

O-344-10

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NUMBER 2519127
BY TAKE-TWO INTERACTIVE SOFTWARE, INC.
TO REGISTER THE FOLLOWING SERIES OF
THREE TRADE MARKS IN CLASS 25**

ROCKSTAR; Rockstar; rockstar

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TO REGISTER THE FOLLOWING TRADE MARK
IN CLASS 25**

ROCKSTAR
Rockstar
rockstar

Background

1. On 19 June 2009, Take-Two Interactive Software, Inc. ('the applicant') applied to register trade mark application number 2519127, consisting of the series of three marks 'ROCKSTAR', 'Rockstar' and 'rockstar', for the following goods:

Class 25: Clothing, footwear, headgear.

2. On 3 July 2009, the Intellectual Property Office ('IPO') issued an examination report in response to the application. In the report, an objection was raised under section 3(1)(b) of the Trade Marks Act 1994 ('the Act') on the grounds that the mark is devoid of any distinctive character, being seen as "a statement of the wearer, even if only aspirational" and "as a way of showing one's allegiance to a particular lifestyle".

3. Responding to the objection, Mr Holah of Field Fisher Waterhouse ('the agent') submitted that the mark contained the minimum degree of distinctive character required for *prima facie* objection, and emphasised that the mark in question should not be subjected to a higher threshold than any other mark. Making reference to how the sign might be used in trade, the agent also submitted that the mark would function as an indicator of trade origin if used on a collar label or swing tag.

4. As these submissions were rejected by the examiner, an *ex parte* hearing was requested. At the hearing of 27 January 2010, I confirmed that the sign was devoid of any distinctive character, pointing out that any capacity for the mark to denote trade origin was secondary to its more immediate function as non-distinctive decoration when used on certain goods contained within the specification. Referring to the current Trade Marks Examination Guide, which sets out the Registrar's practice in respect of marks considered to be statements by or about the wearer, I confirmed that the section 3(1)(b) objection related solely to tee shirts, sweatshirts and baseball caps (this section of the Examination Guide can be viewed at www.ipo.gov.uk/tmmanual-chap3-exam.pdf under paragraph 1.11/page 144

entitled 'Statements by/about the user of goods/wearer of clothing', and is attached as Annex 5 to this decision).

5. The agent failed to make any further submissions following the hearing, either in order to contest my findings, or to instruct that the specification's reference to clothing and headgear *at large* be amended so as to exclude any such goods being tee shirts, sweatshirts and baseball caps. As a consequence, the application was partially refused for all goods except 'footwear' on 28 May 2010. The agent subsequently filed a form TM5 requesting a statement of reasons for the Registrar's decision.

6. I am now asked under section 76 of the Trade Marks Act 1994, and rule 69 of the Trade Marks Rules 2008, to state in writing the grounds of my decision and the materials used in arriving at it. No formal evidence of use has been put before me for the purposes of demonstrating acquired distinctiveness. Therefore, in respect of the goods and services listed at paragraph 1 above, I have only the *prima facie* case to consider.

The applicant's case for registration

7. All arguments in support of *prima facie* acceptance were presented either in the form of the agent's letter dated 18 August 2009, or in the form of oral submissions made at the *ex parte* hearing on 27 January 2010. In the aforementioned letter, reference was made to a number of Court decisions, including the European Court of Justice's ('ECJ') ruling on 'SAT.2' (case C-329/02, *SAT.1 SatellitenFernsehen GmbH v OHIM*), with the agent emphasising that linguistic or artistic creativity and/or imaginativeness are not requirements for finding distinctive character. Reference was also made to the Appointed Person's decision in 'There ain't no F in Justice' (BL O/094/08) where it was held that, whilst distinctiveness must be assessed in relation to those goods or services for which registration is sought, the manner of use (for example, upon a label, or swing ticket, or printed across the front of a tee shirt) "*is a matter of choice for the trade mark owner*" (paragraph 25 of that decision refers).

8. These points were expanded upon in oral submissions made at the hearing, with the agent arguing that the Registrar had no legal justification for raising an objection, relying instead upon its own self-determined practice of raising objections against those marks which it considers incapable of being perceived *prima facie* as a denotation of trade origin when used in relation to tee shirts, sweatshirts and baseball caps. The agent emphasised that the mark was not a slogan *per se*, and that it should not be precluded from registration on the basis of being assessed as a slogan. Oral reference was also made to the aforementioned decision on 'There ain't no F in Justice', with the agent submitting that the application in suit is equitable to the mark previously considered by the Appointed Person, and that a similar conclusion should be reached in this case.

