

PTO Form 1980 (Rev 9/2007)

OMB No. xxx-xxxx (Exp. x/xxxx)

Request for Reconsideration after Final Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	78946407
LAW OFFICE ASSIGNED	LAW OFFICE 117
MARK SECTION (no change)	
ARGUMENT(S)	
<p><u>REQUEST FOR RECONSIDERATION</u></p> <p>The Applicant, Sun Chemical Corporation (“Applicant”), by its attorneys, hereby files its Request for Reconsideration in response to the Office Action dated June 26, 2007. In support of its Request, Applicant states as follows.</p> <p>I. <u>Refusal to Register Based Upon a Likelihood of Confusion</u></p> <p>Applicant has filed an application for registration of the mark FRONTPAGE for use in connection with “printing inks for use in the graphic arts industry” in International Class 2. The Examining Attorney has refused registration under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), on the basis of a likelihood of confusion with Registration No. 1,088,020 for the mark FRONT PAGE (stylized) for use in connection with “lithographic plates” in International Class 7. Applicant requests that this refusal be withdrawn and the mark be approved for publication in light of the following arguments.</p> <p>In her final refusal, the Examining Attorney first argues that the marks are “virtually identical except that registrant’s mark contains a space and is slightly stylized.” With regard to the goods, she contends that “it appears that both applicant’s goods and registrant’s goods are used in the same field,” and that “it is clear that the trade channels for the goods are the same.” In support of her refusal she</p>	

provides copies of third-party registrations purportedly showing use of marks in connection with the same or similar goods as those of applicant and registrant, as well as Internet evidence showing that many companies provide a variety of printing supplies.

Applicant respectfully asserts that the goods of Registrant and Applicant differ materially and are distributed in such a manner that confusion is not likely. Also, as will be demonstrated, a careful review of the evidence submitted by the Examining Attorney will show that it does not support the refusal to register. As a result, the refusal to register should be withdrawn.

A. The Goods are Unrelated

If the goods in question are not related or marketed in a manner causing them to be encountered by the same persons in situations creating the incorrect assumption of origination from the same source, then confusion is not likely. This is so even if the marks are identical. *Local Trademarks, Inc. v. Handy Boys, Inc.*, 16 USPQ2d 1156 (TTAB 1990); *Quartz Radiation Corp. v. Comm/Scope Co.*, 1 USPQ2d 1668 (TTAB 1986). See TMEP § 1207.01(a)(i). In *Borg-Warner Chemicals, Inc. v. Helena Chemical Co.*, 225 USPQ 222 (TTAB 1983), the Board held that:

The Board in the past has found no likelihood of confusion even with respect to identical marks applied to goods and/or services used in a common industry where such goods and/or services are clearly different from each other and there is insufficient evidence to establish a reasonable basis for assuming that the respective goods as identified by their marks, would be encountered by the same purchasers.

Borg-Warner Chemicals, 225 USPQ at 224. In this case, the goods in question are not related or marketed in such a way that they would be encountered by the same consumers in situations that would create the incorrect assumption that they originate from the same source. Registrant uses its mark in connection with "lithographic plates." Such plates are made of aluminum or plastic, have a roughened texture and are covered with a photosensitive emulsion that is used to create the image to be printed. See generally Exhibit A, p.3. Applicant, in contrast, does not intend to use the mark in connection with such a product, but rather intends to use the mark in connection with printing inks for use in the graphic arts industry. Such goods are liquid and consist of a vehicle, coloring ingredients, and additives. See Exhibit B. The vehicle is either vegetable-based or solvent-based, while the coloring ingredients and additives are generally chemical-based. See *id.* Because the respective goods of Registrant and

Applicant are completely different in nature, the relevant consumers do not expect them to emanate from the same source.

The Board encountered a similar situation in *Kimberly-Clark Tissue Co. v. Scott Fetzer Co.*, Serial No. 74/423,659, 1999 WL 381056 (TTAB 1999) (attached as Exhibit C). In *Kimberly-Clark*, the Board held that there was no likelihood of confusion between applicant's SCOT'S TUFF for "carpet shampoos and carpet cleaning preparations" and opposer's SCOTT marks for various cleaning, wiping, scrubbing and absorbing products. With regard to the goods, opposer argued that they were closely related in that they were complimentary products that were used together to remove stains and messes from carpets. In finding the goods to be unrelated, the Board stated as follows:

Simply put, the parties' goods are specifically different. Although the above evidence supports opposer's claim that its products and household cleaners are complementary, it hardly establishes that consumers would have a basis for assuming that both emanate from the same source

More to the point is that the evidence falls short in establishing a basis upon which to conclude that consumers would be likely to believe that paper towels and similar products used for cleaning and wiping on the one hand, and carpet cleaning preparations on the other, emanate from the same source. The record is devoid of even one instance where the same entity makes both types of products. To the extent that other products are marketed under opposer's SCOTT marks, such as dropcloths and air fresheners, we likewise find that the record is lacking in establishing a nexus between those products and applicant's carpet cleaning products such that consumers, upon encountering the parties' marks, would attribute a common source to them.

Kimberly-Clark, 1999 WL 381056, at *4. Similarly, although Applicant's printing inks and Registrant's lithographic plates are complementary, they are specifically different. Applicant's inks are liquid and consist of a vehicle, coloring ingredients, and additives. See Exhibit B. The vehicle is either vegetable-based or solvent-based, while the coloring ingredients and additives are generally chemical-based. See *id.* In contrast, Registrant's lithographic plates are made of solid metal or plastic. See Exhibit A. The goods of Applicant and Registrant are fundamentally different in nature, and there is no nexus between Applicant's goods and Registrant's goods such that consumers, upon encountering the parties' marks, would attribute a common source to them.

B. Consumers are Sophisticated

In making a likelihood of confusion determination, another factor to consider is the conditions

under which and buyers to whom sales are made, *i.e.*, “impulse” versus careful, sophisticated purchasing. *See In re E.I. Du Pont de Nemours & Co.*, 177 USPQ 563, 567 (CCPA 1973). In this case, the goods of Registrant and Applicant are sold to graphic arts companies for use in lithographic printing applications. Lithography is a sophisticated printing method, and the consumers in question make educated decisions about their purchases based on the intended application. Indeed, the predecessor of the Federal Circuit, the Court of Customs and Patent Appeals, specifically held that those in the field of professional lithography are a “discriminating class of purchasers.” *Hunt Co. v. Eastman Kodak Co.*, 140 F.2d 166, 60 USPQ 374 (CCPA 1944). Clearly, the consumers of the goods of both the Applicant and Registrant are sophisticated, discriminating customers who do not impulsively purchase the products in question. This factor weighs against a finding of a likelihood of confusion. *See Industrial Nucleonics Corp. v. Hinde*, 177 USPQ 386, 388 (CCPA 1973) (No likelihood of confusion where Applicant’s goods sold to public agencies and manufacturing institutions on recommendation of consulting engineers, and opposer’s goods selected by construction and consulting engineers, sewage and industrial waste engineers and public agencies).

The Examining Attorney contends that “the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion.” However, “[w]here the purchasers are the same, their sophistication is important and often dispositive because ‘[s]ophisticated consumers may be expected to exercise greater care.’” *Electronic Design & Sales, Inc. v. Electronic Data Sys. Corp.*, 954 F.2d 713, 718, 21 USPQ2d 1388, 1392 (Fed. Cir. 1992) (quoting *Pignons S.A. de Mecanique de Precision v. Polaroid Corp.*, 657 F.2d 482, 489, 212 USPQ 246, 252 (1st Cir. 1981)). Because the consumers in question are sophisticated, they will be able to discern between Applicant’s printing inks and Registrant’s lithographic plates.

C. Goods are Expensive

Another factor to consider is the cost of the goods. *In re N.A.D. Inc.*, 224 USPQ 969, 971 (Fed. Cir. 1985). Any likelihood of confusion is further diminished by the differences in the price ranges for the goods. *See In re Oy Wilh. Schauman Ab*, 189 USPQ 245, 246 (TTAB 1975) (no likelihood of

confusion between low-priced canoes and high-priced yachts). In this case, lithography is an expensive printing method used for large volume print jobs. Blank lithography plates generally cost several hundred dollars and can cost over \$1,000 each. *See, e.g.*, Exhibit D. Ink for use in lithography can cost from \$4 per pound to \$15 per pound or more, and is generally purchased in large quantities. The fact that the goods of both Applicant and Registrant are expensive further reduces the likelihood of confusion. *See Du Pont*, 177 USPQ at 567.

In her final refusal the Examining Attorney attempts to argue that there is a greater likelihood of confusion because the goods of both Applicant and Registrant are expensive because Applicant's goods are sold in bulk. This misconstrues Applicant's argument, as it previously argued that there is no likelihood of confusion *because* the goods of both Applicant and Registrant are expensive. "[O]ther things being equal, confusion is less likely where goods are expensive and are purchased after careful consideration than where they are purchased casually." *Magnaflux Corp. v. Sonoflux Corp.*, 231 F.2d 669, 670, 109 USPQ 313, 315 (CCPA 1956). *See also Electronic Design*, 954 F.2d at 713, 21 USPQ2d at 1392 ("[t]here is always less likelihood of confusion where goods are expensive and purchased after careful consideration.") (quoting *Astra Pharm. Prods. v. Beckman Instruments*, 718 F.2d 1201, 1206, 220 USPQ 786, 790 (1st Cir. 1983)). Also, because the goods of Applicant and Registrant are expensive, the Examining Attorney's argument that consumers are used to identifying trademarks that are used by a particular company on both expensive and inexpensive goods in the same field is inapposite.

