

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

Mailed:  
March 31, 2011

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Fujitech Ltd.

\_\_\_\_\_  
Serial No. 77270424  
Serial No. 77270426

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Jeffrey M. Furr of Furr Law Firm for Fujitech Ltd.

Asmat Khan, Trademark Examining Attorney, Law Office 114  
(K. Margaret Le, Managing Attorney).

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Before Bucher, Wellington, and Ritchie, Administrative  
Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Fujitech Ltd., a Hong Kong company, has filed  
applications to register the mark FUJITECH in standard  
character format and in the following stylized manner:

**Fujitech**

for the following goods in International Class 9:

Audio Players, namely, Music Player 3 (MP3), Mini Disc  
(MD), Compact Disc (CD); Audio Add-On-Cards, Namely,  
Peripheral Component Interconnect (PCI), Accelerated

**Serial Nos. 77270424 and 77270426**

Graphics Port (AGP) Sound, Local Area Network (LAN), Fax Modem, Television Tuner, television tuner boxes; Set Top Converters and Encoders; Audio Cables; Coaxial Cables; Fiber Optics Cables; Games Cables; Telecom or Modular Cables; Audio Adaptors; Coaxial Adaptors; Fiber Optics Adaptors; Games Adaptors; Telecom or Modular Adaptors; Electronic Cards, Namely, Smart Media Cards, Multimedia Cards, Secure Digital Cards sold blank.<sup>1</sup>

The Trademark Examining Attorney refused registration to both applications under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's marks used in connection with the goods listed in the application is likely to cause confusion with the registered marks of two different entities. Specifically, the examining attorney cited the following registered marks owned by Fujifilm Corporation:

**FUJI**

for: photographic apparatus, supplies, and accessories-namely, sensitized photographic film, papers, cameras;<sup>2</sup>

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1 Applications Serial No. 77270424 and 77270426, both filed on September 3, 2007, and based on a foreign registration under Section 44(e).

2 Registration No. 0614791 issued on October 25, 1975, renewed.



for, *inter alia*: photographic cameras, photographic lenses, photofinishing apparatus, processors for graphic arts film, microfilming equipment, video tapes and audio tapes;<sup>3</sup>

and for, *inter alia*: video cameras, video tape recorders, video camcorders, video players, video recorder/players, video image transmitters, video printers, blank video floppy disks, apparatus for analysis of biological image using stimulable phosphor, color printer for making color from video image data by using thermal developing photosensitive material;<sup>4</sup>

FUJI (in standard characters)

for: single use cameras;<sup>5</sup> and

FUJIFILM (in standard characters)

for: single use cameras.<sup>6</sup>

The examining attorney also cited the following two registered marks owned by Fuji Electric Holdings Co., Ltd.:

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<sup>3</sup> Registration No. 1339842 issued on June 11, 1985, renewed.

<sup>4</sup> Registration No. 1949724 issued on January 16, 1996, renewed.

<sup>5</sup> Registration No. 3089936 issued on May 9, 2006.

<sup>6</sup> Registration No. 3092797 issued on May 16, 2006.

# FUJI ELECTRIC

for, inter alia: electric batteries; electric connectors; electric circuit closers; condensers; electric resistors; induction voltage regulators; electric reactors; electric phase modifiers; electric or magnetic meters and testers, namely, circuit testers, frequency meters, watt hour meters, resistance measuring apparatus, voltmeters, wave meters, ammeters and wattmeters; electric door closing apparatus that uses linear motor technology for controlling automatic sliding doors in electric railcars or platforms such as safety fences on train station platforms, sliding doors and partition sliding doors of railcars; computer programs to control equipment, machines, and robots; photosensitive drums, a cartridge component of a laser print engine that receives data for use in copying machines; electric apparatus, namely, electric transformers, electric current transformers, electric power supply apparatus used for conversion of energy, electric switchboards, electric switch boxes, electric switches, telemeters, electricity meters, electric relays, electric time switches, electric safety fuses, circuit breakers, electric converters, electric branch terminals, electric current rectifiers; electrolysis rectifiers; computers; semiconductor devices; computer peripherals; electromechanical controls for operating machines and motors by means of current control; industrial measuring instruments namely, hybrid particle counter electro-magnetic flow meter used as an instrument for detecting individual particles in a fluid, such as water; ultrasonic flow meter and integrator; vending machines; machines for detecting counterfeit coins installed in vending machines for detecting counterfeit money, and counting bills and coins; machines for counting and sorting money; cash registers; x-rays not for medical purposes; water pollution monitors that use biosensors to detect and measure water pollution, atmospheric pollution monitors that use gas analyzers to measure and detect pollution; electric distribution boards; electronic