The Law in relation to section 3(1)(b)

9. Section 3(1)(b) of the Act reads as follows:

3.-(1) The following shall not be registered-

(b) trade marks which are devoid of any distinctive character

Decision - section 3(1)(b)

10. The ECJ has repeatedly emphasised the need to interpret the grounds of refusal of registration listed in Article 3(1) and Article 7(1) (the equivalent provision in Council Regulation 40/94 of 20 December 1993 on the Community Trade Mark) in the light of the general interest underlying each of them (case C-37/03P, *Bio ID v OHIM*, paragraph 59 and the case law cited there and, more recently, case C-273/05P, *Celltech R&D Ltd v OHIM*).

11. The general interest to be taken into account in each case must reflect different considerations according to the ground for refusal in question. In relation to section 3(1)(b) (and the equivalent provision referred to above), the Court has held that "...the public interest... is manifestly indissociable from the essential function of a trade mark" (case C-329/02P, *SAT.1 SatellitenFernsehen GmbH v OHIM*). The essential function thus referred to is that of guaranteeing the identity of the origin of the goods or services offered under the mark to the consumer or end-user by enabling him or her, without any possibility of confusion, to distinguish the product or service from others which have another origin (see paragraph 23 of the above mentioned judgement). Marks which are devoid of distinctive character are therefore those which are incapable of fulfilling that essential function.

12. Section 3(1)(b) must include within its scope those marks which, whilst not designating a characteristic of the relevant goods and services (i.e. not being necessarily descriptive), will nonetheless fail to serve the essential function of a trade mark in that they will be incapable of designating origin. In terms of assessing distinctiveness under section 3(1)(b), the ECJ provided guidance in case C-363/99 *Koninklijke KPN Nederland NV v Benelux-Merkenbureau* (Postkantoor) where, at paragraph 34, it stated:

"A trade mark's distinctiveness within the meaning of Article 3(1)(b) of the Directive must be assessed, first, by reference to those goods or services and, second, by reference to the perception of the relevant public, which consists of average consumers of the goods or services in question, who are reasonably well informed and reasonably observant and circumspect (see *inter alia* joined cases C-53/01 to 55/01 *Linde and Others* [2003] ECR I-3161,

paragraph 41, and case C-104/01 Libertel [2003] ECR I-3793 paragraphs 46 and 75)."

13. This establishes the principle that the question of a mark being devoid of any distinctive character is answered by reference, firstly, to the goods and services applied for, and secondly, to the perception of the average consumer for those goods or services. Whilst the application was refused for 'clothing' and 'headgear' at large, I did emphasise in earlier exchanges that the objection was only maintained in respect of 'tee shirts', 'sweatshirts' and 'baseball caps' (as per the Registrar's practice mentioned at paragraph 4 above). Notwithstanding the broader refusal taken as a result of the applicant's failure to request specification amendment so as to exclude the offending goods, the relevant goods to consider for the purposes of this refusal are therefore 'tee shirts', 'sweatshirts' and 'baseball caps'. In identifying and considering the likely perception of the relevant consumer, these are the types of goods I will focus upon.

14. In seeking to identify the relevant consumer, it is reasonable to assume that these types of clothing products will be purchased and used by the public at large. Notwithstanding the availability of couture fashion ranges which might include tee shirts with a high unit price, items such as tee shirts, sweatshirts and baseball caps are, for the most part, purchased in order to be worn as casual clothing. In many cases, the unit price for such items will be moderate, so the relevant consumer is likely to display only an average level of attention when considering purchase. Consumers are also likely to be reasonably familiar with the practice of emblazoning logos, phrases and other figurative materials across the front of such items. In some cases, (for example, those items marketed by popular international sports clothing brands) consumers will immediately recognise such materials as performing the function of a trade mark i.e. they distinguish one brand's clothing products from those of its competitors. It is also reasonable to speculate that consumers who purchase and wear such products might also wish to display such 'bold' trade mark material as a means of associating themselves with a set of values associated with that particular brand.

