

This Opinion is not a
Precedent of the TTAB

Hearing: September 10, 2020

Mailed: January 7, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re T3 Productions, LLC

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Serial No. 87707617

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Kevin M. Hayes of Klarquist Sparkman LLP for T3 Productions, LLC.

Matthew D. McClellan, Trademark Examining Attorney, Law Office 121,
Richard White, Managing Attorney.¹

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Before Taylor, Shaw and Dunn,
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

T3 Productions, LLC (Applicant) seeks registration on the Principal Register of the mark PORTAL, in standard characters, for “Entertainment services, namely, escape rooms attraction,” in International Class 41.²

¹ The application previously was assigned to Trademark Examining Attorney Krystina Osgood.

² Application Serial No. 87707617 was filed on December 4, 2017 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1(b), based upon Applicant’s bona fide intention to use the mark in commerce.

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when used with the identified services, so resembles the registered mark PORTAL, also in standard characters, for "providing facilities for virtual reality gaming and entertainment experiences in the form of virtual reality arcades," in International Class 41,³ as to be likely to cause confusion, mistake or deception.

When the refusal was made final, Applicant appealed and requested reconsideration. The Examining Attorney denied the request for reconsideration, and the appeal resumed. The case is fully briefed and an oral hearing was held. We affirm the Section 2(d) refusal to register.

I. Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence 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.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). We must consider each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). In any likelihood of confusion analysis, two key considerations are the similarities between services and the similarities between the marks. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental

³ Registration No. 5397743 issued February 6, 2018.

inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.”).

A. Strength of the cited mark

We begin with the strength of the cited mark, considering both its conceptual strength based on the nature of the mark and its commercial strength based on the marketplace recognition of the mark, if any. *In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).”).

Applicant argues that the cited registration PORTAL is entitled to only a narrow scope of protection because of the existence of five third-party registrations for PORTAL marks: “[c]onsumers exposed to these PORTAL formative marks for closer services to the Cited Registration, including one for virtually identical services, are not likely to be confused by Applicant’s mark for much different services[.]”⁴ Applicant introduced registrations for the following marks incorporating the word PORTAL:⁵

Mark	Serial Number	Relevant Services
PORTAL POINT	5746440	Virtual reality game services provided on-line from a computer network
PORTAL QUEST (PORTAL disclaimed)	5646195	Entertainment services, namely, non-downloadable computer games provided via the internet and mobile devices
WORMHOLE PORTAL (PORTAL disclaimed)	5618855	Entertainment services in the nature of providing interactive entertainment facilities for live action multi-track adventure missions attractions

⁴ Applicant’s Br., p. 6, 13 TTABVUE 10.

⁵ Request for Reconsideration dated October 21, 2019, 4 TTABVUE 13-28.

Mark	Serial Number	Relevant Services
FINAL FANTASY PORTAL APP (PORTAL APP disclaimed)	4980866	Providing on-line computer games
WARPPORTAL	3913390	Entertainment services, namely, providing temporary use of nondownloadable interactive games

Turning first to conceptual strength, we note that “[t]hird-party registrations can be used in the manner of a dictionary definition to illustrate how a term is perceived in the trade, industry, or ordinary parlance.” *RxD Media, LLC v. Application Dev. LLC*, 125 USPQ2d 1801, 1812 (TTAB 2018) (citing *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015)).

We find there are some differences between the services with which the third-party marks are used and Registrant’s services. Only one mark, WORMHOLE PORTAL, is used in connection with “providing interactive entertainment facilities” similar to Registrant’s services. Four of the third-party marks are used in connection with on-line games, not providing virtual reality arcade facilities. While it is possible that online games could be offered in virtual reality arcade facilities, we have no evidence that they are. Nevertheless, these four registrations identify computer-based games that appear to be similar to those offered by virtual reality arcades. Given the co-existence of the third-party PORTAL marks, we find Registrant’s PORTAL mark has some inherent weakness, but we must treat it, at worst, as “highly suggestive” because it is registered on the Principal Register without a disclaimer or claim of acquired distinctiveness. *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007) cited in *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1517

(TTAB 2016) (“The registered mark is presumed to be inherently distinctive because it is registered on the Principal Register.”).