Serial Nos. 77270424 and 77270426

monitoring apparatus for use in industrial operations, namely, computer monitors, video cameras and video monitors, LCD displays and flat screen monitors, and oxygen analyzers; remote control apparatus for computers, for operating motors and industrial machines by current control, and for power supplies; metal-clad switch gears used for housing circuit breakers; circuit breakers; crossbar electrical contacts; apparatus for analyzing gas, namely, gas sensors for measuring gas concentration; glass lined ozonizer tubes used to [sic] for ozone production; solar cell and batteries; inverters; programmable controllers; radiation monitors; industrial measuring instruments, namely, oscillographs, voltmeters, ammeters, frequency meters, galvanometers, ohmmeters, dynamometers, wavemeters; fuel batteries; high-frequency transceivers; timers; data processors; data transmitters; hard disks for hard disk drives; blank magnetic data carriers; amplifiers; programmable operation touch panels that connect user to machines' temperature control networks via image displays; pilot lamp;<sup>7</sup> and

FUJI ELECTRIC FA (in standard characters)

for, inter alia: electric current transformers, electric power supplies, electric switchboards, namely, computer hardware and computer software used to control the generation, management, control and distribution of electric power, and electric power distribution switchboards, electric switch boxes, electric switches, telemeters, electricity meters, electric relays, electric automatic time switches, electric safety fuses, circuit breakers, electric converters, electric branch terminals, electric connectors, electrical contacts, electric current rectifiers, electrolysis rectifiers, computers, semiconductor devices, computer peripherals, and video cameras and video monitors, LCD displays and flat screen monitors, and programmable operation touch panels with electric display, electric transformers,

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<sup>7</sup> Registration No. 3223604 issued on April 3, 2007. The word ELECTRIC has been disclaimed. The registration also covers goods in International Classes 7 and 11; we note the examining attorney does not argue that the goods in classes 7 and 11 are related to applicant's goods and, indeed, they are not.

switchgears, inverters, programmable control machines and instruments, electric units for operating machines and motors by means of current control, data processing instruments, namely, data processors, network switches, systems boards, input/output modules and interconnect modules, computers, data transmission instruments, namely, remote controls, computers, telecommunications switches, routers, computer servers, storage systems consisting of storage area networks and memory farms, electronic timers.<sup>8</sup>

Consolidation/ Background

Applicant has appealed the examining attorney's decisions to refuse registration to its marks. Inasmuch as these two ex parte appeals involve nearly identical issues of law and fact, the Board consolidates these two cases by deciding them together in this decision.

By way of background, we note that the examining attorney initially cited only the registration for the stylized FUJI ELECTRIC mark as a bar to registration of applicant's marks based on a likelihood of confusion with that registered mark. After the Trademark Examining Attorney issued her "final" refusal office actions to both applications, applicant filed (on September 20, 2008) appeals and requests for reconsideration concurrently for each application. On December 5, 2008, the examining attorney denied the requests for reconsideration.

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<sup>8</sup> Registration No. 3699253 issued on October 20, 2009. The wording ELECTRIC FA has been disclaimed. The registration also covers goods in International Classes 7; again, we note the

**Serial Nos. 77270424 and 77270426**

Applicant shortly thereafter filed its appeal briefs which, in substance, are nearly the same. With its appeal briefs, applicant attached printouts from the USPTO's electronic database regarding third-party registrations for marks that incorporate the term FUJI (or some derivative thereof). In its appeal briefs, applicant focused solely on trying to distinguish its applied-for marks from the registered FUJI ELECTRIC (stylized) mark. In support, applicant attached printouts showing "approximately 37 marks registered in International Class 009 containing 'fuji' or a version thereof wherein the proprietor of the mark is not those of either applicant's mark or registrant's mark." Brief, (unnumbered) p. 8.

