

09/14/2009 TTAB

**In The United States Patent and Trademark Office  
Trademark Trial and Appeal Board**

In the Matter of:

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A.J. Boggs & Company

Petitioner

v.

General Electric Capital Corporation  
Intrado, Inc.

Registrant

-----

Trademark: 911.NET

Registration No. 2551269

Cancellation No. 040559

Box TTAB No Fee  
Assistant Commissioner of Trademarks  
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Arlington, VA 22202-3514

**PETITIONER'S TRIAL BRIEF**

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## I. SUMMARY OF ARGUMENT

Petitioner, A.J. Boggs & Company ("Petitioner") seeks to cancel the registration of Registrant General Electric Capital Corporation's ("Registrant") 911.NET Mark ("911.NET Registration") for use with emergency communications services.

The issues and the relevant facts in this matter are clear and straightforward. Petitioner began using the 911.Net mark well before Registrant's alleged date of first use of its confusingly similar mark thereby establishing priority and necessitating cancellation. Petitioner conceived of and registered the domain name for the trademark 911.NET in 1996 in connection with its Internet-based information security services. Shortly thereafter in 1996 and 1997, Petitioner began using its 911.NET mark by developing its use in various business and marketing plans as well as using it in support of applications for state and federal grants. By the fall of 2000, Petitioner began using its 911.NET mark in commerce by selling its network security services associated with the developed brand. Petitioner filed for federal trademark protection on August 9, 2001.

Only after Petitioner used the 911.NET mark for several years and filed for trademark protection did Registrant first begin using its 911.NET Registration in October of 2001. Registrant filed an Intent-to-Use application for 911.NET on January 19, 2000 but after amending its application claiming a date of first use of October 15, 2001, it was placed on the Supplemental Register. Because of Petitioner's clear priority of use in the 911.NET mark and the obvious likelihood of confusion that will result between the two marks, Petitioner respectfully requests cancellation of Registrant's 911.NET Registration.

## II. FACTUAL BACKGROUND

Petitioner, A.J. Boggs & Company, is a computer network engineering and software services company located near Lansing, Michigan. (J.C. Anderson, Tr. pp. 6-11). In May 1996,

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Petitioner registered the domain name for 911.NET and immediately began developing various business plans for the 911.NET mark to provide software and related services facilitating secure Internet-based directory services. (J.C. Anderson, Tr. pp. 14-20).

As part of its business plan, Petitioner successfully obtained a grant from the State of Michigan called the State Research Fund Bridge Grant Project. (J.C. Anderson, Tr. p. 19). The purpose of the grant was to provide funding for the development of certain integrated directory services for governmental agencies. (J.C. Anderson, Tr. pp. 19-22; see also, J.C. Anderson, Tr. Ex. 5 (Attached as Exhibit A)). One of the conditions for receiving the grant required Petitioner to develop commercial applications for the directory service technology. (J.C. Anderson, Tr. pp. 20-22; see also, J.C. Anderson, Tr. Ex. 5 (Attached as Exhibit A)). In its June 25, 1996 final report to the State of Michigan and in support of fulfilling the conditions for receiving the grant, Petitioner described the development of 911.NET as one of the commercial application plans for utilizing its directory service technology. (J.C. Anderson, Tr. pp. 20-22; see also, J.C. Anderson, Tr. Ex. 5 (Attached as Exhibit A)).

Over the next several years, Petitioner continued its development of the 911.NET mark in association with Internet-based directory services. In 1997, Petitioner described 911.NET as part of a proposal to the National Institute of Health to provide directory services relating to a human genome directory. (J.C. Anderson, Tr. pp. 29-30). Thereafter, in 1999, Petitioner entered into discussions with Al Eaton, president of Great Lakes Comnet, to become a distributor of the 911.NET products and services. (J.C. Anderson, Tr. pp. 39-43; Eaton Tr. pp. 7-11; See also J.C. Anderson, Tr. Ex. 8 (Attached as Exhibit B)). While Great Lakes Comnet never became a distributor, it did purchase certain network security services provided through 911.NET in May 2000, and March 2001. (J.C. Anderson, Tr. p. 43; Eaton Tr. pp. 10-13; See also Eaton Tr. Ex. 2

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(Attached as Exhibit C)). Further, in October 2000, Petitioner provided certain network security services for American Express Financial Advisors culminating in an invoice dated October 23, 2000, from Petitioner under the heading "911.net Secure Networking Services." (J.C. Anderson, Tr. pp.53-55; J.C. Anderson, Tr. Ex. 12 (Attached as Exhibit D)).

