

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed:  
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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*Zillow, Inc.*  
*v.*  
*Super T Financial Inc. DBA LoanZilla*

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Opposition No. 91203730  
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Matt Schneller of Schneller IP PLLC<sup>1</sup> for Zillow, Inc.

Marianne E. Dutton and John M. Janeway of Janeway Patent Law PLLC for Super T Financial Inc.

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Before Zervas, Ritchie and Masiello, Administrative Trademark Judges.

Opinion by Masiello, Administrative Trademark Judge:

Super T Financial Inc. DBA LoanZilla (“Applicant”) filed an application to register the mark LoanZilla in standard character form for “mortgage brokerage,” in International Class 36.<sup>2</sup>

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<sup>1</sup> Briefs on behalf of Opposer were filed by Matt Schneller, Erin S. Hennessy, and Jennifer Ashton of Bracewell & Giuliani, LLP. After the case was submitted on brief, Matt Schneller filed an appearance (with revocation of prior powers of attorney) under the firm name Schneller IP PLLC.

<sup>2</sup> Application Serial No. 85316446, filed on May 10, 2011 under Trademark Act § 1(a), 15 U.S.C. § 1051(a), stating a date of first use and first use in commerce of May 19, 2010.

Zillow, Inc. (“Opposer”) opposed registration of the mark on the ground that the mark, as used in connection with the identified services, so resembles Opposer’s earlier used and registered marks ZILLOW and ZILLOW.COM as to be likely to cause confusion, mistake or deception, under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). Opposer pleaded ownership of three registrations for the mark ZILLOW and five registrations for the mark ZILLOW.COM, all in standard character form.<sup>3</sup> The pleaded registrations are summarized below:

<u>Mark</u>	<u>Goods and Services</u>
ZILLOW	Non-downloadable computer database software featuring information in the field of real estate, in International Class 42. <sup>4</sup>
ZILLOW	Operating marketplaces for sellers of goods and services in the field of real estate; real estate valuation services, financial valuation of real estate; providing information in the field of real estate, in International Class 36. <sup>5</sup>
ZILLOW.COM	Operating marketplaces for sellers of goods and services in the field of real estate; real estate valuation services, financial valuation of real estate; providing information in the field of real estate, in International Class 36. <sup>6</sup>

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<sup>3</sup> During the course of this proceeding, and prior to trial, the marks in Reg. Nos. 3332886 and 3175031 were amended from ZILLOW.COM to ZILLOW. Moreover, prior to the date hereof, but after the close of Applicant’s testimony period, the marks in all of the other pleaded ZILLOW.COM registrations were amended to ZILLOW. Opposer did not amend its pleading to reflect any of the amendments. In any event, even if all of the registrations had been pleaded in their amended form, our decision in this case would not differ.

<sup>4</sup> Reg. No. 3150074 issued on September 26, 2006; Section 8 affidavit accepted; Section 15 affidavit acknowledged.

<sup>5</sup> Reg. No. 3437691 issued on May 27, 2008; Section 8 affidavit accepted; Section 15 affidavit acknowledged.

<sup>6</sup> Reg. No. 3332886 issued on November 6, 2007; Section 8 affidavit accepted; Section 15 affidavit acknowledged. The mark in this registration was amended from ZILLOW.COM to ZILLOW on September 11, 2012.

ZILLOW.COM Real estate research services; providing non-downloadable software tools for others to design and create websites; hosting websites for others; providing non-downloadable computer software, namely, non-downloadable consumer data storage software in the area of real estate, consumer goods and consumer services; non-downloadable computer database software featuring information in the field of real estate, consumer goods, consumer services, in International Class 42.<sup>7</sup>

ZILLOW.COM Promoting the goods and services of others by means of linking the web site to other web sites featuring real estate, consumer goods and consumer services; advertising and marketing services in the fields of real estate, consumer goods and consumer services; on-line advertising and marketing services in the fields of real estate, consumer goods and consumer services; real estate sales management; real estate marketing services, namely, on-line services featuring tours of real estate; providing an on-line showroom for the goods of others in the field of real estate; providing information in the field of consumer goods for home maintenance, decoration and sales, and consumer services relating to real estate, in International Class 35.<sup>8</sup>

ZILLOW.COM Computer software, namely, consumer data storage software in the area of real estate, consumer goods and consumer services; computer database software featuring information in the field of real estate, consumer goods and consumer services, in International Class 9.<sup>9</sup>

ZILLOW.COM Electronic storage of consumer data, in International Class 39.<sup>10</sup>

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<sup>7</sup> Reg. No. 3565882 issued on January 20, 2009; Section 8 affidavit accepted; Section 15 affidavit acknowledged. The mark in this registration was amended from ZILLOW.COM to ZILLOW on October 29, 2013.

<sup>8</sup> Reg. No. 3437690 issued on May 27, 2008; Section 8 affidavit accepted; Section 15 affidavit acknowledged. The mark in this registration was amended from ZILLOW.COM to ZILLOW on July 30, 2013.

