

**This Opinion is Not a  
Precedent of the TTAB**

Mailed: March 8, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Frank J. Chiara III*  
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Serial No. 86561927  
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Todd Braverman of Pearl Cohen Zedek Latzer Baratz LLP,  
for Frank J. Chiara III.

Parker Howard, Trademark Examining Attorney, Law Office 117,  
Hellen Bryan Johnson, Managing Attorney.

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Before Cataldo, Mermelstein and Greenbaum,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Frank J. Chiara III (“Applicant”) seeks registration on the Principal Register of  
the mark CITY OF HEROES (in standard characters) for

clothing, namely, t-shirts, sweatshirts, hooded  
sweatshirts, polo shirts, tank tops, shirts, pants, hats,  
footwear, headwear, sweatpants, socks, underwear,  
swimwear and wristbands; athletic wear, namely, t-  
shirts, jerseys, tank tops and caps in International Class  
25.<sup>1</sup>

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<sup>1</sup> Application Serial No. 86561927 was filed on March 12, 2015, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with Registration No. 2704516, issued on the Principal Register for the mark CITY OF HEROES (in typed characters) for

Interactive multimedia computer game programs, Interactive video game programs, Electrical circuits for use in amusement game machines for reproducing music speech and special effects, Computer game equipment containing memory devices, namely discs, Computer game joysticks, Video game software, Multimedia software recorded on CD-ROM in the field of computer games, Virtual reality game software, Motion picture films featuring animated cartoons in International Class 9.<sup>2</sup>

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed.<sup>3</sup> We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion as set forth in *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 between the marks and the

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<sup>2</sup> Issued on April 8, 2003. Section 8 affidavit accepted; Section 15 affidavit acknowledged. First renewal.

The Examining Attorney also cited Registration No. 3073447 as a basis for refusal of registration under Section 2(d). However, that registration subsequently was cancelled.

<sup>3</sup> Applicant's brief exceeds the page limits set in Trademark Rule 2.142(b)(2), 37 C.F.R. § 2.142(b)(2) (the rule was amended effective January 14, 2017, but did not change in this respect. Nonetheless, we will exercise our discretion to consider Applicant's non-conforming brief.

similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). We will address each of the *du Pont* factors for which Applicant and the Examining Attorney have submitted arguments and evidence.

*Similarity and dissimilarity of the 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. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005).

Regarding the first factor, we note that there is no dispute but that the marks are identical. The fact that the marks are identical results in this factor strongly supporting the Examining Attorney's position. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) ("Without a doubt the word portion of the two marks are identical, have the same connotation, and give the same commercial impression. The identity of the words, connotation, and commercial impression weighs heavily against the applicant").

In its brief, Applicant raises the following argument: "The Applicant believes that by taking into account all the relevant factors in comparing the Applicant's mark to Registrant's mark, the Board will find the marks are not similar and thus, there is

no likelihood of confusion.”<sup>4</sup> Applicant “admits that Applicant’s mark and Registrant’s mark are identical word marks; nevertheless the marks create different commercial impressions when viewed on the actual goods.”<sup>5</sup> Applicant goes on to argue that

If the previously registered mark is in standard character form, the USPTO will disregard colors, fonts, and other design elements of the mark itself that might serve to distinguish the two in the world outside the USPTO, thus making a confusion finding more likely. *SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 1041 (Fed. Cir. 1983) (a party presenting its mark in standard-character form during registration is barred from asserting a difference based on type style). In general, Federal Courts will not. *See, Hornady Mfg. Co. v. Doubletap, Inc.*, 746 F.3d 995, 1002 n.2 (10th Cir. 2014) (in an infringement action, “standard character registration does not override the requirement that likelihood of confusion be measured by the perceptions of consumers in the marketplace, including the effect of packaging”).

Most of the USPTO’s rules abstracting the application from its broader context favor prior registrants, and therefore tilt in favor of finding likely confusion. As stated numerous times in USPTO Office Actions, doubts are resolved in favor of the senior registrant, *See, e.g., In re Shell Oil Co.*, 992 F.2d 1204, 1209 (Fed. Cir. 1993), whereas the senior user bears the burden of proof in infringement cases.<sup>6</sup>

However, as Applicant no doubt is aware, this is not an infringement action brought by the owner of the cited registration. Here and elsewhere in its brief we note that Applicant has both cited and discussed cases from the district courts. These cases involve infringement and similar claims where the focus is the actual use of marks. These cases are of limited relevance here due to our focus in this proceeding on the application and registration, not actual use. *In re Bercut-*

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<sup>4</sup> 7 TTABVUE 12.