Regarding commercial strength, we have no evidence of third-party use of these marks, nevertheless, a mark’s commercial strength may be curtailed by third-party registration and use of similar marks with similar goods or services. *Jack Wolfskin Austrustung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129 (Fed. Cir. 2015); *Juice Generation*, 115 USPQ2d at 1674-75. But five third-party marks and the cited registration are insufficient to establish that PORTAL formative marks are so “ubiquitous” or “considerable” that we can conclude that these marks are commercially weak terms, particularly when some of the marks are registered for differing services, i.e., provision of online games versus provision of virtual reality arcades. *See Jack Wolfskin*, 116 USPQ2d at 1136 (discussing “voluminous evidence” of registration and use of paw print design elements); *Juice Generation*, 115 USPQ2d at 1674 & n.1 (referring to evidence of 26 third-party marks as “a considerable number”).

In sum, we find that the cited PORTAL mark has some inherent conceptual weakness but it is not commercially weak. At most, the cited mark is entitled to a slightly narrower scope of protection. Nonetheless, even weak marks are entitled to protection against confusion. *See Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1246 (TTAB 2010); *see also King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974).

B. Similarity of the marks

Turning to the similarity of the marks, we find that Applicant's mark is identical to the mark in the cited registration in "appearance, sound, connotation and commercial impression."⁶ *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567). Applicant does not dispute this.

In view thereof, the *DuPont* factor of the similarity of the marks weighs heavily in favor of a finding of likelihood of confusion.

C. The similarity of the services, trade channels, and classes of consumers

We next consider the similarity of the services, trade channels, and classes of consumers. It is well settled that in making our determination, we must look to the services as identified in the application vis-à-vis the services recited in the cited registration. *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods [or services] set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods [and services]").

The respective services need not be identical or even competitive to find a likelihood of confusion. See *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080,

⁶ A typed mark is the legal equivalent of a standard character mark. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012) (explaining that in 2003 there was a non-substantive change in nomenclature from a "typed mark" to a "standard character mark").

1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000). They need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the services] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

Moreover, where, as here, the respective marks are identical, the degree of similarity or relatedness between the services needed to support a finding of likelihood of confusion declines. *See In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1411 (TTAB 2015) (citing *In re Shell Oil Co.*, 992 F.2d 1204, 1207, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993)), *aff’d*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017)

Both Applicant’s and Registrant’s services comprise the provision of facilities or attractions for playing games. Registrant’s services consist of “providing facilities for virtual reality gaming and entertainment experiences in the form of virtual reality arcades.” Applicant’s services are identified as “Entertainment services, namely, escape rooms attraction.” As Applicant explains, its “services are escape rooms that are live-action team-based games where multiple players discover clues, solve puzzles, and accomplish tasks in one or more rooms in order to accomplish a specific goal (usually escaping from the room) in a limited amount of time.”⁷

⁷ Applicant’s Br., p. 8, 13 TTABVUE 12.

The Examining Attorney argues that the respective services are related because they are “extensively provided by the same entity, marketed under the same mark, used by the same class of consumers in the same field of use, and are provided via the same source and through the same trade channels.”⁸ In support, the Examining Attorney introduced the following sixteen web page excerpts from providers of virtual arcades and escape rooms.⁹

