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PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

RE/MAX International, Inc.

v.

Realtymax, Inc.

Opposition No. 111,647
to application Serial No. 75/347,525
filed on August 26, 1997

John R. Posthumus, George G. Matava and Nancy Dempsey of
LeBoeuf, Lamb, Greene & MacRae for RE/MAX International,
Inc.

David P. Bellino for Realtymax, Inc.

Before Hairston, Walters and Wendel, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by Realtymax, Inc. to
register the mark REALTYMAX for services which are
identified as "real estate brokerage, management and
investment."¹

Registration has been opposed by RE/MAX International,

¹ Serial No. 75/347,525 filed August 26, 1997, based upon
applicant's alleged bona fide intention to use the mark in
commerce.

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Inc. on the ground of likelihood of confusion between applicant's mark and opposer's previously used and registered mark RE/MAX for "rendering technical aid and assistance to others in the establishment and operation of a real estate brokerage agency" and "real estate brokerage services."²

Applicant, in its answer, denied the allegations with respect to likelihood of confusion.

The record consists of the pleadings; the file of the involved application; the testimony deposition of opposer's president, Daryl Jesperson (with related exhibits); and opposer's notice of reliance on applicant's answers to opposer's interrogatories and the discovery deposition of applicant's secretary and chief financial officer, David P. Bellino. Applicant did not take testimony or otherwise offer any evidence on its behalf.

Both parties filed briefs on the case, but no oral hearing was requested.

The record shows that opposer first used the RE/MAX mark in connection with real estate brokerage services and for rendering technical aid and assistance to others in the

² Registration No. 1,139,014 issued August 26, 1980; Sections 8 & 15 affidavit accepted. Although opposer pleaded ownership of several other registrations for marks which include the term RE/MAX, in its brief on the case, opposer focused on a likelihood of confusion between the above mark and applicant's mark. In view thereof, we too have focused on the issue of likelihood of confusion vis-à-vis the above mark and applicant's mark.

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establishment and operation of real estate brokerage agencies in 1973. Opposer franchises the right to use the RE/MAX mark to real estate brokers and in turn the real estate brokers enter into contractual relationships with their sales agents to allow the sales agents to use the mark RE/MAX.

With respect to the adoption of the RE/MAX mark, opposer's president, Mr. Jespersen, testified that:

RE/MAX actually is an acronym. It stands for real estate maximums. The real estate is self-explanatory, RE slash. MAX stands for the maximum to the consumer, because they are getting nothing but full-time professional agents in an industry that is unfortunately noted for a lot of part-timers and beginners. It's the maximum for the broker/owner because he not only has the benefit of working with the best in the business, but he has a projectable future income. And it's the maximum for the agent because they receive the maximum commission allowable.

Opposer does business worldwide. It has approximately 3,300 individual RE/MAX offices of which approximately 2,700 are located in the United States and a sales force numbering approximately 57,000 of which approximately 45,000 are located in the United States. Since 1973 the RE/MAX mark has been used in connection with millions of home sales transactions resulting in approximately one trillion dollars in sales in connection with the mark worldwide.

Opposer advertises in a variety of manners, including, print media such as national and local newspapers, direct

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mail pieces, by way of signs at each of opposer's real estate offices, and by way of radio and television commercials. Opposer also does a significant amount of advertising through a fleet of more than 80 hot air balloons bearing the RE/MAX mark. In addition, opposer's individual real estate brokers and sales agents advertise under the RE/MAX mark. Since 1973 opposer has spent approximately \$2.4 billion on worldwide advertisements and promotions for services offered under the RE/MAX mark.³ Opposer controls the use of the RE/MAX mark in that it distributes to its real estate brokers and sales agents a manual which outlines the standards for use of the mark.

The scant information we have about applicant comes from the discovery deposition of applicant's secretary and chief financial officer, David P. Bellino. Mr. Bellino testified that he is also chief financial officer of a company known as ApplianceMAX, which services and sells appliances. According to Mr. Bellino, around 1977 he decided to obtain a real estate broker's license, and in coming up with a name for a real estate company he was forming he decided upon REALTYMAX because it is similar to ApplianceMAX. Mr. Bellino testified that his ApplianceMAX

³ Although opposer did not break down its advertising and sales figures for the United States, we can infer that these figures are substantial inasmuch as the vast majority of opposer's offices and sales agents are located in the United States.