<sup>5</sup> *Id.* at 14.

<sup>6</sup> *Id.* 14-5.

*Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986). Further, our primary reviewing Court has consistently held that when marks are presented in typed or standard character form, there are no differences between the displays of the marks. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000) (“Registrations with typed drawings are not limited to any particular rendition of the mark and, in particular, are not limited to the mark as it is used in commerce”). The rights associated with a mark in standard characters reside in the wording and not in any particular display. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909-11 (Fed. Cir. 2012). *See also In re Cox Enterprises Inc.*, 82 USPQ2d 1040, 1044 (TTAB 2007) (“We must also consider that applicant’s mark, presented in typed or standard character form, is not limited to any special form or style as displayed on its goods”).

Applicant further argues that

Applicant intends on using the CITY OF HEROES mark to promote the city of BOSTON. Like the phrase “BOSTON STRONG,” which was used after the Boston Marathon terrorist attack, Applicant intends on marketing clothing items featuring CITY OF HEROES and COUNTRY OF HEROES for charitable purposes to help the city of Boston.<sup>7</sup>

Applicant asserts that its clothing does not incorporate any comic book heroes.

We note, however, that nothing in Applicant’s CITY OF HEROES mark (or, for that matter, its identification of goods) associates the mark with the City of Boston or limits its connotation or commercial impression to any particular city or type of

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<sup>7</sup> *Id.* at 4.

hero.<sup>8</sup> As a result, we find no support for Applicant's contention that its CITY OF HEROES mark conveys its intention to promote the City of Boston or that such connotation is evident from its mark.

Consistent with our precedents and those of our primary reviewing Court, we find that Applicant's CITY OF HEROES mark is identical to the mark in the cited registration. Furthermore, "even when goods or services are not competitive or intrinsically related, the use of identical marks can lead to an assumption that there is a common source." *In re Shell Oil Co.*, 26 USPQ2d at 1689. *See also Amcor, Inc. v. Amcor Industries, Inc.*, 210 USPQ 70, 78 (TTAB 1981) (When the parties are using or intend to use the identical designation, "the relationship between the goods on which the parties use their marks need not be as great or as close as in the situation where the marks are not identical or strikingly similar"). Bearing this precedent in mind, we turn to a consideration of the similarity of the goods.

*Relatedness of the goods.*

It is settled that in making our determination involving the similarity or dissimilarity of Applicant's goods and Registrant's goods, we must look to the goods as identified in the application vis-à-vis those recited in the cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 110 USPQ2d at 1161; *Octocom Sys., Inc. v. Houston Computers Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB

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<sup>8</sup> We observe that ornamentation on a sample of Applicant's tee shirts displays the mark in stylized form as part of a larger display including the wording "City of Heroes Boston" and the design of a shamrock. However, the additional elements are not part of the applied-for mark.

2011). The respective goods need only be “related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). See also *On-line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984). The issue here is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of these goods. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

Applicant’s goods are identified as

clothing, namely, t-shirts, sweatshirts, hooded sweatshirts, polo shirts, tank tops, shirts, pants, hats, footwear, headwear, sweatpants, socks, underwear, swimwear and wristbands; athletic wear, namely, t-shirts, jerseys, tank tops and caps.

The goods in the cited registration are identified as

Interactive multimedia computer game programs, Interactive video game programs, Electrical circuits for use in amusement game machines for reproducing music speech and special effects, Computer game equipment containing memory devices, namely discs, Computer game joysticks, Video game software, Multimedia software recorded on CD-ROM in the field of computer games, Virtual reality game software, Motion picture films featuring animated cartoons.

The goods of Applicant and Registrant are obviously different in nature. However, it is not necessary that goods be similar or competitive in character to support a holding of likelihood of confusion; it is sufficient that the goods be related in some

manner such that they could be encountered by the same persons under circumstances that could give rise to the mistaken belief that they originate from or are in some way associated with the same producer. *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1410 (TTAB 2010). The Examining Attorney, in support of his contention that the goods at issue are commercially related, has made of record examples of web pages from third-party commercial Internet sites offering for sale various clothing items, as well as animated films and video games.<sup>9</sup> Among these, we note the following:

- the website at [marvel.com](http://marvel.com) offers animated motion pictures, tee shirts, pants, pajamas, costumes, hooded sweatshirts, swimwear all featuring MARVEL and/or the names of superheroes, including IRON MAN and CAPTAIN AMERICA.
- the website at [dcomics.com](http://dcomics.com) offers video games, animated motion pictures, tee shirts, jackets, sweatshirts, footwear, pants, shorts, swimwear, hooded sweatshirts all featuring the names of superheroes, including BATMAN, WONDER WOMAN and SUPERMAN.
- the website at [callofduty.com](http://callofduty.com) offers computer game joysticks and software, tee shirts, caps all featuring, *inter alia*, the mark CALL OF DUTY.
- the website at [capcom.com](http://capcom.com) offers video games, tee shirt, hooded sweatshirts featuring the names of various games, including STREET FIGHTER and game characters.
- the website at [giantkidsworld.com](http://giantkidsworld.com) offers video games, hats, hooded sweatshirts, shirts featuring the names of games and game characters, including NATURO.
- the website at [lego.com](http://lego.com) offers video games, animated motion pictures, shirts, pants, shorts, swimwear, caps, socks all featuring the names of Lego-themed movies, games and characters, including LEGO, CHIMA, STAR WARS and NINJAGO.

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<sup>9</sup> June 19, 2015 first Office action at 13-64.



These websites demonstrate that in the marketplace, third parties offer Applicant's clothing items and Registrant's video games and animated motion pictures under the same marks. These marks include the names of comic books and video games, as well as characters from those books and games, and various other entertainment programs. Applicant is correct that some of the uses of the marks on the clothing items appear to be ornamentation. Nonetheless, this evidence demonstrates that consumers are exposed to video games and animated motion pictures along with collateral merchandise such as clothing offered under the same designations indicating a common source.

As further evidence that Applicant's goods are related to those of Registrant, the Examining Attorney has submitted a number of use-based, third-party registrations.<sup>10</sup> Among these, we note that the following registrations list, in their identifications of goods, both video games and/or animated motion pictures and clothing items:

3878949	3726755	4272827
4522320	4218987	4394583
4743893	4390351	4213031
4285224	4389008	4629076
4374615	4274907	4408090
4353562	4407004	4155842
4305407	4359361	4736024
4744795	4675437	4720091

Third-party registrations that are based on use in commerce have some probative value to the extent that they suggest that the listed goods are of types which may emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783,

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<sup>10</sup> *Id.* at 65-162.

1785-86; *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). Although such registrations do not prove that the registered marks are actually used in the marketplace on both clothing items and video games and animated motion pictures, they at least demonstrate that a number of third parties have sought and obtained registrations of marks for use on both types of goods. Applicant's contention that the goods are unrelated is not borne out by an examination of the registrations.

Applicant argues

First, on its face, clothing brands are not related to computer software, unless there is at least a preponderance of non-rebutted evidence that the Registrant's listing of goods specifically covers "clothing." In fact, Registrant's certificate of registration for CITY OF HEROES, as well as other CITY OF HEROES abandoned and cancelled registrations cover only comic books and computer games, not clothing. Registrant was using the CITY OF HEROES mark since at least as early as 2005 through 2012. Registrant's failure to file for and register CITY OF HEROES in connection with clothing items clearly indicates its lack of intention to use the mark for other goods.<sup>11</sup>

In this case, the Examining Attorney is trying to make a theoretical connection between clothing and computer games on personal conjecture and assumptions and not on any real-world business use and evidence. There is no evidence whatsoever in the record that prior Registrant sells clothing items BRANDED under the mark CITY OF HEROES or uses its mark on clothing items as promotional items. Most importantly, as demonstrated by the attached evidence, Registrant's online version of its CITY OF HEROES computer game, by its own admissions, is no longer active. Further, as shown below, Applicant's CITY OF HEROES mark does not use or related to "SUPERHEROES" or any video game or comic book character. There is NO CONNECTION between Applicant's use and prior Registrant's use except for the USPTO's knee-jerk refusals based on "trademark world" assumptions and not real-world business reality.<sup>12</sup>

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<sup>11</sup> 7 TTABVUE 16-7.

<sup>12</sup> *Id.* at 18.

