

**THIS OPINION  
IS NOT A PRECEDENT OF  
THE TTAB**

Mailed: March 17, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Focus Property Group, LLC Ltd.

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Serial No. 76567880

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Lauri S. Thompson of Greenberg Traurig for Focus Property Group, LLC Ltd.

Vivian Micznik First, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

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Before Seeherman, Walters and Holtzman, Administrative Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Focus Property Group, LLC Ltd. has filed an application to register the standard character mark FOCUS PROPERTY GROUP on the Principal Register for "real estate listings, leasing and brokerage services," in International Class 36.<sup>1</sup> The application includes a disclaimer of PROPERTY GROUP apart from the mark as a whole.

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<sup>1</sup> Serial No. 76567880, filed December 31, 2003, based on use of the mark in commerce, alleging first use and use in commerce as of June 10, 2002.

The examining attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark FOCUS DEVELOPMENT, previously registered for the services listed below, that, if used on or in connection with applicant's services, it would be likely to cause confusion or mistake or to deceive.

Registration No. 2359956 [registered June 20, 2000; Sections 8 and 15 affidavits accepted and acknowledged, respectively]:

- "real estate management and real estate brokerage," in International Class 36.
- "real estate development, construction, residential and commercial building and general contracting," in International Class 37
- The registration includes a disclaimer of DEVELOPMENT apart from the mark as a whole.

Applicant has appealed. Both applicant and the examining attorney have filed briefs.<sup>2</sup> We affirm the refusal to register.

As a preliminary matter, we note applicant's objections in its reply brief to evidence submitted by the examining attorney with her brief. In her brief, the examining attorney included, for the first time, a definition of "focus"; and, attached to her brief, she included

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<sup>2</sup> In its appeal brief, applicant requested that its application be amended to seek concurrent use with the cited registrant. After remand to, and communication with, the examining attorney, applicant withdrew this request and filed a supplemental brief. The examining attorney filed her brief and applicant filed a reply brief. All briefs have been considered.

definitions of "property" and "group." This is appropriate subject matter for judicial notice by the Board. However, we find it unnecessary to exercise our discretion and take judicial notice of these definitions. Therefore, this evidence has not been considered.

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. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

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Considering, first, the services, we note that both the application and the cited registration include, in International Class 36, identical real estate brokerage services and the remaining services in this class in the registration and the application are closely related services that are likely to be offered in connection with real estate brokerage services. Therefore, there is no need to further consider the services in registrant's identification of goods in International Class 37. This *du Pont* factor weighs strongly against applicant.

Moreover, inasmuch as the International Class 36 identifications of services in both the involved application and the cited registration are not limited to any specific channels of trade, we presume that the services would be offered in all ordinary trade channels for these services and to all normal classes of purchasers. *See In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992). Thus, because both the application and the registration include the identical "real estate brokerage services," the trade channels and classes of purchasers for these services are the same.

Applicant describes itself as "a real estate development company working with a variety of builders to create master planned residential communities and commercial properties in the retail, business and gaming industries"; and argues that its services are "expensive" (brief, p. 2)

and purchased by discriminating purchasers exercising a high degree of care.

The examining attorney contends that the record fails to establish that the services are "expensive"; and that real estate brokerage services "are presumed to be offered to a wide range of consumers, many of whom are not likely to be sophisticated in the real estate field" (brief, unnumbered p. 4). The examining attorney submitted, in support of this position, excerpts from four Internet websites pertaining to real estate services and referring to first-time and/or inexperienced homebuyers and/or real estate investors.

We remind applicant 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 what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). In this case, neither the application nor the cited registration contains any limitations as to trade channels or classes of purchasers of the identified real

estate brokerage services. Therefore, applicant's arguments regarding the specific nature of its services and the sophistication of its purchasers are unavailing. "Real estate brokerage services" encompasses all types of real estate brokerage transactions as well as all types of purchasers.

In view of the expense involved in buying or selling a home, we agree with applicant that even ordinary purchasers or sellers of a home are going to exercise some degree of care in choosing a real estate broker. However, because of the close similarity in the marks, as discussed below, even consumers who exercise a degree of care are likely to mistakenly believe that these identical services emanate from the same source.

Turning, now, to consider the marks, we note that the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is 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).

Furthermore, although the marks at issue must be considered

in their entirety, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *See In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

The examining attorney contends that FOCUS is the dominant portion of both marks because it is the first term in each mark, it is an arbitrary term in connection with the identified services, and the remaining terms in each mark are merely descriptive.

Applicant contends that, "even accepting that the dominant portion of each mark is the term FOCUS" (reply brief, p. 6), the marks are multi-word marks that, considered in their entirety, are sufficiently different in sight, sound, meaning and commercial impression. Applicant notes that "property group" and "development" have different meanings and are not "indicative of services somehow associated with real estate" (brief, p. 6).

Again, applicant's arguments are not well taken. First, we agree with the examining attorney, and as apparently admitted by applicant, that FOCUS is the dominant portion of each mark. Not only is it the first term in each mark, but it appears to be arbitrary in connection with the identified services and the additional wording in each mark,

while different from each other, is clearly merely descriptive. When we consider the marks in their entirety, we consider them to be more similar than dissimilar, in fact, they are substantially similar. Therefore, this factor also weighs against applicant.

Applicant contends that applicant and registrant have coexisted for more than five years without actual confusion. However, the absence of actual confusion is of little probative value where we have little evidence pertaining to the nature and extent of the use by applicant and registrant. Moreover, the test under Section 2(d) is not actual confusion but likelihood of confusion. See *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003) ("uncorroborated statements of no known instances of actual confusion are of little evidentiary value."). See also, *In re Kangaroos U.S.A.*, 223 USPQ 1025 (TTAB 1984); and *In re General Motors Corp.*, 23 USPQ2d 1465 (TTAB 1992).

When we consider the record and the relevant likelihood of confusion factors, and all of applicant's arguments relating thereto, including those arguments not specifically addressed herein, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark, FOCUS PROPERTY GROUP, and registrant's mark, FOCUS DEVELOPMENT, their contemporaneous use on the same and closely related services involved in this case is

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likely to cause confusion as to the source or sponsorship of such services.

*Decision:* The refusal under Section 2(d) of the Act is affirmed.