In 1999, SCC (predecessor of Registrant) contacted Petitioner in order to purchase Petitioner's domain name. This request was denied due to Petitioner's vast use of the mark and business plans. SCC eventually filed a suit against Petitioner arguing that A.J. Boggs & Company has no lawful right, claim or ownership in or to the mark "911.NET." In particular, they alleged that A.J. Boggs & Company had engaged in unfair competition, trademark dilution, cyberpiracy, and cybersquatting. This case was eventually dismissed with prejudice, specifically because A.J. Boggs & Company would not give up their domain name and no evidence supporting SCC's claims was provided.

On January 19, 2000 (presumably in preparation of filing the above, mentioned suit) Registrant (then SCC) filed an Intent-to-use application with the United States Patent and Trademark Office for protection of the 911.NET mark. (Application Serial No. 75898002). Petitioner described the services associated with the 911.NET mark as:

*Communication services, namely telephone, wireless, and global computer network communications for identifying and notifying a designated population of an impending emergency situation; Communication services, namely electronic communication and information systems that facilitate access to and use of emergency information by emergency administration personnel, public service access providers, public safety agencies, and commercial firms providing emergency services; telecommunications gateway services, namely computerized 911 support, coordination,, call generation and voice messaging [in International Class 038].*

(Application Serial No. 75898002).

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A final refusal of Registrant's application was mailed on May 11, 2001. (Application Serial No. 75898002). Thereafter, Registrant filed an Amendment to show use for its application claiming a date of first use, and a date of first use in commerce of October 15, 2001 for the 911.NET mark. (Application Serial No. 75898002). Registrant's application was then approved for registration on November 30, 2001 and placed on the Supplemental Register on March 19, 2002. (Application Serial No. 78078405).

On August 9, 2001, Petitioner filed a Use-based application with the United States Patent and Trademark Office for protection of the 911.NET mark with a date of first use of May 16, 1996 and a date of first use in commerce of October 23, 2000. (Application Serial No. 78078405). Petitioner described the services associated with the 911.NET mark as:

*Internet-based information security services, namely, secured transaction, authentication, registration, identification, virtual private network, encryption, data transport and storage, and verification services; facilities, computer equipment, and network security monitoring services; security applications, infrastructure, and operations support services; and monitoring services for compliance with household and enterprise policies, events, procedures, and applicable regulatory standards [in International Class 042].*

(Application Serial No. 78078405).

On January 16, 2002, Petitioner received a Non-final Office Action on its pending application advising Petitioner that Registrant's mark may be cited against Petitioner's mark. (Application Serial No. 78078405). Petitioner then instituted the present proceeding seeking to cancel Registrant's mark from the Supplemental Register on May 10, 2002. (Application Serial No. 78078405).

It is patently clear that Petitioner began using its 911.NET mark well before Registrant. It is also clear that Registrant's filing of this mark was done in preparation of the lawsuit that they were filing - against Petitioner's use of the mark. Obviously, Registrant already knew that

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Petitioner began using its mark before Registrant's alleged date of first use. Equally clear is the obvious likelihood of confusion that will result from the registration of 911.NET by the Registrant and the damage to Petitioner caused by the maintenance of Registrant's 911.NET mark on the Supplemental Register.

III. ISSUE

Whether Registrant's mark should be canceled from the Supplemental Register where Petitioner used its 911.NET mark well before Registrant's alleged date of first use and confusion between Petitioner's and Registrant's identical 911.NET marks is likely resulting in continued harm to Petitioner.

IV. ARGUMENT

Registrant's 911.NET mark should be canceled from the Supplemental Register because the registration damages Petitioner and Petitioner's use of the identical mark establishes priority thereby barring continued registration. In order to prevail in canceling a registration, a petitioner must plead and prove: (1) that it has standing, and (2) that there are valid grounds for canceling the registration. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 945, 55 U.S.P.Q.2d 1842, 1844 (Fed. Cir. 2000) quoting Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 20:41 (4<sup>th</sup> ed. 1996 & Supp. 1999)("McCarthy").

