

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB     JUNE 29, 00

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Central & South West Services, Inc.

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Serial No. 75/334,057

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David H. Judson of Hughes & Luce for applicant.

Jennifer Stiver Chicoski, Trademark Examining Attorney, Law  
Office 115 (Tomas Vlcek, Managing Attorney).

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Before Cissel, Hanak and Walters, Administrative Trademark  
Judges.

Opinion by Walters, Administrative Trademark Judge:

Central & South West Services, Inc. has filed a  
trademark application to register the mark SMARTMOVE for  
"providing information to utility customers related to  
energy efficient homes, including buying or selling a home,  
relocation and moving, and home financing," in International  
Class 42.<sup>1</sup>

The Trademark Examining Attorney has issued a final  
refusal of registration under Section 2(d) of the Trademark

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<sup>1</sup> Serial No. 75/334,057, filed August 1, 1997, based on an allegation of  
a bona fide intention to use the mark in commerce. The identification  
of services as originally set forth has been amended as recited herein.

Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark SMARTMOVE, previously registered for "residential real estate brokerage services,"<sup>2</sup> that, if used in connection with applicant's services, it would be likely to cause confusion or mistake or to deceive. Additionally, the Examining Attorney has made final the requirement for an acceptable recitation of services, contending that the services, as indicated in applicant's amended recitation of services, are indefinite.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. For the reasons discussed below, we affirm the requirement to submit an acceptable identification of services. We also affirm the refusal to register, under Section 2(d), based on the cited registration.

*Recitation of Services*

We address, first, the Examining Attorney's refusal to register because applicant has not complied with the final requirement to submit an acceptable recitation of services.

Applicant does not address this requirement in its brief, nor did it file a reply brief. Thus, we consider this issue to be conceded by applicant and registration is properly refused in view of applicant's failure to comply

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with the requirement for a more definite recitation of services. We note, further, that the Examining Attorney's contentions regarding the indefinite nature of the recitation of services are well taken, including that the services as presently identified include services properly classified in several different International Classes; that the present recitation does not adequately specify the nature of the services; and that applicant's use of a phrase beginning with the word "including" further renders the recitation indefinite.

*Likelihood of Confusion*

In the interest of issuing a complete decision, we address, next, the Examining Attorney's refusal to register under Section 2(d).

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *See, In re E. I. duPont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In the analysis of likelihood of confusion in this case, two key considerations are the similarities between the marks and the similarities between the services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

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<sup>2</sup> Registration No. 1,854,849 issued September 20, 1994, to Long & Foster

Considering, first, the marks, it is clear, and applicant does not dispute, that applicant's mark and the registered mark are identical in appearance, sound, connotation and commercial impression.

Turning our consideration to the services, the Examining Attorney contends that applicant's and registrant's respective services are related and overlap, noting that "[w]hile the services are not identical, their potential consumers, as well as the material content, are very likely to overlap"; and that "registrant's recitation of services is not limited to exclude dealing with 'utility customers,' and 'energy efficient homes' are not precluded from the 'residential' properties that are involved in the real estate brokerage services of the registrant." The Examining Attorney submitted a definition of a "broker" as "one that acts as an agent for others, as in negotiating contracts, purchases or sales in return for a fee or commission"; and submitted a print-out from the Internet, dated November 3, 1998, of registrant Long & Foster's web page, which indicates that, in addition to real estate brokerage services, registrant offers a variety of services including relocation services, property management services, insurance services and refinancing services.<sup>3</sup>

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Companies, Inc., in International Class 36.

<sup>3</sup> While we determine the issue of likelihood of confusion based on the recitation of services set forth in the registration, this is evidence

Applicant contends that "[t]he two marks cover two distinct and non-competitive sets of services." In support of this contention, applicant submitted with its brief several definitions of "broker" which are consistent with the definition recited herein and definitions of the term "real estate broker" as "a person licensed to arrange the buying and selling of real estate for a fee" and as "one who buys and sells lands, and negotiates loans, etc., upon mortgage." While this submission is untimely, we may take judicial notice of these definitions. Applicant contends that because the purchase of a home is an expensive and time-consuming process, purchasers are "sophisticated" and "discriminating" and are "held to a greater standard of care." Applicant contends, further, that the purchasers of the respective services "have different purchasing objectives and are at different stages in the purchasing process." Applicant argues that a prospective homebuyer would utilize applicant's services at the researching stage of the home purchase process and use registrant's service to facilitate the actual purchase of a home.

In deciding cases such as this, we are required to determine the issue of likelihood of confusion on the basis of the goods or services as set forth in the application and the cited registration, respectively. *See In re Elbaum*, 211

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of the scope of services offered by at least one real estate brokerage

USPQ 639, 640 (TTAB 1981). While we have determined that the recitation of services in the application is indefinite, we consider the nature of the services based on the recitations of record in both the application and the cited registration.

It is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that the circumstances surrounding their marketing are such that they would be likely to be seen by the same people under circumstances which could give rise, because of the marks used in connection with them, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein. We note, further, that "[i]f the marks are the same or almost so, it is only necessary that there be a viable relationship between the goods or services in order to support a holding of likelihood of confusion." *In re Concordia International Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983).

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company.

Based on the recitation of services of record in the application and the services recited in the cited registration, we agree with the Examining Attorney that applicant's and registrant's services are closely related, if not overlapping. The services applicant intends to provide under the mark appear to be part of the larger process of home buying, which includes registrant's brokerage services. Further, while not a sufficient basis upon which to draw conclusions about the entire real estate brokerage field, registrant's web page indicates that purchasers may be accustomed to at least some residential real estate brokers who offer additional services, including services of the type applicant intends to provide under the mark. The fact that applicant's services will be limited to providing information about energy efficient homes does not require a different conclusion, as such information is merely a subset of the information concerning homes which a real estate broker could be expected to offer.

In view of the identical commercial impressions of applicant's mark, SMARTMOVE, and registrant's mark, SMARTMOVE, their contemporaneous use on the closely related and overlapping services involved in this case would be likely to cause confusion as to the source or sponsorship of such services. We reach this conclusion notwithstanding the fact that the purchase of a home is a time-consuming and

Serial No. 75/334,057

process which is conducted with great care. We note that even knowledgeable, careful purchasers are not immune from confusion when the marks are identical and both of the identified services are part of the home buying process and may emanate from the same source. *See, In re General Electric Company*, 180 USPQ 542 (TTAB 1973).

*Decision:* The refusal to register based on applicant's failure to submit an acceptable recitation of services, and the refusal to register under Section 2(d) of the Act are affirmed.

R. F. Cissel

E. W. Hanak

C. E. Walters  
Administrative Trademark Judges,  
Trademark Trial and Appeal Board