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UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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General Contact Number: 571-272-8500

Baxley

Mailed: February 27, 2015

Opposition No. 91196299

Connect Public Relations, Inc.

v.

Digitalmojo, Inc.

Cancellation No. 92054395
Cancellation No. 92054427

Digitalmojo, Inc.

v.

Connect Public Relations, Inc.

Before Cataldo, Mermelstein, and Masiello,
Administrative Trademark Judges.

By the Board:

In the amended notice of opposition in Opposition No. 91196299, Connect Public Relations, Inc. ("Connect") opposes registration of Digitalmojo, Inc.'s ("Digitalmojo") application to register the mark CONNECT in standard character form for goods in International Class 9 and services in International Classes 35, 38, 42, and 45[1] on the ground of likelihood of

[1] Application Serial No. 77714693, filed April 15, 2009, based on an assertion of a bona fide intent to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b). The identification of goods and services in the application is as follows: "Audio recordings featuring music; video recordings featuring music;

confusion with its previously used and registered marks CONNECT PUBLIC

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downloadable audio and video recordings featuring music; prerecorded music on CD, DVD and other media" in International Class 9; "Business marketing services in the nature of agency representation of companies marketing a variety of services to home owners and renters, namely, utility hook-ups, telecommunication services, home security services, home warranties, home and yard maintenance, furniture and appliance rental; comparative marketing and advertising services for providers of residential and business telecommunications services, namely, for providers of broadband cable, DSL, fiber-optic and satellite Internet access services, cable and satellite television, voice over IP, and long-distance telephone services; operation of telephone call centers for others; marketing of high speed telephone, Internet, and wireless access, and directing consumers to access providers; providing an online directory information service featuring information regarding, and in the nature of, classifieds; advertising and information distribution services, namely, providing classified advertising space via the global computer network; **promoting the goods and services of others over the Internet;** providing online computer databases and on-line searchable databases featuring classified listings and want ads; online business networking services; providing telephone directory information via global communications networks; providing an online interactive website obtaining users comments concerning business organizations, service providers, and other resources; providing information, namely, compilations, rankings, ratings, reviews, referrals and recommendations relating to business organizations, service providers, and other resources using a global computer network; providing telephone directory information via global communications networks; arranging for others the initiation and termination of telecommunication services and utility services in the nature of water, gas and electricity and consultation rendered in connection therewith" in International Class 35; "Providing online chat rooms for registered users for transmission of messages concerning classifieds, virtual community and social networking; providing on-line chat rooms and electronic bulletin boards for transmission of messages among users in the field of general interest; providing email and instant messaging services" in International Class 38; "Computer services, namely, creating an on-line community for registered users to participate in discussions, get feedback from their peers, form virtual communities, and engage in social networking; computer software development; application service provider (ASP) featuring software to enable uploading, posting, showing, displaying, tagging, blogging, sharing or otherwise providing electronic media or information over the Internet or other communications network; providing temporary use of non-downloadable software applications for classifieds, virtual community, social networking, photo sharing, video sharing, and transmission of photographic images; computer services, namely, hosting online web facilities for others for organizing and conducting online meetings, gatherings, and interactive discussions; computer services in the nature of customized web pages featuring user-defined information, personal profiles and information" in International Class 42; and "On-line social networking services; internet based dating, introduction and social networking services" in International Class 45 (emphasis added).

RELATIONS for goods and services in International Classes 9, 16, 35, and 38[2] and CONNECTPR for goods and services in International Classes 9, 16, 35, and 38;[3] and its previously used word mark CONNECT.[4] Digitalmojo, in its answer, denies the salient allegations of the amended notice of opposition.

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[2] The pleaded registrations for the mark CONNECT PUBLIC RELATIONS in typed form are as follows:
Registration No. 2362916 for "Printed publications, namely, reports, press kits and brochures in the fields of market research and consulting, public and media relations, sales promotion, strategic marketing planning, development of market positioning and messaging, background editorial support of sales promotion material, and seminar creation and operation" in International Class 16, issued June 27, 2000, renewed;
Registration No. 2373504 for "Marketing and market research and consulting services; public and media relations services and **sales promotion services**" (emphasis added) in International Class 35, issued August 1, 2000, renewed;
Registration No. 2373505 for "Prerecorded audio recordings, prerecorded video recordings, and prerecorded audio-visual recordings featuring topics in the fields of marketing and market research and consulting services, public and media relations services and sales promotion services; electronic publications featuring topics in the fields of marketing and market research and consulting services, public and media relations services and sales promotion services on computer discs and CD-ROM" in International Class 9, issued August 1, 2000, renewed; and
Registration No. 2383778 for Communications services, namely, delivery of messages by electronic transmission" in International Class 38, issued September 5, 2000, renewed.
The registrations all include disclaimers of PUBLIC RELATIONS. Because the registrations are for the mark CONNECT PUBLIC RELATIONS in typed form, they encompass any presentation of that mark. *See Citigroup Inc. v. Capital City Bank Group Inc.*, 98 USPQ2d 1253, 1258 (Fed. Cir. 2011).