D. Examining Attorney's Evidence Unpersuasive

In support of her refusal, the Examining Attorney provides two types of evidence. First are printouts of third-party registrations purportedly showing use of the same mark in connection with the goods of both Applicant and Registrant. Second are printouts of Internet websites of third party sellers of printing supplies. As will be shown below, neither type of evidence lends support to the refusal.

1. Third-Party Registrations are of No Probative Value

In support of her refusal, the Examining Attorney provides 13[1] third-party registrations purportedly showing that “printing inks for use in the graphic arts industry” and “lithographic plates” are related. However, such third-party registrations are of no probative value in this case. In determining whether the goods of an applicant and a registrant are related, the ultimate question is whether the goods in question are encountered by the same persons in situations creating the incorrect assumption of origination from the same source. *See, e.g., Local Trademarks, Inc. v. Handy Boys, Inc.*, 16 USPQ2d 1156 (TTAB 1990). Third-party registrations that cover a number of different goods or services only have some probative value to the extent that they may serve to suggest that goods or services are of a type that may emanate from a single source. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993). *See* TMEP § 1207.01(d)(iii). While third party registrations may have some probative value to the extent they may serve to suggest that such goods or services are of a type which emanate from a single source, they provide no evidence as to the nature of the consumers of the identified goods or how such consumers use such goods, nor do they show how the goods are marketed and sold. Third party registrations are not evidence of what happens in the marketplace. *See AMF Corp. v. Am. Leisure Prods., Inc.*, 177 USPQ 268, 269 (CCPA 1973).

Applicant first notes that of the 13 registrations submitted by the Examining Attorney, eight of them do not cover goods of the types offered by both Applicant and Registrant. Registration No. 1,711,005 for the mark DIC does not cover lithographic plates in Class 7. Registration No. 2,733,636 for the mark NUR does not cover lithographic plates, but instead covers digital inkjet printing, a completely different process. Also, the NUR plates are only sold as a unit with the printer. Similarly, Registration No. 3,084,370 for the mark IMPRINTOR covers plates for use in transfer pad printing, a different printing process than lithography. Registration No. 899,476 for the mark PITNEY BOWES covers plates for office printing machines such as address printing machines and are not intended for use in lithography or the graphic arts field. Registration No. 1,641,839 for the mark PERMA-MARK covers tool bits for printing plates, not printing plates. Registration No. 1,847,516 for the mark SOHN only covers “embossed storage sheets for printing plates” and not lithographic plates. Finally, neither Registration No. 2,417,099 for the mark VESTA nor Registration No. 2,145,538 for the mark BASE LINE covers printing inks in Class 2. Because none of these eight registrations cover the goods of both

Applicant and Registrant, they lend no support to the refusal to register.

With regard to the remaining five third-party registrations, Registration Nos. 1,617,265, 1,711,005, 2,519,144, 2,700,348 and 3,046,486, each of them covers "printing plates." However, none of them covers "lithographic plates." Applicant submits that these are inadequate support for the refusal to register. It is true that a determination of the issue of likelihood of confusion between the applied-for and registered marks must be made on the basis of the goods as they are identified in the involved application and registration. In such circumstances, if there are no limitations in the identification, it is presumed under Section 7(b) of the Trademark Act that the "registration encompasses all goods of the nature and type described, [and] that the identified goods move in all channels of trade that would be normal for such goods." *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). "However, when third-party registrations are being submitted for the purpose of showing that goods are related, the same Section 7(b) presumptions do not apply." *In re Apollo Colors*, Serial No. 75942300, at 10-11 (TTAB July 7, 2005) (Unpublished) (attached as Exhibit E). In this case there is no presumption that these third party registrations for "printing plates" cover "lithographic plates," as printing plates can be used in a number of other printing processes including digital printing and transfer pad printing. See Reg. Nos. 2,733,636 and 3,084,370, discussed *supra*. As a result they lend no support to the assertion that lithographic plates and printing inks for use in the graphic arts industry are related. Accordingly, the cited third party registrations are entitled to little weight.

2. Internet Evidence does not Support the Refusal to Register

In support of her refusal to register, the Examining Attorney provides printouts of a number of websites for sellers of lithographic supplies. These include Takach Press Corp., Rembrandt Graphic Arts, Utrecht Art, Valley Litho Supply, Boyd's and Coast Graphic Supply. A careful review of each of these websites, however, shows that none of them sells printing inks and lithographic plates under the same brand. Rather, they are merely distributors of such goods. As a result, they lend no support to the argument that consumers would expect such goods to emanate from the same source. "The mere fact that two products may move in the same channels of trade to the same class of purchaser does not, *ipso facto*, prove that there is a definite relationship between the goods." *Champion Int'l Corp. v. Genova*,

Inc., 199 USPQ 301, 305 (TTAB 1978).

The Examining Attorney also provided printouts from two websites for companies that offer a range of printing products under their house brands, U.S. Litho Supply and Daniel Smith, Inc. These two companies also offer the products of a number of other manufacturers. “[M]erely because very large stores carry both applicant's goods and registrant's goods does not mean that the goods are related. It is common knowledge that today's very large stores carry a wide array of goods which are totally dissimilar.” *In re Inktec Co., Ltd.*, Serial No. 75/531,517, 2002 WL 987344 at *2 (TTAB May 14, 2002) (attached as Exhibit F). In any event, these two references by themselves lend inadequate support to a likelihood of confusion refusal.

Because the Examining Attorney's Internet evidence does not demonstrate that lithographic plates and printing ink for use in the graphic arts industry are related or marketed in a manner causing them to be encountered by the same persons in situations creating the incorrect assumption of origination from the same source, they do not support the refusal to register on the basis of a likelihood of confusion.

Finally, the Examining Attorney has provided a *Wikipedia* entry for “lithography,” as well as dictionary definitions for “graphic arts,” “offset printing,” and “lithography.” None of these provide any information as to how lithographic plates and printing ink are manufactured or distributed, let alone information regarding the sale of such goods under the same mark. As a result, they lend no support to the refusal to register.

II. CONCLUSION

Applicant respectfully submits that there is no likelihood of confusion in this case. The goods of Applicant and Registrant are fundamentally different, are expensive and are sold to sophisticated consumers. Furthermore, the Examining Attorney's evidence fails to demonstrate a relationship between the goods such that consumers would be confused as to source. In light of the foregoing, Applicant requests that the refusal to register be withdrawn and the mark published for opposition in the *Official Gazette*.

[1] The Examining Attorney actually submitted 15 third-party registrations. However, Registration Nos. 2,797,658 and 3,084,370 share the same owner, as do Registration Nos. 2,145,538 and 2,234,027. Each pair shares the same identification of goods, so the Applicant will only address Registration Nos. 3,084,370 and 2,145,538 in its Request for Reconsideration.

EVIDENCE SECTION

EVIDENCE FILE NAME(S)	
ORIGINAL PDF FILE	http://tgate/PDF/RFR/
ORIGINAL PDF FILE	http://tgate/PDF/RFR/
ORIGINAL PDF FILE	http://tgate/PDF/RFR/
ORIGINAL PDF FILE	http://tgate/PDF/RFR/
ORIGINAL PDF FILE	http://tgate/PDF/RFR/
ORIGINAL PDF FILE	http://tgate/PDF/RFR/
DESCRIPTION OF EVIDENCE FILE	Exhibits A and B are encyclopedia entries; Exhibits C, E, and F are decisions of the Trademark Trial and Appeal Board; and Exhibit D is a printout from the website of a lithographic supply company

SIGNATURE SECTION

RESPONSE SIGNATURE	/William D Jackson/
SIGNATORY'S NAME	William D. Jackson
SIGNATORY'S POSITION	Attorney of Record
DATE SIGNED	12/26/2007
AUTHORIZED SIGNATORY	YES
CONCURRENT APPEAL NOTICE FILED	YES

FILING INFORMATION SECTION

SUBMIT DATE	Wed Dec 26 17:16:36 EST 2007
TEAS STAMP	USPTO/RFR-75.205.75.153-2 0071226171636052054-78946 407-410e78ba92bda0c24ee61 94f154367c547-N/A-N/A-200 71226165437794650

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OMB No. xxx-xxxx (Exp. x/xxxx)

Request for Reconsideration after Final Action**To the Commissioner for Trademarks:**

Application serial no. 78946407 has been amended as follows:

ARGUMENT(S)

In response to the substantive refusal(s), please note the following:

REQUEST FOR RECONSIDERATION

The Applicant, Sun Chemical Corporation ("Applicant"), by its attorneys, hereby files its Request for Reconsideration in response to the Office Action dated June 26, 2007. In support of its Request, Applicant states as follows.

