

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Applicant: Real Estate USA, Inc. Attorney Docket No. REUSA231122  
Serial No.: 78/408,332 Trademark Attorney: Woodrow N. Hartzog  
Filed: April 26, 2004 Law Office: 113  
Mark: REUSA AND DESIGN

**APPELLANT'S REPLY BRIEF**

Seattle, Washington

May 30, 2006

**TO THE COMMISSIONER FOR TRADEMARKS:**

The Examining Attorney's Appeal Brief relies principally upon the argument that the final refusal of registration of Appellant's design mark should be affirmed because Appellant's mark has incorporated the entire literal element of Registrant's mark and that all of the other differences in wording and design should be ignored. The Achilles' heel of the Examining Attorney's argument, however, is that the so-called "literal element of Registrant's mark" are the merely descriptive words "Real Estate USA" which are unregistrable by themselves and have been disclaimed in both the cited registration and Appellant's application. Notwithstanding these facts, the Examining Attorney treats the prior registration as if it gives the Registrant the exclusive right to use "Real Estate USA", rather than being a very narrow registration which should be limited to its particular design elements.

The Examining Attorney argues that a consumer when vocally requesting Appellant's services would not refer to Appellant's design and that when doing business over the phone,



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Appellant would be referred to as "Real Estate USA". This argument might have relevance if Appellant was attempting to register merely the words "Real Estate USA" and, if the prior registration prevented use of those words rather than having specifically disclaimed the exclusive right to use the terms apart from the mark as shown, i.e., with a specific design which is very different from the design of Appellant's mark.

The Examining Attorney's argument concerning Appellant doing business over the phone as "Real Estate USA" is not supported by evidence and ignores the likelihood of Appellant being referred to as "REUSA". Even more importantly, however, the Examining Attorney's argument misunderstands the reality of the commercial use of the mark sought to be registered, namely, as a visual identifier of Appellant's services which appears on yard signs and printed materials for the purpose of distinguishing Appellant's real estate agency services from those of others. While the sound of a mark is an element to be considered with respect to likelihood of confusion, where the dominant word of Appellant's mark, namely, "REUSA" is not found in the prior registration, and the only similarities between Appellant's mark and the cited registration are the merely descriptive words "Real Estate USA", the marks are not likely to be confused.

The Examining Attorney argues that the Appellant relies "too heavily" on the differences between the designs to obviate a likelihood of confusion. To the contrary, it is the differences in the designs which will be emphasized by consumers where the only similarity in the marks is the merely descriptive term "Real Estate USA". As the Board may take judicial notice of, it is likely that every real estate agency in the country makes use of the term "real estate" to inform consumers of the nature of the services they offer. The Examining Attorney is treating the prior registration as if the literal element, namely the words "Real Estate USA" were totally arbitrary and entitled to a broad scope of protection. In fact, these words are entitled to no exclusivity and their descriptive use by Appellant should be ignored and, the very substantial differences in

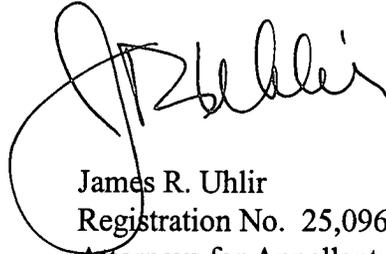
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appearance, sound and meaning between the remaining elements of Appellant's mark and the prior registration emphasized. This is what occurs in the marketplace and no conclusion can be reached other than that there is no likelihood of confusion in this case.

For the reasons set forth above and for the reasons set forth earlier in Appellant's Appeal Brief, Appellant respectfully requests that the rejection of the present application be reversed and that the application be passed to registration.

Respectfully submitted,

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I hereby certify that this Appellant's Reply Brief is being deposited with the U.S. Postal Service in a sealed envelope as first class mail with postage thereon fully prepaid and addressed to the Trademark Trial and Appeal Board, U.S. Patent and Trademark Office, P. O. Box 1451, Alexandria, VA 22313-1451.

Date:

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