[3] The pleaded registrations for the mark CONNECTPR in typed or standard character form are as follows:
Registration No. 2365074 for "Communications services, namely, delivery of messages by electronic transmission" in International Class 38, issued July 4, 2000, renewed;
Registration No. 2366850 for "Marketing and market research and consulting services; public and media relations services and sales promotion services" in International Class 35 (emphasis added), issued July 11, 2000, renewed;
Registration No. 2383777 for "Prerecorded audio recordings, prerecorded video recordings, and prerecorded audio-visual recordings featuring topics in the fields of marketing and market research and consulting services, public and media relations services and sales promotion services; electronic publications featuring topics in the fields of marketing and market research and consulting services, public and media

In the second amended petitions to cancel in Cancellation No. 92054395, Digitalmojo seeks cancellation of Connect's pleaded Registration No. 2366850 for the mark CONNECTPR in typed form for "Marketing and market research and consulting services; public and media relations services and sales promotion services" in International Class 35 on the ground of abandonment. In Cancellation No. 92054427, Digitalmojo seeks cancellation of Connect's pleaded Registration No. 2373504 for the mark CONNECT PUBLIC RELATIONS in typed form also for "Marketing and market research and consulting services; public and media relations services and sales promotion services" in International Class 35 on the ground of abandonment. In particular, Digitalmojo alleges that "[Connect] has changed its name to Connect Marketing, Inc., and is offering its ... Services under the

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relations services and sales promotion services on computer discs and CD-ROMs" in International Class 9, issued September 5, 2000;

Registration No. 2713692 for "Printed publications, namely, brochures in the fields of market research and consulting, public and media relations, sales promotion, strategic marketing planning, development of market positioning and messaging, background editorial support of sales promotion material, and seminar creation and operation" in International Class 16, issued May 6, 2003, renewed; and

Registration No. 3330353 for "Printed publications, namely, brochures comprised of brochures, and press releases, in the fields of market research and consulting, public and media relations, sales promotion, strategic marketing planning, development of market positioning and messaging, background editorial support of sales promotion materials, and seminar creation and operation" in International Class 16, issued November 6, 2007, Section 8 accepted, Section 15 acknowledged.

[4] Connect alleges previous use of the CONNECT mark for "prerecorded audio recordings, prerecorded video recordings, and prerecorded audio-video recordings; electronic publications featuring public and media relations services and sales promotion services;" "printed publications;" "marketing and market research and consulting services; public and media relations services and sales promotion services;" and "communications services, including delivery of messages by electronic transmission."

mark CONNECT MARKETING, and not" its pleaded marks. Second amended petitions to cancel, paragraph 8. Therefore, Digitalmojo alleges that Connect has ceased use of its pleaded marks in International Class 35 and intends not to resume such use. *Id.*, paragraph 9. Connect, in its answers, denies the salient allegations of the second amended petitions to cancel. The above-captioned proceedings were consolidated in a February 23, 2012 order.

This case now comes up for consideration of (1) Connect's motion (filed April 29, 2014) for summary judgment in each of the above-captioned proceedings; and (2) Digitalmojo's cross-motion (filed October 16, 2014) for summary judgment in the above-captioned cancellation proceedings that was incorporated into its brief in response to Connect's motion.[5]

The cancellation proceedings are the equivalent of compulsory counterclaims in the opposition proceeding. *See* Trademark Rules 2.106(b)(2)(ii) and 2.114(b)(2)(ii). In deciding cases that include compulsory counterclaims, the Board generally decides the counterclaims first.[6] *See, e.g., Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC,* 110 USPQ2d 1458, 1461-62 (TTAB 2014); *Tea Board of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1886 (TTAB 2006). The Board therefore turns first to the parties' cross-

[5] Digitalmojo, on May 22, 2014, filed a motion for leave to take discovery under Fed. R. Civ. P. 56(d) prior to responding to the motion for summary judgment. The Board denied that motion in a September 16, 2014 order and reset Digitalmojo's time in which to respond to the motion for summary judgment.