<sup>9</sup> Reg. No. 3493872 issued on August 26, 2008; Section 8 affidavit accepted; Section 15 affidavit acknowledged. The mark in this registration was amended from ZILLOW.COM to ZILLOW on December 24, 2013.

<sup>10</sup> Reg. No. 3175031 issued on November 21, 2006; Section 8 affidavit accepted; Section 15 affidavit acknowledged. The mark in this registration was amended from ZILLOW.COM to ZILLOW on July 24, 2012.

ZILLOW

A wide range of goods and services in International Classes 9, 35, 36, and 42, including, *inter alia*, computer software for providing mortgage information, analysis, and advice in the fields of mortgage lending and home equity lending; computer software for providing mortgage quotes, for confirming lender availability and interest, and for reviewing and rating lenders and mortgage professionals; advertising and marketing in the field of mortgage services; making referrals in the field of financial services and mortgage services; matching borrowers with potential lenders in the field of mortgage lending; financial services, namely, mortgage and home equity loan planning; providing mortgage and home equity loan quotations to others and providing anonymous mortgage and home equity loan quotations to others; providing information, analysis, and advice in the fields of mortgage lending and home equity lending; providing a web site where users can post ratings, reviews, and recommendations in the fields of mortgage lending services and home equity loan services; and non-downloadable computer database software featuring information and advertising in the field of mortgages..<sup>11</sup>

Applicant denied the salient allegations of the notice of opposition. (A counterclaim filed on November 14, 2012 was withdrawn without prejudice on November 20, 2012.)<sup>12</sup> The case has been fully briefed.

**I. The record.**

The record includes the pleadings and, by operation of Trademark Rule 2.122, 37 C.F.R. § 2.122, the application file for the opposed mark. Opposer's pleaded registrations are of record, as Opposer attached to its notice of opposition printouts of information from the electronic database records of the Patent and

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<sup>11</sup> Reg. No. 4201269 issued on September 4, 2012.

<sup>12</sup> TTABVue # 9.

Trademark Office showing the current status and title of such registrations.<sup>13</sup> The record also includes the following testimony and evidence:<sup>14</sup>

**A. Opposer's evidence.**

1. Testimony deposition of Erin Lantz, Opposer's director of Zillow Mortgage Marketplace, dated April 25, 2013. TTABvue # 20; the confidential portion of the deposition was filed as TTABvue # 21.
2. Opposer's confidential notice of reliance on a two-page report of results of a survey of unaided awareness and total awareness of Opposer and certain competitors. TTABvue # 13 ("PNOR 1").<sup>15</sup>
3. Opposer's notice of reliance filed April 10, 2013, with attachments filed April 16, 2013, TTABvue ## 14-17 (collectively, "PNOR 2"), consisting of the following evidence:
  - Partial screenshot of LoanZilla web page.
  - Printouts of current and historical Zillow web pages.
  - List of awards and accolades.
  - List of news articles.
  - Copies of press notices relating to Opposer.
  - Opposer's 2011 annual report, with Form 10-K for 2011 and Form 10-Q for period ending June 30, 2012.
  - Opposer's Form 10-K for 2012.
  - Title and status information for Opposer's pleaded registrations.

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<sup>13</sup> 37 CFR 2.122(d); Notice of opposition, TTABvue # 1. Opposer also submitted status and title information regarding most of its pleaded registrations under notice of reliance. PNOR 2.

<sup>14</sup> The parties stipulated during discovery that any "public-facing documents" exchanged during discovery "are authentic and admissible in this proceeding, and may be submitted during the parties' trial periods via Notice of Reliance alone." See Opposer's notice of reliance, TTABvue # 14 at 2; and Applicant's brief at 9.

<sup>15</sup> This confidential document does not fall within Trademark Rule 2.122 concerning notices of reliance and does not fall into the category of "public-facing documents," as contemplated by the parties' stipulation. However, Applicant has not objected to its admission; and we note that Applicant characterizes the parties' stipulation more broadly than does Opposer, indicating that *any* documents exchanged during discovery would be deemed "authenticated and thus admissible without requiring a person to testify that a document is what it purports to be on its face." Applicant's brief at 9. Accordingly, we have considered the two-page survey report.

- Materials relating to Applicant's brokerage license and the acquisition of Applicant's domain name.
  - Applicant's responses to Opposer's interrogatories.
4. Opposer's rebuttal notice of reliance ("PNOR 3") on results of a search of the electronic records of the U.S. Patent and Trademark Office. TTABvue # 25.

**B. Applicant's evidence.**

1. Applicant's notice of reliance on the following classes of evidence, filed July 12, 2013, with amendments thereto filed July 16 and August 8, 2013, TTABvue ## 22-24 ("DNOR"):
- Opposer's responses to Applicant's interrogatories.
  - Copies of third-party registrations of marks having a "-zilla" formative.
  - Internet evidence of third-party use of marks having a "-zilla" formative.
  - Wikipedia entries.
  - Excerpts from Wikizilla website.
  - Census data relating to home values.
  - Web pages from Opposer's website.
  - Web pages from Mortech website.

