

**THIS OPINION IS NOT A
PRECEDENT OF THE T.T.A.B.**

Mailed:
June 12, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Kid's Choice Dental, Inc.

REQUEST FOR RECONSIDERATION

Serial No. 78717522

Paul Adams of The Adams Law Firm for Kid's Choice Dental,
Inc.

S. David Sterkin, Trademark Examining Attorney, Law Office
110 (Chris A. F. Pedersen, Managing Attorney).

Before Hairston, Walsh and Bergsman, Administrative
Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Kid's Choice Dental, Inc. filed an intent-to-use
application to register the mark shown below for
"dentistry."



In a decision mailed on May 1, 2007, the Board
affirmed the refusal to register the application on the

ground that applicant's mark so resembles Registration No. 2,497,011 for the mark KIDSCHOICE for "health care services" as to be likely to cause confusion.

On May 30, 2007, applicant filed a request for reconsideration of the May 1, 2007 decision. Applicant contends that the Board erred in its determination that the marks are similar. Specifically, applicant argues that "the vibrant, colorful, whimsical, and visually striking appearance of the design in Applicant's mark" distinguishes applicant's mark from the mark in the cited registration. Applicant asserts that the Board's finding that the words KID'S CHOICE create the dominant commercial impression in applicant's mark is incorrect for the following reasons:

1. There is no factual basis for the presumption that words form the dominant portion of a combination word and design trademark. Applicant points out that there is no factual support of this presumption.
2. The case law relied upon by the Board is factually distinguishable from the case *sub judice*;¹

¹ The relevant portion of the decision reads as follows:

With respect to the design portion of applicant's mark, in analyzing a composite mark comprising words and a design, the word portion of the mark (*i.e.*, KID'S CHOICE DENTAL) is usually considered the dominant part of a mark because it is more easily remembered and used in communications. Consumers will not reference the toothpaste tube

3. "There is no factual or policy basis for the Board's long-standing position that the word portion of a mark is 'usually considered the dominant part of a mark because it is more easily remembered and used in communications.'" (Request for Reconsideration, p. 2); and,
4. The marketplace today is a visual marketplace and, therefore, the word dominance presumption is out-of-date.

Applicant's request for reconsideration is not well taken. Our reviewing court has stated that "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests upon a consideration of the marks in their entireties." *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1983) ("Indeed, this type of analysis appears to be unavoidable"). Thus, it is proper to find that one part of a mark creates a dominant commercial impression so long as that finding is based on rational reasons.

Unless the evidence shows that the marks are encountered together, it is not proper to compare the marks

when asking for or discussing applicant's dental services. *CBS Inc. v. Morrow*, 708 F.2d 157 9, 218 USPQ 198, 200 (Fed. Cir. 1983); *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987).

side-by-side, point-by-point, for similarities and differences. *Lever Brothers Co. v. Winzer Co. of Dallas, Inc.*, 326 F.2d 817, 140 USPQ 247, 249 (CCPA 1964); *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1976). This means the analysis of the marks should focus on the recollection of the average purchaser who normally retains a general rather than a specific impression of the trademarks, as well as consideration of the fallibility of memory over time.² *Geigy Chemical Corp. v. Atlas Chem. Ind., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, *supra*; *Sealed Air Corp. v. Scott Paper Co.*, *supra*. In the case *sub judice*, we did not use a side-by-side comparison in analyzing the marks, but sought to identify the general impression created by applicant's mark. Thus, our approach was entirely

² Applicant contends that the Board has "erroneously ignored the bright colored design in Applicant's mark so appealing to children who are the 'customers' of Applicant's services." With respect to dentistry, children may be the patients, but it is the parents who select the dentist, make the medical decisions, and pay for the services. Under these circumstances, it is the parents who are the "customer." Thus, applicant's argument that the design element of its mark appeals to its customers (*i.e.*, children) is disingenuous. In any event, there is no evidence in the record regarding the extent to which children choose their dentist.

consistent with governing precedent from our reviewing court.