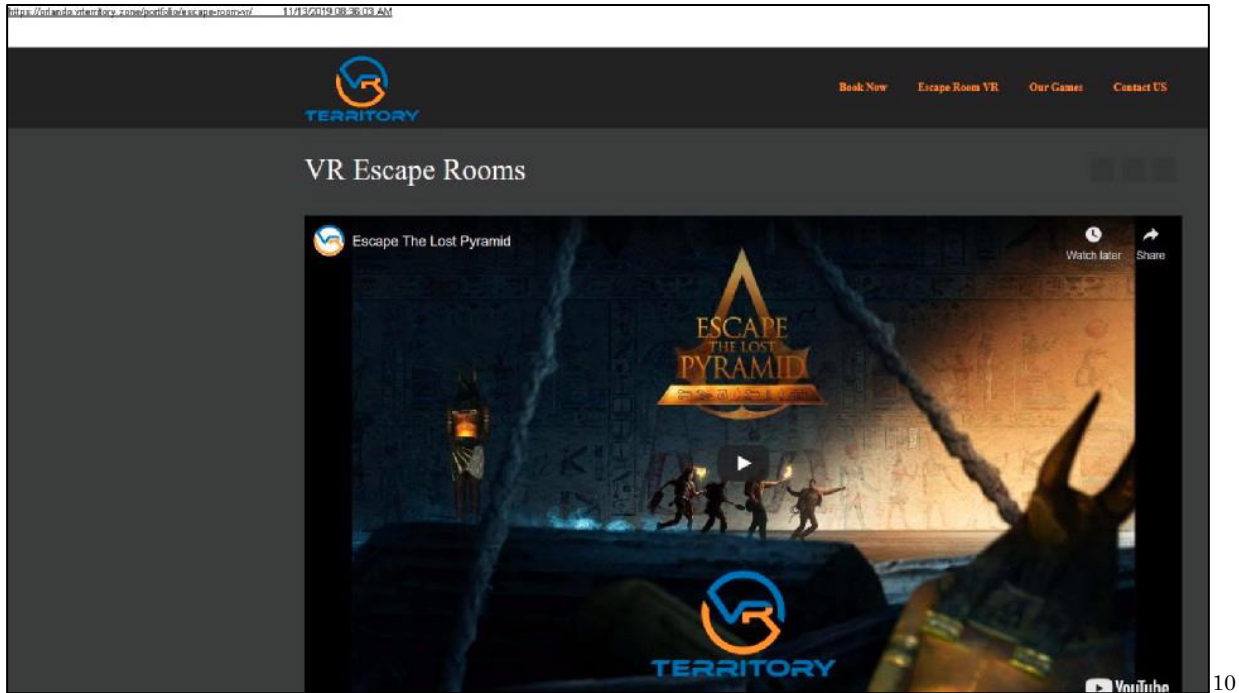
1. Excerpts from the website of Rush Hour Gaming showing that it provides facilities for virtual reality arcade services and also provides live escape room attractions and entertainment facilities.
2. Excerpts from the website of Escape Room NJ showing that it provides facilities for escape room attractions and entertainment facilities, which also include virtual reality escape room services.
3. Excerpts from the website of Urban Enigmas showing that it provides facilities for escape room attractions and entertainment, as well as virtual reality arcade services.
4. Excerpts from the website of Escape Reality Sarasota showing that its services include the provision of facilities for escape room attractions, which also feature virtual reality escape room games.
5. Excerpts from the website of My Escape Mission showing that its services include the provision of facilities for escape room attractions and a virtual reality arcade.
6. Excerpts from the website of Lake Geneva Clue Room showing that its services include the provision of facilities for escape room attractions and a virtual reality arcade.
7. Excerpts from the website of Escape Challenge St. Louis showing that its services include the provision of facilities for escape room attractions, as well as virtual reality gaming features.
8. Excerpts from the website of Xtreme Action Park showing that its services include the provision of facilities for escape room attractions and a virtual reality arcade.

⁸ Examining Attorney’s Br., 16 TTABVUE 7.