**II. Standing.**

Opposer has properly made of record its pleaded registrations and has demonstrated its use of the ZILLOW service mark in connection with its online information services in the field of real estate.<sup>16</sup> Opposer has thus shown that it is not a mere intermeddler and has established its standing to oppose registration of applicant's mark. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

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<sup>16</sup> *See, e.g.*, PNOR 2, TTABvue # 15 at 9-62.

**III. Opposer's claim under Section 2(d).**

We now address Opposer's claim under Trademark Act § 2(d) on the ground of priority and likelihood of confusion. In view of Opposer's ownership of valid and subsisting registrations of its pleaded marks, priority is not in issue with respect to the marks and the goods and services identified in those registrations. *King Candy, Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Our determination of likelihood of confusion is based on an analysis of all probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.* 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

**A. The marks at issue.**

We first consider the similarity or dissimilarity of the marks at issue in terms of appearance, sound, meaning, and overall commercial impression. We base our determination on a consideration of the marks in their entirety. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). *See also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 23, 234 (CCPA 1981). However, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entirety. *In re National Data Corp.*, 224 USPQ at 751; *see also Price Candy Company v. Gold Medal Candy Corporation*, 220 F.2d 759, 105 USPQ 266, 268 (CCPA 1955).

Clearly the marks at issue, ZILLOW and LOANZILLA, are not identical. It is equally clear that they share the letter string ZILL. Opposer contends that ZILL constitutes “the most distinctive and memorable part of each mark.”<sup>17</sup> However, Opposer’s focus on only the letters ZILL is not supported by any rationale, other than the fact that these letters are common to both parties’ marks. Opposer’s mark, as a whole, is fanciful, and the letters ZILL are no more fanciful than the mark as a whole. Opposer has not proposed any reason for considering ZILL to be a separate distinctive element, apart from the remainder of the mark. Similarly, there is no reason to focus only on the letters ZILL in Applicant’s mark. Moreover, as we will discuss below, Applicant contends that the element ZILLA has special meaning in its mark. For that reason, focusing only on the letters ZILL would be an impermissible dissection of Applicant’s mark. *DuoProSS Meditech Corp. v. Inviro Medical Devices Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1756 (Fed. Cir. 2012).

Visually, the two marks are distinguishable. To the extent that they are similar, we note that in Applicant’s mark the ZILL component is embedded among other letters, which diminishes its visual impact to some extent.

The two marks also have certain phonetic differences. However, we give due consideration to the possibility that ZILLOW might be pronounced in a manner resembling “zilla.”

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<sup>17</sup> Opposer’s brief at 11.

With respect to meaning, we note that Opposer's mark is a coinage, with no literal meaning. Opposer has explained the suggestive connotation of its mark as follows:

The Zillow name evolved from the desire to make zillions of data points for homes accessible to everyone. And, since a home is about more than just data – it is where you lay your head to rest at night, like a pillow – “Zillow” was born.<sup>18</sup>

Applicant's mark also is a coinage, although it is built upon the component LOAN, which has obvious meaning in the field of loan brokerage. Applicant has explained the overall connotation of the mark as follows:

The word “Zilla” is a play on words from GodZilla. The LoanZilla logo is designed to resemble a lizard. We have future plans to use lizard and/or dinosaur themes in our marketing. The term “Zilla” is routinely used by many industries to imply something large, dominating and/or intimidating [*sic*].<sup>19</sup>

Applicant has made of record the following entry from Wikipedia:

**-zilla**

...

**-zilla** is an English slang suffix, a back-formation derived from the English name of the Japanese movie monster Godzilla. It is popular for the names of software and websites. It is also found often in popular culture to imply some form of excess, denoting the monster-like qualities of Godzilla.<sup>20</sup>

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<sup>18</sup> Lantz Exhibit E. *See also* Lantz 30:8-13 (“‘Z’ is for the zillion data points that you need to figure out what to do with your home; the ‘illow’ is like pillow, because home buying is not just data, it’s emotional, it’s something that people are connected to, it’s where you want to lay your head down at night, like a pillow.”)

<sup>19</sup> Applicant's response to Interrogatory No. 12, PNOR 2, TTABvue # 17 at 196.

<sup>20</sup> DNOR, TTABvue # 22 at 243-44.

