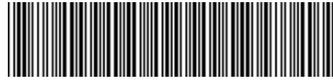


UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 86391941

MARK: FRONT DOOR PROPERTIES



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GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/trademarks/index.jsp>

TTAB INFORMATION:

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>

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EXAMINING ATTORNEY'S APPEAL BRIEF

ISSUE/MAILING DATE: 09/22/2016

The applicant, Cindy Chism, has appealed the trademark examining attorney's FINAL refusal to register the proposed mark **FRONT DOOR PROPERTIES** for use in conjunction with "commercial and residential real estate agency services; real estate listing; real estate services, namely, property management services for condominium associations, homeowner associations and apartment buildings." Registration was refused under Section 2(d) of the Trademark Act of 1946 (as amended), 15 U.S.C. Section 2(d) on the grounds that consumers who utilize the applicant's and the registrant's services are likely to confuse the applicant's proposed mark **FRONT DOOR PROPERTIES** with **Registration No. 4466672** for the mark **FRONTDOOR** for "information services provided via a global computer network, namely, providing an interactive website featuring specific news and instructive information on the process of home purchasing, selling, renting, and leasing."

It is respectfully requested that the refusal to register be affirmed.

FACTS

On September 11, 2014, the applicant, Cindy Chism, filed an application to register the mark **FRONT DOOR**

PROPERTIES for “commercial and residential real estate agency services; real estate listing; real estate services, namely, property management services for condominium associations, homeowner associations and apartment buildings.” On December 23, 2014, registration was initially refused under Section 2(d) of the Trademark Act because the applicant’s mark was found to be confusingly similar to **Registration No. 4466672**, for the mark **FRONTDOOR** for “information services provided via a global computer network, namely, providing an interactive website featuring specific news and instructive information on the process of home purchasing, selling, renting, and leasing,” registered to Scripps Networks, LLC. On April 10, 2015, the applicant filed responsive arguments to the initial refusal under Section 2(d). The examining attorney was not persuaded by these arguments and on November 18, 2015, after a period of suspension, a FINAL refusal issued.^[1] On May 10, 2016, the applicant filed a Notice of Appeal and on July 26, 2016, the application was forwarded to the examining attorney for filing of a brief.

ISSUE ON APPEAL

The sole issue on appeal is whether there is a likelihood of confusion between the applicant’s proposed mark, **FRONT DOOR PROPERTIES** and the registrant’s mark, **FRONTDOOR**, where the services are closely related. Trademark Act Section 2(d), 15 U.S.C., Section 1052(d)

ARGUMENTS

I. THE MARK FRONT DOOR PROPERTIES IS LIKELY TO CAUSE CONFUSION WITH THE REGISTERED MARK FRONTDOOR.

The court in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563 (C.C.P.A. 1973), originally listed the principal factors to be considered, if relevant, in determining whether there is a likelihood of confusion under Section 2(d). In any likelihood of confusion determination, two key considerations are similarity of the marks and similarity or relatedness of the goods and/or services. *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 (TTAB 2015) (citing *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 USPQ 24, 29 (C.C.P.A. 1976)); *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010); see TMEP §1207.01. That is, the marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973)); TMEP §1207.01(b)-(b)(v). Additionally, the goods and/or services are compared to determine whether they are similar or commercially related or travel in the same trade channels. *See Coach Servs., Inc. v. Triumph Learning LLC*, 668

F.3d 1356, 1369-71, 101 USPQ2d 1713, 1722-23 (Fed. Cir. 2012); *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165, 64 USPQ2d 1375, 1381 (Fed. Cir. 2002); TMEP §1207.01, (a)(vi).

A. THE MARKS ARE NEARLY IDENTICAL.

Marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)); TMEP §1207.01(b)-(b)(v). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) (citing *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007)); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988)); TMEP §1207.01(b).

In this case, the applicant’s proposed mark FRONT DOOR PROPERTIES and the registrant’s mark FRONTDOOR differ only by applicant’s use of the highly descriptive, if not generic, term, PROPERTIES and the space placed between FRONT and DOOR.

As an initial point and as indicated above, the applicant has merely added the highly descriptive, if not generic, term PROPERTIES to the registrant’s mark. Adding a term to a registered mark generally does not obviate the similarity between the compared marks, as in the present case, nor does it overcome a likelihood of confusion under Section 2(d). *See Coca-Cola Bottling Co. v. Jos. E. Seagram & Sons, Inc.*, 526 F.2d 556, 557, 188 USPQ 105, 106 (C.C.P.A. 1975) (finding BENGAL and BENGAL LANCER and design confusingly similar); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1269 (TTAB 2009) (finding TITAN and VANTAGE TITAN confusingly similar); *In re El Torito Rests., Inc.*, 9 USPQ2d 2002, 2004 (TTAB 1988) (finding MACHO and MACHO COMBOS confusingly similar); TMEP §1207.01(b)(iii).