I. Refusal to Register Based Upon a Likelihood of Confusion

Applicant has filed an application for registration of the mark FRONTPAGE for use in connection with "printing inks for use in the graphic arts industry" in International Class 2. The Examining Attorney has refused registration under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), on the basis of a likelihood of confusion with Registration No. 1,088,020 for the mark FRONT PAGE (stylized) for use in connection with "lithographic plates" in International Class 7. Applicant requests that this refusal be withdrawn and the mark be approved for publication in light of the following arguments.

In her final refusal, the Examining Attorney first argues that the marks are "virtually identical except that registrant's mark contains a space and is slightly stylized." With regard to the goods, she contends that "it appears that both applicant's goods and registrant's goods are used in the same field," and that "it is clear that the trade channels for the goods are the same." In support of her refusal she provides copies of third-party registrations purportedly showing use of marks in connection with the same or similar goods as those of applicant and registrant, as well as Internet evidence showing that many companies provide a variety of printing supplies.

Applicant respectfully asserts that the goods of Registrant and Applicant differ materially and are distributed in such a manner that confusion is not likely. Also, as will be demonstrated, a careful review of the evidence submitted by the Examining Attorney will show that it does not support the refusal to

register. As a result, the refusal to register should be withdrawn.

A. The Goods are Unrelated

If the goods in question are not related or marketed in a manner causing them to be encountered by the same persons in situations creating the incorrect assumption of origination from the same source, then confusion is not likely. This is so even if the marks are identical. *Local Trademarks, Inc. v. Handy Boys, Inc.*, 16 USPQ2d 1156 (TTAB 1990); *Quartz Radiation Corp. v. Comm/Scope Co.*, 1 USPQ2d 1668 (TTAB 1986). See TMEP § 1207.01(a)(i). In *Borg-Warner Chemicals, Inc. v. Helena Chemical Co.*, 225 USPQ 222 (TTAB 1983), the Board held that:

The Board in the past has found no likelihood of confusion even with respect to identical marks applied to goods and/or services used in a common industry where such goods and/or services are clearly different from each other and there is insufficient evidence to establish a reasonable basis for assuming that the respective goods as identified by their marks, would be encountered by the same purchasers.

Borg-Warner Chemicals, 225 USPQ at 224. In this case, the goods in question are not related or marketed in such a way that they would be encountered by the same consumers in situations that would create the incorrect assumption that they originate from the same source. Registrant uses its mark in connection with "lithographic plates." Such plates are made of aluminum or plastic, have a roughened texture and are covered with a photosensitive emulsion that is used to create the image to be printed. See generally Exhibit A, p.3. Applicant, in contrast, does not intend to use the mark in connection with such a product, but rather intends to use the mark in connection with printing inks for use in the graphic arts industry. Such goods are liquid and consist of a vehicle, coloring ingredients, and additives. See Exhibit B. The vehicle is either vegetable-based or solvent-based, while the coloring ingredients and additives are generally chemical-based. See *id.* Because the respective goods of Registrant and Applicant are completely different in nature, the relevant consumers do not expect them to emanate from the same source.

The Board encountered a similar situation in *Kimberly-Clark Tissue Co. v. Scott Fetzer Co.*, Serial No. 74/423,659, 1999 WL 381056 (TTAB 1999) (attached as Exhibit C). In *Kimberly-Clark*, the Board held that there was no likelihood of confusion between applicant's SCOT'S TUFF for "carpet shampoos and carpet cleaning preparations" and opposer's SCOTT marks for various cleaning, wiping, scrubbing

and absorbing products. With regard to the goods, opposer argued that they were closely related in that they were complimentary products that were used together to remove stains and messes from carpets. In finding the goods to be unrelated, the Board stated as follows:

Simply put, the parties' goods are specifically different. Although the above evidence supports opposer's claim that its products and household cleaners are complementary, it hardly establishes that consumers would have a basis for assuming that both emanate from the same source

More to the point is that the evidence falls short in establishing a basis upon which to conclude that consumers would be likely to believe that paper towels and similar products used for cleaning and wiping on the one hand, and carpet cleaning preparations on the other, emanate from the same source. The record is devoid of even one instance where the same entity makes both types of products. To the extent that other products are marketed under opposer's SCOTT marks, such as dropcloths and air fresheners, we likewise find that the record is lacking in establishing a nexus between those products and applicant's carpet cleaning products such that consumers, upon encountering the parties' marks, would attribute a common source to them.

Kimberly-Clark, 1999 WL 381056, at *4. Similarly, although Applicant's printing inks and Registrant's lithographic plates are complementary, they are specifically different. Applicant's inks are liquid and consist of a vehicle, coloring ingredients, and additives. *See* Exhibit B. The vehicle is either vegetable-based or solvent-based, while the coloring ingredients and additives are generally chemical-based. *See id.* In contrast, Registrant's lithographic plates are made of solid metal or plastic. *See* Exhibit A. The goods of Applicant and Registrant are fundamentally different in nature, and there is no nexus between Applicant's goods and Registrant's goods such that consumers, upon encountering the parties' marks, would attribute a common source to them.

B. Consumers are Sophisticated

In making a likelihood of confusion determination, another factor to consider is the conditions under which and buyers to whom sales are made, *i.e.*, "impulse" versus careful, sophisticated purchasing. *See In re E.I. Du Pont de Nemours & Co.*, 177 USPQ 563, 567 (CCPA 1973). In this case, the goods of Registrant and Applicant are sold to graphic arts companies for use in lithographic printing applications. Lithography is a sophisticated printing method, and the consumers in question make educated decisions about their purchases based on the intended application. Indeed, the predecessor of the Federal Circuit, the Court of Customs and Patent Appeals, specifically held that those in the field of professional lithography are a "discriminating class of purchasers." *Hunt Co. v. Eastman Kodak Co.*, 140 F.2d 166,

60 USPQ 374 (CCPA 1944). Clearly, the consumers of the goods of both the Applicant and Registrant are sophisticated, discriminating customers who do not impulsively purchase the products in question. This factor weighs against a finding of a likelihood of confusion. See *Industrial Nucleonics Corp. v. Hinde*, 177 USPQ 386, 388 (CCPA 1973) (No likelihood of confusion where Applicant's goods sold to public agencies and manufacturing institutions on recommendation of consulting engineers, and opposer's goods selected by construction and consulting engineers, sewage and industrial waste engineers and public agencies).

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C. Goods are Expensive

Another factor to consider is the cost of the goods. *In re N.A.D. Inc.*, 224 USPQ 969, 971 (Fed. Cir. 1985). Any likelihood of confusion is further diminished by the differences in the price ranges for the goods. See *In re Oy Wilh. Schauman Ab*, 189 USPQ 245, 246 (TTAB 1975) (no likelihood of confusion between low-priced canoes and high-priced yachts). In this case, lithography is an expensive printing method used for large volume print jobs. Blank lithography plates generally cost several hundred dollars and can cost over \$1,000 each. See, e.g., Exhibit D. Ink for use in lithography can cost from \$4 per pound to \$15 per pound or more, and is generally purchased in large quantities. The fact that the goods of both Applicant and Registrant are expensive further reduces the likelihood of confusion. See *Du Pont*, 177 USPQ at 567.

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In support of her refusal, the Examining Attorney provides 13[1] third-party registrations purportedly showing that "printing inks for use in the graphic arts industry" and "lithographic plates" are related. However, such third-party registrations are of no probative value in this case. In determining whether the goods of an applicant and a registrant are related, the ultimate question is whether the goods in question are encountered by the same persons in situations creating the incorrect assumption of origination from the same source. *See, e.g., Local Trademarks, Inc. v. Handy Boys, Inc.*, 16 USPQ2d 1156 (TTAB 1990). Third-party registrations that cover a number of different goods or services only have some probative value to the extent that they may serve to suggest that goods or services are of a type that may emanate from a single source. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86

(TTAB 1993). See TMEP § 1207.01(d)(iii). While third party registrations may have some probative value to the extent they may serve to suggest that such goods or services are of a type which emanate from a single source, they provide no evidence as to the nature of the consumers of the identified goods or how such consumers use such goods, nor do they show how the goods are marketed and sold. Third party registrations are not evidence of what happens in the marketplace. See *AMF Corp. v. Am. Leisure Prods., Inc.*, 177 USPQ 268, 269 (CCPA 1973).

Applicant first notes that of the 13 registrations submitted by the Examining Attorney, eight of them do not cover goods of the types offered by both Applicant and Registrant. Registration No. 1,711,005 for the mark DIC does not cover lithographic plates in Class 7. Registration No. 2,733,636 for the mark NUR does not cover lithographic plates, but instead covers digital inkjet printing, a completely different process. Also, the NUR plates are only sold as a unit with the printer. Similarly, Registration No. 3,084,370 for the mark IMPRINTOR covers plates for use in transfer pad printing, a different printing process than lithography. Registration No. 899,476 for the mark PITNEY BOWES covers plates for office printing machines such as address printing machines and are not intended for use in lithography or the graphic arts field. Registration No. 1,641,839 for the mark PERMA-MARK covers tool bits for printing plates, not printing plates. Registration No. 1,847,516 for the mark SOHN only covers “embossed storage sheets for printing plates” and not lithographic plates. Finally, neither Registration No. 2,417,099 for the mark VESTA nor Registration No. 2,145,538 for the mark BASE LINE covers printing inks in Class 2. Because none of these eight registrations cover the goods of both Applicant and Registrant, they lend no support to the refusal to register.