When the appeal files were forwarded to the examining attorney for briefing, she requested that jurisdiction over the applications be remanded to her because "upon further review, ...there is evidence to support a likelihood of confusion refusal of the application[s] based on the existence of trademark applications and registrations owned by Fujifilm Corporation and Fuji Electric Assets Management Co." Requests for Remand (filed February 23, 2009). We note that several of registrations that the examining

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examining attorney does not argue that the goods in class 7 are related to applicant's goods and, indeed, they are not.

**Serial Nos. 77270424 and 77270426**

attorney references as being discovered "upon further review" were those referenced in the attachments to applicant's appeal briefs as evidence of third-parties owning registrations for marks containing the term "fuji."

The requests for remand were granted by the Board and the examining attorney subsequently issued office actions ultimately refusing registration to applicant's applied-for marks based on the registered marks identified above.

We again note that applicant's appeal brief addressed only the refusal to registration based on the FUJI ELECTRIC (stylized) registration. On June 4, 2010, the Board resumed the appeal proceedings and allowed applicant time to file a supplemental brief in view of the additional registrations being cited as bars to registration of the applied-for marks. No such supplemental brief was filed. The examining attorney, on October 4, 2010, filed her appeal briefs.

In view of the above, we do not have ideal briefing of the issues currently before us. We have an appeal brief from applicant that addresses only one of the cited registrations as a bar to registration of its marks.

Likelihood of Confusion Analysis

Our determination of likelihood of confusion under Section 2(d) is based on consideration of all of the



**Serial Nos. 77270424 and 77270426**

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, 567 (CCPA 1973). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks").

We further note that our analysis is made with respect to each of the registered marks, and the goods identified in the respective registration, vis-à-vis applicant's marks and the goods identified in the applications. That is, we do not consider the registrations in conjunction with one another. We keep in mind that there are two entities whose respective registrations have been cited in support of refusing registration to applicant's marks. Notwithstanding, we need only find a likelihood of confusion based on any one of the cited registrations in

**Serial Nos. 77270424 and 77270426**

order to affirm the refusals to registration of the applied-for marks.

We turn first to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. In comparing the marks, we are mindful 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 impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Furthermore, although likelihood of confusion must be determined by analyzing the marks in their

**Serial Nos. 77270424 and 77270426**

entireties, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties." *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Comparing applicant's marks to the registered marks, it is clear that they are similar to the extent that all marks share the dominant literal element, FUJI. The term either appears alone or followed by descriptive and/or suggestive terms. Descriptive matter or highly suggestive terms, such as TECH, ELECTRIC, FA, FILM, are generally viewed as a less dominant or significant feature of the mark. *In re National Data Corp.*, 224 USPQ at 750. Accordingly, when not combined with FUJI, there is disclaimer of these terms in the registrations (see footnotes 7 and 8). *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001). See also *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000), quoting *In re National Data Corp.*, 224 USPQ at 750 ("Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion'").

**Serial Nos. 77270424 and 77270426**

As far as appearance, one of applicant's marks and several of the registered marks are stylized. With the exception of one registered mark, the stylization employed is not so different from one another to distinguish or outweigh the importance of the marks sharing the same dominant element, FUJI. In fact, several of the registered marks are in standard character format and we must therefore assume the marks may be displayed in the same manner as that employed by applicant; likewise, applicant's typed mark may appear in the same font as the registered marks. *Citigroup Inc. v. Capital City Bank Group, Inc.*, \_\_\_ F.3d \_\_\_, \_\_\_ USPQ2d \_\_\_, slip op. at 12-13 (Fed. Cir. Mar. 28, 2011).

As to the registered mark appearing in highly stylized letters forming a rectangle with two "edged" corners, shown again below,



consumers will be able to decipher the literal term FUJI, in spite of the fanciful letters and design. Nevertheless, with respect to this mark and viewing it as a whole, we acknowledge that the stylization is significant and creates a different appearance.

As far as connotation and commercial impression, the examining attorney argues in her brief that the "relevance or meaning" of the term FUJI is "as an iconic symbol for Japan, referring to one of Japans three holy mountains" and that this term "creates a stronger commercial impression."<sup>9</sup> Brief, (unnumbered) p. 8. Applicant, on the other hand, does not offer a possible connotation for its marks or that of the registered marks. Thus, to the extent consumers are familiar with the Japanese mountain, Mt. Fuji, the marks may have the same connotation or create the same commercial impression.

