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Mailed:
July 10, 2006
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re The Members Group, Inc.

Serial No. 78462370

Timothy J. Zarley of Zarley Law Firm, P.L.C. for The Members Group, Inc.

David H. Stine, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

Before Seeherman, Bucher and Drost, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

The Members Group, Inc., seeks registration on the Principal Register of the following special form mark:



for services recited in the application, as amended, as follows:

"financial services provided to credit unions, namely, credit, debit and ATM card processing, financial asset/liability management, automated financial clearinghouse services, share draft financial services and mortgage loan services" in International Class 36.¹

This case is now before the Board on appeal from the final refusal of the Trademark Examining Attorney to register applicant's mark based upon Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). The Trademark Examining Attorney has found that applicant's mark, when used in connection with the recited services, so resembles the mark **TMG** (*standard character drawing*), which is registered for "Real estate brokerage services; Real estate agencies; Loan brokerage, consulting and services; Mortgage brokerage," also in International Class 36,² as to be likely to cause confusion, to cause mistake or to deceive.

Applicant and the Trademark Examining Attorney have filed briefs in this case, but applicant did not request an oral hearing. We affirm the refusal to register.

Applicant argues that given the highly-stylized nature of its mark, this mark cannot be treated simply as a

¹ Application Serial No. 78462370 was filed on August 5, 2004 based upon applicant's allegation of first use anywhere and first use in commerce at least as early as June 7, 2004. The record contains the statement that "The mark consists of the stylized letters TMG with the G forming an arrow."

² Registration No. 2784099 issued to The Mardrian Group, Inc. on November 18, 2003, having claims of first use anywhere and first use in commerce at least as early as October 24, 1997.

straightforward letter combination mark. Applicant also argues that the respective services are quite different - as recited, as well as based upon screen prints it copied from registrant's website. According to that information, The Mardrian Group is a construction company that uses its service mark in association with its construction company services. Finally, applicant argues that inasmuch as its recitation of services focuses on providing products and services to credit unions, and registrant's recitation of services makes no reference to servicing credit unions, there is no overlap in services.

By contrast, the Trademark Examining Attorney argues that "the identical, and completely arbitrary, letter combination 'TMG' is the obvious dominant feature of applicant's mark." Trademark Examining Attorney's brief, unnumbered p. 2. He argues, further, that "the degree of stylization in this case is not sufficiently striking, unique or distinctive as to create a commercial impression separate and apart from the literal feature." *Id.* at unnumbered pp. 2 - 3. Moreover, he contends that inasmuch as registrant's mark is presented in a standard character drawing, the scope of protection for the registered mark is not limited to any particular presentation and must be assumed to encompass any stylization of the letter

combination TMG in a format similar to that used by applicant.

As to the relationship of the services, the Trademark Examining Attorney argues that based upon the respective recitations of services herein, both applicant and registrant are sources of mortgage loan financing. Furthermore, he argues that applicant's mortgage loan services are complementary to registrant's real estate-related services inasmuch as most buyers of real estate require financing.

Finally, the Trademark Examining Attorney argues that even though applicant's channels of trade may be restricted to credit unions, because registrant's recitation is entirely unrestricted as to trade channels, it must be presumed that registrant's mortgage services are available to any interested parties, including credit unions.

Likelihood of Confusion: Analysis

Our determination under Section 2(d) of the Act is based upon an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key

considerations are the similarities between the marks and the relationship of the goods or services. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

The marks

We turn first to the du Pont factor focusing on the similarity of the marks as to appearance, sound, connotation and commercial impression. Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

Here applicant's mark and the registered mark are both letter marks. Whether or not specific letter combinations are confusingly similar are affected by, *inter alia*, where the letters may fall along the continuum of distinctiveness, as well as the degree of stylization involved in the presentation of the mark. See, e.g., Diamond Alkali Company v. Dundee Cement Company, 343 F.2d 781, 145 USPQ 211 (CCPA 1965), involving the following marks:



Dundee Cement Co.'s stylized letter "D"



Diamond Alkali Co.'s stylized house mark

and in which the Court, in finding no likelihood of confusion, stated that Diamond Alkali Co.'s mark would be regarded as an arbitrary design that is capable of many different interpretations rather than as a letter "d."