[6] By deciding the counterclaim first, the Board determines whether the plaintiff in an opposition or cancellation proceeding can rely upon the registration that is the subject of the counterclaim in support of the opposition or cancellation.

motions for summary judgment on the abandonment claims in the cancellation proceedings.

Connect, in support of its motion, contends that it adopted and commenced use of its pleaded registered CONNECT PUBLIC RELATIONS and CONNECTPR marks in 1998 for the recited services in International Class 35 and has not subsequently discontinued such use. Accordingly, Connect contends that there is no genuine dispute that it has not abandoned, or even discontinued use, of those pleaded registered marks and that it is therefore entitled to dismissal of the cancellation proceedings as a matter of law.

Connect's evidence in support of its motion for summary judgment in the cancellation proceedings includes the affidavit of its founder and president, Neil Myers ("Myers"), who avers that, "in the early 1990s," he founded Connect's predecessor, Network Associates Consulting, Inc. ("Network"), which was "engaged in providing marketing, including business marketing, market research, consulting, public relations, media relations, and sales promotion services; that Network changed its name to Connect in the spring of 1998; that Connect adopted and began use in interstate commerce of the CONNECT PUBLIC RELATIONS, CONNECTPR, and CONNECT marks at the time of that name change; that Connect obtained nine registrations for the CONNECT PUBLIC RELATIONS and CONNECTPR marks, including the two registrations in International Class 35 that are at issue in the

cancellation proceedings; that Connect has not discontinued use of the pleaded marks for any period of time; and that, since such adoption, it has promoted its goods and services under those marks in a variety of mediums, including its own websites, sales brochures, advertisements in nationally distributed magazines, business cards, and trade shows. Exhibits submitted through the Myers affidavit consist of: (1) a 1998 marketing brochure which purports to demonstrate Connect's adoption and use of the CONNECT, CONNECT PUBLIC RELATIONS, and CONNECTPR marks in interstate commerce; (2) an August 1998 magazine advertisement showing use of the CONNECT, CONNECT PUBLIC RELATIONS, and CONNECTPR marks; (3) a "recent proposal for a potential client in the telecommunications industry" that demonstrates Connect's use of the CONNECT and CONNECT PUBLIC RELATIONS marks; (4) an excerpt from Connect's former website, printed March 21, 2013, showing Connect's use of the CONNECT and CONNECT PUBLIC RELATIONS marks; and (5) an excerpt from Connect's current website, printed April 4, 2014, showing Connect's use of the CONNECT, CONNECT PUBLIC RELATIONS, and CONNECTPR marks.

In response and in support of its cross-motion, Digitalmojo contends that the documents submitted through the Myers affidavit do not support ongoing use of the CONNECT PUBLIC RELATIONS and CONNECTPR marks. In particular, Digitalmojo contends that the website excerpts that Connect submitted "appear to be ... 'mock up[s]'" with wording overlayed on top of

other wording, "hardly the way one would expect [Connect] to use 'all [its pleaded marks] in commerce;'" and that the CONNECTPR mark is not among the "four parts of [Connect's] new brand" which were adopted when Connect became CONNECT MARKETING.

Summary judgment is an appropriate method of disposing of cases in which there are no genuine disputes as to any material fact, thus leaving the case to be resolved as a matter of law. *See* Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of demonstrating that there is no genuine issue of material fact remaining for trial and that it is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1987); *Sweats Fashions Inc. v. Pannill Knitting Co. Inc.*, 833 F.2d 1560, 4 USPQ2d 1793 (Fed. Cir. 1987). The nonmoving party must be given the benefit of all reasonable doubt as to whether genuine issues of material fact exist, and the evidentiary record on summary judgment, and all inferences to be drawn from the undisputed facts, must be viewed in the light most favorable to the nonmoving party. *See Opryland USA, Inc. v. Great American Music Show, Inc.*, 970 F. 2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992).