Applicant has also submitted an excerpt of the Wikipedia entry for “Godzilla,” which states in pertinent part:

**Godzilla** ... is a *kaiju* (Japanese giant monster), first appearing in Ishiro Honda’s 1954 film *Godzilla*. Since then, Godzilla has gone on to become a worldwide pop culture icon....<sup>21</sup>

To support applicant’s contention that the suffix -ZILLA is associated with Godzilla, lizards, or monsters, applicant has submitted the following evidence:

- a webpage entitled “Wikizilla,” which describes itself variously as “The Godzilla and King Kong Wiki”; “The encyclopedia of all things Godzilla, and all other Toho monsters that anyone can edit”; and “the giant monster Wikia and the well-cited, definitive source for *Giant Monster* information.”<sup>22</sup>
- Applicant’s webpage at <mckimmortgage.com/loancenter.aspx> showing a display of the mark LoanZilla, in which the letter Z is stylized with a coiling, lizard-like tail.<sup>23</sup>
- Wikipedia entry for “Bridezillas,” stating, “Bridezillas is an American reality television series.... The word ‘bridezilla’ is a portmanteau combining bride with the fictional rampaging beast ‘Godzilla’ to indicate a difficult bride.”<sup>24</sup> The web page shows a logo presentation of the name, featuring a waving, pointed tail emanating from the final letter S.
- Website of a sushi restaurant called “Nomzilla!,” featuring a design of a seated giant lizard, eating with chopsticks.<sup>25</sup>
- Copy of U.S. Reg. No. 2515370 for the mark BOSSZILLA for “series of video tapes and video discs that show dealing with a difficult employer.”<sup>26</sup>
- Web page of online store named “Zilla,” featuring products for pet reptiles, showing a logo having a lizard design.<sup>27</sup>

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<sup>21</sup> *Id.* at 245-46.

<sup>22</sup> *Id.* at 260-61.

<sup>23</sup> *Id.* at 250.

<sup>24</sup> *Id.* at 58.

<sup>25</sup> *Id.* at 105.

<sup>26</sup> *Id.* at 110.

Applicant has also made of record a substantial number of U.S. trademark and service mark registrations for marks that include the suffix -ZILLA, for use in connection with a wide variety of goods and services.<sup>28</sup> A representative sample of these marks includes ARMEDZILLA, REVZILLA, POPZILLA, ARCHZILLA, BULB-ZILLA, CAREZILLA, CHILLZILLA, FREIGHTZILLA, FRUITZILLA, GUARDZILLA, ICEZILLA, MOLDZILLA, MOW-ZILLA and OFFICE ZILLA. Although these registrations do not demonstrate what commercial impression the marks are intended to create, they do demonstrate that the suffix -ZILLA holds some special appeal for trademark applicants. (Relatively few of the registrations are accompanied by evidence of use of the marks; we note that a registration alone does not demonstrate that the mark is in actual use. *See* TBMP § 704.03(b)(1)(B) (2014) and cases cited therein. (“Even when a third-party federal registration has been properly made of record, its probative value is limited, particularly when the issue to be determined is likelihood of confusion, and there is no evidence of actual use of the mark shown in the registration.”))

Opposer objects that the evidence discussed above is irrelevant because “Godzilla’ has nothing to do with mortgage brokerage services,” and because most of the evidence of third-party use or adoption of -ZILLA marks relates to marks in fields unrelated to mortgage brokerage or real estate.<sup>29</sup> It is true that the evidence

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<sup>27</sup> *Id.* at 241-42.

<sup>28</sup> *Id.* at 54-238.

<sup>29</sup> Opposer’s brief at 12.

discussed above is not effective to demonstrate the weakness of Opposer's mark in the field of real estate, either because the marks are in use in fields of business unrelated to real estate or because the registrations, alone, are not evidence of actual use of the marks. However, the evidence is relevant for the purpose of demonstrating the special meaning that, according to Applicant, the suffix -ZILLA has for trademark applicants.

The evidence of record substantiates Applicant's contention that the suffix -ZILLA suggests an association with the attributes of the monster Godzilla and that this suggestiveness likely affects the commercial impression that customers will receive from the mark. This suggestive meaning is absent from Opposer's mark, and as a result the two marks create substantially different overall commercial impressions. Accordingly, the *du Pont* factor of the similarity or dissimilarity of the marks weighs against a finding of likelihood of confusion.

**B. Similar marks in use.**

In accordance with *du Pont*, we consider any evidence of record regarding "the number and nature of similar marks in use on similar goods [and services]." *du Pont* at 567. Applicant argues that "There are many live third-party registrations for marks that contain 'zill', the part of Opposer's mark that Opposer identifies as being the dominant portion. And many of the registered marks are used to identify goods and services similar to Opposer's computer software services."<sup>30</sup> Of course, for purposes of demonstrating the weakness of a mark,

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<sup>30</sup> Applicant's brief at 38.

third-party registrations alone have little weight, because they are not evidence that the marks are in use. *Productos Lacteos Tocumbo S.A. de C.V. v. Paeteria La Michoacana Inc.*, 98 USPQ2d 1921, 1934 (TTAB 2011). However, applicant has demonstrated through internet evidence that a number of the marks are in use at least in internet advertisements.<sup>31</sup> Among these, we note the following:

BUGZILLA	Web-based bugtracker and testing tool.
MOZILLA	Source of the Firefox web browser.
FILEZILLA	Open source FTP software.
SHOPZILLA	Online shopping service.
ARMEDZILLA	Online community for veterans.
REZILLA	Online motorcycle accessories and apparel retailer (also using marks TeamZilla, VineZilla).
GO!ZILLA	Download manager and download accelerator software.
CLONEZILLA	A partition and disk imaging/cloning program for system deployment, bare metal backup and recovery.
RARZILLA	Freeware.
EVENTZILLA	Online ticket sales.
WARPZILLA	Software related to Firefox web browser.