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business has grown rapidly such that he has not had an opportunity to develop a business plan for the real estate company and that no services have been rendered under the REALTYMAX mark.

Priority of use is not in issue inasmuch as opposer introduced a copy of its pleaded registration for the RE/MAX mark through the testimony of Mr. Jesperson, and Mr. Jesperson testified that the registration is subsisting and owned by opposer. See *King Candy Co. v Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). The only issue is whether applicant's use of REALTYMAX for real estate brokerage, management and investment would be likely to cause confusion with opposer's mark RE/MAX for rendering technical aid and assistance to others in the establishment and operation of a real estate brokerage agency and real estate brokerage services.

Upon consideration of the pertinent factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973), for determining whether a likelihood of confusion exists, we agree with opposer that confusion as to source or sponsorship is likely to occur.

Turning first to the services, applicant does not dispute that the services in connection with which it intends to use its mark are identical (real estate brokerage) and otherwise related. Thus, if the parties'

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respective services were to be rendered under the same or substantially similar marks, confusion would be likely to occur.

Turning then to the marks, it is our view that when considered in their entirety, the marks RE/MAX and REALTYMAX are substantially similar in sound and meaning. When spoken, REALTYMAX sounds similar to RE/MAX because both share "RE" and "MAX." Obviously, the forward slash in opposer's RE/MAX mark is not pronounced when spoken. As to meaning, opposer's witness testified that the "RE" in its mark connotes real estate and the "MAX" maximum, with the overall meaning being "real estate maximums." Applicant's mark REALTYMAX can be said to have essentially the same meaning, with the REALTY portion connoting real estate and the MAX portion connoting maximum.⁴ Also, while we recognize that the marks differ in appearance, applicant's mark REALTYMAX may well be viewed as an extended version of opposer's REMAX mark. In finding that the marks are similar, we have kept in mind that consumers often retain only a general rather than specific recall of marks to which they are exposed.

We note applicant's argument that the marks are not similar because opposer's mark RE/MAX, as actually used, is depicted in the colors blue and red and typed capital

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letters, whereas applicant will not present its mark in this manner. As opposer correctly points out in its reply brief, because its RE/MAX mark is registered in typed capital letters, opposer is not limited to any particular presentation of its mark. Thus, in determining likelihood of confusion, we must look to the term RE/MAX, without regard to any particular presentation of the mark.

Another factor which is indicative of likelihood of confusion in this case is the demonstrated strength of opposer's mark. Although we need not decide whether the RE/MAX mark is famous, as urged by opposer, it is unquestionably a well-known mark in the field of real estate brokerage services. Opposer has had substantial sales of its services under the RE/MAX mark for a number of years, and it has expended significant outlays for advertising and promotion of its mark. The RE/MAX mark is thus well-recognized and, irrespective of whether the mark is famous, it is a strong mark which is entitled to a correspondingly broad scope of protection.

Finally, with respect to applicant's contention that there is no evidence of any known instances of actual confusion, this is hardly surprising inasmuch as applicant's secretary/chief financial officer testified that applicant had not begun use of the REALTYMAX mark. In any event, the

⁴ We judicially notice that The American Heritage Dictionary of

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test under Section 2(d) of the Trademark Act is not actual confusion but likelihood of confusion.

In view of the foregoing, we conclude that purchasers familiar with opposer's real estate brokerage and related services provided under the mark RE/MAX would be likely to believe, upon encountering applicant's mark REALTYMAX for identical and related services, that the services originate with or were somehow associated with or sponsored by the same entity.

Decision: The opposition is sustained.

P. T. Hairston

C. E. Walters

H. R. Wendel
Administrative Trademark Judges
Trademark Trial and Appeal Board

the English Language (1976) defines "max" as "maximum."