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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Kids Hope United

Serial No. 78549913

Richard O'Brien and Laura Rankin of Sidley Austin Brown & Wood LLP for Kids Hope United.

Alain Lapter, Trademark Examining Attorney, Law Office 108
(Andrew Lawrence, Managing Attorney).

Before Hairston, Mermelstein and Wellington, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

On January 19, 2005 Kids Hope United applied to
register the mark KIDS HOPE UNITED and Design, as
reproduced below,



for services ultimately identified as:

Business consultation services for community social service agencies in International Class 35;

Charitable services, namely providing programs to help adolescents who have been involved in the juvenile justice system to develop skills to live independently; providing educational and prevention programs on teen pregnancy; providing school based counseling, early education and school readiness programs; providing training programs for parents and caregivers in skills for raising children and managing a home; providing educational programs to promote the mental, emotional, social and spiritual health and development of families and educate the public about the needs of children and families; providing training programs for persons seeking careers in social work in International Class 41;

After-school services for school-aged children designed to provide safe child care which complements formal education; day care for children from infancy to school age in International Class 43;

Mental health services, namely providing therapy to behaviorally challenged youth, and providing crisis intervention for youth and families in International Class 44; and

Social services and child welfare services, namely offering programs that address the needs of abused or neglected children through adoption, kinship care and foster care services; case management services through coordination of legal, social and psychological services for abused and neglected children; providing foster care grandparent programs, in-home civil protection, support, education and counseling in International Class 45.¹

¹ Serial No. 78549913; alleging a date of first use anywhere of November 1, 2004, and a date of first use in commerce of November 15, 2004.

The trademark examining attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), in view of the marks KIDS HOPE USA² (in standard character form) and KIDS HOPE USA and Design,³ as reproduced below,



both owned by the same entity for "educational services, namely, providing training and coordination of training programs in the field of at-risk school aged children." The words "KIDS" and "USA" have been disclaimed in both registrations. It is the examining attorney's position that applicant's mark so resembles these registered marks that, as used in connection with the identified services, it is likely to cause confusion, to cause mistake, or to deceive.

² Registration No. 2693529 issued March 4, 2003.

³ Registration No. 2693528 issued March 4, 2003.

When the refusal was made final, applicant filed this appeal. Applicant and the examining attorney have filed briefs. We affirm the refusal to register.

We turn first to a procedural matter. In its appeal brief, applicant states that subsequent to the filing of its request for reconsideration "the Patent and Trademark Office has published at least two more 'kids' plus 'hope' marks for opposition." (Brief at 7). Applicant lists the Serial Numbers of the applications and the marks and argues that this is additional evidence that marks containing the words KIDS and HOPE are weak marks. However, in order to rely upon a third-party application, a copy of such application, or the electronic equivalent thereof from the USPTO's database, must be submitted. Moreover, Trademark Rule 2.142(d) provides that the record in the application must be complete prior to the filing of an appeal. Additional evidence filed after appeal normally will be given no consideration. In this case, applicant failed to properly make the third-party applications of record. Thus, in reaching our decision herein, we have given no consideration to these applications. We should add that even if such applications were considered, they would have no effect on our decision herein. Third-party applications have virtually no probative value; actual copies of the

applications would show only that the applications have been filed.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

With respect to the du Pont factor regarding the similarity or dissimilarity of the services, we note that the examining attorney, in his brief, has focused his arguments on the similarity of applicant's Class 41 services and registrant's services. The examining attorney does not discuss applicant's other services in Classes 35, 43, 44, and 45. In view thereof, we consider the examining attorney to have withdrawn the refusal to register as to these classes.

In comparing the services, it is not necessary that they be identical or even competitive in order to support a finding of likelihood of confusion. It is sufficient that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under circumstances which could give rise, because of the marks used in connection therewith, to the mistaken belief that the services originate from or are in some way associated with the same source. In re International Telephone and Telegraph Corp., 197 USPQ 910 (TTAB 1978). Further, it is well settled that the question of likelihood of confusion must be determined based on an analysis of the services recited in applicant's application vis-à-vis the services recited in the cited registrations, 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 1783 (Fed. Cir. 1992); and The Chicago Corp. v. North American Chicago Corp., 20 USPQ2d 1715 (TTAB 1991).

In this case, we find that applicant's Class 41 services and registrant's services are closely related, if not overlapping. Applicant's Class 41 services are identified as follows:

Charitable services, namely providing programs to help adolescents who have been involved in the juvenile justice system to develop skills to live

independently; providing educational and prevention programs on teen pregnancy; providing school based counseling, early education and school readiness programs; providing training programs for parents and caregivers in skills for raising children and managing a home; providing educational programs to promote the mental, emotional, social and spiritual health and development of families and educate the public about the needs of children and families; providing training programs for persons seeking careers in social work.