15. However, there are also many occasions where tee shirt producers will emblazon textual and/or figurative materials across the front of casual clothing in order to perform a function *other* than that of denoting trade origin. The practice of displaying messages, phrases and decorative images across the front of casual clothing is well established, with the normally basic design of tee shirts and sweatshirts (in comparison to more tailored clothing) making such items an effective platform for displaying messages which are intended to be no more than a statement by, or about, the wearer. Such messages might be commemorative (as in 'Village Cricket Team Spanish Tour 2010'), political (as in 'Ban the Bomb'), provocative (as in 'Kiss Me Quick'), or may serve some other communicative function. In such cases, the use

of messages is clearly not intended to denote trade origin. Furthermore, the relevant consumer understands that to be the case.

16. Having set out some context regarding the Registrar's approach towards those signs which might be used for purposes other than denoting trade origin when displayed on certain items of clothing, I must also bear in mind that the test attributed to the relevant consumer is one based upon immediacy or first impression. This has been confirmed by the European Court of First Instance (now the General Court) which, in its decision on *Sykes Enterprises v OHIM* (Real People Real Solutions, 2002, ECT II-5179, stated the following:

"...a sign which fulfils functions other than that of a trade mark is only distinctive for the purposes of Article 7(1)(b) of Regulation No 40/94 if it may be perceived immediately as an indication of the commercial origin of the goods or services in question, so as to enable the relevant public to distinguish, without any possibility of confusion, the goods or services of the owner of the mark from those of a different commercial origin."

17. Turning to the mark itself, the sign comprises of the term 'rock star' in three separate arrangements of upper and lower case lettering. None of these arrangements are figurative to an extent that the relevant consumer might question what the phrase is or means, so I shall treat all three marks as one and the same. Although it does not enjoy an individual definition in the Cambridge online dictionary, the term 'rock star' is nonetheless listed under the more general definition for 'star' where it is defined as '*a very famous, successful and important person, especially a performer such as a musician, actor or sports player. A **rock/movie/football star***' (my emphasis). I would submit that the term enjoys a high level of recognition amongst consumers, and that the term denotes certain values and behaviours. In the strictest sense, the label 'rock star' is generally applied to someone who, apart from enjoying success within the music business, is also likely to be wealthy, non-conformist, individual and, in some cases, decadent and/or hedonistic. In a more general/public sense, these are all characteristics equally likely to be attractive to the relevant consumer of tee shirts - if one is not a rock star 'by trade', one may still wish to be associated with the sort of values and behaviours associated with the term.

18. As a result of its ability to convey such values (and thereby appeal to the potential consumer), the Registrar considers the term 'rock star' to be one which, firstly, is likely to be used as a decorative message printed on the front of a t-shirt or sweatshirt; and secondly, is unlikely to be perceived *prima facie* as an indicator of trade origin when used in such a way. In support of the Registrar's position on the likelihood of such use, I refer to the four Internet pages attached as Annexes to this decision. The first two references (Annexes 1 and 2), which are taken from **www.zazzle.co.uk** and **www.alibaba.com**, both show tee shirts emblazoned with the words 'Rock Star' together with related figurative materials (the device of a guitar

in one; the device of a star in the other). The second two references, both taken from **www.justjen.com** and presented as Annexes 3 and 4, show the words 'rock star' displayed in jewelled lettering across the front of both ladies and children's wear. In the case of the latter, I note that that the product is promoted via accompanying text which states that "*Your girl's fans know she is a rockstar, now give her the shirt to make it clear*". Presentation of the sign in this manner only serves to reinforce the arguments made in paragraph 17 above, that is, the term 'rock star' appeals to the wearer by virtue of the message it conveys. Whether intended to be recognised by others as a 'serious' presentation of one's ambition in life or, as is more likely to be the case, as a self-deprecating, ironic and/or humorous reference to what one aspires to be, the phrase would not be perceived as indicating trade origin.

19. Of all the submissions made by Mr Holah both in writing and at the *ex parte* hearing, the greatest emphasis was placed on the alleged parallels between this application and the 'There ain't no F in Justice' trade mark considered by Professor Annand sitting as the Appointed Person (BL O/094/08). In response, and notwithstanding the value of previous decisions in the context of providing guidance, it should be pointed out that the Registrar is not bound by a decision of the Appointed Person which relates to a sign dissimilar to that being addressed in this decision. In assessing whether a sign is likely to individualise goods (such as T-shirts) to a particular undertaking the Registrar undertakes a test based on the balance of probabilities that does not ignore use of the sign in context. I therefore consider my assessment and resulting section 3(1) objection to be both fair and reasonable, given the nature of the term applied for; the nature of the goods; the likely perception of the relevant consumer; and the well-established obligation on the part of the Registrar to consider notional and fair use of the mark being applied for.