In support of its contentions, Applicant introduced into the record copies of cancelled registrations and abandoned applications for CITY OF HEROES-formative marks owned by Registrant, none of which recite clothing items in their identifications of goods or services.<sup>13</sup> Applicant also introduced into the record a screenshot from the open-source Internet reference Wikipedia, indicating that the online video game under the title CITY OF HEROES ceased to be available after November 30, 2012.<sup>14</sup>

There is no question that the goods identified in the cited registration do not include clothing. Even if one or more of Registrant's cancelled registrations or abandoned applications recited clothing items, it would not be material to our consideration of the cited mark. As noted above, there are obvious differences between Registrant's goods and Applicant's goods. The relatedness of the goods stems not from their similarities as identified in the involved application and cited registration, but rather from the Examining Attorney's evidence, discussed above, indicating that third parties use and register marks to identify the source of both video games, joysticks and animated motion pictures and various items of clothing.

In addition, even if we infer from Registrant's cancelled registrations and abandoned applications, and the statements from a Wikipedia article, that Registrant no longer offers its online video game, this does not establish that Registrant has ceased use of its CITY OF HEROES mark for the goods identified in

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<sup>13</sup> Applicant's December 20, 2015 response to first Office action at 18-23.

<sup>14</sup> *Id.* at 15.

the cited registration. Section 7(b) of the Trademark Act provides that a certificate of registration on the Principal Register shall be *prima facie* evidence of the validity of the registration, of the registrant's ownership of the mark and of the registrant's exclusive right to use the mark in connection with the goods or services identified in the certificate. Applicant argues

In this case, Applicant is not making a collateral attack on Registrant's mark or registration, but merely indicating that the business reality is that Registrant ceased use and therefore, its registration (a) should not be given such a broad scope of protection to cover goods not listed in the registration certificate and (b) where the USPTO provided no evidence that this particular registrant ever used or intends on using the mark on clothing.<sup>15</sup>

Regardless of whether Applicant presents this argument as indicating a "business reality," it is settled that during *ex parte* prosecution, including an *ex parte* appeal, an applicant will not be heard on matters, *e.g.*, a registrant's nonuse of the mark that constitute a collateral attack on the cited registration. *In re Dixie Restaurants*, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *In re Peebles Inc.*, 23 USPQ2d 1795, 1797 n.5 (TTAB 1992). Under Section 7(b) of the Act, the registered mark is presumed to be valid and Applicant's evidence does not weigh against such presumption in this *ex parte* matter to which Registrant is not a party. Furthermore, it is not necessary for the Examining Attorney to introduce evidence that Registrant used its mark on clothing, but rather that clothing may emanate from the same source as Registrant's identified goods.

Finally, we note Applicant's argument that

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<sup>15</sup> 7 TTABVUE 21.

goods are not “related” for purposes of determining likelihood of confusion merely because other third parties have registered both computer games or publications or clothing. Following that logic, all goods and services are related to clothing since every major brand holder sells or distributes promotional clothing items.<sup>16</sup>

As discussed above, the evidence of record suggests that third parties use and register designations as marks to indicate the source of both Applicant’s goods and Registrant’s goods. The Internet evidence in particular suggests that, particularly given the tendency of makers of video games and animated motion pictures to market clothing items as collateral goods, these goods are available to consumers on the same websites in the “real world.” Nonetheless, as also discussed above, our focus in this proceeding on the registrability of the mark and goods set out in the involved application vis-à-vis the cited registration, not what extrinsic evidence may suggest about Applicant’s or Registrant’s actual use. *In re Bercut-Vandervoort & Co.*, 229 USPQ at 764.

In light of the foregoing evidence, we find that the goods of Applicant and Registrant are commercially related, and that the *du Pont* factor relating to the similarity or dissimilarity of the goods weighs in favor of a finding of likelihood of confusion.

*Trade channels.*

The only evidence relating to the trade channels through which the goods at issue travel is the third-party website evidence submitted by the Examining Attorney, discussed above. We recognize that a potentially infinite variety of goods are

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<sup>16</sup> *Id.* at 18.

available on the Internet. Nonetheless, this evidence shows that certain websites feature the goods of both Applicant and Registrant under the same designations. These are not retail aggregation or department store sites that offer a wide variety of goods, but rather websites devoted to videogames, movies and goods ancillary thereto. We find the evidence sufficient to show that, in the virtual marketplace, goods of the type identified by Applicant and Registrant are found offered by the same retailers. Accordingly, the *du Pont* factor relating to the similarity or dissimilarity of established, likely-to-continue trade channels favors a finding of likelihood of confusion.