In evaluating the similarity or dissimilarity of the marks, a particular feature or portion may be accorded more weight if it makes a memorable impression that consumers will remember and rely upon to identify the services at issue. *In re Appetito Provisions Co.*, 3 UPSPQ2d 1553, 1554 (TTAB 1987); *In re Apparel Ventures, Inc.*, 229 USPQ 225, 226 (TTAB 1986). Where, as here, applicant's mark comprises both a word and a design, the general framework for analyzing such marks is that the literal portion is accorded greater weight because purchasers will use the words to request or refer to the services. *In re Appetito Provisions Co.*, *supra*; *Amoco Oil Co. v. Amerco, Inc.*, 192 USPQ 729, 735 (TTAB 1976); *In re Carriage, Inc.*, 189 USPQ 648, 649 (TTAB 1976); *B.F. Trappey's Sons, Inc. v. Mama Cookie Bakeries, Inc.*, 168 USPQ 440, 441 (TTAB 1970); *In re Wallach's Inc.*, 130 USPQ 366, 367 (TTAB 1961). The Federal Circuit and its predecessor court have adopted this analytical framework. *See Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390395 (Fed. Cir. 1983) (in analyzing the parties' combined word and design marks, the dominant portion was the word "Giant"); *W. B. Roddenbery Co. v. Kalich*, 158 F.2d 289, 72 USPQ 138,

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139-140 (CCPA 1946) ("in the case of a trademark which consists of words accompanied by other pictorial indicia the portion of the mark which would be likely to indicate origin would be the words used"); *Rice-Stix Dry Goods Co. v. Industrial Undergarment Corp.*, 158 F.2d 289, 68 USPQ 186, 187 (CCPA 1946) ("the public frequently remembers and purchases a vendor's merchandise without regard to the pictorial and other subordinate matter associated with a label or trademark").

In this case, the words KID'S CHOICE create the dominant commercial impression in applicants mark because the words KID'S CHOICE is the largest part of the mark and it appears across the top of the mark. This display of the words KID'S CHOICE grabs the attention of the viewer. On the other hand, the word "Dental" is displayed in smaller letters below the words KID'S CHOICE. In addition, the word "Dental" is a generic term when used in connection with dentistry, and therefore it has little, if any, trademark significance. The tube of toothpaste and the toothpaste squeezed from the tube underline the words KID'S CHOICE and highlight or emphasize the term KID'S CHOICE. For these reasons, we believe that consumers will identify and call for applicant's services as KID'S CHOICE dental

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services, not the toothpaste dentist or KID'S CHOICE with the toothpaste design.

Also, the mark KIDSCHOICE, in the cited registration, is a typed drawing, without a design element.³ In registering its mark in block letters, registrant remains free to change the display of its mark at any time and may, in fact, use it in same "vibrant, colorful, whimsical, and visually striking appearance" as applicant's mark, if it so desires. Registrant's rights reside in the term KIDSCHOICE and not in any particular form of the mark. See *Phillips Petroleum Co. v. C.J. Webb, Inc.*, 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971); *In re Pollio Dairy Products Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988); *Philmont Electronics, Inc. v. Lang*, 212 USPQ2d 534, 536 (TTAB 1981). Accordingly, there are no visual differences that could obviate a likelihood of confusion between the marks. Consumers viewing applicant's mark may believe that KID'S CHOICE DENTAL services are related to KIDSCHOICE healthcare services.

For the preceding reasons, we believe that KID'S CHOICE is the dominant portion of applicant's mark, and it is likely to be used in calling for applicant's services.

³ A typed drawing, now identified as a mark in standard character format.

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To the extent that applicant argues that the general framework for analyzing combination marks comprised of words and designs has no factual or legal support or that it is not applicable in this case, it was incumbent upon applicant to submit facts demonstrating how consumers perceive applicant's mark prior to the appeal.

Finally, with regard to applicant's argument that the "marketplace is a visual marketplace" (Request for Reconsideration, p. 11), applicant has not explained how that purported change has affected the way people perceive trademarks. Whether a mark is seen on the internet, on television, in magazines, or on billboards, consumers still visually process the marks in the same way no matter which medium is used.

Decision: Applicant's request for reconsideration is denied.