When the moving party's motion is supported by evidence sufficient to indicate that there is no genuine dispute as to any material fact, and that the moving party is entitled to judgment, the burden shifts to the nonmoving party to demonstrate the existence of specific genuinely-disputed facts that must be resolved at trial. The nonmoving party may not rest on the mere

allegations of its pleadings and assertions of counsel, but must designate specific portions of the record or produce additional evidence showing the existence of a genuine dispute as to any material fact remaining for trial. In general, to establish the existence of disputed facts requiring trial, the nonmoving party "must point to an evidentiary conflict created on the record at least by a counterstatement of facts set forth in detail in an affidavit by a knowledgeable affiant." *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 941, 16 USPQ2d 1783, 1786 (Fed. Cir. 1990).

Trademark Act Section 45, 15 U.S.C. § 1127, states in relevant part as follows: "A mark shall be deemed to be 'abandoned' ... [w]hen its use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances."[7] Therefore, as the party moving for summary judgment on the abandonment claims that are asserted against it, Connect must establish that there is no genuine dispute that (1) there was no discontinuation of use of the CONNECT PUBLIC RELATIONS and CONNECTPR marks or (2) there was no intent not to resume use of those marks. To prevail on its cross-motion, Digitalmojo must establish that there is no genuine dispute as to any material fact regarding both Connect's (1) discontinuation of use of the involved marks, and (2) intent not to resume such use.

[7] The pleaded abandonment claims are not based on three consecutive years of nonuse. *See* Trademark Act Section 45.

Regarding the CONNECT PUBLIC RELATIONS mark, Connect's motion is supported by the Myer declaration, wherein Connect's founder and president avers, among other things, that Connect has not discontinued use of the CONNECT PUBLIC RELATIONS mark for any period of time since it commenced use of that mark in 1998 and has not abandoned or intended to abandon that mark. That declaration is supported by 2013 and 2014 excerpts from Connect's website, which provide URLs and access dates necessary to make those excerpts of record for purposes of deciding the parties' motions. *See Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031 (TTAB 2010). Although the nature of Connect's use of the CONNECT PUBLIC RELATIONS mark changed from a house mark to a mark for one of the four categories of services that Connect renders, the 2013 and 2014 website excerpts clearly indicate that the CONNECT PUBLIC RELATIONS mark is still being used on the services identified in Connect's Registration No. 2373504. Accordingly, we find that Connect has met its initial burden of establishing that there is no genuine dispute that Connect did not discontinue use of the CONNECT PUBLIC RELATIONS mark when it changed its house mark to CONNECT MARKETING.

In response, Digitalmojo essentially attacks the website excerpts submitted by Connect as being "mockup[s]," but provides no contrary archival website excerpts which indicate that the website excerpts that Connect submitted are in any way fabricated or otherwise fail to show use of its marks

by Connect.[8] Indeed, the website excerpt that Digitalmojo submitted as an exhibit to the second amended petition to cancel in Cancellation No. 92054427 shows use of the CONNECT PUBLIC RELATIONS mark.[9] In addition, Digitalmojo essentially concedes in its brief that Connect is using the CONNECT PUBLIC RELATIONS mark. *See* Digitalmojo brief at 8 ("[Digitalmojo] asserts that Myers' statement that [ConnectPR] is using CONNECT PUBLIC RELATIONS in this same graphic is an admission that the presentation of these three words together, regardless of the differences in size between "connect" and "public relations," is a use of CONNECT PUBLIC RELATION [(sic)], and not a use of CONNECT."). Moreover, Digitalmojo alleges no date on which Connect supposedly discontinued use of the CONNECT PUBLIC RELATIONS mark and provides no evidence to support any allegation of intent not to resume use of that mark. Based on the foregoing, we find that there is no genuine dispute that Connect did not discontinue use of that mark and that Connect is therefore entitled to entry of summary judgment on the abandonment claim in Cancellation No. 92054427. Accordingly, Connect's motion for summary judgment on the

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[8] To the extent that Digitalmojo alleges that Connect's website excerpts appear to be mockups, we note that websites often do not print out as neatly as they appear in screenshots.

[9] The Board allowed Cancellation No. 92054427 to go forward notwithstanding that website excerpt because, other than status and title copies of pleaded registrations, the Board does not consider exhibits to pleadings. *See* Trademark Rule 2.122(c). In addition, the screenshot of that website excerpt was not properly of record because it did not include the date of access thereof. *See Safer Inc., supra.*

abandonment claim in Cancellation No. 92054427 is granted, and Digitalmojo's cross-motion for summary judgment on that claim is denied.

