

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF
THE TTAB

Mailed: September 20, 2006
PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Topping

Serial No. 78294931

William D. O'Neill of Senniger Powers for Ross E. Topping.

Rebecca Smith, Trademark Examining Attorney, Law Office 110
(Chris A. F. Pedersen, Managing Attorney).

Before Hohein, Hairston and Cataldo, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Ross E. Topping has filed an application to register
the mark THE MORTGAGE DOCTORS for "residential mortgage
brokerage services; mortgage brokerage and mortgage lending
consultation services for residential properties" in class
36.¹

¹ Serial No. 78294931, filed September 2, 2003, alleging a date
of first use anywhere of January 1, 2000 and a date of first use
in commerce of January 10, 2001. The word MORTGAGE is disclaimed
apart from the mark as shown. The application also includes
"radio programming" services in class 41. These services are not
at issue in this appeal.

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used in connection with applicant's services, so resembles the mark DOCTOR MORTGAGE which is registered for "mortgage brokering, lending, purchasing and selling,"² as to be likely to cause confusion, mistake or deception.

Applicant and the examining attorney have filed briefs, but an oral hearing was not requested.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the 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 Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

² Registration No. 2,004,291 issued January 1, 1996; renewed. The word MORTGAGE is disclaimed apart from the mark as shown.

Considering first the services, applicant argues that there is no likelihood of confusion because it specializes in residential mortgage services and registrant specializes in commercial mortgage services. In this regard, applicant submitted a printout of registrant's Internet homepage which describes registrant's services.

However, as the examining attorney correctly notes, it is well settled that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than on the basis of what the record reveals the services to be. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Further, where the services in an application or cited registration are broadly described, such that there are no restrictions as to trade channels and purchasers, it is presumed that the identification of services encompasses not only all services of the nature and type described therein, but that the identified services are offered in all the normal channels of trade, and that they would be purchased by all

the usual customers. See, e.g., In re Elbaum, 211 USPQ 639, 640 (TTAB 1981).

It is true that, as identified in his application, applicant's "residential mortgage brokerage services; mortgage brokerage and mortgage lending consultation services for residential properties" are specifically limited to residential properties. However, because registrant's services of "mortgage brokering, lending, purchasing and selling" are not limited to any particular type of properties, we must assume that they encompass residential mortgage brokering, lending, purchasing and selling. Thus, for purposes of our likelihood of confusion analysis, the services of applicant and registrant are identical and otherwise closely related. Also, the customers and trade channels for the respective services are consequently deemed to be the same.

Turning then to a consideration of the marks, the examining attorney argues as follows:

Applicant's mark is THE MORTGAGE DOCTORS. The registered mark is DOCTOR MORTGAGE. The applicant's mark is essentially a transposition of the registrant's mark. Such a transposition does not create a different commercial impression that would negate the likelihood of confusion. (citations omitted). Strictly viewed, the

applicant has adopted the identical terms DOCTOR and MORTGAGE from the registered mark and simply transposed the order of them creating a likelihood of confusion between the marks. (Brief at 3).

Applicant, on the other hand, contends that the marks are very different in terms of connotation and commercial impression. Specifically, applicant argues that his mark THE MORTGAGE DOCTORS suggests a group of trained professionals in the mortgage industry and that registrant's mark DOCTOR MORTGAGE suggests a business title or personal name referring to a single individual in the mortgage field. Applicant submitted copies of third-party registrations of pairs of transposed marks for various goods and services. Applicant argues that the marks involved in this case are similar to the pairs of marks in these third-party registrations and therefore his mark should be allowed to register. Further, applicant argues that marks containing the term "DOCTOR," "DOC" or "DR." are weak marks which are therefore entitled to only a limited scope of protection. Applicant maintains that the term "DOCTOR" suggests an expert or professional. In support of his position, applicant submitted copies of third-party registrations that contain the term "DOCTOR," "DOC" or "DR." for various goods and services.

Registrant's mark is for the term DOCTOR MORTGAGE while applicant's mark is for the words THE MORTGAGE DOCTORS. Both marks contain the identical words "doctor(s)" and "mortgage." Applicant has taken the only two words in registrant's mark, transposed the words, and placed the word "the" before them. These differences do not serve to distinguish the marks in terms of sound and appearance. Further, we are not persuaded that reversing the order of the words in the marks makes a significant difference in commercial impression. As the Board has previously stated:

Further, the reversal in one mark of the essential elements of another mark may serve as a basis for a finding of no likelihood of confusion only if the transposed marks create distinctly different commercial impressions. See: Bank of America National Trust and Savings Assn. v. American National Bank of St. Joseph, 201 USPQ 842 (TTAB 1978), and cases cited therein. Here, where the goods in question are legally identical, and where both marks, when applied to the goods in question, are likely to be perceived by purchasers as signifying that the product sold thereunder busts through, or breaks up, rust, we agree with the Examining Attorney that the marks create substantially similar commercial impressions, and there is a likelihood of confusion. Cf. In re Inco, 154 USPQ 629 (TTAB 1967) ["GUARDIAN OF POSTURE for mattresses versus "POSTURGUARD" for mattresses - registration refused], and McNamee Coach Corp. v. Kamp-A-While Industries, Inc. v. 148 USPQ 765 (TTAB 1965) ["KING KAMPER" for camping trailers versus "KAMP KING KOACHES" for campers - registration refused].