“[T]he purpose of a defendant introducing third party uses is to show that customers have become so conditioned by a plethora of such similar marks that customers ‘have been educated to distinguish between different [such] marks on the bases of minute distinctions.’” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin*,

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<sup>31</sup> DNOR, TTABvue # 22 at 64-95; 247-48; 251; 257-58; 264.

396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005). The above-listed examples of use show, on their face, “that the public may have been exposed to those internet websites and therefore may be aware of the advertisements contained therein.” *Rocket Trademarks Pty Ltd., v. Phard S.p.A.*, 98 USPQ 2d 1066, 1072 (TTAB 2011). The evidence does indeed suggest that a plethora of marks having the suffix -ZILLA are present in the marketplace. These marks are similar to Opposer’s mark in that they share the letter string ZILL. In the context of the record as a whole, we find this evidence sufficient to suggest that customers likely can distinguish between Opposer’s mark and marks that include the suffix -ZILLA on the basis of other elements in the marks (*i.e.*, the final letter A and the presence of a prefix preceding the letter Z). We therefore find that the *du Pont* factor of the number and nature of similar marks in use on similar goods and services weighs against a finding of likelihood of confusion.

**C. The parties’ goods and services.**

We consider next the similarity or dissimilarity of the goods and services at issue.<sup>32</sup> Opposer’s core service is the operation of a website that provides a database of information relating to real estate.<sup>33</sup> The database is searchable by address, so that customers may find information regarding specific parcels of real estate.<sup>34</sup> Among the featured items of information is an estimated market value of the real

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<sup>32</sup> In discussing Opposer’s business we will refer primarily to its services, because its goods are software that is instrumental in providing those services or in making those services accessible to customers.

<sup>33</sup> Lantz 5:11-6:7.

<sup>34</sup> PNOR 2, TTABvue #15 at 33, 48, 56-58.

estate, which may sometimes reflect the price at which the property is currently offered for sale.<sup>35</sup> Some customers find Opposer's website useful for hunting for homes to buy or rent and for offering their homes for sale or rent. Many customers of Opposer therefore have a strong interest in information as to ways to finance the purchase of a home. To accommodate and attract such customers, Opposer's website features computer-generated estimates of mortgage interest rates that might be offered by lenders to finance the purchase of a particular home. The website also provides computer-generated estimates of the monthly costs of carrying a mortgage of a particular amount, duration, and interest rate, secured by a particular property. Importantly, Opposer's website, under the rubric "Zillow Mortgage Marketplace," offers customers an online form for anonymously requesting a loan to be secured by a mortgage on a particular property.<sup>36</sup> The information provided by the customer on the online request form is distributed by Opposer to participating lenders, and those lenders may, at their option, respond to the customer with a non-binding indication of willingness to lend the required amount to the customer on particular terms and at a particular rate of interest. The customer, armed with information regarding the range of available loan rates, may then contact one or more lenders and attempt to negotiate the terms of an actual loan.

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<sup>35</sup> *Id.* at 45-46, 50, 63, 67, 263-269.

<sup>36</sup> *Id.* at 279-80.

Opposer's pleaded registrations cover services that are described with sufficient breadth as to cover the services described above.<sup>37</sup> We also note that Opposer has pleaded a registration of its mark that covers "computer software for providing mortgage information, analysis, and advice in the fields of mortgage lending and home equity lending; computer software for providing mortgage quotes, for confirming lender availability and interest, and for reviewing and rating lenders and mortgage professionals."<sup>38</sup>

Applicant wishes to register its mark for "mortgage brokerage." Opposer has admitted that it "does not provide, broker, or originate mortgages."<sup>39</sup> Moreover, Opposer takes pains to inform its customers that Opposer is not a mortgage broker and has no involvement in any real estate or mortgage transaction that its customers may enter into, even if the parties to the transaction made initial contact with each other through use of Opposer's services:

**Zillow Mortgage Marketplace IS NOT:**

***Involved in the transaction***

Zillow Mortgage Marketplace is merely the meeting place where borrowers and lenders come together. Once a loan agreement is reached, it's between the borrower and lender; Zillow is not involved in the transaction.

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<sup>37</sup> See, in particular, Reg. Nos. 3437691; 3332886; and 3565882.

<sup>38</sup> Reg. No. 4201269.

<sup>39</sup> Opposer's response to Interrogatory No. 42, DNOR, TTABVue # 22 at 24.

