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SEPT 11, 97

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Kids Count Entertainment, Inc.

Serial No. 74/527,928

Andrew Hartman of Sachnoff & Weaver, Ltd. for applicant.

Hope E. Slonim, Trademark Examining Attorney,
Law Office 106 (Mary I. Sparrow, Managing Attorney)

Before Simms, Cissel, and Hairston, Administrative Trademark
Judges.

Opinion by Simms, Administrative Trademark Judge:

Kids Count Entertainment, Inc. (applicant), an Illinois
corporation, has appealed from the final refusal of the
Trademark Examining Attorney to register the mark KIDS COUNT
for the following goods:

gift and party supplies made of paper--
namely, napkins, table cloths, paper coasters,
hats, bags, invitations, gift wrap, table
centerpieces, placemats, crepe paper; stationery
and school supplies--namely, stationery-type
portfolios, theme pads, notebooks, note paper,
binders, pens, pen and pencil kits, calendars, and
adhesive note papers; posters, greeting cards,

decals, paper heat transfers, coloring books and activity books.¹

The Examining Attorney has refused registration under Section 2(d) of the Act, 15 USC §1052(d), on the basis of Registration No. 1,864,403, issued November 22, 1994, for the mark KIDS COUNT for educational services; namely, providing in-class incentives to grade school students to demonstrate excellence in problem-solving activities in the field of math through the issuance of awards. The registration is held by Big Y Foods, Inc. Applicant and the Examining Attorney have submitted briefs, but no oral hearing was requested.

The Examining Attorney argues that confusion is likely because of the identity of the marks and the close relationship between registrant's services and applicant's goods. In this regard, the Examining Attorney contends that applicant's goods, including such items as posters and decals or stickers, may be used as incentive awards. In support of this argument, the Examining Attorney has made of record electronic copies of third-party registrations showing that posters and stickers have been identified in those registrations as incentive awards for children. Accordingly, the Examining Attorney argues that the average purchaser may think that applicant's posters, decals and

¹ Serial No. 74/527,928, filed May 20, 1994, based upon applicant's bona fide intention to use the mark in commerce,

other stationery and school supplies come from the same source as registrant's educational services in the nature of incentives to show excellence in math.

It is entirely possible, if not probable, that the purchasing public would mistakenly believe that the applicant's goods, which are often used as incentive awards, are a particular product line from a producer of incentive programs for grade school students.

Examining Attorney's appeal brief, 5.

Finally, the Examining Attorney argues that any doubt should be resolved against applicant who has a duty to select a mark which is not likely to cause confusion with a registered mark.

Applicant, on the other hand, contends that there is no indication that applicant's goods move or will move in the same channels of trade as registrant's services. In fact, applicant argues that math awards travel in different channels of trade than applicant's paper goods. Applicant argues, without apparent support, that registrant's awards are targeted to grade school teachers and administrators. Finally, applicant contends that the registered mark is weak and entitled to a narrow scope of protection. In this regard, applicant points to at least three third-party registrations. These are for the marks KIDS COUNT for family radio entertainment; KIDS COUNT for diaper bags and

kids clothes; and OUR KIDS COUNT for printed material, novelties, flags, apparel, balloons and snacks.

As the Examining Attorney has pointed out, likelihood of confusion may exist where goods and services are not identical or even competitive in nature, it being sufficient that the goods or services are related in some manner and/or that the circumstances surrounding their marketing are such that they will be likely to be encountered by the same persons under circumstances that could give rise, because of the similarity or identity of the marks used therewith, to the mistaken belief that they originate from or are in some way associated with the same entity. Here, while applicant's stationery and school supplies are specifically different from registrant's educational services, the Examining Attorney has demonstrated some overlap between the goods and services. Moreover, we are inclined to believe that the relevant purchasing public, aware of registrant's incentive awards educational program offered under the mark KIDS COUNT, who then encounter, under the identical mark, stationery and school supplies, such as note paper, pens, calendars, posters, etc., are likely to believe that applicant's goods come from or are sponsored by the same entity that is associated with the educational services in the field of math.

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Decision: The refusal of registration is affirmed.

R. L. Simms

R. F. Cissel

P. T. Hairston
Administrative Trademark
Judges, Trademark Trial
and Appeal Board