: The refusal to register is affirmed.

R. L. Simms

D. E. Bucher

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L. K. McLeod
Administrative Trademark
Judges, Trademark
Trial and Appeal Board