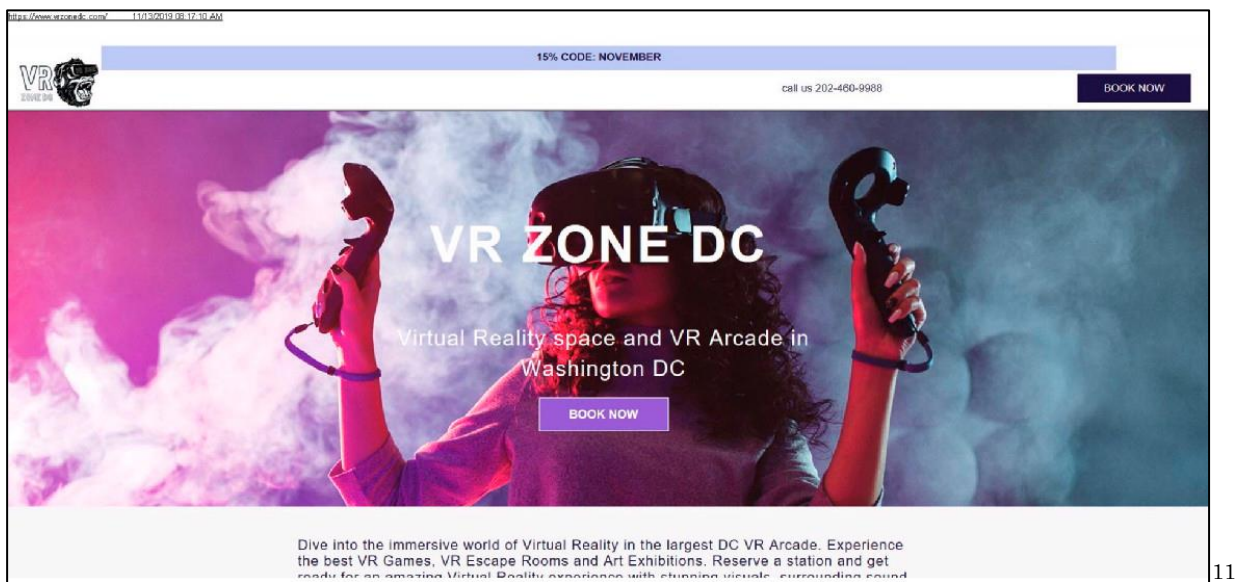
⁹ Office Actions of March 20, 2018, April 19 2019, and November 13, 2019.

9. Excerpts from the website of Zenith Fun showing that its services include the provision of facilities for escape room attractions and a virtual reality arcade.
10. Excerpts from the website of VR Zone DC showing that its services feature a virtual reality arcade, which includes virtual reality escape rooms.
11. Excerpts from the website of Warrior VR Arcade showing that its services feature a virtual reality arcade, which includes virtual reality escape rooms.
12. Excerpts from the website of VR Tech Lounge showing that its services feature a virtual reality arcade, which includes virtual reality and live escape rooms.
13. Excerpts from the website of Quest Ledge showing that its services feature a virtual reality arcade, which includes virtual reality escape rooms.
14. Excerpts from the website of VR Territory showing that its services feature a virtual reality arcade, which includes virtual reality escape rooms.
15. Excerpts from the website of Xperience Kelowna showing that its services include the provision of facilities for escape room attractions and a virtual reality arcade.
16. Excerpts from the website of Mayze Games showing that its services include the provision of facilities for escape room attractions and a virtual reality arcade.

The foregoing evidence establishes that virtual reality arcades are related to escape rooms. Both are offered together by the same entities under the same roof and advertised under the same mark. Indeed, not only are virtual reality arcades offered alongside escape rooms, some virtual reality arcades also offer virtual reality escape rooms. That is, some virtual reality arcades include escape room experiences played via virtual reality equipment. For example, VR Zone DC, VR Tech Lounge, Quest Ledge, and VR Territory all offer virtual reality escape rooms. The web page excerpts from VR Territory arcade and the VR Zone DC arcade advertising their “VR Escape Rooms” appear below:



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Applicant nevertheless argues that the respective services are different because its services “are live-action team-based games where multiple players discover clues,

¹⁰ Office Action of November 13, 2019, p. 71.

¹¹ *Id.* at 2.

solve puzzles, and accomplish tasks in one or more rooms in order to accomplish a specific goal”¹² whereas Registrant’s consumers “experience VR in **individual booths wearing headphones[.]**”¹³ That is, Applicant’s services are offered to groups in shared rooms, not to individuals in booths:

Applicant’s services are not for individual players alone (as the services of the Cited Registration explicitly are, as also evidenced by Registrant’s description of its services) – it is a team activity involving more than one person, in the same room, accomplishing a common goal – solving puzzles to escape the room.¹⁴

This argument is unpersuasive. Applicant, relying on excerpts from Registrant’s website, seeks to limit the scope of Registrant’s services by extrinsic evidence. But neither Applicant’s nor Registrant’s identification of services limit the respective services to a particular number of users or types of rooms. Nor will we read such limitations into the description of services. *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1748 (Fed. Cir. 2017); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) (Board may not improperly read limitations into a registration); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009) (“We have no authority to read any restrictions or limitations into the registrant’s description of goods.”). Therefore, we may not look to extrinsic evidence about Applicant’s or Registrant’s actual services, customers, or channels of trade. *See Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed.

