



United States  
General Accounting Office  
Washington, D.C. 20548

Office of the General Counsel

B-239045

July 5, 1990

The Honorable Jim Sasser  
United States Senate

Dear Senator Sasser:

You asked in your March 8, 1990, letter for our advice and counsel with regard to Ms. [redacted] use of the Head Start name and logo. Ms. [redacted] owns a company, Edu-Graphics, Inc., that designs and prints preschool materials with the Head Start name and logo for sale to organizations (federal grantees and their delegate agencies) that run local Head Start programs. The Department of Health and Human Services, which (through the Administration for Children, Youth and Families (ACYF)) administers the Head Start program for the federal government and holds a trademark in the name and logo, has directed Ms. [redacted] to cease using the name and logo.

While the ultimate judgment of whether an infringement has taken place lies with the courts, in our judgment, the Department has a reasonable basis for taking the position that Ms. [redacted] activities constitute trademark infringement. Edu-Graphics could apply to the ACYF for a license to use the Head Start name and logo on the products it markets to Head Start grantees. However, whether ACYF would grant such a license is entirely within its discretion.

Ms. [redacted] advertises her products through promotional literature that includes pictures of the products bearing the Head Start name and logo. She then fills orders for the products from the local Head Start organizations. She asserts that her activities do not constitute trademark infringement because she is not using the name and logo to identify herself or her company, and is selling only to organizations authorized to use the trademark. She contends there is no likelihood of confusion, a necessary element in trademark infringement.

The Department asserts that Ms. [redacted] activities constitute trademark infringement because she does not have the Department's permission to use the name or logo and her activities cause confusion. In the Department's view, both

local Head Start organizations and members of the public to whom those organizations sell or distribute Edu-Graphics' materials are likely to think that ACYF has produced or endorsed the materials.

The Department has authorized local grantees and delegate agencies to use the Head Start name and logo without further approval on "stationery, posters, recruitment literature, newsletters, and other promotional items designed to inform the local community of Head Start activities." See 52 Fed. Reg. 10951 (1987). For items they manufacture, sell, or distribute, however, the grantees and delegate agencies must request approval at least 60 ~~days~~ prior to engaging in such activity. Id. The Department points out that it "has not awarded a commercial license to any organization or business to manufacture, sell, distribute or use either the Head Start name or the logo for commercial purposes."

The trademark law (popularly known as both the Trademark Act of 1946 and the Lanham Act) applies to any person who, without consent, reproduces the trademark of another for use in commerce "in connection with the sale, offering for sale, distribution, or advertising of any goods or services [in a way which] is likely to cause confusion, or to cause mistake, or to deceive." Such persons are liable in a civil action to the owner of the trademark. 15 U.S.C. § 1114 (1988). If the owner of a trademark permits unauthorized use, the mark may lose its significance in identifying the owner's goods, and trademark protection may be diminished or lost. Wallpaper Mfrs., Ltd. v. Crown Wallcovering Corp., 680 F.2d 755, 766 (C.C.P.A. 1982); Quality Inns Int'l, Inc. v. McDonald's Corp., 695 F. Supp. 198, 213-14 (D. Md. 1988). Thus, it behooves a trademark owner to be diligent in protecting the trademark.

It may not be improper for Edu-Graphics to sell to grantees and delegate agencies materials bearing the Head Start name and logo, if the name and logo are not used in advertising and if the materials are of the type the Department has approved for use by grantees and their delegates. Any other use of the name and logo by Edu-Graphics, however, would be of questionable propriety.

There is no question that Edu-Graphics is using the Head Start trademarks in commerce "in connection with the sale, offering for sale, distribution, or advertising" of its materials. The primary question at issue is whether this use of the Head Start name and logo is likely to cause confusion. While an authoritative answer to this question must come from the courts, the Department does seem to have a legitimate basis for its claim of infringement.

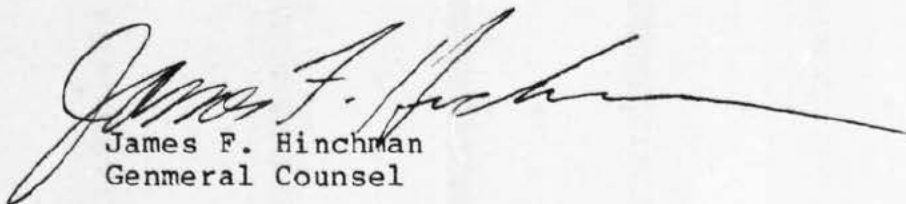
Traditionally, the question to be resolved where confusion is at issue has been whether use of a particular mark (or name) will confuse people about the source of goods displaying that mark. Hercules v. National Patent Development Corp., 524 F.2d 1227, 1229 (C.C.P.A. 1975); Paula Payne Products Co. v. Johnson Publishing Co., 473 F.2d 901 (C.C.P.A. 1973). However, confusion has come to include confusion as to sponsorship, endorsement, or some other affiliation. Stop the Olympic Prison v. U.S. Olympic Committee, 489 F. Supp. 1112, 1121-22 (S.D.N.Y. 1980); Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 204-05 (2d Cir. 1979). In other words, in the case at hand, the question is whether grantees or the public are likely to believe that the Department has produced, endorsed, or otherwise approved the sale of these materials.

It is not unreasonable for the Department to take the position that confusion is likely. According to representatives of ACYF and the Department, ACYF has for many years produced and distributed to local organizations and to the public various materials, including publications, posters, and certificates, that bear the Head Start name and logo. It would not be unreasonable to think that a local organization that has been receiving such material from the ACYF for many years would assume that the ACYF is the source of, or has approved, Edu-Graphics' material. In fact, representatives of the Department and ACYF told us that several grantees had informed them that they (the grantees) were under the impression that ACYF had endorsed Edu-Graphics' products. Also, the public has no way of knowing that the material originated outside and without the consent of the Department (or ACYF).

Thus, it appears that the Department's view that Edu-Graphics' activities constitute trademark infringement of its Head Start name and logo is not unreasonable, and its actions to preserve its trademarks are consistent with trademark law.

We hope this information is helpful.

Sincerely yours,

  
James F. Hinchman  
General Counsel