With regard to the remaining five third-party registrations, Registration Nos. 1,617,265, 1,711,005, 2,519,144, 2,700,348 and 3,046,486, each of them covers “printing plates.” However, none of them covers “lithographic plates.” Applicant submits that these are inadequate support for the refusal to register. It is true that a determination of the issue of likelihood of confusion between the applied-for and registered marks must be made on the basis of the goods as they are identified in the involved application and registration. In such circumstances, if there are no limitations in the identification, it is presumed under Section 7(b) of the Trademark Act that the “registration encompasses all goods of the nature and type described, [and] that the identified goods move in all channels of trade that would be normal for

such goods.” *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). “However, when third-party registrations are being submitted for the purpose of showing that goods are related, the same Section 7(b) presumptions do not apply.” *In re Apollo Colors*, Serial No. 75942300, at 10-11 (TTAB July 7, 2005) (Unpublished) (attached as Exhibit E). In this case there is no presumption that these third party registrations for “printing plates” cover “lithographic plates,” as printing plates can be used in a number of other printing processes including digital printing and transfer pad printing. *See* Reg. Nos. 2,733,636 and 3,084,370, discussed *supra*. As a result they lend no support to the assertion that lithographic plates and printing inks for use in the graphic arts industry are related. Accordingly, the cited third party registrations are entitled to little weight.

2. Internet Evidence does not Support the Refusal to Register

In support of her refusal to register, the Examining Attorney provides printouts of a number of websites for sellers of lithographic supplies. These include Takach Press Corp., Rembrandt Graphic Arts, Utrecht Art, Valley Litho Supply, Boyd’s and Coast Graphic Supply. A careful review of each of these websites, however, shows that none of them sells printing inks and lithographic plates under the same brand. Rather, they are merely distributors of such goods. As a result, they lend no support to the argument that consumers would expect such goods to emanate from the same source. “The mere fact that two products may move in the same channels of trade to the same class of purchaser does not, *ipso facto*, prove that there is a definite relationship between the goods.” *Champion Int’l Corp. v. Genova, Inc.*, 199 USPQ 301, 305 (TTAB 1978).

The Examining Attorney also provided printouts from two websites for companies that offer a range of printing products under their house brands, U.S. Litho Supply and Daniel Smith, Inc. These two companies also offer the products of a number of other manufacturers. “[M]erely because very large stores carry both applicant’s goods and registrant’s goods does not mean that the goods are related. It is common knowledge that today’s very large stores carry a wide array of goods which are totally dissimilar.” *In re Inktec Co., Ltd.*, Serial No. 75/531,517, 2002 WL 987344 at *2 (TTAB May 14, 2002) (attached as Exhibit F). In any event, these two references by themselves lend inadequate support to a likelihood of confusion refusal.

Because the Examining Attorney’s Internet evidence does not demonstrate that lithographic plates

and printing ink for use in the graphic arts industry are related or marketed in a manner causing them to be encountered by the same persons in situations creating the incorrect assumption of origination from the same source, they do not support the refusal to register on the basis of a likelihood of confusion.

Finally, the Examining Attorney has provided a *Wikipedia* entry for "lithography," as well as dictionary definitions for "graphic arts," "offset printing," and "lithography." None of these provide any information as to how lithographic plates and printing ink are manufactured or distributed, let alone information regarding the sale of such goods under the same mark. As a result, they lend no support to the refusal to register.

II. CONCLUSION

Applicant respectfully submits that there is no likelihood of confusion in this case. The goods of Applicant and Registrant are fundamentally different, are expensive and are sold to sophisticated consumers. Furthermore, the Examining Attorney's evidence fails to demonstrate a relationship between the goods such that consumers would be confused as to source. In light of the foregoing, Applicant requests that the refusal to register be withdrawn and the mark published for opposition in the *Official Gazette*.

[1] The Examining Attorney actually submitted 15 third-party registrations. However, Registration Nos. 2,797,658 and 3,084,370 share the same owner, as do Registration Nos. 2,145,538 and 2,234,027. Each pair shares the same identification of goods, so the Applicant will only address Registration Nos. 3,084,370 and 2,145,538 in its Request for Reconsideration.

EVIDENCE

Evidence in the nature of Exhibits A and B are encyclopedia entries; Exhibits C, E, and F are decisions of the Trademark Trial and Appeal Board; and Exhibit D is a printout from the website of a lithographic supply company has been attached.

Original PDF file:

<http://tgate/PDF/RFR/>

Converted PDF file(s) (pages)

Original PDF file:

<http://tgate/PDF/RFR/>

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SIGNATURE(S)

Request for Reconsideration Signature

Signature: /William D Jackson/ Date: 12/26/2007

Signatory's Name: William D. Jackson

Signatory's Position: Attorney of Record

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the applicant's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the applicant in this matter: (1) the applicant has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the applicant has filed a power of attorney appointing him/her in this matter; or (4) the applicant's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

The applicant is filing a Notice of Appeal in conjunction with this Request for Reconsideration.

Serial Number: 78946407

Internet Transmission Date: Wed Dec 26 17:16:36 EST 2007

TEAS Stamp: USPTO/RFR-75.205.75.153-2007122617163605

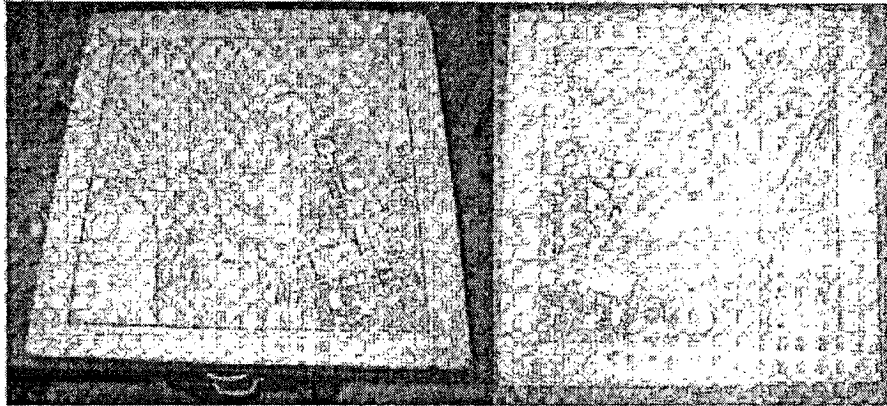
2054-78946407-410e78ba92bda0c24ee6194f15

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Lithography

From Wikipedia, the free encyclopedia

Invented by Bavarian author Aloys Senefelder in 1796, ^{[1][2]} **lithography** is a method for printing on a smooth surface. It can be used to print text or artwork onto paper or another suitable material. It can also refer to photolithography, a microfabrication technique used to make integrated circuits and microelectromechanical systems.



Lithography stone and mirror-image print of a map of Munich.

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- 1 Printing
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 - 1.3 The early process
 - 1.4 Refinements
 - 1.5 The modern process
- 2 Microlithography and nanolithography
- 3 Lithography as an artistic medium
- 4 References
- 5 See also
- 6 External links

Printing

The principle

Lithography is a printing process that uses chemical processes to create an image. For instance, the positive part of an image would be a hydrophobic chemical, while the negative image would be water. Thus, when the plate is introduced to a compatible ink and water mixture, the ink will adhere to the positive image and the water will clean the negative image. This allows for a relatively flat print plate which allows for much longer runs than the older physical methods of imaging (e.g., embossing or engraving).

The chemical process

Lithography works because of the repulsion of oil and water. The image is drawn on the surface of the print plate with an oil-based medium (hydrophobic). The range of oil-based mediums is endless, but the dexterity of the image relies on the lipid content of the material being used--its ability to withstand water and acid.

Following the placement of the image is the application of an acid emulsified with gum arabic. The function of this emulsion is to create a salt layer directly around the image area. The salt layer seeps into the pores of the stone, completely enveloping the original image. This process is called etching. Using lithographic turpentine, the printer then removes the greasy drawing material, leaving only the salt layer; it is this salt layer which holds the skeleton of the image's original form. When printing, the stone or plate is kept wet with water. Naturally the water is attracted to the layer of salt created by the acid wash. Ink that bears a high lipid content is then rolled over the surface. The water repels the grease in the ink and the only place for it to go is the cavity left by the original drawing material. When the cavity is sufficiently full, the stone and paper are run through a press which applies even pressure over the surface, transferring the ink to the paper and off the stone.



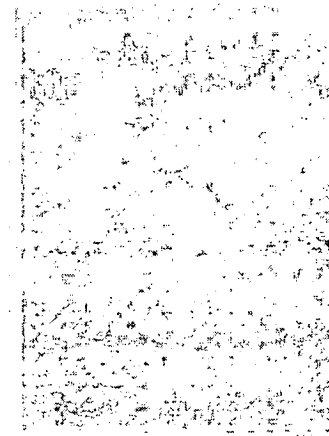
Lithography press for printing maps in Munich.