20. The current Trade Marks Examination Guide contains a section on 'notional and fair use' which confirms that the Registrar has a duty to consider how a trade mark might be used in the marketplace and, more importantly, the extent to which different types of usage may have a bearing on how distinctive that mark would be in its various modes of use (see page 82 of the Examination Guide pdf at **www.ipo.gov.uk/tmmanual-chap3-exam.pdf** - also attached as Annex 6 to this decision). Although this section lists use on packaging and advertising as being examples of how a mark might be displayed beyond more conventional use on labels and tags etc., it seems reasonable, given what I have already stated regarding the common practice of displaying slogans and phrases on tee shirts, to consider such presentation of this mark as being within the ambit of notional and fair use when assessing in the context of clothing. In essence, an assessment which takes into account established practices within the relevant trade is, I believe, a prerequisite for undertaking a 'stringent and full' examination in accordance with guidance as set out in *Libertel* (paragraph 59) and *OHIM v Erpo Möbelwerk* (paragraph 45).

21. The practice of considering how a mark is likely to be used in context (and the resulting perception of the relevant consumer) is well established in respect of the assessment of *prima facie* distinctiveness. Notwithstanding the fact that criteria for assessing distinctive character should not differ in respect of the different sub-categories of trade marks (whether slogans, shapes, surface treatments, colours etc.), the ECJ has nonetheless confirmed in cases such as *Henkel KGaA v OHIM* (case C-144/06 P) and *Vibe Technologies Ltd's Application* (Appointed Person's decision of 2009, ETMR 12) that the perception of the average consumer will not necessarily be the same for all such categories of marks (respective paragraphs 36 and 63 of those decisions refer). Additionally, in *OHIM v Avon Products, Inc.* (case T-184/07) the General Court (then the CFI) considered how a mark would likely be perceived in an oral capacity given that the goods in question (cosmetics) were recognised as being commonly marketed and sold via doorstep selling techniques (paragraph 21 refers). Whilst neither of these trade mark cases have material similarities to the refused mark, their corresponding decisions nevertheless emphasise the multi-factorial analysis which one has to apply in order to accurately and effectively assess a mark's capacity to function *prima facie* as an indicator of trade origin. Alongside the Registrar's paramount obligation to undertake a thorough semantic analysis of the sign applied for, it must also consider - by reference to the goods intended for coverage - additional factors such as the corresponding market, and the likely perception of the relevant consumer. My acknowledgement that the sign 'Rock Star' could reasonably be displayed for purposes of non-distinctive decoration rather than for purposes of origin signification - when used in respect of tee shirts, sweatshirts and baseball caps - is therefore nothing more than a result of the Registrar fulfilling its obligation to adopt a multi-factorial approach towards the examination of a trade mark.

22. In refusing the mark, the Registrar is not alleging that the sign 'rock star' is factually incapable of denoting trade origin when used in respect of tee shirts. The proviso to section 3(1) makes it clear that, with use, the sign may acquire distinctive character. However, in the absence of any materials which show how the mark is used, or is intended to be used, I have had to consider the application solely by reference to mark's semantic characteristics, the goods applied for, and taking into account what I consider to be the well-established trade practice of displaying non-distinctive messages and slogans on the front of specific items of clothing. In doing so, I must conclude that the sign 'rock star' is *prima facie* incapable of denoting trade origin when used in respect of tee shirts, sweatshirts and baseball caps.

Conclusion

23. In this decision, I have considered all documents filed by the applicant/agent, and all arguments submitted to me in relation to this application. Having done so, and for the reasons given above, the application is partially refused in respect of 'clothing' and 'headgear' (in so far as those terms cover tee shirts, sweatshirts and baseball

caps) under the terms of section 37(4) of the Act because it fails to qualify under section 3(1)(b) of the Act.