Registrant's services are identified in each registration as "educational services, namely, providing training and coordination of training programs in the field of at-risk school aged children." Applicant acknowledges that both its services and registrant's services fall into the broad category of services which benefit children. It is applicant's position, however, that the respective services are different because registrant's services involve church volunteers who develop one-on-one mentoring relationships with at-risk children from elementary schools whereas applicant offers its services directly to children, their families, and other caregivers. In addition, applicant argues that the respective services are not similar in nature because registrant focuses only on at-risk school aged children whereas applicant "provides a continuum of services which begin before children are born and continue throughout children's lives." (Brief at 11).

Applicant's identified services of "providing training programs for parents and caregivers in skills for raising children and managing a home" and "providing educational programs to promote the mental, emotional, social and spiritual health and development of families and educate the public about the needs of children and families" are broad enough to encompass training programs and educational programs aimed at helping at-risk school aged children. Such services, therefore, are closely related to, if not overlapping with, registrant's services of "providing training and coordination of training programs in the field of at-risk school aged children." Further, in the absence of any limitations in the respective identifications of services, we must presume that applicant's and registrant's services would be offered in some of the same channels trade, such as by community organizations and churches, to some of the same class of purchasers, such as parents and caregivers. In re Elbaum, 211 USPQ 639 (TTAB 1981). In other words, we cannot draw the distinctions urged by applicant with respect to the channels of trade and purchasers or users. We find, therefore, that applicant's Class 41 services and registrant's services are sufficiently related that if offered under the same or similar marks, confusion as to source or sponsorship

thereof would be likely to occur. See *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 209 USPQ 986 (CCPA 1981) [likelihood of confusion may be found if there is an overlap or relatedness in any item in the identifications of goods and/or services].

We turn then to the du Pont factor of the similarity or dissimilarity of the marks. We must determine whether applicant's mark and registrant's marks, when compared in their entireties, are similar or dissimilar in terms of sound, appearance, connotation and commercial impression. Although the marks must be considered in their entireties, 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). Furthermore, 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 commercial impression that confusion as to the source of the 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).

With respect to the marks, applicant argues that the examining attorney has failed to analyze applicant's mark and registrant's marks in their entireties. In particular, applicant maintains that the examining attorney failed to give appropriate consideration to the term UNITED and the star design in its mark and the term USA and the design element in registrant's marks. Further, applicant contends that the examining attorney failed to take into account the evidence it presented to show that registrant's marks are weak and, as such, are entitled to only a narrow scope of protection. Applicant maintains that a finding of likelihood of confusion cannot be based upon the presence in each mark of the weak or suggestive term KIDS HOPE, when the remaining portions of applicant's and registrant's marks differ in appearance, sound and meaning. In support of its position that the common element KIDS HOPE must be de-emphasized due to the common and weak nature thereof, applicant relies upon copies of seven third-party registrations for marks which include the words KIDS or CHILDREN and HOPE for various training and educational programs aimed at helping children. In addition, applicant submitted Internet printouts of web pages for organizations

with names that include the terms KIDS or CHILDREN and HOPE.

The examining attorney, however, maintains that when applicant's mark and registrant's marks are considered in their entireties, with appropriate weight given to certain features, they are highly similar. With respect to the third-party registrations, the examining attorney points out that none of the marks in these registrations includes the exact phrase KIDS HOPE. Thus, it is the examining attorney's position that such registrations do not demonstrate that marks which include the phrase KIDS HOPE are weak and entitled to only a limited scope of protection. The examining attorney contends that, at most, the third-party registrations demonstrate that the individual words KIDS and HOPE are somewhat weak. Further, the examining attorney maintains that unlike applicant's mark, each of the marks in the third-party registrations is significantly different from the cited registered marks in commercial impression.

We agree with the examining attorney that when applicant's mark and each of registrant's marks are considered in their entireties, they are so similar in sound, appearance, connotation and commercial impression that the contemporaneous use thereof in connection with the

closely related services in this case is likely to cause confusion as to the origin or affiliation or source of such services.

In comparing applicant's mark and registrant's mark KIDS HOPE USA (in standard character form), we first note that each of these marks is dominated by the identical term KIDS HOPE. Although registrant's mark includes the additional word USA, this merely geographically descriptive and disclaimed word is clearly subordinate to KIDS HOPE. Further, consumers are often known to use shortened forms of names, and it is highly likely that registrant and its services are referred to as "Kids Hope." Cf. *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 219 (CCPA 1978) [Rich, J., concurring: "the users of language have a universal habit of shortening full names - from haste or laziness or just economy of words"]. Likewise, the phrase KIDS HOPE dominates over the word UNITED and the star design in applicant's mark. The portion of applicant's mark most likely to be remembered by purchasers and users in referring to applicant's services is KIDS HOPE. Thus, the dominant portion of these marks are identical. The significance of the phrase KIDS HOPE as the dominant element of these marks is further reinforced by the fact that it is the first part of the marks. Presto Products

Inc. v. Nice-Pak Products, Inc., 9 USPQ2d 1896, 1897 (TTAB 1988) ["It is often the first part of a mark which is most likely to be impressed upon the mind of purchasers and be remembered"]. See also Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) ["Veuve" is the most prominent part of the mark VEUVE CLICQUOT because "veuve" is the first word in the mark and the first word to appear on the label].