A. Petitioner May Successfully Petition to Cancel Mark From the Supplemental Register.

Petitioner has standing to cancel Registrant's mark from the supplemental register where its 911.NET mark was refused registration because of the 911.NET Registration. Where a petitioner's application is refused *ex parte* because of a registered mark, petitioner has standing to petition to cancel that registration. *Lipton Industries, Inc. v. Ralston Purina*, 670 F.2d 1024, 213 U.S.P.Q. 185 (C.C.P.A. 1982). Any person who believes that he or she will be damaged by the

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registration of a mark on the supplemental register has the right to apply to cancel such registration. 15 U.S.C. § 1092; *Blanchard Importing & Distributing Co., Inc. v. Societe E. Blanchard et Fils*, 402 F.2d 797, 800; 159 U.S.P.Q. 520, 523 (1968). In this case, Petitioner received an office action regarding its application for its 911.NET mark stating that the 911.NET Registration would be cited against Petitioner's mark preventing registration. Thus, Petitioner has standing to petition to cancel the 911.NET Registration.

B. Registrant's s Mark Should be Canceled Pursuant to Sections 2(d) and 2(f) of the Lanham Act.

The 911.NET Registration should be canceled where Petitioner made prior use of an inherently distinctive mark that is likely to cause confusion. Section 2(d) of the Lanham Act bars the registration of a service mark which:

*[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.*

15 U.S.C. § 1052(d). Further, in *Towers v. Advent Software, Inc.*, 913 F.2d 942, 16 U.S.P.Q. 2d 1039 (Fed. Cir. 1990), the Court stated:

*[a] party opposing registration of a trademark due to a likelihood of confusion with his own unregistered term cannot prevail unless he shows that his term is distinctive of his goods, whether inherently or through the acquisition of secondary meaning or through 'whatever other type of use may have developed a trade identity.'*

*Id.* at 945, quoting *Otto Roth & Co. v Universal Food Corp.*, 640 F.2d 1317, 1320, 209 U.S.P.Q. 40, 43 (C.C.P.A. 1981).

It is well settled that a suggestive mark is inherently distinctive without the need to show secondary meaning. See, *Audio Fidelity, Inc., v. London Records, Inc.*, 332 F. 2d 577; 141 U.S.P.Q 791 (1964). A suggestive mark suggests something about the goods or services, but

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"requires imagination, thought, and perception to reach a conclusion as to the nature of the goods." *Stix Prods., Inc. v. United Merchants & Manufacturers*, 295 F.Supp. 479, 488, 160 U.S.P.Q. 777, 785 (S.D.N.Y. 1968). Here, Petitioner's 911.NET mark is used for Internet-based information security services, secure directory services, encryption, secured transaction data transport and storage and verification services, etc. See Application Serial No. 78078405. The three-digit abbreviated dialing code "911" is commonly associated with an emergency situation where people dial that number in a life or death situation to receive assistance. Petitioner provides no emergency services to people but rather it provides services to businesses allowing for private and secure transmission and sharing of data through computer networks. "911", as used by Petitioner, connotes a sense of security that upon thought and reflection, allows customers to conceptualize the nature of Petitioner's services. Thus, Petitioner's 911.NET mark is suggestive and inherently distinctive of the services provided.

However, Registrant's use of the term 911.NET is does not function as a trademark. The TTAB has specifically addressed the use of generic terms with top level domain names.

[The designation CONTAINER.COM] is . . . a compound word, a generic term combined with the top level domain indicator, ".COM." In proving genericness, the Office may satisfy its burden by showing that these separate generic words have a meaning identical to the meaning common usage would ascribe to those words as a compound. *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110 (Fed. Cir. 1987). In a similar sense, neither the generic term nor the domain indicator has the capability of functioning as an indication of source, and combining the two does not result in a compound term that has somehow acquired this capability.

*In re Martin Container, Inc.*, 65 USPQ2d 1058, 1061 (TTAB 2002). In the case at hand, Registrant specifically identifies emergency telecommunication services. Therefore, the use of this mark in conjunction with emergency 911 services would not only be descriptive of the use, but also generic. Claiming ownership of the term 911.NET for emergency telecommunication services would be analogous to a company trying to obtain registration for the term CRACKER

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for use in conjunction with crackers. The above TTAB cases are not the only view on this matter. The USPTO has also made decisions regarding this matter in everyday examinations. In one instance, an applicant attempted to register CAR.NET for use in conjunction with computerized information storage and retrieval services relating to automobile dealers, namely the sales of automobile dealerships and automobile affiliated companies of others, by use of interactive computer network. This mark, not surprisingly, was found not to be registerable, while the term CAR when used in conjunction with jewelry was accepted and registered with the USPTO.