Dated this 5 day of October 2010

**David Evans
For the Registrar
The Comptroller-General**

APPENDIX

Annex 1

Website found at www.zazzle.co.uk/rockstar+tshirts

The screenshot shows a Windows Internet Explorer browser window with the address bar displaying <http://www.zazzle.co.uk/rockstar+tshirts>. The page content is organized into a grid of product listings. Each listing includes a thumbnail image of a t-shirt, a title, and the creator's name. The titles and creators are as follows:

- Jason Mraz - Hooded Sweatshirt by ZazzleMraz
- Famous T-Shirt (Blue) by TheSpottedOlive
- KISS Bears T-shirt by kissmerch
- ROCK STAR TEE SHIRTS by DesignToShirt
- Bones & Rainbows Women's Tee T-shirt by zupiitees
- Rock Hand Skull Ringer T T-shirts by the3rdbase
- Dads Like To Rock Out T-Shirt by TheSpottedOlive
- ROCK STAR IN BLUE VINTAGE STYLE T-shirt by nassosvakalis
- Rocktopus Tshirt by Detourdesignables
- Women's Cheap Trick Logo - Pick You by cheaptrick
- Roxie Rockstar Tee Shirts by ButtermilkBiscuits
- Born To Rock Tee Shirt by magarmor

The left sidebar contains a 'Narrow By Topic' section with various categories such as 'Animals, Pets', 'Architecture, Living Space', 'Arts, Design, Fashion', 'Astronomy, Space', 'Business, Motivational', 'Computers, Science, Technology', 'Contests', 'Events, Holidays, Greetings', 'Fantasy, Science Fiction', 'Food, Drink', 'Government, Military', 'Humour, Sayings', 'Miscellaneous', 'Nature, Landscapes', 'Panoramic Maps, Photos, Views', 'Party, Music, Entertainment', 'People, Health, Cultures', 'Photography', 'Places, Regional', 'Politics', 'Religion', 'Spirituality, Inspirational', 'Sports, Teams', 'Transportation', 'Travel, Hobbies, Gaming', 'Vintage, Historical', and 'Youth, School, Academics'. At the bottom of the sidebar is a 'CREATE YOUR OWN!' button with a 'YOUR DESIGN' placeholder.

The browser's taskbar at the bottom shows several open applications: Start, Novell-deliv..., Inbox - Micr..., 2519127 R..., Semantic - ..., Rockstar T..., VORSPRUN..., "Rock Star"..., and the system clock at 11:55.







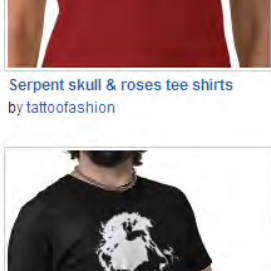








www.zazzle.co.uk/rockstar+tshirts continued

Rockstar T-Shirts, Hoodies, Custom Rockstar Shirts and Clothing - Windows Internet Explorer provided by UK-IPD

File Edit View Favorites Tools Help

http://www.zazzle.co.uk/rockstar+tshirts

YOUR DESIGN HERE
YOUR IDEAS ON 100'S OF PRODUCTS.
Get Started Now!

 <p>KISS Dressed To Kill T-shirt by kissmerch</p>	 <p>Saints of Los Angeles Shirt by motleycrue</p>	 <p>Star T Shirt by apollo335</p>
 <p>BuzyB. Rock Star T Shirt by Bajan_Beau</p>	 <p>Rob Thomas Blue Abstract T Shirt by robthomas</p>	 <p>Rockstar Shirt by magarmor</p>
 <p>Serpent skull & roses tee shirts by tattooofashion</p>	 <p>Cheap Trick Logo - Pick Your Shirt by cheaptrick</p>	 <p>Incubus Three Hearts T-shirt by incubus</p>
 <p>Beethoven Tshirt by magarmor</p>	 <p>Jason Mraz - Microphone T-Shirt by ZazzleMraz</p>	 <p>Interpol Logo Tshirt by Interpol</p>
		

Start Novell-deliv... Inbox - Micr... 2519127 R... Semantic - ... Rockstar T... VORSPRUN... "Rock Star" ... 11:55