Further, the applicant has disclaimed the highly descriptive/generic term PROPERTIES apart from the mark as shown. Although marks are compared in their entireties, one feature of a mark may be more significant or dominant in creating a commercial impression. *See In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985); TMEP §1207.01(b)(viii), (c)(ii). Disclaimed matter that is descriptive of or generic for a party’s services is typically less significant or less dominant when comparing marks. *See In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Nat'l Data Corp.*, 753 F.2d at 1060, 224 USPQ at 752; TMEP §1207.01(b)(viii), (c)(ii).

Still further, the fact that the applicant has placed a space between the word FRONT and the word DOOR does not

obviate the likelihood of confusion. The compared wording is identical except for a slight difference in appearance between registrant's mark, which appears as a compound word with no space separating the words, that is, FRONTDOOR; and applicant's mark, in which the wording appears as multiple words with space separating the words, that is, FRONT DOOR. Despite this minor difference, the shared terms are identical in sound and virtually identical in appearance, and are thus confusingly similar for the purposes of determining likelihood of confusion. *See, e.g., Seaguard Corp. v. Seaward Int'l, Inc.*, 223 USPQ 48, 51 (TTAB 1984) (“[T]he marks ‘SEAGUARD’ and ‘SEA GUARD’ are, in contemplation of law, identical [internal citation omitted].”); *In re Best W. Family Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) (“There can be little doubt that the marks [BEEFMASTER and BEEF MASTER] are practically identical”); *Stock Pot, Inc., v. Stockpot Rest., Inc.*, 220 USPQ 52, 52 (TTAB 1983), *aff'd* 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984) (“There is no question that the marks of the parties [STOCKPOT and STOCK POT] are confusingly similar. The word marks are phonetically identical and visually almost identical.”).

Finally, the common element in each of the marks is the first wording in applicant's mark and the only wording in registrant's mark – FRONT DOOR vs. FRONTDOOR. Consumers are generally more inclined to focus on the first word, prefix, or syllable in any trademark or service mark. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F. 3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered” when making purchasing decisions).

In summary, the marks are essentially identical in part and create the same overall commercial impression and meaning. The dominant element in the applicant's mark is the wording FRONT DOOR, which is nearly identical in appearance, sound, connotation, and commercial impression to the entirety of registrant's mark, FRONTDOOR. The disclaimed word PROPERTIES has no source-indicating value because it is highly descriptive, if not generic. FRONT DOOR and FRONTDOOR serve as the source-identifiers for both marks. In fact, the applicant states in its brief at page 4 that “there is some merit to” the examining attorney's “observation” that the marks are similar.

B. APPLICANT'S SERVICES AND THE REGISTRANT'S SERVICES ARE HIGHLY RELATED AND ARE PROVIDED IN THE SAME CHANNELS OF TRADE.

The second step in a likelihood of confusion analysis is to compare the services to determine if they are related or if the activities surrounding their marketing are such that confusion as to origin is likely. *In re August Storck KG*, 218 USPQ 823 (TTAB 1983); *In re International Telephone and Telegraph Corp.*, 197 USPQ 910 (TTAB 1978);

Guardian Products Co., v. Scott Paper Co., 200 USPQ 738 (TTAB 1978).

In the present case, a discussion of the relatedness of the services must start with the well-recognized proposition that where the marks of the respective parties are identical or virtually identical, as in this case, the degree of similarity or relatedness between the services needed to support a finding of likelihood of confusion declines. See *In re i.am.symbolic, Llc*, 116 USPQ2d 1406, 1411 (TTAB 2015) (citing *In re Shell Oil Co.*, 992 F.2d 1204, 1207, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993)); TMEP §1207.01(a).

Regarding the services at issue, the applicant and registrant provide very highly related real estate services in the field of home purchasing and selling.

Specifically, both the applicant's and registrant's services are considered related because it is common in the real estate industry to market the applicant's and the registrant's respective services under the same or similar marks. This is evidenced by the excerpts taken from the applicant's website at www.frontdoorproperties.com and attached to the initial Office action dated December 23, 2014. These excerpts from applicant's website demonstrate that in addition to its applied for services of "commercial and residential real estate agency services; real estate listing; real estate services, namely, property management services for condominium associations, homeowner associations and apartment buildings," the applicant also provides the registrant's services of "home mortgage information" and an "interactive website featuring specific news and instructive information on the process of home purchasing, selling, renting, and leasing." Note the following from the excerpts taken from the applicant's website:

-Buyer & Seller Tips

-Blog

-Newsletter SIGNUP

-Mortgage Calculator

-"Buyer Tips" including "Before you shop" and "Before you buy"

-Seller Tips

Still further, the Internet evidence attached to the FINAL office action dated November 18, 2015 consists of excerpts taken from www.longandfoster.com; www.wyndhamvacationrentals.com; www.stuartandmaury.com; www.yelp.com; www.ejfrealestate.com and www.peakeinc.com. This evidence establishes that the same entity commonly provides the relevant services of the applicant and registrant and

markets the services under the same mark and that the relevant services are provided through the same trade channels and used by the same classes of consumers in the same fields of use and that the services are complementary. Specifically, note the following:

-www.longandfoster.com. Long and Foster provides the following services:

Commercial real estate listings

Residential home listing

Property management services

Provision of information and news on buying, financing and selling a home

-www.wyndhamvacationrentals.com.

Wyndham provides the following services:

Real estate rental listings

Real estate sales listings for homes and condos

Real estate management services

Information to prospective real estate renters

-www.stuartandmaury.com and www.yelp.com. Stuart and Maury provides the following services:

Residential home listings

Property management services

Provision of information on buying, financing and selling a home

Provision of information on renting a home

-www.ejfrealestate.com. EJF provides the following services:

Real estate brokerage/selling services

Owner association management services

Rental property management services

Commercial property management services

Provision of information and news of interest to home owners

-www.peakeinc.com. Peake Management and Sales provides the following services:

Residential property management company

Real estate sales

Provision of Information via a blog on real estate sales, buying and selling

Evidence obtained from the Internet may be used to support a determination under Section 2(d) that goods and/or services are related. *See, e.g., In re G.B.I. Tile & Stone, Inc.*, 92 USPQ2d 1366, 1371 (TTAB 2009); *In re Paper Doll Promotions, Inc.*, 84 USPQ2d 1660, 1668 (TTAB 2007). The Internet has become integral to daily life in the United States, with Census Bureau data showing approximately three-quarters of American households used the Internet in 2013 to engage in personal communications, to obtain news, information, and entertainment, and to do banking and shopping. *See In re Nieves & Nieves LLC*, 113 USPQ2d 1639, 1642 (TTAB 2015) (taking judicial notice of the following two official government publications: (1) Thom File & Camille Ryan, U.S. Census Bureau, Am. Cmty. Survey Reports ACS-28, *Computer & Internet Use in the United States: 2013* (2014), available at <http://www.census.gov/content/dam/Census/library/publications/2014/acs/acs-28.pdf>, and (2) The Nat'l Telecomms. & Info. Admin. & Statistics Admin., *Exploring the Digital Nation: America's Emerging Online Experience* (2013), available at http://www.ntia.doc.gov/files/ntia/publications/exploring_the_digital_nation_-_americas_emerging_online_experience.pdf). Thus, the widespread use of the Internet in the United States suggests that Internet evidence may be probative of public perception in trademark examination.

Based on the above, the applicant's and registrant's services must be considered related for likelihood of confusion purposes. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009).

The applicant argues that only the applicant's exact services recited in the application should be considered when determining likelihood of confusion. See the applicant's brief at pages, 6, 13 and 15. While it is accurate that the question of likelihood of confusion is determined on the identification of services recited in the application and the registration, absent restrictions in an application and/or registration, the identified services must be presumed to travel in the same channels of trade to the same class of purchasers. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1356, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d at 1268, 62 USPQ2d at 1005. Additionally, unrestricted and broad identifications are presumed to encompass all services of the type described. See *In re Jump Designs*, 80 USPQ2d 1370, 1374 (TTAB 2006); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992).

In this case, the identifications set forth in the application and registration are identical in terms of nature and channels of trade or classes of purchasers – both are provided in the field of real estate and both are directed at those customers who own or are buying or selling a home. Therefore, it is presumed that these services travel in all normal channels of trade, and are available to the same class of purchasers. See *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 1053, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012). Accordingly, the services of applicant and the registrant are considered related for purposes of the likelihood of confusion analysis.

In the present application, given the evidence of record, it is clear that the relevant consumers are likely to encounter both the services of the applicant and registrant marketed under the same or similar marks.

Additionally, the applicant when arguing that its services and those of the registrant travel in different channels of trade and markets states that its services are provided only in limited locations in Texas while the registrant's services are seemingly provided only via its website. However, the applicant is seeking a geographically unrestricted registration. Moreover, the owner of a registration without specified limitations, as is the case with the registered mark, enjoys a presumption of exclusive right to nationwide use of the registered mark under Trademark Act Section 7(b), 15 U.S.C. §1057(b), regardless of its actual extent of use. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1568, 218 USPQ 390, 393 (Fed. Cir. 1983). Therefore, the geographical extent of applicant's and registrant's activities is not relevant to a likelihood of confusion determination.