On the other hand, while applicant's mark in the present case contains some stylization, the letters T•M•G are readily apparent. Although applicant is correct in contending that the analysis of similarity of the marks changes somewhat when one or both marks is so highly stylized that it creates a striking visual impression apart from the spoken letters, we do not consider applicant's mark to have such a remarkable stylization. Compare Diamond Alkali Company v. Dundee Cement Company, *supra*; Georgia Pacific Corporation v. Great Plains Bag Company, 614 F.2d 757, 760; 204 USPQ 697 (CCPA 1980). The clear impression and connotation conveyed by applicant's mark is of the letters T•M•G. The letter combinations of applicant's mark and registrant's mark are, thus, identical. When spoken, the marks will sound the same and will have the same meaning, that of the letters T•M•G.³

³ It appears that registrant and applicant have derived their respective marks from the initials of their corporate names ("The Mardrian Group" and "The Members Group"). Consumers, however, cannot be expected to know the origin of these initialisms, and therefore the connotations of the marks themselves must be considered to be identical.

With respect to appearance, the stylization of applicant's mark clearly creates some differences in the appearance of the two marks. However, the stylization is not so great that it alters the commercial impression conveyed by the mark. Further, as the Examining Attorney has pointed out, inasmuch as registrant's mark is presented in a standard character format, the protection afforded the registrant's mark would extend to its use of a type font similar to that used in the lettering of applicant's mark - although the protection afforded the cited mark would not include such stylized elements as the conflation of the letters T and M, and the arrow design creating the letter G.

Applicant cites to the decision of In re Electrolyte Laboratories Inc., 913 F.2d 930, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990), where the Court of Appeals for the Federal Circuit, held that the following marks for a dietary potassium supplement were not likely to cause confusion, noting that "[t]he letter 'K' in both marks is the chemical symbol for potassium":



However, unlike in those marks, where the common element was the non-distinctive letter K, the letter combination TMG in the instant case is arbitrary as used in connection with registrant's and applicant's services.

Thus, despite some differences in appearance, applicant's stylized mark creates the same commercial impression as registrant's TMG mark. This factor favors a finding of likelihood of confusion.

The services

We turn then to the du Pont factor focusing on the relationship of the respective services. Registrant's services are identified as "Real estate brokerage services; Real estate agencies; Loan brokerage, consulting and services; Mortgage brokerage"; while applicant's application includes a number of services, the closest of them to registrant's recited services are "mortgage loan services" provided to credit unions, so we will concentrate our analysis on these services. Tuxedo Monopoly, Inc. v. General Mills Fun Group, 209 USPQ 986, 988 (CCPA 1981) [if confusion is likely with respect to any of the identified goods (or services) in a class, likelihood of confusion must be found for the class as a whole].

Applicant argues that its services are quite different from registrant's services. Additionally, applicant cites to the home page of registrant's website, which states:

TMG - The Mardrian Group, Inc., founded in 1992, is a general construction company specializing in construction of commercial, industrial, residential developments, religious and non-profit facilities."⁴

Applicant argues from this extrinsic evidence that registrant's service mark is used in connection with registrant's construction company services "aimed at consumers who would like to build and develop real estate." "This is a much different group of consumers than the consumers that will be purchasing the credit and debit processing and financial services of the applicant's company. Consequently, because of the difference in the services, the overlap between the consumers of the applicant's services and the consumers of the Registrant's services would be *de minimus*." Applicant's response of May 6, 2005, pp. 6 - 7.