¹² Applicant’s Br., p. 18, 13 TTABVUE 12.

¹³ *Id.* at 7, 13 TTABVUE 11.

¹⁴ *Id.* at 8, 13 TTABVUE 12.

Cir. 1987) (quoting *CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983)); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981) (citing *Kalart Co., Inc. v. Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139 (CCPA 1958)).

Moreover, the third-party website excerpts show that some virtual reality arcades offer virtual reality escape rooms for teams, not just for individual players. For example, VR Zone DC offers virtual reality escape rooms for 2-4 players and 2-3 players:



Similarly, the VR Tech Lounge website states that its virtual reality escape rooms have a “[m]aximum capacity of 40 participants and 8 players at the time [sic].”¹⁶ The VR Territory arcade website states that its VR escape rooms may be played by “GROUPS OF 2 OR 4!”¹⁷ Given that these virtual reality arcades offer escape rooms

¹⁵ Office Action of November 13, 2019, p. 6.

¹⁶ *Id.* at 41.

¹⁷ *Id.* at 74.

to groups, we see no reason why Registrant's services could not be offered to groups, like Applicant's services.

Regarding channels of trade and classes of consumers, we note that the third-party website excerpts show that escape room attractions are offered alongside virtual reality arcades, and in some cases, the escape rooms are virtual as well. Accordingly, we find the channels of trade and classes of consumers to be at least overlapping, if not the same. That is, consumers seeking out escape room attractions would find them offered by the same entities that offer virtual reality arcades.

In sum, the *DuPont* factor regarding the similarity of services, channels of trade and classes of consumers weigh in favor of a finding of a likelihood of confusion.

D. The Degree of Consumer Care

The fourth *DuPont* factor concerns “[t]he conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. When considering this factor, we are bound by the identifications of services in the application and the cited registration, which are not limited to sophisticated purchasers. *See Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1310-11 (Fed. Cir. 2002).

Applicant argues that “the services of the Cited Registration are ‘sophisticated’”¹⁸ because Registrant's web site states its virtual reality arcade “provide[s] the highest-

¹⁸ Applicant's Br., p. 7, 13 TTABVUE 11.

quality VR experiences in a **sophisticated**, but family-friendly atmosphere. You won't hear a cacophony of blaring arcade sounds here.”¹⁹

We do not find this argument persuasive. Registrant's reference to a “sophisticated, but family-friendly atmosphere” likely refers to the arcade décor or the volume of sounds heard in its arcades rather than to the commercial sophistication of prospective consumers. Moreover, given that the price for participation in escape rooms ranges from \$25 to \$30 per person, and the per person price for participation in virtual reality arcades ranges from \$10 for 15 minutes to \$50 for an hour,²⁰ we find the cost of the respective services is unlikely to elicit a high degree of care from prospective consumers. In other words, because Applicant's and Registrant's PORTAL entertainment services are relatively inexpensive, consumers would not exercise a high degree of care when making their purchasing decision. “When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.” *Recot v. Becton*, 54 USPQ2d at 1899 (citations omitted).

This *DuPont* factor is neutral.

¹⁹ *Id.*, quoting from Registrant's web site attached as Ex. 6 to Applicant's Request for Reconsideration, 4 TTABVUE 29.

²⁰ *See* Office Actions of April 19 2019, pp. 2, 4, 19, 41, 42, and November 13, 2019. pp. 3, 32, 75.

E. Conclusion

Because the marks are identical, the services are related, and the channels of trade and classes of consumers overlap, there is a likelihood of confusion between Applicant's mark, PORTAL, and the identical mark PORTAL in the cited registration. Any weakness in the cited mark is insufficient to overcome the identity of the marks and the relatedness of the services.

Decision: The refusal to register Applicant's mark PORTAL is affirmed.