1. Petitioner has Prior Use of the 911.NET Mark

Petitioner began using the 911.NET mark well before Registrant's use thereby establishing priority. Petitioner first used its mark in commerce on October 23, 2000, nearly one year before Registrant's alleged October 15, 2001 date of first use. (See, J.C. Anderson, Tr. pp. 53-55; J.C. Anderson, Tr. Ex. 12 (Attached as Exhibit D); see also Registrant's Application Serial No. 78078405, claiming the Oct. 15, 2001 date of first use). This use alone is sufficient to establish priority.

Nevertheless, the extensive brand development undertaken by Petitioner prior to the October 23, 2000 date of first use in commerce clearly establishes priority over Registrant. Petitioner began using and developing the 911.NET mark nearly five years before Registrant's application or date of first use. Petitioner first registered the domain name 911.NET in May of 1996. (J.C. Anderson, Tr. pp. 14-20). For the next several years Petitioner continuously developed the 911.NET brand. In 1996, Petitioner described the 911.NET as one of the commercial applications for utilizing its directory service technology developed through a grant from the State of Michigan (J.C. Anderson, Tr. pp. 20-22; J.C. Anderson, Tr. Ex. 5 (Attached as Exhibit A)). In 1997, Petitioner described the development of 911.NET in a proposal to the

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National Institute of health to provide directory services relating to a human genome directory. (J.C. Anderson, Tr. pp. 29-30). In 1999, as evidenced by email communications and invoices, Petitioner entered into negotiations with Great Lakes Comnet to become a distributor of 911.NET services and provided network security services under the 911.NET brand. (J.C. Anderson, Tr. pp. 39-43; Eaton Tr. pp. 7-11; J.C. Anderson, Tr. Ex. 8 (Attached as Exhibit B); See also Eaton Tr. Ex. 2 (Attached as Exhibit C)).

While the brand development undertaken by Petitioner prior to the October 23, 2000 use in commerce does not provide a basis for registration, such use is germane in establishing priority. In *Shalom Children's Wear Inc. v In-Wear* 26 U.S.P.Q. 2d 1516 (1993), the Board considered certain pre-sales activities of the opposer in determining the priority between two conflicting marks. The Board held:

*Use analogous to trademark use ... is non-technical use of a trademark in connection with the promotion or sale of a product under circumstances which do not provide basis for an application to register, usually because the statutory requirement for use on or in connection with the sale of goods in commerce has not been met. Although never considered an appropriate basis for an application to register, such use has consistently been held sufficient use to establish priority rights as against subsequent users of the same or similar marks.*

*Id.* at 1519.

In the present case, Petitioner's October 23, 2000 date of first use in commerce undoubtedly predates Registrant's alleged October 15, 2001 use. In addition, Petitioner's brand development activities beginning in 1996, predating Registrant's application and use by nearly five years, clearly establishes Petitioner's priority rights.

2. Registrant's and Petitioner's Marks are Likely to be Confused

The 911.NET Registration should be canceled where the mark is identical to Petitioner's 911.NET mark, and the services provided are similar such that confusion is likely. In *E.I. du*

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*Point de Nemous & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973), thirteen factors were cited in analyzing whether two marks are confusingly similar. Not all of the thirteen factors may be relevant and any one of the factors may be determinative. *In re Dixie Restaurants, Inc.*, 105 F.3d 1405, 1406-07, 41 U.S.P.Q. 2d 1531, 1533 (Fed. Cir. 1997). The factors of particular relevance in this case are the similarity of the marks and the relatedness of the services.

3. Similarity of the Marks

There is no doubt that the marks of the two parties in this matter are identical in terms of appearance, sound and connotation, and the marks present identical commercial impressions. Because the marks are identical, invariably, any use by Registrant of the 911.NET mark will create confusion.