***A mortgage broker***

Zillow Mortgage Marketplace is not in the business of brokering loans. We are not a licensed broker and have no part in the financial part of a mortgage transaction.<sup>40</sup>

However, for purposes of determining whether services are related in connection with an analysis of likelihood of confusion, it is not necessary that they be similar or competitive in character; it is sufficient that they be related in some manner or that conditions and activities surrounding marketing of the services be such that they would be encountered by the same persons under circumstances that could, because of the similarities of marks used with them, give rise to the mistaken belief that they originate from or are in some way associated with the same producer. *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1410 (TTAB 2010); *Schering Corporation v. Alza Corporation*, 207 USPQ 504, 507 (TTAB 1980); *Oxford Pendaflex Corporation v. Anixter Bros. Inc.*, 201 USPQ 851, 854 (TTAB 1978). In the present case, it is clear that the parties' services are commercially related. Although Opposer is not a mortgage broker and its services are less comprehensive than those of a mortgage broker, Opposer provides to its customers some of the functions that customers would obtain as part of mortgage brokerage services, *i.e.*, the identification of willing lenders, information regarding available interest rates, and limited intermediary services between the customer and the lenders. Moreover, Opposer has pleaded a registration of the mark

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<sup>40</sup> Opposer's website at <[zillow.com/mortgage/help/HowZillowIsDifferent.htm](http://zillow.com/mortgage/help/HowZillowIsDifferent.htm)>, DNOR, TTABvue # 22 at 269. (Emphasis and bolding in original.)

ZILLOW for “providing mortgage and home equity loan quotations to others,”<sup>41</sup> services that are clearly among those traditionally provided by a mortgage broker.

It is also relevant that Opposer’s website attracts real estate professionals who wish to advertise on the site, in order to reach customers having a strong interest in real estate. Among these professionals are not only real estate agents and brokers, but lenders and mortgage brokers.<sup>42</sup> The advertising of such professionals is an important source of Opposer’s revenue.<sup>43</sup> Significantly, Applicant admitted that it has used Opposer’s website “for property valuation [and] shopping its competitors,” and that it has “considered advertising on the site.”<sup>44</sup>

The evidence of record indicates that the parties’ services are related. Accordingly, the *du Pont* factor relating to the similarity of the goods and services favors a finding of likelihood of confusion.

**D. The parties’ channels of trade.**

We next consider the parties’ established and likely-to-continue trade channels. As there are no limitations as to channels of trade in the identifications of goods and services in the registrations and application, we presume that they move in all channels of trade normal for such goods and services. *See Octocom Sys. Inc. v. Houston Computers Svcs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *Paula Payne Products Co. v. Johnson Publishing Co.*, 473 F.2d 901, 177

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<sup>41</sup> Reg. No. 4201269.

<sup>42</sup> *See, e.g.*, Lantz Exhibit F at ZILL000084; PNOR 2 at ZILL000071-72, ZILL000308.

<sup>43</sup> Lantz 13:10-14.

<sup>44</sup> Applicant’s responses to Interrogatories Nos. 32-34, PNOR 2, TTABvue #17 at 205-07.

USPQ 76 (CCPA 1973); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992).

As Opposer's service is web-based, Opposer largely promotes and provides its services through its website at <zillow.com>, through mobile applications, and through other internet "portals" such as Yahoo! Real Estate. Opposer also indicated that it promotes its services through individual agent and broker "partners," third-party classified or listing sites, and newspapers that agree to provide listing information.<sup>45</sup> Opposer's witness testified that until shortly before trial, Opposer spent little on advertising, but relied largely on its public relations team to generate publicity; and that Opposer uses search engine optimization for the purpose of maximizing its internet presence.<sup>46</sup> Opposer first advertised on television at the end of 2012, and that effort constituted its first "paid advertising at any scale."<sup>47</sup>

Applicant, for its part, stated that it employs and intends to employ marketing techniques such as client referrals, real estate broker referrals, networking, and its website.<sup>48</sup> Applicant argues:

Applicant offers Applicant's mortgage brokerage services online exclusively on Applicant's website. Once a customer decides to pursue a mortgage with Applicant, a meeting is scheduled to further discuss in person. Consequently, most of Applicant's mortgage brokerage service is necessarily conducted in person. Other than having a website, Applicant does not advertise. Instead, customers are made aware of Applicant's mortgage brokerage services through client referrals, real estate broker referrals, and networking.

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<sup>45</sup> Opposer's response to Interrogatory No. 11, DNOR, TTABvue # 22 at 13-14.

<sup>46</sup> Lantz 25:2-25; 26:9-27:4.

<sup>47</sup> Lantz confidential deposition 32:15-33:13.

<sup>48</sup> Applicant's responses to Interrogatories Nos. 8-9, PNOR 2, TTABvue # 17 at 194.

...

Although a consumer can find Opposer's and Applicant's respective websites while surfing the internet, the same consumer can also find virtually all possible goods and services.

Applicant's brief at 26 (citations to record omitted).

