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Mailed: May 6, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re QVC, Inc.

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Serial No. 76316937

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

Won T. Oh, Trademark Examining Attorney, Law Office 114 (Margaret Le, Managing Attorney).

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Before Seeherman, Walters and Chapman, Administrative Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

QVC, Inc. has filed an application to register the mark shown below on the Principal Register for "electric fans, electric space heaters and household air cleaners," in International Class 11.<sup>1</sup>

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<sup>1</sup> Serial No. 76316937, filed September 25, 2001, based on an allegation of a bona fide intention to use the mark in commerce.



The examining attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles the mark EQUITABLE HOMEWORKS, previously registered for the services listed below that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or deception:<sup>2</sup>

"on line and mail order retail store services featuring consumer and commercial energy related products, namely, gas grills, carbon monoxide alarms, gas lamps and gas heaters," in International Class 35.<sup>3</sup>

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We reverse the refusal to register.

The examining attorney contends that applicant's mark consists, essentially, of the registered mark minus the word

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<sup>2</sup> Prior to appeal, the examining attorney withdrew an earlier refusal to register, under Section 2(d) of the Trademark Act, based on Registration No. 2089124 for the mark HOMEWORKS, previously registered for electric lighting controls.

<sup>3</sup> Registration No. 2753645, issued August 19, 2003. The registration also includes the following goods, which the examining attorney makes clear in his brief are not the basis for the refusal herein: "inspection, maintenance and repair services for air conditioners, furnaces and other energy-using equipment, namely, hot water heaters; providing line protection and replacement for gas and water lines," in International Class 37; and "providing energy efficiency auditing," in International Class 42.

EQUITABLE; that the registered mark is not a weak mark; that the registered mark is not restricted to any particular style or type font and, thus, could appear with the EQUITABLE portion in smaller letters, making the term HOMEWORKS the dominant portion; and that, otherwise, neither term in the registered mark is dominant.

The examining attorney submitted third-party registrations which he contends show the relatedness of the involved goods and services. Specifically, he submitted six third-party registrations owned by three parties. One of the registrations is based on Section 44 of the Trademark Act and is of no probative value. Only two parties own the other five registrations, and each registration includes long lists of goods which include among them some of applicant's goods and some of the goods which are the subject of registrant's retail services.

Applicant contends that the marks are different and that the examining attorney has improperly dissected the registered mark; that the word EQUITABLE is the dominant portion of the registered mark, as registrant admitted during the prosecution of its then-application; that EQUITABLE distinguishes the registered mark from applicant's mark; that the term HOMEWORKS is weak in the field of consumer products and services; that HOMEWORKS is highly suggestive in connection with products for the home; and

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that "applicant's mark is sought to be registered for specific products[,] whereas, the registered mark has been registered for services."

In support of its position, applicant submitted copies of eight third-party registrations for marks that consist of or include the term HOMEWORKS or HOME WORKS for a wide variety of goods and services; a copy of the application file history for the cited registration, which includes copies of numerous advertisements for the then-applicant's services; and the results of a Google search of the Internet showing use of HOMEWORKS in connection with numerous third-party websites (28 items appear to use the term HOMEWORKS in connection with various goods or services related to the home, while context of the remaining entries is unclear or the entries refer to school assignments); and excerpts from two third-party websites ([www.parcor.com](http://www.parcor.com) states that it is a contractor that "delivers energy solutions bundled to fit any homeowner's budget" and refers to "The Homeworks Financing Plan"; and [www.apluselectronic.com/homeworks](http://www.apluselectronic.com/homeworks) states that "HomeWorks Interactive can make a home safer by automatically turning on landscape and security lighting each night").

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of

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confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that “[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein. The factors deemed pertinent in this proceeding are discussed below.

Considering, first, the goods and services involved in this case, we note that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant’s application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d

1715 (TTAB 1991). Further, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

In this case we have, on the one hand, registrant's services featuring the sale of gas grills, carbon monoxide alarms, gas lamps and gas heaters; and, on the other hand, applicant's electric fans, electric space heaters and household air cleaners. The evidence submitted by the examining attorney consists essentially of a few registrations owned by only two third parties. One registration identifies "a full line of domestic heating appliances," which specifically includes "natural gas heaters" and "electric fans"; and two other registrations include "fans" and "gas lamps." Although third-party registrations are not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, such registrations nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988). However, we find that registrations by only two third parties with no

additional evidence is insufficient to meet the examining attorney's burden of establishing that the goods and services herein are related.

We consider, next, whether applicant's mark and the registered mark, when viewed in their entirety, are similar in terms of appearance, sound, connotation and commercial impression. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entirety, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

In applicant's mark, the word portion, HOMEWORKS, clearly dominates over the minimal design consisting of a

background swirl and the contrasting boldness of the lettering of the words HOME and WORKS.

While we do not agree with applicant that the term HOMEWORKS is highly suggestive in relation to products and services for the home, the evidence submitted by applicant does support the conclusion that HOMEWORKS is at least somewhat suggestive in connection with such goods and services. Conversely, there is no indication that EQUITABLE is anything other than arbitrary in connection with registrant's services. Thus, regarding the cited mark, EQUITABLE HOMEWORKS, we find that EQUITABLE is the dominant portion of the mark, both because it is the first term in the mark and because of the somewhat suggestive nature of HOMEWORKS.

Considering both marks in their entireties, we find that the marks are different in appearance, connotation and commercial impression.

In view of the differences between applicant's mark, , and registrant's mark, EQUITABLE HOMEWORKS, and because the examining attorney has not established a relationship between the respective goods and services, we find on this ex parte record that there is no likelihood of confusion.

*Decision:* The refusal under Section 2(d) of the Act is reversed.