*Other registered marks.*

Applicant, in its December 20, 2015 response to the Examining Attorney's first Office action, included a chart listing 71 live applications and registrations for "CITY OF" formative marks including serial number or registration number, mark and status as a live application or registration.<sup>17</sup> In his final Office action, the Examining Attorney advised Applicant that submission of a list of registrations does not make them of record, and indicated the proper method for doing so.<sup>18</sup> Applicant reproduced the same chart, without any additional information, in its request for reconsideration.<sup>19</sup> Applicant argues

The phrase "CITY OF" with additional terms is extensively used in connection with a wide range of goods and services. Applicant cites to the list of numerous CITY OF registrations previously cited in the

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<sup>17</sup> p. 12-3.

<sup>18</sup> p. 4.

<sup>19</sup> 4 TTABVUE 12-3.

response to the USPTO Office Actions. Thus, “CITY OF HEROES” is a relatively weak mark entitled to a very narrow scope of protection vis-a-vis other marks containing the phrase “CITY OF.”<sup>20</sup>

Now, while Applicant's Attorney realizes that he did not make the seventy one (71) CITY OF marks of record in the response to the Office Action by including print-outs of all 71 citations, the USPTO clearly have the ability to check its own records.<sup>21</sup>

First, the Examining Attorney is correct that to make a third-party registration of record, a copy of the registration, either a copy of the paper USPTO record, or a copy taken from the electronic records of the Office, should be submitted during prosecution of the application. Mere listings of or references to registrations are not sufficient to make the registrations of record. *In re Compania de Licores Internacionales S.A.*, 102 USPQ2d 1841, 1843 (TTAB 2012); *In re Hoefflin*, 97 USPQ2d 1174, 1177 (TTAB 2010). It is clear from Applicant’s brief that Applicant was aware of this requirement and failed to meet it.<sup>22</sup> Second, the Board does not take judicial notice of applications or registrations; they must be proved by competent evidence. *See, e.g., In re Jonathan Drew Inc.*, 97 USPQ2d 1640, 1644 n.11 (TTAB 2011) (stating that “the Board’s well-established practice is not to take judicial notice of registrations that reside in the USPTO”); *Beech Aircraft Corp. v. Lightning Aircraft Co.*, 1 USPQ2d 1290, 1293 (TTAB 1986) (“[W]e do not take judicial notice of application and registration files that reside in the Patent and Trademark Office on the basis of their mere identification in briefs, pleadings and

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<sup>20</sup> 7 TTABVUE 22.

<sup>21</sup> *Id.* at 23.

<sup>22</sup> 7 TTABVUE 22, 25.

evidentiary submissions.”). As such, Applicant’s list of marks, without any accompanying indication of the goods or services or other relevant information, has very limited probative value.<sup>23</sup> The existence of this list of registrations is insufficient to persuade us that the mark in the cited registration is entitled to such a narrow scope of protection as to permit registration of an identical mark for related goods. *Cf. Jack Wolfskin Ausrüstung Fur Draussen GmbH v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (third-party weakness evidence characterized as “voluminous”).

*Other considerations.*

Finally, Applicant argues that a very small percentage of registrations recite both computer games and clothing among their goods and that

By maintaining the Section 2(d) refusal, the USPTO is forcing Applicant to either request a consent from a Registrant which is no longer in business or file an unnecessary and expensive Petition to Cancel five (5) active registrations owned by Registrant in order to clear the way for Applicant to register its mark. These alternatives are unnecessary and unreasonable under the facts of this case.<sup>24</sup>

Section 7(b) of the Trademark Act provides that a certificate of registration on the Principal Register, *inter alia*, shall be *prima facie* evidence of the validity of the cited registration. As Applicant correctly notes, its remedies in this case were to seek a consent agreement from Registrant or cancellation of the cited registration.

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<sup>23</sup> Further, any expired registrations and pending and abandoned applications are also of no value. *See Action Temporary Services Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) (“[A] cancelled registration does not provide constructive notice of anything”), and the applications show only that they have been filed. *Interpayment Services Ltd. v. Docters & Thiede*, 66 USPQ2d 1463 (TTAB 2003).

<sup>24</sup> 7 TTABVUE 27.



*Balancing the factors.*

Having considered the arguments and evidence of record and all relevant *du Pont* factors, including those not specifically discussed herein, we find that Applicant's mark, used in connection with Applicant's goods, so closely resembles the cited registered mark as to be likely to cause confusion, mistake or deception as to the source of Applicant's goods.

**Decision:** The refusal to register is affirmed.