Annex 2

Website found at

www.alibaba.com/product-free/261502851/Rock_Star_toddler_t_shirt.html

The screenshot shows a Windows Internet Explorer browser window displaying the Alibaba.com product page for a Rock Star toddler t-shirt. The browser's address bar shows the URL: http://www.alibaba.com/product-free/261502851/Rock_Star_toddler_t_shirt.html. The page features the Alibaba.com logo and navigation tabs for Products, Suppliers, and Buyers. A search bar is visible with the text "Search Products". The breadcrumb trail indicates the product is in the category "Children's T-Shirts (23697)". A summary box states "There are 3892 toddler t-shirt from 27 suppliers on Alibaba.com" and lists related search terms: "toddler t-shirt", "blank toddler t-shirts", "t-shirts for boys", "plain cotton t-shirt", and "Wholesale toddler t-shirt". The main product listing includes a black t-shirt with a white star and "ROCK STAR" text. The product title is "Rock Star toddler t-shirt". Below the image, there is a "See larger image" link and an "Add to My Favorites" button. The product details section shows "Other products by Technics: Printed" and "FOB Price: Get Latest Price". A contact box includes "Mr. Sir or Madam" (offline), a "Contact Supplier" button, and a "Send a Message to this Supplier" link. A "Supplier Details" sidebar lists "Babygags Inc [United States]", "Business Type: Trading Company", and a "Contact Details" link. Below the product details, there are tabs for "Product Details" and "Company Profile". The "Quick Details" section shows "Product Type: T-Shirts", "Age Group: Children", and "Technics: Printed". The "Specifications" section lists the product name and price: "Rock Star toddler t-shirt", "Your Price: \$15.99". The browser's taskbar at the bottom shows several open applications, including "Novell-deliv...", "Inbox - Micr...", "2519127 R...", "Semantic - ...", "Rock Star ...", "VORSPRUN...", and "Rock Star". The system clock shows 11:57.

Annex 3

Website found at www.justjen.com/buy/tshirt-rockstar.htm

Rockstar T Shirt - Be a Rockstar with dazzling rhinestones - Windows Internet Explorer provided by UK-IPO

File Edit View Favorites Tools Help

http://www.justjen.com/buy/tshirt-rockstar.htm

My Cart ♦ Styles & Sizes ♦ Help ♦ Contact ♦ Call Toll Free 1.888.744.6379

just jen SHOPS * CUSTOM * T SHIRTS * CLOTHING * WHOLESALE

Rockstar T Shirt

Rock Star t shirt sparkles with Swarovski crystals, fitted 100% cotton. Choice of crystal and shirt color. Live your life at full volume!

Created exclusively by Just Jen with 14 facet Swarovski crystals. "ROCK STAR" letters (all upper case) in your choice of crystal rhinestone colors. Guitar in Crystal AB rhinestones. 100% cotton, made in USA. Available in boy beater tank, spaghetti strap tank or baby doll shirt styles.

Shown: Light Siam rhinestones

- ✓ Swarovski Crystal
- ✓ Ships in 1 day
- ✓ \$5 Economy Shipping
- ✓ Free Shipping over \$75

Pick from...
- 11 shirt styles
- 22 crystal colors

QUICK LINKS

[»bride shirts](#) [»birthday shirts](#)
[»custom hoodies](#) [»sister shirts](#)

Create Your Own

- Custom
- Personalized

Shops

- All Rhinestone Clothing
- Baby & Girls
- Bridal
- Cheerleading
- Birthday
- Christmas

Womens Shop

- Womens T-shirts
- Womens Hoodies
- Maternity

Products

- Home
- All Rhinestone T-shirts
- Hoodies & Sweats
- Aprons
- Caps

Favorites

- Lucky T-shirt
- Skull T-shirt
- Cross T-shirt
- #1 Mom
- Love
- Martini T-shirt
- Cross Hoody
- USA T-shirt
- Rodeo

[close-up](#) Price: 33.90

Select a T-Shirt Style

size & info	size & info	size & info	size & info	size & info	size & info	size & info
Fitted Short-Sleeve	Fitted Long-Sleeve +2.00	Beater Tank	Spaghetti Tank	Raglan 3/4 Sleeve +2.00	Unisex T-Shirt (Non-Fitted)	Maternity T-Shirt (Black & White)

size & info	size & info	size & info	size & info
Cotton-Spandex Short-Sleeve (Longer Length) +\$2.00	Cotton-Spandex Long-Sleeve (Longer Length) +\$3.00	Polo Short-Sleeve +\$4.00	Organic Short-Sleeve +\$2.00

Select a Shirt Size and Color

Start Novell-deliv... Inbox - Mic... 2519127 R... Semantic... Rockstar T... VORSPRUN... "Rock Star" ... 11:59

Annex 4

Website found at www.justjen.com/buy/tshirt-girls-rockstar.htm

just jen SHOPS * CUSTOM * T SHIRTS * CLOTHING * WHOLESALE

My Cart * Styles & Sizes * Help * Contact * Call Toll Free 1.888.744.6379

Rock Star T Shirt

Girls Rock Star t shirt sparkles with guitar in the middle. Your girl's fans know she is a rockstar, now give her the shirt to make it clear.

Crystallized with Swarovski crystal rhinestones - imported from Austria for maximum sparkle.