In re Nationwide Industries, Inc., 6 USPQ2d 1882, 1884 (TTAB 1988)(RUST BUSTER for rust-penetrating spray lubricants confusingly similar to BUST RUST for penetrating oil).

As to applicant's disagreement with the examining attorney's determination that applicant's and registrant's marks have the same commercial impression, we find his argument on this point unpersuasive. Specifically, although there may be subtle differences in the meanings of the marks when they are subjected to close analysis, we do not believe that consumers will undertake such an analysis. The test for likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. Also, in evaluating similarities between the marks, the emphasis must be on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106 (TTAB 1975). Registrant's mark DOCTOR MORTGAGE and applicant's mark THE MORTGAGE DOCTORS have virtually the same meaning and commercial impression, when used in connection with mortgage services. Both marks indicate a mortgage expert/experts. Thus, when the marks are considered in

their entireties, we find that they are similar in sound, appearance, meaning and commercial impression.

In reaching our decision herein, we have considered the third-party registrations of marks that contain the word DOCTOR or variations thereof. The probative value of this evidence is very limited in our determination of the specific issue of likelihood of confusion in this case. There is no evidence that the marks are in use or that purchasers are familiar with them. See: *Spice Islands, Inc. v. Frank Tea and Spice Co.*, 505 F.2d 1293, 184 USPQ 35 (CCPA 1974); and *Red Carpet Corp. v. Johnstown American Enterprises, Inc.*, 7 USPQ2d 1404 (TTAB 1988). Further, although the third-party registrations indicate that the word DOCTOR is suggestive of an expert or authority, this fact does not help to distinguish THE MORTGAGE DOCTORS and DOCTOR MORTGAGE. The word DOCTOR, as used in both marks, conveys the same suggestive significance. In short, the marks here are virtually identical in meaning and commercial impression such that when used on legally identical and closely related mortgage services, the marks are likely to cause confusion among purchasers.

Insofar as the third-party registrations of transposed marks are concerned, they do not compel a different result herein. It is well settled that each case must be

determined on its own merits. See e.g., *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ["Even if some prior registrations had some characteristics similar to [applicant's] application, the PTO's allowance of such prior registrations does not bind the Board or this court"].³

Applicant also argues that the customers of applicant's and registrant's services "make their purchase decisions only after a very deliberate and studied decision-making process." (Brief at 12). We recognize that mortgage services are not impulse purchases. This, however, does not require a finding of no likelihood of confusion. Even assuming that the purchasers of these services exercise care, this does not mean that such purchasers are immune from confusion as to the origin of the respective services, especially when sold under substantially similar marks. *Wincharger Corp. v. Rinco, Inc.*, 297 F.2d 261, 132 USPQ 289 (CCPA 1962); and *In re Total Quality Group Inc.*, 51 USPQ2d 1474 (TTAB 1999).

Applicant also asserts that he and the registrant have

³ Also, as the examining attorney correctly observes, in many of the examples "the goods/services of the respective registrants are not identical" and in other examples "there are additional design elements or wording that further distinguishes the marks." (Brief at 4-5).

used their marks concurrently without any incidents of actual confusion, and that this shows that confusion is not likely to occur. We are not persuaded by this argument. Applicant has not provided any evidence as to the extent of his use, nor is there any evidence as to registrant's use, such that we can determine whether there has been a meaningful opportunity for confusion to occur.

We conclude that consumers familiar with registrant's mortgage brokering, lending, purchasing and selling services offered under the mark DOCTOR MORTGAGE would be likely to believe, upon encountering applicant's substantially similar mark THE MORTGAGE DOCTORS for residential mortgage brokerage services, mortgage brokerage, and mortgage lending consultation services for residential properties, that the respective services originate from or are somehow associated with or sponsored by the same source.

Finally, to the extent that any of applicant's arguments raise a possible doubt about our conclusion of a likelihood of confusion, we resolve such doubt, as we must, in favor of the registrant. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

Ser No. 78294931

Decision: The Section 2(d) refusal to register applicant's "residential mortgage brokerage services; mortgage brokerage and mortgage lending consultation services for residential properties" in class 36 is affirmed. The application will go forward as to the "radio programming" services in class 41.