The early process

Lithography was invented by Aloys Senefelder in Bohemia in 1796. In the early days of lithography, a smooth piece of limestone was used (hence the name "lithography"—"lithos" (λίθος) is the ancient Greek word for stone). After the oil-based image was put on the surface, acid burned the image onto the surface; gum arabic, a water soluble solution, was then applied, sticking only to the non-oily surface and sealing it. During printing, water adhered to the gum arabic surfaces and avoided the oily parts, while the oily ink used for printing did the opposite.

Refinements

Senefelder had experimented in the early 1800s with multicolor lithography; in his 1819 book, he predicted that the process would eventually be perfected and used to reproduce paintings.^[1] Multi-color printing was introduced through a new process developed by Godefroy Engelmann (France) in 1837 known as Chromolithography.^[1] A separate stone was used for each colour, and a print went through the press separately for each stone. The main challenge was of course to keep the images aligned (*in register*). This method lent itself to images consisting of large areas of flat color, and led to the characteristic poster designs of this period.



An example of lithography, 1902 (original size 33×24cm).

The modern process

Modern high-volume lithography is used to produce posters, books, newspapers, and packaging —just about any smooth, mass-produced item with print on it.

In this form of lithography, which depends on photographic processes, flexible aluminum or plastic printing plates are used in place of stone tablets. Modern printing plates have a brushed or roughened texture and are covered with a photosensitive emulsion. A photographic negative of the desired image is placed in contact with the emulsion and the plate is exposed to light. After development, the emulsion shows a reverse of the negative image, which is thus a duplicate of the original (positive) image. The image on the plate emulsion can also be created through direct laser imaging in a CTP (Computer-To-Plate) device called a platesetter. The positive image is the emulsion that remains after imaging. For many years, chemicals have been used to remove the non-image emulsion, but now plates are available that do not require chemical processing.



Sea anemones from Ernst Haeckel's *Kunstformen der Natur* (*Artforms of Nature*) of 1904.

The plate is affixed to a drum on a printing press. Rollers apply water, which covers the blank portions of the plate but is repelled by the emulsion of the image area. Ink, applied by other rollers, is repelled by the water and only adheres to the emulsion of the image area--such as the type and photographs on a newspaper page.

If this image were directly transferred to paper, it would create a positive image, but the paper would become too wet. Instead, the plate rolls against a drum covered with a rubber *blanket*, which squeezes away the water and picks up the ink. The paper rolls across the blanket drum and the image is transferred to the paper. Because the image is first transferred, or *offset* to the rubber drum, this reproduction method is known as *offset lithography* or offset printing.

Many innovations and technical refinements have been made in printing processes and presses over the years, including the development of presses with multiple units (each containing one printing plate) that can print multi-color images in one pass on both sides of the sheet, and presses that accommodate continuous rolls (*webs*) of paper, known as web presses. Another innovation was the continuous dampening system first introduced by Dahlgren. This increased control over the water flow to the plate and allowed for better ink and water balance. Current dampening systems include a "delta effect" which slows the roller in contact with the plate, thus creating a sweeping movement over the ink image to clean impurities known as "hickies".

The advent of desktop publishing made it possible for type and images to be manipulated easily on personal computers for eventual printing on desktop or commercial presses. The development of digital imagesetters enabled print shops to produce negatives for platemaking directly from digital input, skipping the intermediate step of photographing an actual page layout. The development of the digital platesetter in the late twentieth century eliminated film negatives altogether by exposing printing plates directly from digital input, a process known as computer to plate printing.

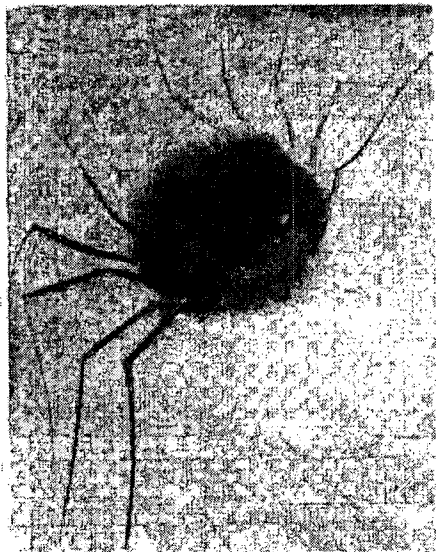
Microlithography and nanolithography

Microolithography and nanolithography refer specifically to lithographic patterning methods capable of structuring material on a fine scale. Typically features smaller than 10 micrometers are considered microlithographic, and features smaller than 100 nanometers are considered nanolithographic. Photolithography is one of these methods, often applied to semiconductor manufacturing of microchips. Photolithography is also commonly used in fabricating MEMS devices. Photolithography generally uses a pre-fabricated photomask or reticle as a master from which the final pattern is derived.

Although photolithographic technology is the most commercially advanced form of nanolithography, other techniques are also used. Some, for example electron beam lithography, are capable of much higher patterning resolution (sometime as small as a few nanometers). Electron beam lithography is also commercially important, primarily for its use in the manufacture of photomasks. Electron beam lithography as it is usually practiced is a form of maskless lithography, in that no mask is required to generate the final pattern. Instead the final pattern is created directly from a digital representation on a computer, by controlling an electron beam as it scans across a resist-coated substrate.

In addition to these commercially well-established techniques, a large number of promising microlithographic and nanolithographic technologies exist or are emerging, including nanoimprint lithography, interference lithography, X-ray lithography, extreme ultraviolet lithography, and scanning probe lithography. Some of these emerging techniques have been used successfully in small-scale commercial and important research applications.

Lithography as an artistic medium



Smiling Spider by Odilon Redon

During the first years of the nineteenth century, lithography made only a limited impact on printmaking, mainly because technical difficulties remained to be overcome. Germany was the main centre of production during this period. Godefroy Engelmann, who moved his press from Mulhouse to Paris in 1816, largely succeeded in resolving the technical problems, and in the 1820's lithography was taken up by artists such as Delacroix and Géricault. London also became a centre, and some of Géricault's prints were in fact produced there. Goya in Bordeaux produced his last series of prints in lithography - *The Bulls of Bordeaux* of 1828. By the mid-century the initial enthusiasm had somewhat died down in both countries, although lithography continued to gain ground in commercial applications, which included the great prints of Daumier, published in newspapers. Rodolphe Bresdin and Jean-Francois Millet also continued to practice the medium in France, and Adolf Menzel in Germany.

In 1862 the publisher Cadart tried to launch a portfolio of lithographs by various artists which flopped, but included several superb prints by Manet. The revival began in the 1870's, especially in France with artists such as Odilon Redon, Henri Fantin-Latour and Degas producing much of their work in this way. The need for strictly limited editions to maintain the price had now been realized, and the medium became more accepted.

In the 1890's colour lithography became enormously popular with French artists, Toulouse-Lautrec most notably of all, and by 1900 the medium in both colour and monotone was an accepted part of printmaking, although France and the US have used it more than other countries. George Bellows, Pablo Picasso, Jasper Johns, David Hockney and Robert Rauschenberg are a few of the artists who have produced most of their prints in the medium. More than other printmaking techniques, printmakers in lithography still largely depend on access to a good printer, and the development of the medium has been greatly influence by when and where these have been established. See the List of Printmakers for more practitioners.

References

- [^] *abc* Meggs, Philip B. A History of Graphic Design. ©1998 John Wiley & Sons, Inc. p 146
- [^] Carter, Rob, Ben Day, Philip Meggs. Typographic Design: Form and Communication, Third Edition. ©2002 John Wiley & Sons, Inc. p 11

See also

- Printing
- Printmaking
- Letterpress printing
- Block printing
- Chromolithography
- Flexography
- Etching (disambiguation)
- Intaglio
- Color printing
- Offset printing
- Lineography
- Rotogravure
- Serilith
- Typography

External links

- Åke Westins Ateljé, Swedish lithography artist
- Museum of Modern Art information on printing techniques and examples of prints
- The Invention of Lithography, Aloys Senefelder, (Eng. trans. 1911)*(a searchable facsimile at the University of Georgia Libraries; DjVu and layered PDF format)*
- [1]search What's lithography by Theo De Smedt
- Extensive information on Honoré Daumier and his life and work, including his entire output of lithographs
- Digital work catalog to 4000 lithographs and 1000 wood engravings

- Delacroix's *Faust* lithographs at the Davison Art Center, Wesleyan University

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Encyclopædia Britannica Article

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Printing inks contain three components: the vehicle, the colouring ingredients, and the additives. The vehicle, responsible for transferring the colouring ingredients from the ink fountain to the typeform, can be either a vegetable base (linseed, rosin, or wood oils), which dries by penetration and oxidation and at the same time ensures fixation, or a solvent base derived from kerosene, in which case drying takes place by evaporation. The colouring ingredients come in several forms: pigments, which are fine, solid particles manufactured from chemicals, generally insoluble in water and only slightly soluble in solvents; agents made from chemicals but soluble both in water and in solvents; and lacquers, obtained by fixing a colouring agent on powdered aluminum. The additives stabilize the mixture and give the ink additional desirable characteristics. The nature and proportions of the ingredients vary according to the printing process to be used and to the material to be printed. The proportions must be checked and sometimes modified during printing.



