Paper No. 81
PTH

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB APRIL 28, 00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

QVC, Inc.
v.
Home Shopping Network, Inc.

Opposition Nos. 102,173; 103,135; 104,078; 104,173; 104,181; 104,193; and 104,323
to application Serial Nos.
74/591,905 and 74/591,904 filed on October 28, 1994; 74/607,590 filed on December 6, 1994; 74/605,832 filed on December 2, 1994; 74/596,583 filed on November 7, 1994; 74/666,266 filed on April 12, 1995; and 74/620,266 filed on January 10, 1995 respectively

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Request for Reconsideration

Glenn Gundersen, Martin J. Black, Andrew Fish and Terrence A. Dixon of Dechert Price & Rhoads for QVC, Inc.

Edward T. Colbert and Brian S. Mudge of Kenyon & Kenyon for Home Shopping Network, Inc.

Before Hairston, Walters and Chapman, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Home Shopping Network, Inc. (Applicant), following an approved request for extension of time, filed a timely motion on January 31, 2000 for reconsideration of that

portion of our December 17, 1999 decision, which sustained Opposition Nos. 102,173; 103,135; 104,173; and 104,193 and refused registration to applicant. QVC, Inc. (Opposer) has filed a brief in opposition thereto and applicant has filed a reply brief.

Applicant continues to maintain that certain evidence submitted by opposer during its rebuttal testimony period was improper, namely, that it is evidence which should have been presented during opposer's testimony-in-chief. Applicant's arguments in this regard are in essence a rehash of the arguments previously made by applicant in its motion to strike the evidence, which the Board denied. We are not persuaded that our ruling on applicant's motion was in error.

Further, applicant contends that the Board gave insufficient weight to the testimony of several witnesses that opposer purposely avoided use of the term "home shopping" in describing its services because opposer believed that consumers understood the term to refer to applicant. Applicant maintains that such testimony is proof that even opposer recognizes that consumers associate "Home Shopping" with applicant.

As noted in our opinion, we found plausible the explanation of opposer's witness, Frederick Siegel, that opposer preferred to use terms other than "home shopping" in

describing its services in order to project a more upscale image. We did not overlook the testimony of other witnesses that opposer deliberately avoided using the term “home shopping” in describing its services because it believed consumers understood the term to refer applicant. However, as we pointed out in our decision, it may well be that applicant, as a result of its long and continuous use of “Home Shopping” alone and as part of other phrases, has acquired a de facto secondary meaning in the term that some or even many people have come to associate “Home Shopping” with applicant. Nonetheless, where as here, the evidence as a whole establishes that the term is primarily perceived as a generic term, the recognition of the term as a service mark by certain consumers is deemed no more than a de facto secondary meaning that, in legal effect, can neither confer nor maintain service mark rights in the term.

Further, applicant argues that the Board abused its discretion by relying on newspaper articles, court decisions and rulings by the Federal Communications Commission wherein “home shopping” was used in a generic manner instead of evidence submitted by applicant showing a strong enforcement program with respect to the use of “Home Shopping.”

The evidence submitted by applicant in this regard consists of the testimony of applicant’s witness, Susan Weiss, regarding applicant’s enforcement efforts and copies

of stipulated orders from several federal court proceedings. As for the testimony of Ms. Weiss regarding applicant's enforcement efforts, it was simply outweighed by the overwhelming evidence of generic use of "home shopping." Moreover, we did not find the stipulated orders to be of particularly persuasive weight inasmuch as they did not appear to be based on any evidentiary showing that would have been of any help in determination of the issues before us. Stated differently, they appeared to be orders which were prepared as a condition of settlement, and regardless of what private agreements may exist between parties and what concessions may have been made in settling a case, no party has a right to a registration contrary to the Trademark Act.

We should add that it is well settled that evidence of the relevant public's understanding of a term may be obtained from newspapers, magazines and other publications. See: In re Merrill Lynch, Pierce, Fenner, and Smith Inc., 828 F.2d 1567, 4 USPQ2d 1141 (Fed. Cir. 1987) and In re Northland Aluminum Products, Inc., 777 F.2d 1566, 227 USPQ 961 (Fed. Cir. 1985). Thus, it was entirely proper in reaching our decision to rely on excerpts from newspaper articles wherein "home shopping" was used in a generic manner. Also, evidence of the generic use of the term "home shopping" in court decisions and by the regulatory agency in

the field is probative of the how the relevant public would understand the term.

Decision: The request for reconsideration is denied.

P. T. Hairston

C. E. Walters

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