Regarding the CONNECTPR mark, we find that, in view of the absence of that mark from the undated "recent proposal for a potential client in the telecommunications industry" that shows only Connect's use of the CONNECT and CONNECT PUBLIC RELATIONS marks and the excerpt from Connect's former website, printed March 21, 2013, which does not show Connect's use of the CONNECTPR, we find that disposition of Cancellation No. 92054395 by summary judgment is inappropriate. At a minimum, there are genuine disputes as to whether Connect discontinued use of the CONNECTPR mark with intent not to resume such use and as to whether Connect's use of the CONNECT PR (two words) mark in the excerpt from its present website, printed April 4, 2014, constitutes a readoption of that mark following an abandonment. *See First National Bank of Omaha v. Autoteller Systems Service Corp.*, 9 USPQ2d 1740 (TTAB 1988). In view thereof, Connect's motion for summary judgment and Digitalmojo's cross-motion on the abandonment claim in Cancellation No. 92054395 are both denied.

We now turn to Connect's motion for summary judgment on the Section 2(d) claim in Opposition No. 91196299. As a party moving for summary judgment in its favor on its Section 2(d) claim, Connect must establish that there is no genuine dispute that: (1) it has standing to maintain this proceeding; (2) it is the prior user of its pleaded marks or owner of

registrations for those marks; and (3) contemporaneous use of the parties' respective marks on their respective services would be likely to cause confusion, mistake or to deceive consumers. *See Hornblower & Weeks, Inc. v. Hornblower & Weeks, Inc.*, 60 USPQ2d 1733, 1735 (TTAB 2001). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it would have the burden of proof at trial, judgment as a matter of law may be entered in favor of the moving party. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. at 322-23.

In view of the dismissal of Cancellation No. 92054427, Connect can rely upon Registration No. 2373504 for the mark CONNECT PUBLIC RELATIONS for "Marketing and market research and consulting services; public and media relations services and sales promotion services" in International Class 35 in support of its motion for summary judgment in the opposition on its pleaded Section 2(d) claim. That registration by itself provides a sufficient basis for granting Connect's motion for summary judgment in International Class 35.

In view of Connect's submission of copies of current printouts of information from the TSDR database records of the USPTO showing the current status and title of Connect's pleaded registrations other than Registration No. 2366850, there is no genuine dispute as to Connect's standing to maintain that opposition. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000). Likewise, Section 2(d)

priority is not an issue in this case as to the marks and the goods and services covered by the pleaded registrations other than Registration No. 2366850. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

In determining likelihood of confusion issues, two key factors are the degree of similarity of the parties' marks and the degree of similarity of their goods and services at issue. *See Federated Foods, Inc. v. Fort Howard Paper Co.,* 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). As to the marks at issue, Connect's CONNECT PUBLIC RELATIONS mark (with PUBLIC RELATIONS disclaimed) and Digitalmojo's CONNECT mark differ only by Connect's inclusion in its mark of disclaimed matter which identifies one of the services that Connect renders under that mark. The disclaimer constitutes an admission of the merely descriptive nature of PUBLIC RELATIONS in connection with Connect's services in International Class 35, and an acknowledgment of the lack of an exclusive right therein at the time of the disclaimer. *See Quaker State Oil Refining Corp. v. Quaker Oil Corp.*, 453 F.2d 1296, 172 USPQ 361, 363 (CCPA 1972). Moreover, the wording PUBLIC RELATIONS is at least plausibly descriptive of some of Digitalmojo's services in International Class 35, such as "[b]usiness marketing services in the nature of agency representation of companies marketing a variety of services ..." and "promoting the goods and services of others over the Internet." Descriptive or generic matter may have little or no

significance in likelihood of confusion determinations. *See Swatch AG (Swatch SA) (Swatch Ltd.) v. M. Z. Berger & Co.*, 108 USPQ2d 1463, 1470 (TTAB 2013) (common use of generic term does not render marks similar). This is especially true where the wording is descriptive with respect to both parties' services. In view of the disclaimer of PUBLIC RELATIONS in a mark for a registration in connection with services that include "public ... relations" in the recitation of services, Connect has established, *prima facie*, that CONNECT is the dominant term in its CONNECT PUBLIC RELATIONS mark. *See In re National Data Corp.,* 753 F.2d 1056, 224 USPQ 749, 750 (Fed. Cir. 1985). Because Digitalmojo's CONNECT mark consists in its entirety of the dominant term in Connect's CONNECT mark, we find that Connect has met its initial burden of showing that there is no genuine dispute that the marks CONNECT PUBLIC RELATIONS and CONNECT have substantially similar connotations and overall commercial impressions.