"ROCK STAR" letters (all upper case) in your choice of crystal rhinestone colors. The guitar comes in CrystalAB rhinestones.

Shown: Light Siam (red) diamond rhinestones

Price: 31.90

- ✓ Swarovski Crystal
- ✓ Ships in 1 day
- ✓ \$5 Economy Shipping
- ✓ Free Shipping over \$75

Pick from...
- 6 shirt styles
- 6 shirt colors
- 22 crystal colors

QUICK LINKS
[mermaid shirt](#), [flower girl shirt](#), [cupcake t shirt](#), [girls diva shirt](#), [crown hoodie](#), [girls rockstar shirt](#)

Create Your Own
Custom
Personalized

Shops
Womens
Baby & Girls
Bridal
Maternity
Cheerleading

Kids Shop
Big Sister
Birthday
Animals
Princess

Products
Home
All Rhinestone T-shirts
Hoodies & Sweats

Favorites
Diva T-shirt
Cupcake T-shirt
My Mom Rocks!
Lady Bug Hoody
Rockstar T-shirt
Skull T-shirt
Mermaid

Select Shirt Style

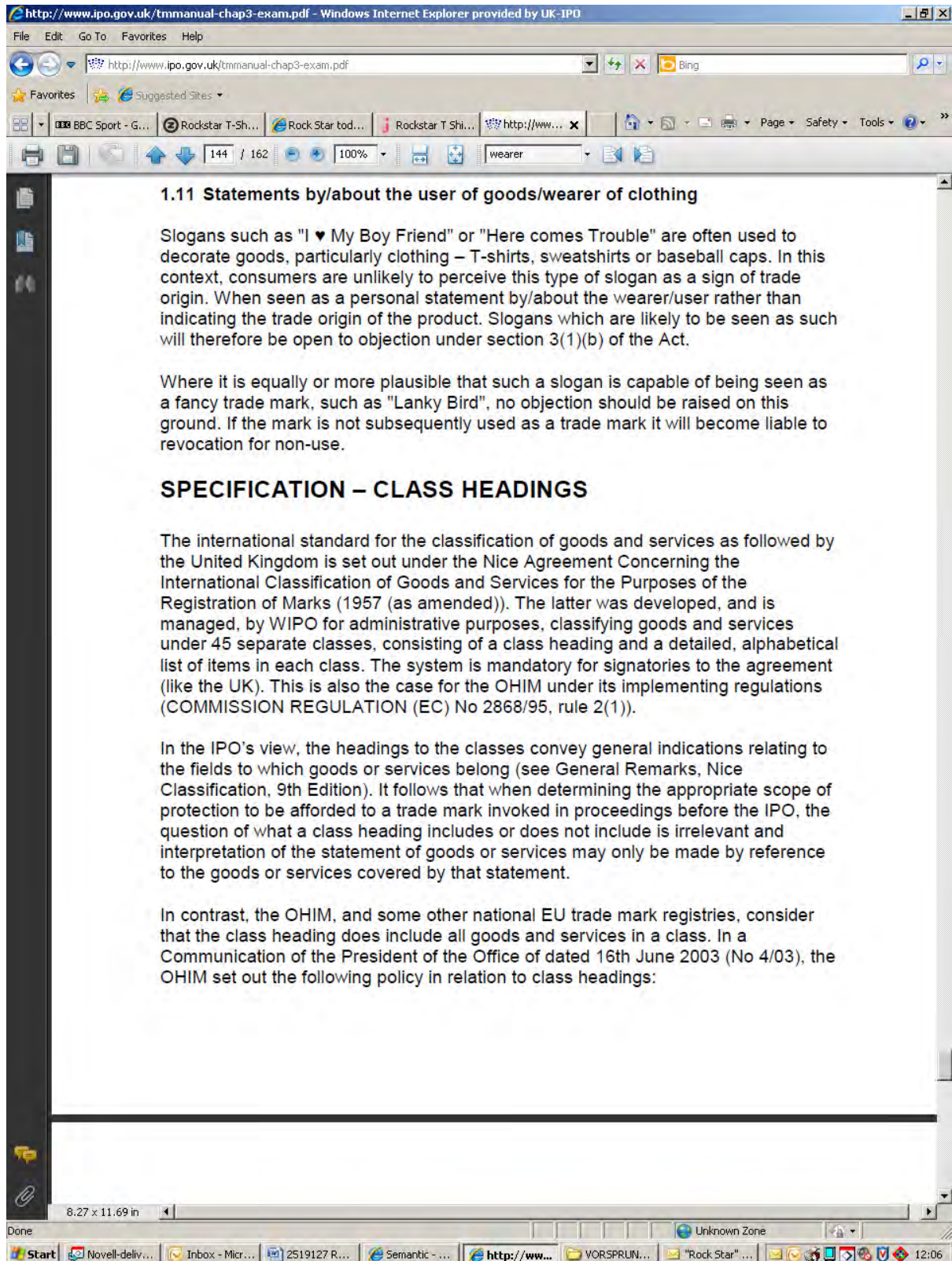
- [size & info](#)
Infant Onesie
- [size & info](#)
Long-sleeve Infant Onesie
- [size & info](#)
Infant Tee
- [size & info](#)
Long-sleeve Infant Shirt
- [size & info](#)
Child T-Shirt
- [size & info](#)
Long-sleeve Child T
- [size & info](#)
Child Raglan