As we have noted above, the record shows that mortgage brokers advertise on Opposer's website;<sup>49</sup> that Opposer's service is, in itself, a channel of trade through which mortgage brokers may attract clients;<sup>50</sup> and that Applicant has considered advertising on Opposer's web site.<sup>51</sup> Inasmuch as the website through which Opposer *provides* its service is a likely trade channel through which mortgage brokers may *advertise* their services, the *du Pont* factor of trade channels weighs in favor of a finding of likelihood of confusion.

**E. Customers; Conditions of sale.**

We next consider "the conditions under which and the buyers to whom sales are made." *du Pont* at 567. Applicant has described its customers and intended customers as homeowners, persons seeking to purchase homes, persons wishing to obtain mortgages or loans for purchase or refinance of homes and real estate, and persons seeking to purchase commercial real estate or to obtain commercial real

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<sup>49</sup> See, e.g., Lantz Exhibit F at ZILL000084; PNOR 2 at ZILL000071-72, ZILL000308.

<sup>50</sup> PNOR 2, TTABvue # 15 at 8; TTABvue # 16 at 40-46.

<sup>51</sup> Applicant's responses to Interrogatories Nos. 32-34, PNOR 2, TTABvue # 17 at 206-07.

estate loans for purchase and refinance.<sup>52</sup> At the time of trial, applicant had no commercial customers.<sup>53</sup>

Opposer described the users of its website service as homeowners and renters in the United States; the full range of individuals and businesses interested in the purchase or rental of real estate; those interested in the mortgage markets; real estate professionals and mortgage professionals.<sup>54</sup>

There is clearly substantial overlap between the classes of customers to which the two parties market their services, but those classes are not entirely co-extensive. Some of Opposer's customers are casual browsers, and use of Opposer's service entails little or no obligation on the part of the user. Applicant argues that its customers should be considered careful and discriminating:

[P]urchasers of real estate are highly discriminating. For most people, a house is the most expensive purchase they will make in their lifetime.

...

The time and deliberation involved in purchasing a home, along with the long-term commitment and large initial deposit – especially after the recent housing crash – make home purchasers careful and deliberate in their decisions.<sup>55</sup>

We agree that an elevated degree of care is involved in selecting a mortgage broker.

The likelihood that customers will have in-person contact with a representative of

Applicant adds an element of care to the conditions of selection. We take into

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<sup>52</sup> *Id.* at 192-193.

<sup>53</sup> Applicant's supplemental response to Interrogatory No. 2, PNOR 2, TTABvue # 17 at 214-215.

<sup>54</sup> Opposer's responses to Interrogatories Nos. 13-14, DNOR TTABvue # 22 at 14.

<sup>55</sup> Applicant's brief at 28-29.

consideration the fact that a mortgage broker's mark may be seen by users of Opposer's website, because mortgage brokers advertise there. However, as we have noted above, Opposer takes pains to inform its users that it is not a mortgage broker. On balance, we find that the *du Pont* factor of customers and the conditions of sale weighs somewhat against a finding of likelihood of confusion.

**F. The fame of Opposer's mark.**

Opposer maintains that its mark is "well known and famous in the real estate and mortgage fields" and is "entitled to a broad range of protection above and beyond the normal presumption that any doubts must be resolved in favor of the owner of the prior registration."<sup>56</sup> Fame, if it exists, plays a dominant role in the likelihood of confusion analysis because famous marks enjoy a broad scope of protection. A famous mark has extensive public recognition and renown. *Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002); *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000); *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992). Because of the extreme deference that we accord a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, it is the duty of the party asserting that its mark is famous to clearly prove it. *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007).

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<sup>56</sup> Opposer's brief at 14.

Opposer has presented, by means of its annual reports, dollar figures for its revenues and “sales and marketing” expenditures between 2008 and 2012,<sup>57</sup> as well as the number of average monthly users of its website in those years. Applicant argues that the figures for revenues and monthly users have not been properly verified, and that the figures for sales and marketing expenditures have not been verified at all. Even though the annual reports are in evidence for what they show on their face, the factual assertions set forth therein are mere hearsay unless supported by testimony. With respect to the sales and marketing expenditures, Applicant’s point is well taken, as we see no testimony to indicate that they are accurate. The figures for revenues and average monthly users were verified in a desultory manner by the director of Opposer’s Zillow Mortgage Marketplace.<sup>58</sup> We will in any event consider the revenue and average monthly user figures for what they are worth. Those figures show substantial and growing performance for Opposer’s business, with figures for 2012 and 2011 being much greater than those for 2008-2010. However, no context is provided for these raw statistics so as to allow the Board to compare Opposer’s performance with that of similar businesses.

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<sup>57</sup> Opposer’s Annual Report for 2011 at 2 and 2011 Form 10-K at 54, PNOR 2, TTABvue # 16 at 107 and 165; Opposer’s 2012 Form 10-K at 4 and 36, *id.* at 268 and TTABvue # 17 at 5.

<sup>58</sup> See Lantz 13:10-14:

Q. First, I just wanted to verify that the financial revenue and monthly unique site user figures in the 2011 and 2012 annual reports are, to the best of your knowledge, accurate.

