

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB DEC. 31, 98

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re The Paper Magic Group, Inc.

Serial No. 75/000,903

Charles N. Quinn of Dann, Dorfman, Herrell & Skillman
for The Paper Magic Group, Inc.

Jeri J. Fickes, Trademark Examining Attorney, Law Office
108 (Dave Shallant, Managing Attorney)

Before Cissel, Hairston and Wendel, Administrative
Trademark Judges.

Opinion by Wendel, Administrative Trademark Judge:

The Paper Magic Group, Inc. filed an application to
register the mark KIDS STUFF and design, as shown below,
for Halloween and costume novelty masks, capes, wigs, hats,
pantyhose and tights.¹

¹ Ser. No. 75/000,903, filed Oct. 3, 1995, claiming first use
dates of June 1, 1993.

Registration has been finally refused under Section 2(d) of the Trademark Act, on the ground of likelihood of confusion with the registered mark KIDSTUFF for "children's clothing, namely, shorts, shirts, overalls and play suits."² The Examining Attorney has also made final the requirement that a drawing be submitted which complies with the requirements of 37 CFR Sections 2.51 and 2.52 for a special form drawing, including the requirement that no gray tones be used.

Applicant and the Examining Attorney have filed briefs, but no request was made for an oral hearing.

Giving consideration first to the marks involved, the Examining Attorney maintains that the marks are not only phonetically and connotatively identical, but also are potentially visually identical. The Examining Attorney bases this latter conclusion on the fact that the registered mark is a typed drawing and thus unrestricted in form of presentation.

Applicant, on the other hand, argues that the marks are not close to being identical in appearance or commercial impression, in view of the design features of applicant's mark. Applicant points to the stylized form of

² Reg. No. 1,110,560, issued Jan. 2, 1979, claiming first use dates of Oct. 25, 1939. Combined Section 8 and 15 affidavit

the words KIDS STUFF on the diamond background as well as the "juvenile figures" scattered over the words and contends that these features result in a distinctly different commercial impression for its mark from the "plain vanilla, unstylized, words-only" mark of registrant.

Although it is true that in determining the likelihood of confusion, marks must be considered in their entireties, it is well established that there is nothing improper in giving more or less weight to a particular feature of a mark. In re National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). If the word portion of a mark rather than the design feature (or features) is more likely to be remembered and relied upon by purchasers in referring to the goods, it is the word portion which will be accorded more weight. See Ceccato v. Manifattura Lane Gaetano Marzotto & Figli S.p.A., 32 USPQ2d 1192 (TTAB 1994); In re Appetito Provisions Co., 3 USPQ2d 1553 (TTAB 1987).

Here we consider the words KIDS STUFF to be the dominant portion of applicant's mark. Clearly it would be by these words, not the design features, that purchasers would refer to, or call for, the goods. Furthermore, the youthful figures in costumes climbing over the letters serve more to reinforce the word portion of the mark and to

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depict the goods upon which the mark is being used than to create a separate impression as an indication of source. Cf. *Ceccato v. Manifattura Lane Gaetano Marzotto & Figli S.p.A.*, *supra* [coat of arms reinforces meaning of word mark]; *In re Appetito Provisions Co.*, *supra* [sandwich design merely descriptive of food sold in registrant's restaurant].

In addition, we agree with the Examining Attorney that registrant's mark is far from a "plain vanilla" mark. Inasmuch as KIDSTUFF has been registered with a typed drawing, registrant's mark must be construed to encompass any form of presentation, with or without design features, including a format very similar to that of applicant's. See *Squirto v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937 (Fed. Cir. 1983); *Jockey International Inc. v. Mallory & Church Corp.*, 25 USPQ2d 1233 (TTAB 1992). While registrant might not have its figures dressed in Halloween costumes, similar figures dressed in ordinary children's clothing would be a reasonable alternative. It is only the mark that applicant seeks to register that is limited to one particular stylized form.

Accordingly, we find the marks to be not only identical in sound, but also highly similar in commercial impression and in appearance.

Turning to the goods involved, applicant's principal argument is that the marketing environments for the products of the respective parties are "quite different," and thus there is no likelihood of confusion. Applicant states that its Halloween costume items are sold mainly in drugstores and mass merchandising outlets such as K-Mart, and not in children's specialty stores.

The Examining Attorney correctly points out that because there are no limitations in either the registration or the application with respect to channels of trade, both the children's apparel of registrant and the children's costume apparel of applicant must be presumed to travel in all the normal channels of trade for these goods. See *Kangol Ltd. v. KangaROOS U.S.A. Inc.*, 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992) and the cases cited therein. The normal channels of trade for the goods of both applicant and registrant, in the Examining Attorney's view, would include large discount stores, mail order catalogs and children's shops. To support this assertion, she has made of record advertisements in a recent Disney catalog for both children's clothing and costumes.

We find no basis for applicant's presumption that registrant's children's clothing would be sold for the most part in children's specialty shops. It is common knowledge

that children's clothing is sold in discount stores, department stores, and other types of mass merchandising outlets, as well as children's specialty shops. Thus, there is an overlap in the types of stores in which applicant's Halloween costumes and registrant's children's apparel would be sold and, accordingly, the same purchasers would encounter both types of children's goods in the same stores.

If there is any remaining doubt as to the likelihood that purchasers, on encountering the two "KIDSTUFF" marks on these children's items, would attribute the goods to a single source, we find that the Examining Attorney has obviated this doubt by making of record several third-party registrations and applications showing the adoption of the same mark by an entity for both children's apparel and children's Halloween costumes. Such evidence is more than adequate to show that both types of goods might well be assumed to emanate from the same source when highly similar marks are used in connection therewith. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988).

Accordingly, we find that there is the likelihood of confusion in view of the similarity of the marks, the close relationship of the goods upon which the marks are used and

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the similarity of the trade channels in which the respective goods travel.

Insofar as the requirement for an acceptable drawing is concerned, applicant has requested deferral until there has been a decision on the merits or other indication that the application is in condition for publication.

Applicant's request is not well taken. In order for a substitute drawing to be considered by the Examining Attorney, the drawing must have been submitted prior to the filing of an appeal. See TBMP §1201.02; TMEP §1105.04(c).

Decision: The refusal to register under Section 2(d) and the requirement for an acceptable drawing are affirmed.

R. F. Cissel

P. T. Hairston

H. R. Wendel
Trademark Administrative Judges,
Trademark Trial and Appeal Board

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