By contrast, the Trademark Examining Attorney claims that applicant's services are related to registrant's services. In asserting this, he has taken the position that extrinsic evidence regarding the nature of registrant's

⁴ <http://www.mardrian.com/pages/866830/index.htm>

actual services may not be used to limit the protection accorded to registrant by its registration.

We agree with the Trademark Examining Attorney. It is well settled that the likelihood of confusion determination must be made on the basis of the recitation of services as set forth in the involved application, compared with the recitation of services contained in the cited registration, rather than on the basis of what the evidence might show the applicant's or registrant's actual services to be. See Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990) and Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Accordingly, we must deem the registrant's services to encompass all those services identified in its registration, and to move in all appropriate channels of trade and to all appropriate customers for those services as recited.

The Trademark Examining Attorney is also correct in noting that services need not be identical in order to support a finding of likelihood of confusion, provided there is a showing of the relatedness of the services and an overlap of customers.

In this vein, the Trademark Examining Attorney acknowledges that there are differences in the wording of

the recitations of registrant's and applicant's services, but argues that the respective service recitations include "critical overlap." Trademark Examining Attorney's brief, unnumbered p. 4.

In fact, there appear to be a number of ways in which credit unions would be in the market for the services listed in the cited registration.

This registration recites "mortgage brokerage" services among the services registrant offers. Mortgage brokers act as intermediaries, distributing mortgage products from large lenders to qualified borrowers. Smaller lending institutions like credit unions may well use such specialized mortgage brokers. Furthermore, a credit union that offers mortgage loans directly to its members could use a mortgage broker to arrange for a subsequent sale of the mortgage paper in the secondary wholesale markets.

Similarly, applicant's recitation of services includes providing mortgage loan services to credit unions. This service recitation would include helping credit unions with the lending process by offering mortgage loans to qualified credit union borrowers.

Therefore, from the standpoint of the employees and/or officers of a credit union, the services offered by registrant as a mortgage broker and those offered by

applicant as a mortgage wholesaler would likely be seen as closely-related activities.

Indeed, applicant does not dispute the position of the Trademark Examining Attorney that mortgage brokerage and mortgage loans services are complementary. Rather, its entire argument is that because the cited registration "does not recite services to credit unions," then "the registrant's identification of services does not encompass the services described by Applicant." However, because there are not any limitations in registrant's recitation, its services are presumed to be rendered to all appropriate consumers for its services. *In re Elbaum*, 211 USPQ 639 (TTAB 1981). There is nothing in the record to suggest that mortgage brokerage services of the kind recited by registrant would not be offered to credit unions.

Hence, this factor too favors the position taken by the Trademark Examining Attorney.

Channels of Trade

As discussed above, absent any specific limitations in the recitation of services contained within the cited registration, the issue of likelihood of confusion must be determined by looking at all the usual channels of trade and methods of distribution for the respective services. See

CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198 (Fed. Cir. 1983). The Trademark Examining Attorney is correct in noting that the recitation of services contained in the cited registration has no limitations on registrant's customers. Because, as noted above, such services may be rendered to credit unions, registrant's recitation of services must be deemed to encompass services rendered to credit unions. Thus, this key du Pont factor also favors the position taken by the Trademark Examining Attorney.

Sophistication of customers

Credit unions, as purchasers of both types of services, would be considered to be sophisticated purchasers - a factor that would normally favor applicant. However, we find that because of the strong similarities in the marks herein, even careful consumers are likely to be confused.

Resolve any doubt against the newcomer

We confess, after weighing all the relevant du Pont factors in the instant case, that the issue of likelihood of confusion is not free from doubt. However, it is well established that should we retain any doubt on the issue of likelihood of confusion, such doubt must be resolved in favor of the prior user and against the newcomer. Gillette Canada Inc. v. Ranir Corp., 23 USPQ2d 1768 (TTAB 1992).

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Decision: The refusal to register under Section 2(d) of the Lanham Act is hereby affirmed.