Letterpress and offset use greasy inks. For printing on sheet-fed presses, thick greasy inks are used in which the vehicle is generally made of vegetable oils with the addition of hard natural or synthetic resins dispersed in mineral oils. Roll-fed rotaries use fluid greasy inks in which the vehicle is made up of heavy mineral oils.

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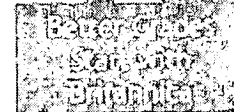
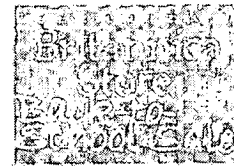
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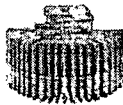
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The colour black is generally obtained from an organic pigment, carbon black, derived from the incomplete combustion of oils or of natural gas. Coloured pigments are inorganic compounds of chromium (yellow, green, and orange), molybdenum (orange), cadmium (red and yellow), and iron (blue).

Inks for offset are more highly coloured than those used in letterpress, because they must be transferred to the blanket before they reach the paper. Furthermore, the pigments must resist being picked up by the water from the dampening system.

Inks with various special qualities exist for both letterpress and offset. In high-gloss inks, the vehicle is not homogeneous, as with ordinary inks, but heterogeneous, based on synthetic resins dissolved in a solvent, with lead and cobalt additives. This ink glazes as it dries. When printing several colours, the whole series of operations must be finished before the ink has time to dry so that the inks can attach themselves to the surface.

Quick-setting inks utilize a vehicle that also has a base of resins dissolved in a quick-drying solvent.

Heat-set inks require the application of heat to facilitate both the oxidation process and the evaporation of the solvent, as well as the penetration of certain elements that had rendered the ink more fluid. Cold-set inks are hardened by chilling after printing, having been kept fluid by heat until they were applied to the typeform.

Moisture-set inks become fixed when they are applied directly to damp paper or upon exposure to a water-spray after they are applied to dry paper. In such inks, which are used more in the United States than they are in Europe, the vehicle is a solvent, soluble in water, that, on contact, penetrates the paper, leaving the pigment on its surface. Odourless moisture-set inks are used for printing food packaging.

Among other special-characteristic inks are metallic inks containing powdered copper, bronze, aluminum, or gold mixed with the pigment; magnetic inks, containing a powdered magnetized iron mixed with the pigment for "recognizing" the shape of printed characters as they pass before electronic reading equipment; and fluorescent inks.

Rotogravure uses fluid inks in which the colouring agent, fixed on a natural or synthetic resin, is integrated in a fluid solvent to which, just before printing, a second, extremely volatile solvent is added.



Flexography also uses fluid inks whose pigments or colouring agents are dissolved in pure alcohol, in alcohol solutions, or in water.

Serigraphy uses inks of extremely varied consistency, depending on the surface to which they are to be applied; some are little different from ordinary paint, except that their composition must not be such that rapid drying would clog the mesh of the screen.

Robert Lechêne

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Electrostatic printing Printing inks Additional Reading



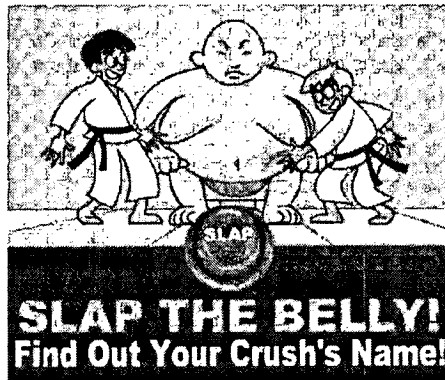
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1999 WL 381056 (Trademark Tr. & App. Bd.)

*1 THIS DISPOSITION IS NOT CITABLE AS PRECEDENT OF THE T.T.A.B.

Trademark Trial and Appeal Board
Patent and Trademark Office (P.T.O.)
KIMBERLY-CLARK TISSUE COMPANY

v.

THE SCOTT FETZER COMPANY

Opposition No. 94,387
application Serial No. 74/423,659

June 7, 1999
Hearing: May 7, 1998

filed on August 12, 1993

Jeffery A. Handelman of Brinks Hofer Gilson & Lione for Kimberly-Clark Tissue Company.
Robert P. Ducatman, Timothy P. Fraelich and Deborah R. Schwartz of Jones, Day, Reavis
& Pogue for The Scot Fetzer Company.

Before Cissel, Walters and Quinn
Administrative Trademark Judges.
Opinion by Quinn
Administrative Trademark Judge:

An application has been filed by The Scot Fetzer Company to register the mark SCOT'S
TUFF for " carpet shampoos and carpet cleaning preparations." ^[FN1]

Registration has been opposed by Kimberly-Clark Tissue Company under Section 2(d) of
the Trademark Act. Opposer alleges that applicant's mark, if applied to applicant's
goods, would so resemble opposer's previously used and registered SCOTT marks and SCOTT
formative marks for various cleaning, wiping, scrubbing and absorbing products as to
be likely to cause confusion. ^[FN2]

Applicant, in its answer to the amended opposition, denied the salient allegations.

The record consists of the pleadings; the file of the involved application; trial
testimony, with related exhibits, taken by each party; ^[FN3] certified copies of forty-three
of opposer's pleaded registrations, portions of discovery depositions with related
exhibits, and dictionary definitions, all introduced by opposer's notices of reliance;
and discovery depositions with related exhibits, opposer's responses to interrogatories
and requests for admissions, and excerpts from phone directories, all made of record
by way of applicant's notices of reliance. Opposer and applicant filed briefs on the
case, and both were represented by counsel at an oral hearing held before the Board.

Opposer was founded in 1879 and, since that time, has continued to sell, with great
success, various cleaning, wiping, scrubbing and absorbing paper and cloth products under
its SCOTT marks. Opposer's registrations date back to 1915 and, in addition to the SCOTT
mark, opposer owns registrations for marks such as SCOTT FOLD, SCOTTCLOTH, SCOTTEX,
SCOTTISSUE, SCOTTOWELS, SCOTTPLUS, SCOTTFRESH, SCOTT SELECT and SCOTTPURE. Opposer has

divided its business into three primary segments: the consumer business; the do-it-yourself business; and the away from home business. Opposer's products have been sold through mass merchandisers, grocery and drug stores, warehouse clubs, and hardware stores. The products are bought by various classes of purchasers, including ordinary consumers, as well as institutional customers such as hotels, office buildings, health care facilities and restaurants. Opposer has extensively promoted its products in a wide variety of media, including television, radio, newspapers, magazines, trade journals, catalogs and direct mailings, and through participation at trade shows. Sales and advertising figures are very impressive, but a confidentiality agreement precludes us from reciting the specifics.

*2 Applicant was founded in 1914 by George Scott and Carl Fetzer. Since that time, applicant has been engaged in the manufacture and sale of vacuum cleaners. Another entity, Scot Laboratories, was formed in 1964 and sold carpet cleaning preparations to applicant for use with its vacuum cleaning machines which apparently included a carpet shampooer. Scot Laboratories became a division of applicant in 1971. Applicant began selling carpet cleaning preparations under the mark SCOT'S TUFF in 1993. The goods have been promoted in newspapers and trade journals.^[FN4]

A procedural matter requires our attention before we turn to the merits of the likelihood of confusion claim. After the filing of the parties' briefs, but before the oral hearing was held, applicant moved to strike several of opposer's registrations on the grounds that some of the registrations were canceled by the Office, and that others were abandoned. Thus, applicant argued, these registrations were immaterial and should be stricken from the record. Opposer objected to the motion to strike, but also confirmed that four of the registrations were canceled under Section 8. The Board, in an order dated February 5, 1998, denied the motion to strike. Applicant also filed a motion to amend the pleadings to conform to the evidence pursuant to Fed. R. Civ. P. 15(b). The Board, in the same order, deferred consideration of the motion until final hearing. It is this Fed. R. Civ. P. 15(b) matter that requires our consideration.

Applicant has moved to amend its answer to include counterclaims to conform to the evidence presented at trial. Applicant contends that certain portions of the testimony of record establish that twelve of opposer's registrations have been abandoned and that, therefore, the registrations should be canceled. Applicant further contends that the issue of abandonment was tried with the consent of the parties. Applicant points to portions of the testimony of Robert Behan, and asserts that Mr. Behan, "without equivocation and without objection from [opposer], that [opposer] is no longer offering goods in connection with twelve subject trademark registrations and that it has divested itself of the capability of manufacturing such goods." Applicant goes on to state that while it raised the abandonment issue in its brief, opposer's reply brief is silent on the issue.

Opposer objects to the motion, arguing that the issue of abandonment was not tried by the express or implied consent of the parties. Opposer also directs the Board's attention to the fact that applicant filed, on July 25, 1997, twelve separate petitions to cancel the registrations.^[FN5]

Essentially for the reasons set forth in more detail in opposer's brief in opposition to the motion, applicant's motion is not well taken. Opposer was not put on notice that the validity of its registrations was being challenged until after the trial had concluded in this case and opposer's brief had been filed.