4. Relatedness of the Goods or Services

Where the marks are identical or substantially similar, only a "viable relationship" between the goods or services is necessary to support a holding of likelihood of confusion. See, McCarthy, § 23.20.1. Here, Registrant's 911.NET Registration is for, *inter alia*, "Communications services, namely electronic communication and information systems that facilitate access to and use of emergency information by emergency administration personnel, public service access providers, public safety agencies and commercial firms providing emergency services." (See, Application Serial No. 75898002). Petitioners services associated with its 911.NET mark are, *inter alia*, Internet-based information security services, namely, secured transaction, authentication, registration, identification, virtual private network, encryption, data transport and storage and verification services and network security monitoring services. (See, Application Serial No. 78078405). Customers seeking communications services associated with information systems that facilitate access to and use of emergency information from Registrant will certainly have a need for the information security services provided by

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Petitioner to authenticate, protect and monitor their networks. Thus, more than a viable relationship between the services provided by the respective parties is present necessitating a finding of likelihood of confusion.

V. CONCLUSION

Registrant's 911.NET Registration should be canceled from the Supplemental Register. Petitioner conclusively demonstrated priority in the 911.NET mark by establishing an October 23, 2000 date of first use as well as significant developmental use of the mark well in advance of Petitioner's October 15, 2001 alleged use. The filing date of the Registrant's application was made in bad faith since Registrant already knew that the exact mark was being used by A.J. Boggs & Company (whom they filed suit against less than a year after filing the application). Registrant has provided no proof of use to date, presumably, because Registrant is fully aware that Petitioner was using the mark before filing the application. Registrant's mark is identical to Petitioner's mark and is likely to cause confusion to customers where the goods are highly related. Therefore, Petitioner believes the evidence justifies the Registrant's registration be canceled and requests that the board cancel Registrant's mark now.

Respectfully submitted,  
**HOWARD AND HOWARD ATTORNEYS, P.C.**

August 8, 2003

  
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**In The United States Patent and Trademark Office  
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In the Matter of:

A.J. Boggs & Company

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v.

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Registrant

Trademark: 911.NET

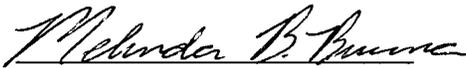
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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy Applicant's Trial Brief was served upon the attorneys of record of all parties to the above by First Class Mail at their respective business addresses (P.O. Box 368 Charlotte, VT 05445) with postage fully prepaid on August 8, 2003.

  
Melinda B. Buurma

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**In The United States Patent and Trademark Office  
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Registrant

Trademark: 911.NET

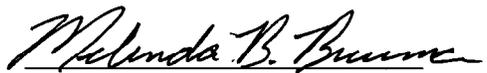
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**CERTIFICATE OF EXPRESS MAILING**

I hereby certify that the Applicant's Trial Brief is being deposited with the United States Postal Service as Express Mail, postage prepaid, in an envelope as Express Mail Post Office to Addressee, Mailing Label No. ET275388995US and addressed to the Commissioner for Trademarks, **Box TTAB – No Fee**, 2900 Crystal Drive, Arlington, Virginia 22202-3514, on **August, 2003**.

  
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August 8, 2003



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**RE: Cancellation No. 040559**

Enclosed, please find the original and 2 copies of Petitioner's Trial Brief, in addition to the certificate of service and the certificate of express mailing. Please record the original and forward the others to the proper individuals handling this matter for the Trademark Trial and Appeal Board. If you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

HOWARD & HOWARD ATTORNEYS, P.C.

Melinda B. Buurma

Enclosures

Cc: Gordon E. R. Troy

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TRADEMARK TRIAL AND APPEAL BOARD

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

**BRITISH-AMERICAN TOBACCO COMPANY LIMITED**  
and **TABACALERA ISTMENA, S.A.**,

Petitioners,

v.

**PHILIP MORRIS USA INC.**, formerly  
known as **PHILIP MORRIS INCORPORATED**,

Registrant.



08-04-2003

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**Cancellation No. 26,549**

**REGISTRANT'S BRIEF IN OPPOSITION**

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CERTIFICATE OF MAILING BY FIRST CLASS MAIL

I hereby certify under 37 CFR §1.8(a) that this correspondence is being deposited with the United States Postal Service as first class mail with sufficient postage on the date indicated below and is addressed to the Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3514.

July 31, 2003

Date of Deposit

Signature

Irene Hudson

Typed or Printed Name of Person Signing Certificate