In sum, we conclude that applicant's marks are similar to each and every one of the registered marks.

We next turn to the *du Pont* factor involving any possible weakness of the common element "Fuji" due to

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<sup>9</sup> The examining attorney did not reference any authority in her brief as to the meaning of the term "Fuji." We take judicial notice of the following definition:

**Fuji, Mount** also **Fu·ji·ya·ma** (fōjē-yä'mä, -mä) or

**Fu·ji·no·ya·ma** (-nō-) or **Fu·ji·san** (-sän')

The highest peak, 3,778.6 m (12,389 ft), in Japan, in central Honshu west-southwest of Tokyo. An almost perfectly symmetrical snow-capped volcanic cone, it is a sacred mountain and pilgrimage site. Its last major eruption was in 1707.

[The American Heritage Dictionary of English Language (4<sup>th</sup> edition, 2000).

The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

**Serial Nos. 77270424 and 77270426**

third-party use of the same or similar marks in the marketplace. With its brief, applicant attached printouts from a USPTO database showing the existence of approximately thirty-seven (37) registrations owned by various entities for marks containing the term "Fuji" and covering goods in International Class 9.<sup>10</sup> To the extent that applicant is attempting to show a weakness of the term "Fuji" in connection with electronic goods, these third-party registrations, by themselves, are insufficient in this regard. Absent evidence of actual use, third-party registrations have little probative value because they are not evidence that the marks are in use on a commercial scale or that the public has become familiar with them. See *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973) (the purchasing public is not aware of registrations reposing in the U.S. Patent and Trademark Office). See also *In re Hub Distributing, Inc.*, 218 USPQ 284, 285 (TTAB 1983).

[I]t would be sheer speculation to draw any inferences about which, if any of the marks subject of the third party (sic) registrations are still in use. Because of this doubt, third party (sic) registration evidence proves nothing about the impact of the third-party marks on purchasers in terms of dilution of the mark

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<sup>10</sup> As previously noted, applicant referenced and provided copies of registrations owned by Fujifilm Corporation which were subsequently cited as the basis, in part, of the likelihood of confusion refusal with respect to each applied-for mark.

**Serial Nos. 77270424 and 77270426**

in question or conditioning of the purchasers as their weakness in distinguishing source.

*In re Hub Distributing, Inc.*, 218 USPQ at 286.

We now turn to the *du Pont* factor requiring us to consider any relatedness of the goods. In this regard, we must keep in mind that there is no rule that certain goods are *per se* related, such that there must be a likelihood of confusion from the use of similar marks in relation thereto. See, e.g., *Information Resources Inc. v. XPress Information Services*, 6 USPQ2d 1034, 1038 (TTAB 1988) (regarding computer hardware and software); *Hi-Country Foods Corp. v. Hi Country Beef Jerky*, 4 USPQ2d 1169, 1171 (TTAB 1987) (regarding food products); *In re Quadram Corp.*, 228 USPQ 863, 865 (TTAB 1985) (regarding computer hardware and software); *In re British Bulldog, Ltd.*, 224 USPQ 854, 855-56 (TTAB 1984) and cases cited therein (regarding clothing).

The examining attorney has taken a very minimalist approach in her argument and presentation of evidence in support of her contention that applicant's goods are related to those in the cited registrations. Her brief contains one case-specific sentence in this regard:

A likelihood of confusion exists in the instant case because consumers will likely believe there is an association, sponsorship or an affiliation between the applicant's FUJITECH mark and the registrants' marks

**Serial Nos. 77270424 and 77270426**

which consist of variations of the dominant term FUJI because the parties have highly related and complementary goods, including, for example, audio players, audio tapes, cables, electric switches, secure digital cards, cameras, video tapes and players, computer peripherals, peripheral component interconnect (PCI), accelerated graphics port (AGP), local area network (LAN), fax modem, coaxial cables, computers, adaptors, transformers, routers, and circuit breakers such that the goods would be marketed in the same channels of trade.

[Unnumbered p. 11, emphasis supplied herein to illustrate goods of applicant.]