*3 Our review of the record convinces us that the issue of abandonment was not tried,

either by express or implied consent of the parties, as contemplated by Fed. R. Civ. P. 15(b). Colony Foods, Inc. v. Sagemark, Ltd., 735 F.2d 1336, 222 USPQ 185 (Fed. Cir. 1984). The mere introduction of responses to a few questions on cross examination falls far short in this case of establishing that the issue was tried. To allow amendment at this late juncture would result in undue prejudice to opposer. ABC Moving Co., Inc. v. Brown, 218 USPQ 336, 339 (TTAB 1983). Inasmuch as it appears that opposer was not on notice that abandonment of twelve of its registrations was an issue in this case, the motion to amend is denied.

This interlocutory ruling results in a somewhat unusual procedural situation in this case. That is to say, although this case is at final hearing, there remains a cloud over twelve of opposer's registrations by virtue of the pendency of the consolidated cancellation proceedings. Generally, when an opposer's registration is sought to be canceled, that matter is taken up first, usually as a compulsory counterclaim in the opposition, before proceeding to the merits of the opposition.[FN6] Nonetheless, due to the late stage of this proceeding and the early stage of the cancellation proceedings, the Board is inclined to issue a final decision in the present case. In doing so, while we obviously are aware that twelve of opposer's registrations remain under attack, we will decide the likelihood of confusion issue herein as if these twelve registrations survived the cancellation proceedings, thereby remaining valid and subsisting registrations. We now turn to the likelihood of confusion issue in this case.

In view of opposer's ownership of valid and subsisting registrations for its pleaded marks, there is no issue with respect to opposer's priority.^[FN7] King Candy Co., Inc. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). In any event, the record clearly establishes that opposer began using its SCOTT marks long prior to the filing date of applicant's intent-to-use application.

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. 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 similarities between the goods. We will first turn our attention to these factors, and then will consider the remaining relevant du Pont factors.

Insofar as the goods are concerned, the essence of opposer's arguments is that the goods " are closely related in that they are complementary products that are used together to remove stains and messes from carpets." In making this point, opposer particularly notes applicant's spot remover products, such as the pet stain and odor carpet cleaner and the food stain carpet cleaner, which are used by blotting the soiled area with a towel or cloth. Stephen Platt, opposer's vice president, sales, testified about opposer's sales demonstrations where opposer's heavy-duty towels are dunked in water, wrung out and then used to remove stains from carpet, and that the towels do not shred or fall apart. In this connection, some of opposer's products are promoted as " tough enough to work with cleaning agents."

*4 Opposer also highlights its joint marketing efforts under opposer's SCOTT mark with at least two third parties.^[FN8] One involved the joint marketing of opposer's SCOTT shop towels with the cleaning product SIMPLE GREEN sold by Sunshine Makers, Inc. The testimony establishes that the SIMPLE GREEN brand product has a carpet cleaning application. In this promotion, a roll of opposer's shop towels was packaged and sold together with SIMPLE GREEN brand cleaner in True Value hardware stores. Although the two companies engaged in discussions regarding further joint promotions, nothing ever materialized.^[FN9]

The other effort undertaken by opposer involved Church & Dwight Co., Inc., which sells various household cleaning products under the mark ARM & HAMMER. There is testimony to the effect that the companies discussed a project for a household cleaner to be jointly branded under the companies' marks. No such product ever came to the market, however.

We acknowledge that the record establishes that the parties' goods travel in some of the same channels of trade for household products and are bought by the same classes of purchasers for such products. Also, the goods are relatively inexpensive and are purchased with nothing more than ordinary care. Nevertheless, Mr. Platt testified that opposer's goods essentially are paper products. (dep., pp. 56-60) Further, none of opposer's registrations covers household cleaning preparations.

Simply put, the parties' goods are specifically different. Although the above evidence supports opposer's claim that its products and household cleaners are complementary, it hardly establishes that consumers would have a basis for assuming that both emanate from the same source, or that there is an industry practice of such joint promotions or that consumers have become accustomed to such a practice. In this connection, while opposer's joint promotion with Sunshine Makers was characterized as a " success," the record lacks any details (e.g. sales or duration) about the promotion, thereby making it impossible to gauge the exposure to consumers in the marketplace. Other than this single promotion, it appears that other efforts have not moved beyond the discussion phase.

More to the point is that the evidence falls short in establishing a basis upon which to conclude that consumers would be likely to believe that paper towels and similar products used for cleaning and wiping on the one hand, and carpet cleaning preparations on the other, emanate from the same source. The record is devoid of even one instance where the same entity makes both types of products. To the extent that other products are marketed under opposer's SCOTT marks, such as dropcloths and air fresheners, we likewise find that the record is lacking in establishing a nexus between those products and applicant's carpet cleaning products such that consumers, upon encountering the parties' marks, would attribute a common source to them.

We next turn to compare opposer's SCOTT marks (both SCOTT and SCOTT formative marks) to applicant's mark SCOT'S TUFF. Although there is a similarity between the marks in that SCOTT and SCOT'S sound alike, we find that when the marks are considered in their entireties, on balance, the differences outweigh the similarities. Although the TUFF portion of applicant's mark is clearly subordinate to the SCOT'S portion, it nevertheless forms part of the mark and cannot be ignored. Giant Food, Inc. v. Nation's Foodservice, Inc., 710 F.2d 1565, 218 USPQ 390, 395 (Fed. Cir. 1983). Further, the SCOT'S portion of applicant's mark is spelled differently (one fewer letter " t") from opposer's SCOTT mark. As to opposer's argument that consumers will assume that SCOT'S TUFF is just another variant of opposer's SCOTT and SCOTT formative marks, the differences between the marks and the goods sold thereunder lead us to conclude that confusion is unlikely to occur in the marketplace.

*5 With respect to the absence of actual confusion between the marks, we find that applicant has overstated its case. Applicant would have us place significant weight on this factor due to " over eighty years of concurrent use of marks incorporating ' Scott' or ' Scot' by the parties to this opposition." What opposer correctly points out, however, is that applicant is referring to its use of the designation " The Scott & Fetzer Company" in connection with applicant's sale of vacuum cleaners. Applicant sales of its carpet cleaner under the involved mark SCOT'S TUFF, however, did not commence until 1993. In any event, although neither party is aware of any instances of actual confusion,

proof of actual confusion, often very difficult to obtain, is not required to show a likelihood of confusion.

Another factor concerns the fame of opposer's SCOTT mark. Fame, of course, is a significant factor in the determination of likelihood of confusion, and can play a dominant role in cases featuring a famous mark. Kenner Parker Toys Inc. v. Rose Art Industries Inc., 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992). There is no question but that opposer has enjoyed huge success with its paper products. As noted earlier, although a confidentiality agreement prevents us from setting forth opposer's sales volume and advertising expenditures, suffice it to say that they are, by any standard, enormous. Given these figures and the many years of use of the SCOTT mark, we have no problem concluding that this mark is famous as used in connection with paper towels, facial tissues, toilet paper and closely related products sold by it. The evidence of third-party uses shown by applicant does very little to diminish this fame inasmuch as virtually all of the uses involve goods and/or services different from the ones of the parties in this case. Moreover, applicant has not supplied any evidence bearing on the extent of these uses.

At the same time, we also recognize that SCOTT is a fairly common surname and appears in the names of many businesses as shown by the telephone directory listings submitted by applicant. The commonality of the surname "Scott" tends, we think, to contribute to the limitation of the fame of opposer's mark to those products mentioned above.

While we find that opposer's SCOTT mark is a famous mark for cleaning, wiping, scrubbing and absorbing paper products, we do not view the mark in the same fashion in relation to non-paper or non-cloth items such as carpet shampoos and carpet cleaning preparations. There is no evidence on which we can find that opposer's SCOTT marks for its various cleaning, wiping, scrubbing and absorbing products are so famous that the fame carries over to nonpaper (or non-cloth) items such as carpet cleaning preparations. There simply is no evidence establishing public awareness and transference of the trademark function of opposer's SCOTT marks to carpet cleaners by virtue of the fame of opposer's mark for its products. G.H. Mumm & Cie v. Desnoes & Geddes Ltd., 917 F.2d 1292, 16 USPQ2d 1635, 1639 (Fed. Cir. 1990); Levi Strauss & Co. v. Genesco, Inc., 742 F.2d 1401, 222 USPQ 939 (Fed. Cir. 1984); and Bausch & Lomb Inc. v. Leupold & Stevens Inc., 6 USPQ2d 1475 (TTAB 1988). Thus, to the extent that fame can be accorded to opposer's SCOTT marks, the fame is confined to its cleaning, wiping, scrubbing and absorbing paper and cloth products, and does not extend to carpet cleaners at this time.

*6 Further, the fact that applicant's mark may call to mind opposer's mark is not dispositive. Likelihood of confusion under Section 2(d) means more than the likelihood that the public will recall a mark on seeing the mark of another. It must also be established that "there is a reasonable basis for the public to attribute the particular product or service of another to the source of the goods or services associated with the famous mark." University of Notre Dame Du Lac v. J.C. Gourmet Food Imports Co., Inc., 703 F.2d 1372, 217 USPQ 505, 507 (Fed. Cir. 1983), aff'g 213 USPQ 594 (TTAB 1982). See also: Jacobs v. International Multifoods Corp., 668 F.2d 1234, 212 USPQ 641, 642 (CCPA 1982), aff'g 211 USPQ 165 (TTAB 1981); In re Ferrero, 479 F.2d 1395, 178 USPQ 167 (CCPA 1973); Recot Inc. v. Becton, 50 USPQ2d 1439 (TTAB 1998); Viacom International Inc. v. Komm, 46 USPQ2d 1233 (TTAB 1998); Original Appalachian Artworks, Inc. v. Streeter, 3 USPQ 1717 (TTAB 1987); and American Express Co. v. Payless Cashways, Inc., 222 USPQ 907 (TTAB 1984). Here, the record falls short of establishing the reasonable basis contemplated by the Court.