Although the marks are dominated by the identical phrase, we must, of course, consider the marks in their entireties. In doing so, we find that the marks are similar in sound and appearance. While we note that applicant's mark contains a star design, this small design is simply too insufficient an element to distinguish applicant's mark from registrant's mark KIDS HOPE USA (in standard character form). The star would not change the pronunciation of applicant's mark. Moreover, because registrant's mark is in standard character form, it may be displayed in any reasonable manner, including the same font as used by applicant. See, e.g., Phillips Petroleum Co. v. C. J. Webb, Inc., 442 F.2d 1376, 170 USPQ 35 (CCPA 1971) and INB National Bank v. Metrohost Inc., 22 USPQ2d 1585 (TTAB 1992).

Further, the marks are very similar in meaning and in their overall commercial impression. The phrase KIDS HOPE, in the context of applicant's and registrant's services, has the identical suggestive meaning of offering "hope to children" Thus, the connotation and overall images conveyed by the marks are similar.

We also find that applicant's mark KIDS HOPE UNITED and Design and registrant's mark KIDS HOPE USA and Design are similar. As discussed above, the phrase KIDS HOPE is the dominant element in applicant's mark. With respect to registrant's mark KIDS HOPE USA and Design, it is the literal portion of this mark, KIDS HOPE USA, rather than the design element which would be regarded by purchasers as the principal source-signifying portion of the mark. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987) [if a mark comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request or refer to the services]. Further, because of the geographically descriptive nature of the term USA, it is the phrase KIDS HOPE which is the dominant element in registrant's mark.

As indicated, the comparison of marks is not made on a side-by-side basis and the recall of purchasers or users of services is often hazy and imperfect. Thus, the

differences in applicant's mark and each of registrant's marks are not so significant that they are likely to be remembered by the relevant public when seeing these marks at different times in connection with closely related training and educational programs. Even if purchasers remember the specific differences in the marks, they are likely to perceive applicant's mark KIDS HOPE UNITED and Design as simply a variation of registrant's marks KIDS HOPE USA (in standard character form) and KIDS HOPE USA and Design. In other words, they are likely to assume that applicant's mark identifies related training and educational programs aimed at helping children coming from the same or an affiliated organization, rather than a different source.

Applicant's evidence does not compel a different result in determining likelihood of confusion. It is well settled that third-party registrations are not evidence of use of the marks shown therein, or that consumers have been exposed to them. *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268 (CCPA 1973). Likewise, the Internet printouts are of limited probative value because there is no indication of the extent to which the services identified at the web sites have been rendered,

when the marks were adopted, or customer familiarity with the marks.

Third-party registrations, however, are probative to the extent that they may show the meaning of a mark or a portion of a mark in the same way that dictionaries are employed. See *Mead Johnson & Company v. Peter Eckes*, 195 USPQ 187 (TTAB 1977). Here, the third-party registrations and web sites containing the words KIDS or CHILDREN and HOPE indicate that such words were chosen by the trademark owners to suggest that their services "offer children hope."

However, this fact does not help to distinguish applicant's mark and registrant's marks. The phrase KIDS HOPE, as used in these marks, conveys the same suggestive significance and the additional words and design elements do not change that meaning or commercial impression of the marks.

In any event, even if marks which contain the words KIDS or CHILDREN and HOPE are considered to be weak due to an assertedly high degree of suggestiveness conveyed by such words, even weak marks are entitled to protection where confusion is likely. Here, notwithstanding any alleged weakness in the phrase KIDS HOPE, applicant's mark is still substantially similar in sound, appearance,

connotation and commercial impression to each of the registered marks. Also, as the examining attorney points out, because none of the marks in the third-party registrations contains the exact phrase KIDS HOPE,⁴ they are not as similar to registrant's marks as is applicant's mark.

Finally, applicant argues that there has been no actual confusion despite concurrent use of applicant's and registrant's marks. This argument, however, is unpersuasive, particularly since we have no information regarding the extent of applicant's and registrant's use or whether a meaningful opportunity for actual confusion has existed. In re Kangaroos U.S.A., 223 USPQ 1025, 1026-1027 (TTAB 1984) [claim of no actual confusion "is of little probative value in an ex parte proceeding ... where we have no evidence pertaining to the nature and extent of the use by applicant and registrant ... and the registrant has no chance to be heard from ..."].

Accordingly, we conclude that persons familiar with either of the registered marks KIDS HOPE USA or KIDS HOPE USA and Design for educational services, namely, providing training and coordination of training programs in the field

⁴ For example, the third-party registrations cover such marks as KIDS AT HOPE, HOPE STREET KIDS, and HOPE FOR PARENTS AND KIDS.

of at-risk school aged children would be likely to believe, upon encountering the substantially similar mark KIDS HOPE UNITED and Design for providing training programs for parents and caregivers in skills for raising children and managing a home; and providing educational programs to promote the mental, emotional, social and spiritual health and development of families and educate the public about the needs of children and families, that such closely related services emanate from or are associated with or sponsored by the same source.

Decision: The refusal to register applicant's mark for its Class 41 services because of Registration Nos. 2693528 and 2693529 is affirmed. The application will go forward with respect to the other classes.