Further, the presumption under Trademark Act Section 7(b), 15 U.S.C. §1057(b), is that the registrant is the owner of the mark and that use of the mark extends to all services identified in the registration. The presumption also implies that the registrant operates in all normal channels of trade and reaches all classes of purchasers of the identified services. *In re Melville Corp.*, 18 USPQ2d 1386, 1389 (TTAB 1991); *McDonald's Corp. v. McKinley*, 13 USPQ2d 1895, 1899 (TTAB 1989); *RE/MAX of Am., Inc. v. Realty Mart, Inc.*, 207 USPQ 960, 964-65 (TTAB

1980); *see* TMEP §1207.01(a)(iii).

The applicant also argues that the applicant and the registrant each market and promote their respective marks and associated services via their own dedicated websites and social networking accounts. See applicant's brief at page 16. However, when doing a general search on the internet for goods or services, consumers do not usually use specific web addresses but rather conduct a general search. When they find a website that they want to visit, they click on the link produced by the search results; they don't typically separately enter the web address produced by the search. Thus, a consumer having a vague recollection of applicant's name and services or registrant's name and services could conduct a search on the internet that could bring up applicant's website when in fact the intention was to locate registrant's website and visa versa.

The applicant further argues that the relevant consumer is sophisticated and therefore any likelihood of confusion is limited. Even if consumers of the compared services could be considered sophisticated and discriminating, it is settled that "even sophisticated purchasers are not immune from source confusion, especially in cases such as the present one involving identical marks and related goods [and/or services]." *In re i.am.symbolic, Llc*, 116 USPQ2d 1406, 1413 (TTAB 2015) (citing *In re Research & Trading Corp.*, 793 F.2d 1276, 1279, 230 USPQ 49, 50 (Fed. Cir. 1986)); *see also In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). The identity of the marks and the relatedness of the services "outweigh any presumed sophisticated purchasing decision." *In re i.am.symbolic, Llc*, 116 USPQ2d at 1413 (citing *HRL Assocs., Inc. v. Weiss Assocs., Inc.*, 12 USPQ2d 1819, 1823 (TTAB 1989), *aff'd*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990)); *see also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1325, 110 USPQ2d 1157, 1163-64 (Fed. Cir. 2014).

C. ABSENCE OF ACTUAL CONFUSION NOT DISPOSITIVE

Finally, the applicant argues that to date there has been no instances of actual confusion between applicant and registrant. The test under Trademark Act Section 2(d) is whether there is a likelihood of confusion. It is not necessary to show actual confusion to establish a likelihood of confusion. *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) (citing *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1571, 218 USPQ 390, 396 (Fed. Cir. 1983)); TMEP §1207.01(d)(ii). The Trademark Trial and Appeal Board stated as follows:

[A]pplicant's assertion that it is unaware of any actual confusion occurring as a result of the contemporaneous use of the marks of applicant and registrant is of little probative value in an ex parte proceeding such as this where we have no evidence pertaining to the nature and extent of the use by applicant and registrant (and thus cannot ascertain whether there has been ample opportunity for confusion to arise, if it were going to); and the registrant has no chance to be heard from (at least in the absence of a

consent agreement, which applicant has not submitted in this case).

In re Kangaroos U.S.A., 223 USPQ 1025, 1026-27 (TTAB 1984).

CONCLUSION

The marks are nearly identical and create the same overall meaning and commercial impression. Moreover, the source-indicating elements of both marks are nearly identical – FRONT DOOR vs. FRONTDOOR. The services are highly related real estate services that are commonly provided by a single source. Specifically, entities that provide real estate agency, real estate listing and management services similar to the applicant's services often also provide information services on the subjects of home purchasing, selling, renting and leasing similar to registrant's services. The examining attorney must resolve any doubt as to the issue of likelihood of confusion in favor of the registrant and against the applicant who has a legal duty to select a mark which is totally dissimilar to trademarks already being used. *Burroughs Wellcome Co. v. Warner Lambert Co.*, 203 USPQ 191 (TTAB 1979).

Therefore, the examining attorney respectfully requests that the refusal to register the mark based on a finding of likelihood of confusion under Section 2(d) of the Trademark Act be affirmed.

[1] Registration was originally also refused under Section 2(d) of the Trademark Act because of a finding of likelihood of confusion with Registration No. 3571149. On April 15, 2015, the present application was suspended pending the receipt of renewal documents in Registration No. 3571149. On September 11, 2015, the Trademark Office cancelled Registration No. 3571149 and therefore that portion of the original Section 2(d) refusal was WITHDRAWN as moot.

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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

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