With regard to the services at issue, the Board's determination of likelihood of confusion is based upon the parties' services as they are identified in the application and registrations at issue, not on how the parties may actually use their marks. *See Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992). The Board must presume that the scope of the services at issue encompasses all of the services of the nature and type described, that they travel in all channels of trade normal for those services, and that they are sold to all classes of prospective

purchasers for those services. *See In re Elbaum,* 211 USPQ 639, 641 (TTAB 1981).

In Board *inter partes* proceedings, likelihood of confusion may be found with respect to a particular international class based on any single item within the identification of goods or services for that class. *See Tuxedo Monopoly Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Rocket Trademarks Pty Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066 (TTAB 2011). That is, if likelihood of confusion is found with respect to any item within a particular class, that finding applies to the entire class at issue.

Connect's recited services in pleaded Registration No. 2373504 include "sales promotion services," whereas Digitalmojo's involved services in International Class 35 include "promoting the goods and services of others over the Internet." Because we must presume that the parties' services both encompass sales promotion services conducted over the Internet, there is no genuine dispute that these services are at least overlapping. Based on the foregoing, we find that Connect has met its initial burden of establishing that there is no genuine dispute as to any material fact regarding its Section 2(d) claim regarding Digitalmojo's CONNECT mark in International Class 35 based on likelihood of confusion with its CONNECT PUBLIC RELATIONS mark for the services identified in its pleaded Registration No. 2373504.

In response, Digitalmojo contends that there are genuine disputes as to the trade channels and classes of purchasers of the respective services.[10] However, because there is no genuine dispute that the parties' services are overlapping, if not essentially identical, we must also presume that the parties' services are sold in all channels of trade normal for those services to all classes of prospective purchasers for those services. *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers"). Thus neither argument nor evidence that a party's goods or services are in reality sold in narrower channels of trade or to a narrower group of consumers can raise a genuine issue of material fact for trial. *See Paula Payne Prods. Co. v. Johnson Publ'g Co., Inc.*, 473 F.2d 901, 177 USPQ 76, 77–78 (CCPA 1973) ("[W]e give full sweep to appellant's registration description of goods and view the goods and modes of distribution as the same.").

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[10] In its brief, Digitialmojo asserts that the parties market their services in different trade channels to different classes of purchasers. In particular, Digitalmojo contends that it markets its services "directly to consumers," whereas Connect's services are "directed to businesses." This assertion, however, is directly contradicted by the plain language of Digitalmojo's recitation of services in International Class 35, which begins with the wording "[b]usiness marketing services in the nature of **agency representation of companies** marketing a variety of services to home owners and renters, namely, utility hook-ups, telecommunication services, home security services, home warranties, home and yard maintenance, furniture and appliance rental; **comparative marketing and advertising services for providers of residential and business telecommunications services**, namely, for providers of broadband cable, DSL, fiber-optic and satellite Internet access services, cable and satellite television, voice over IP, and long-distance telephone services." (emphasis added).

Digitialmojo further contends that there are genuine disputes as to the scope of protection to which Connect is entitled in view of third-party registrations for the word CONNECT in connection with other goods and services and third-party registrations for marks containing the word CONNECT in connection with marketing services. However, third-party registrations cannot justify the registration of another mark that is so similar to a previously registered mark as to create a likelihood of confusion, or to cause mistake, or to deceive. *See e.g., In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1272 (TTAB 2009).

Digitialmojo contends in addition that entry of summary judgment is inappropriate in this case because there is no evidence of record regarding the level of sophistication of purchasers of the goods and services at issue. However, even sophisticated purchasers are not immune from source confusion, especially in cases such as the instant one involving highly similar marks and overlapping goods. *See Cunningham,* 55 USPQ2d at 1846.