A. Yeah.

Opposer made of record a very short summary of the results of a comparative survey of unaided awareness and total awareness of Opposer and certain of its competitors.<sup>59</sup> But the assessment of these results by Opposer's own witness was not sanguine.<sup>60</sup>

Opposer has also presented a modest number of news articles mentioning its business,<sup>61</sup> some of which acknowledge Opposer's prominence. The record also includes a list of "Awards & Accolades" and a list of the titles of news articles, both from Opposer's website.<sup>62</sup> However, such lists are insufficient proof of such accolades or of the content of the news articles.

On this record, Opposer has failed to demonstrate that its mark is famous for purposes of a likelihood of confusion analysis. Accordingly, we find that the *du Pont* factor of fame is neutral.

**G. The variety of services on which Opposer's mark is used.**

Opposer argues that it uses its mark on a wide variety of products and services, and that therefore it is "more likely that relevant consumers will be confused by the applicant's similar mark."<sup>63</sup> Opposer's service is primarily one of providing information, and the types of information provided extend into a variety of different fields. In the field of real estate, Opposer provides information about the condition of particular parcels of real estate; an estimate of their value; known

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<sup>59</sup> PNOR 1.

<sup>60</sup> Lantz 32:23-33:13 (confidential).

<sup>61</sup> PNOR 2, TTABvue #15 at 172-230; TTABvue #17 at 93-102.

<sup>62</sup> PNOR 2, TTABvue # 15 at 107-14; and 115-71.

<sup>63</sup> Opposer's brief at 19; Opposer's reply brief at 6-7.

offering prices; sales history, etc. In the field of finance, Opposer provides information about interest rates for mortgages, estimates of needed financing, and estimates of the cost of financing. Also in the field of finance, Opposer's website relays to customers actual financing proposals from lenders, and relays to lenders information relating to potential borrowers. Moreover, Opposer owns a registration for the mark ZILLOW that covers "financial services, namely, mortgage and home equity loan planning."<sup>64</sup> In the field of advertising, Opposer provides software products to real estate and finance professionals enabling them to coordinate their advertising, to some extent, with Opposer's services. Opposer's website also provides information regarding home remodeling and improvement services. We agree that the ramification of Opposer's services into various different fields of information (especially in the field of finance) increases the likelihood that a customer would mistakenly perceive a connection between Opposer and a similar mark used in connection with a different financial service, such as mortgage brokerage. Accordingly, this *du Pont* factor favors a finding of likelihood of confusion.

**H. Absence of actual confusion.**

Both Opposer and Applicant have stated that they have no knowledge of any instance of actual confusion involving the parties' marks.<sup>65</sup> Applicant argues that

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<sup>64</sup> Reg. No. 4201269.

<sup>65</sup> Opposer's response to Interrogatory No. 25, DNOR, TTABvue # 22 at 19; Applicant's response to Interrogatory No. 29, PNOR 2, TTABvue # 17 at 204.

the lack of any actual confusion indicates that confusion is not likely.<sup>66</sup> However, Applicant first used its mark in advertising in May 2010<sup>67</sup> and, according to its brief, first made use of the mark in June 2010.<sup>68</sup> Thus, there is no indication that there has been a meaningful opportunity for confusion to occur. Under the circumstances, we find the lack of evidence of actual confusion to be a neutral factor in our analysis of likelihood of confusion. *Cf. Citigroup Inc. v. Capital City Bank Group, Inc.*, 94 USPQ2d 1645, 1660 (TTAB 2010), *aff'd*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011).

**I. Applicant's alleged bad faith.**

Opposer argues that Applicant, prior to adopting Applicant's mark, was aware of Opposer and its mark; and that the Board should "infer Applicant's bad faith intent to trade on [Opposer's] goodwill."<sup>69</sup> Applicant does not dispute that it was aware of Opposer, had used Opposer's services and had contemplated advertising on Opposer's website. However, these facts, without more, are not inconsistent with good faith on the part of Applicant in adopting its mark. On this record we see no evidence of bad faith. Accordingly, we find this factor to be neutral.

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<sup>66</sup> Applicant's brief at 40-41.

<sup>67</sup> Applicant's response to Interrogatory 17, PNOR 2, TTABvue # 17 at 198.

<sup>68</sup> Applicant's brief at 40.

<sup>69</sup> Opposer's brief at 19.

**IV. Conclusion.**

We have considered all of the evidence of record and all arguments of the parties relevant to the *du Pont* factors, including those not specifically discussed herein. While the parties' services are commercially related and there is overlap between the parties' customer classes and channels of trade, the parties' marks are extremely different in overall commercial impression, and that difference is further emphasized by the number and nature of marks incorporating the -ZILLA suffix in use by third parties. Accordingly, we find that Applicant's mark is not likely to give rise to confusion, mistake or deception as to the source of Applicant's services.

**Decision:** The opposition is dismissed.