There is no attempt to delineate which of the above-identified goods are those of applicant versus those belonging to one of the two registrants. The examining attorney does not elaborate as to why she believes the goods are "highly related and complementary." The list of goods is also somewhat misleading because while the term "audio players" is listed in the two applications, it is immediately followed by "namely, Music Player 3 (MP3), Mini Disc (MD), Compact Disc (CD)," none of which utilizes "audio tapes." In light of the fact that seven different registrations owned by two different entities have been cited in support of the likelihood of confusion refusal to registration, it was incumbent upon her to explain, at the very least, which goods from each registration were most likely to support the refusal.



**Serial Nos. 77270424 and 77270426**

As to the evidence, the examining attorney relies exclusively on the printouts of 44 third-party registrations for marks purportedly covering both applicant's goods and those of one of the registrants. She argues that these registrations have "probative value to the extent that they serve to suggest that the goods listed therein are of a kind that may emanate from a single source."

Third-party registrations which individually cover a number of different items and which are based on use in commerce may serve to suggest that the listed goods are of a type that may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1469 (TTAB 1988), *aff'd* (unpublished) No. 88-1444 (Fed. Cir. Nov. 14, 1988). citing to *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993) and other cases.

As to the third-party registration printouts submitted by the examining attorney, we initially note that over one-third of these are based on Section 44(e) (ownership of a foreign registration) and do not have use in commerce dates. As we have previously stated many times in other decisions, such registrations are not indicative of a common source in the United States of the goods identified

**Serial Nos. 77270424 and 77270426**

therein and have no probative value. See, e.g., *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470, n. 6 (TTAB 1988) (third-party registrations which are based upon foreign registrations "are not even necessarily evidence of a serious intent to use the marks shown therein in the United States on all of the listed goods and services, and they have very little, if any, persuasive value on the point for which they were offered."). Accordingly, we have not considered these third-party registrations.

We further note that the examining attorney has merely referenced the printouts and the existence of the third-party registrations. That is, no attempt was made to spell out the goods in the third-party registrations that are relevant to showing a relationship between applicant's goods vis-à-vis any of the goods listed in the seven different registrations.

In our review of the third-party registrations that are based on use, we found most covered at least one of the goods identified in the applications as well as one of the goods identified in one of the seven different registrations; however, there is not a significant number of registrations covering the same specific item in the applications and the same specific item found in any one of the seven different registrations. For example, there are

**Serial Nos. 77270424 and 77270426**

approximately three to four registrations which individually cover applicant's MP3 players (or goods that are described so broadly as to encompass MP3 players) as well as cameras, found in registrant Fujifilm Corporation's registrations.<sup>11</sup> Likewise, there is roughly the same number of third-party registrations for marks individually covering applicant's electronic cards, e.g., Smart Media, Secure Digital, etc. and cameras. There are also fewer than a handful of third-party registrations that cover electronic cards and "blank video floppy disks" identified in one of Fujifilm Corporation's registrations. With regard to the goods identified in the registrations owned by Fuji Electric Holdings Co., Ltd., the third-party registrations have even less significance in establishing a relationship with any of the goods in the subject applications.

In sum, the third-party registrations are not sufficiently convincing of the relatedness of the goods. In particular, there are too few showing the relatedness of any specific item in the application with an item in a

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<sup>11</sup> For example, we note Registration No. 3308778 for the mark EBOC covers, *inter alia*, "digital cameras" and "MP3 players"; and Registration No. 3180906 for the mark SMALLDOG.COM covers, *inter alia*, "cameras" and "apparatus for transmitting and reproducing sound or images."

**Serial Nos. 77270424 and 77270426**

given cited registration. Furthermore, it would be too tenuous of a connection for us to somehow consider all of the registrations conjunctively for purposes of showing that all or certain of the goods of applicant's and any one of the registrant's are related.

On this record, we cannot make a finding that applicant's goods are clearly related to any of the goods in the cited registrations. Accordingly, the examining attorney has not made out a prima facie showing in this regard; again, the limited number of use-based and probative third-party registrations submitted are insufficient in this regard. We do not hesitate to point out that on a different record, such as might be adduced by a competitor in an opposition proceeding, a different result may be reached on the issue of the relatedness of the goods.

Ultimately, in spite of the respective marks being similar, we are constrained to find that there is no likelihood of confusion in this case without a finding that the goods of applicant are related to any of those listed in the cited registrations.

Decision: The refusals to register are reversed.