Digitalmojo relies in part upon a declaration of its attorney, Thomas W. Cook, as an exhibit to its brief in support of its cross-motion and in opposition to Connect's motion. The Cook declaration consists largely of legal argument and makes of record the third-party registrations upon which Digitalmojo relies. To the extent that Cook presents opinions regarding likelihood of confusion between the marks at issue in that declaration, the record indicates

that he was not disclosed as an expert witness. *See* Trademark Rule 2.120(a)(2); TBMP § 401.03. More importantly, likelihood of confusion is an issue which must be determined by the Board after consideration of all of the evidence of record. We may not abdicate that responsibility by deferring to Digitalmojo's counsel who — unsurprisingly — opines that there are genuine disputes of material fact remaining for trial. *Quaker Oats Co. v. St. Joe Processing Co., Inc.*, 232 F.2d 653, 109 USPQ 390, 391 (CCPA 1956). Moreover, except under limited circumstances not at issue herein, an attorney generally should not appear as a witness in a proceeding in which he is an advocate. *See* Patent and Trademark Rule 11.307. Accordingly, we have considered the Cook declaration only to the extent that it introduces the third-party registrations upon which Digitalmojo relies.

Based on the foregoing, we find that Digitalmojo has failed to raise a genuine dispute as to whether there is a likelihood of confusion between Connect's registered CONNECT PUBLIC RELATIONS mark and Digitalmojo's CONNECT mark in International Class 35. In view thereof, Connect's motion for summary judgment is hereby granted in International Class 35. The opposition is sustained and registration is refused as to that class only.

With regard to the remaining classes in Digitalmojo's involved application, however, we find that disposition of this proceeding by summary judgment is inappropriate. At a minimum, there is a genuine dispute as to

whether the identified goods and services in International Classes 9, 38, 42, and 45 in Digitalmojo's involved application are related to Connect's pleaded goods and services in International Classes 9, 16, 35, and 38 in a way that is likely to give rise to source confusion.[11] *See In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082 (Fed. Cir. 2014). In view thereof, Connect's motion for summary judgment is denied in those classes.

Proceedings herein are resumed. These consolidated proceedings will go forward only in Opposition No. 91196299 with regard to the Section 2(d) claim against Digitalmojo's involved application in International Classes 9, 38, 42, and 45 and in Cancellation No. 92054395 with regard to the abandonment claim against Connect's pleaded Registration No. 2366850.[12] Remaining dates are reset as follows.[13]

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[11] The parties should not infer that this is the only issue remaining for trial in the opposition.

[12] The parties are reminded that our decision granting partial summary judgment is interlocutory in nature and may not be appealed until a final decision is rendered in the proceeding. *See Copeland's Enterprises Inc. v. CNV Inc.*, 887 F.2d 1065, 12 USPQ2d 1562 (Fed. Cir. 1989).
Evidence submitted in connection with the motions for summary judgment is of record for the consideration of those motions only. To be considered at final hearing, any such evidence must be properly introduced in evidence during the appropriate trial period. *See Levi Strauss & Co. v. R. Josephs Sportswear Inc.,* 28 USPQ2d 1464 (TTAB 1993); *Pet Inc. v. Bassetti*, 219 USPQ 911 (TTAB 1983); *American Meat Institute v. Horace W. Longacre, Inc.*, 211 USPQ 712 (TTAB 1981).

[13] Connect's pretrial disclosures were due two days prior to the filing of its motion for summary judgment. The Board presumes that Connect served those pretrial disclosures. Connect is reminded that it has an ongoing duty to supplement and/or correct the pretrial disclosures in a timely manner, as needed. *See* Fed. R. Civ. P. 26(e).

Connect's 30-day testimony period as plaintiff in the opposition to close:	April 13, 2015
Digitalmojo's pretrial disclosures due:	April 28, 2015
Digitalmojo's 30-day testimony period as defendant in the opposition and as plaintiff in the cancellation to close:	June 12, 2015
Connect's pretrial disclosures for rebuttal in the opposition and as defendant in the cancellation due:	June 27, 2015
Connect's 30-day testimony period as defendant in the cancellation and for rebuttal as plaintiff in the opposition to close:	August 11, 2015
Digitalmojo's rebuttal disclosures as plaintiff in the cancellation due:	August 26, 2015
Digitalmojo's 15-day rebutal testimony period as plaintiff in the cancellation to close:	September 25, 2015
Brief for Connect as plaintiff in the opposition due:	November 24, 2015
Brief for Digitalmojo as defendant in the opposition and as plaintiff in the cancellation due:	December 24, 2015
Brief for Connect as defendant in the cancellation and reply brief, if any, as plaintiff in the opposition due:	January 23, 2016
Reply brief, if any, for Digitalmojo as plaintiff in the cancellation due:	February 7, 2016

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125. An oral hearing will be set only upon request filed as provided by

Trademark Rule 2.129. If either of the parties or their attorneys should have a change of address, the Board should be so informed promptly.