- [size & info](#)
Child / Infant Tank Top
- [size & info](#)
Bamboo T-Shirt

Select Shirt Size & Color

Annex 5

Trade Marks Examination Guide - section entitled 'Statements by/about the user of goods/wearer of clothing'



1.11 Statements by/about the user of goods/wearer of clothing

Slogans such as "I ♥ My Boy Friend" or "Here comes Trouble" are often used to decorate goods, particularly clothing – T-shirts, sweatshirts or baseball caps. In this context, consumers are unlikely to perceive this type of slogan as a sign of trade origin. When seen as a personal statement by/about the wearer/user rather than indicating the trade origin of the product. Slogans which are likely to be seen as such will therefore be open to objection under section 3(1)(b) of the Act.

Where it is equally or more plausible that such a slogan is capable of being seen as a fancy trade mark, such as "Lanky Bird", no objection should be raised on this ground. If the mark is not subsequently used as a trade mark it will become liable to revocation for non-use.

SPECIFICATION – CLASS HEADINGS

The international standard for the classification of goods and services as followed by the United Kingdom is set out under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (1957 (as amended)). The latter was developed, and is managed, by WIPO for administrative purposes, classifying goods and services under 45 separate classes, consisting of a class heading and a detailed, alphabetical list of items in each class. The system is mandatory for signatories to the agreement (like the UK). This is also the case for the OHIM under its implementing regulations (COMMISSION REGULATION (EC) No 2868/95, rule 2(1)).

In the IPO's view, the headings to the classes convey general indications relating to the fields to which goods or services belong (see General Remarks, Nice Classification, 9th Edition). It follows that when determining the appropriate scope of protection to be afforded to a trade mark invoked in proceedings before the IPO, the question of what a class heading includes or does not include is irrelevant and interpretation of the statement of goods or services may only be made by reference to the goods or services covered by that statement.

In contrast, the OHIM, and some other national EU trade mark registries, consider that the class heading does include all goods and services in a class. In a Communication of the President of the Office of dated 16th June 2003 (No 4/03), the OHIM set out the following policy in relation to class headings:

Annex 6

Trade Marks Examination Guide - section entitled 'Notional and Fair Use'

“NOTIONAL AND FAIR USE” and section 3(1)

The concept “Notional and fair use” refers to how a trade mark may be used in the market-place and, consequently, will have a bearing on how distinctive the mark will be in its various modes of use. This will include use on business papers, on packaging and in advertising, ie. not just on more conventional means for carrying brands, such as swing tags and sew-in labels etc. A mark may lose trade mark significance when encountered in a promotional context rather than physically used on the goods. Care must be taken when examining a mark which “reads” into the goods or services.

“Notional and fair use” of a mark registered in block capitals will also include use in differing typefaces and in upper and lower case letters.

OBSERVATIONS (Post advertisement)

Section 38(3) of the Act provides that, once an application has been published, any person may at any time before registration, make observations as to whether a trade mark should be registered.

Section 40(1) of the Act (as recently amended by The Trade Marks (Proof of Use) Regulations 2004) states that, where no notice of opposition is filed or opposition is withdrawn or decided in favour of the applicant, the registrar shall register the trade mark:

“...unless it appears to him having regard to matters coming to his notice since the application was accepted that the registration requirements (other than those mentioned in section 5(1),(2) or (3)) were not met at that time”.

Consequently, for applications published after 5 May 2004, objections based upon the existence of earlier conflicting trade marks can only be raised after publication in