Based on the record before us, we see the likelihood of confusion claim asserted by opposer

as amounting to only a speculative, theoretical possibility. We suppose that somebody, somewhere, someday, may be confused, but the likelihood is remote. Language used by our primary reviewing court is helpful in resolving the likelihood of confusion controversy in this case:

We are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal.

Electronic Design & Sales Inc. v. Electronic Data Systems Corp., 954 F.2d 713, 21 USPQ2d 1388, 1391 (Fed. Cir. 1992), citing Witco Chemical Co. v. Whitfield Chemical Co., Inc., 418 F.2d 1403, 1405, 164 USPQ 43, 44-45 (CCPA 1969), *aff'g* 153 USPQ 412 (TTAB 1967).

Finally, there is no evidence of any bad faith by applicant in adopting its mark SCOT'S TUFF. Scot Laboratories, which became a division of applicant several years ago, sold carpet cleaning products to applicant for use with applicant's vacuum cleaning machines (which also included a carpet shampooer). According to the testimony of Patrick Dowling and Robert Shumay, both employed by applicant, Scot Laboratories selected its business name to trade on its association with its primary customer at that time, applicant (The Scott Fetzer Company).

In making our determination in this case, we cannot help but take special note of the case of Scott Paper Co. v. Scott's Liquid Gold, Inc., 589 F.2d 1225, 200 USPQ 421 (3d Cir. 1978). See also: S.C. Johnson & Son, Inc. v. Johnson, 266 F.2d 129, 121 USPQ 63 (6th Cir. 1959), *cert. denied* 361 US 820; and S.C. Johnson & Son, Inc. v. Johnson, 175 F.2d 176 (2d Cir. 1949). Although there is not, of course, any estoppel effect (see Board's decision on summary judgment, dated February 12, 1996), the decision tends to support the result reached herein. Based on its SCOTT mark, opposer brought a trademark infringement action in federal district court, challenging a third-party's (Scott's Liquid Gold, Inc.) use of its registered mark SCOTT'S LIQUID GOLD for furniture polish. In pertinent part, the appellate court found that despite the facts that the goods moved through the same channels of trade to the same classes of purchasers, that the goods were inexpensive, that paper towels and furniture polish were functionally related and often used together, that household cleaners might be a logical area for opposer's expansion, and that both marks include the name SCOTT, there was not such a likelihood of confusion sufficient to warrant injunctive relief against the defendant's use of its mark. In reversing, the court of appeals found that the lower court ignored the absence of evidence showing that other paper companies sold liquid cleaners. The court also stated that "selection of a mark with a common surname naturally entails a risk of some uncertainty and the law will not assure absolute protection."

*7 Suffice it to say that while the decision is not binding on this Board, it is, nonetheless, instructional, given the overall factual context of the two cases. Further, although opposer contends that marketing has changed since the court's opinion in that products today are co-branded and are the subjects of joint promotions, evidence showing these practices to be commonplace is lacking.

Given the voluminous record in this case and the lengthy briefs, the Board is compelled to make one final point. Both parties' briefs have made and debated, and we have considered, arguments other than those specifically mentioned in this opinion. We find it unnecessary, however, to comment on each and every one.

In sum, the cumulative differences between the parties' marks and the goods sold thereunder persuade us that confusion is unlikely to occur in the marketplace.

Decision: The opposition is dismissed.

R. F. Cissel

T. J. Quinn

C. E. Walters

Administrative Trademark Judges, Trademark Trial and Appeal Board

FN1. Application Serial No. 74/423,659, filed August 12, 1993, alleging a bona fide intention to use the mark in commerce.

FN2. In its amended pleading, opposer also claimed ownership of registrations of the mark SANI-TUFF for hand soap, dispensers and disposable wipers. Although the registrations were properly made of record, no mention of them was made in either of opposer's briefs or at the oral hearing. Further, applicant's statement that opposer no longer uses the mark stands unrebutted. It would appear that opposer essentially gave up on its likelihood of confusion claim with respect to this mark. We hasten to add, however, that we reach the same result on likelihood of confusion between SANI-TUFF and applicant's mark as between opposer's SCOTT marks and applicant's mark: no likelihood of confusion.

FN3. Opposer's testimony of Edward T. O'Brien, Jr. was submitted in affidavit form pursuant to the parties' agreement.

FN4. The record shows that in addition to the carpet cleaners, applicant sells a variety of other household cleaners under the SCOT'S TUFF mark. These cleaners include kitchen and bathroom cleaners, and glass and surface cleaners. In the present case, however, applicant is seeking to register its trademark for carpet shampoos and carpet cleaning preparations only. Our determination in this proceeding must be based on a consideration of the identified goods in the involved application, and not whether confusion is likely in connection with goods not listed in the application before us here. Saks & Co. v. Snack Food Association, 12 USPQ2d 1833, 1836 (TTAB 1989). The dismissal of the present opposition in no way precludes the Board from reaching a different result, based on a different record, if the parties were to litigate applicant's right to registration of SCOT'S TUFF as a trademark for any of its other types of household cleaners.

FN5. Cancellation proceedings were instituted, and the proceedings were consolidated by the Board.

FN6. We note that opposer, as respondent in the cancellation proceedings, urged that the petitions be dismissed essentially on the basis that applicant's challenge to the registrations could have and should have been timely raised as compulsory counterclaims in this opposition. Although the Board denied opposer's motion on February 12, 1999, opposer has filed a request for reconsideration of that decision.

FN7. The Board's check of Office records shows that some of opposer's registrations of record have been canceled. When a federal registration owned by a party has been properly made of record in an inter partes proceeding, and there are changes in the status of the registration between the time it was made of record and the time the case is decided, the Board, in deciding the case, will take judicial notice of, and rely upon, the current status of the registration, as shown by the Office records. Royal Hawaiian Perfumes, Ltd. v. Diamond Head Products of Hawaii, Inc., 204 USPQ 144 (TTAB 1979); and TBMP S 703.02(a). The following registrations introduced by way of opposer's notice of reliance

have been canceled: Registration Nos. 1,615,762; 1,630,017; 1,648,827; 1,651,305; 1,650,698; 1,652,446; 1,659,371; 1,691,598; and 1,694,452. These registrations have not been considered in reaching our decision.

FN8. Applicant quibbles with some of the details concerning these efforts and urges the Board to disregard Mr. Platt's testimony. Contrary to applicant's remarks, we find Mr. Platt's testimony, as well as that of the witnesses from the two third parties, to be credible.

FN9. Mark Rhodes, opposer's district team leader in Atlanta, Georgia, also testified that retailers try to group similar items for display. In this connection, Mr. Rhodes pointed to exhibit no. 164, which shows 409 brand cleaner on shelves just above paper towels as part of a single display in a retail store.

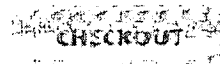
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USLS-SS012-02	10 1/2 x 21 1/2 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	449.07	119.26	0
USLS-SS012-03	12 3/8 x 24 15/47 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	470.62	136.50	0
USLS-SS012-04	13 x 18 1/2 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	458.84	127.05	0
USLS-SS012-05	17 1/2 x 18 1/2 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	243.78	171.03	0
USLS-SS012-06	17 x 21 1/2 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	241.35	193.08	0
USLS-SS012-07	19 3/4 x 23 1/8 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	301.59	241.27	0
USLS-SS012-08	19 3/8 x 26 1/2 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	339.04	271.23	0
USLS-SS012-09	19-3/8 x 26-1/2 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	422.46	337.73	0
USLS-SS012-10	20-5/16 x 26 - 60 Single Sided Conventional Offset	348.74	278.99	0

	Plates - .012 Gauge - Straight Edge			
USLS-SS012-11	20-5/16 x 30 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	402.39	321.91	0
USLS-SS012-12	20 x 24 1/16 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	347.79	254.23	0
USLS-SS012-13	21-1/2 x 27-1/2 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	390.42	312.34	0
USLS-SS012-14	21-1/2 x 27-3/8 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	388.65	310.92	0
USLS-SS012-15	21-1/2 x 27-9/16 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	394.34	313.05	0
USLS-SS012-16	21-13/16 x 33-1/2 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	482.52	386.01	0
USLS-SS012-17	21 3/8 x 27 9/16 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	389.03	311.23	0
USLS-SS012-18	21-5/8 x 25-5/8 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	365.92	292.73	0
USLS-SS012-19	21-5/8 x 27-9/16 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	393.58	314.87	0
USLS-SS012-20	21-7/8 x 35 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	505.57	404.45	0
USLS-SS012-21	21-9/16 x 27-9/16 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	392.45	313.96	0

USLS-SS012-22	22-1/16 x 26-3/8 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	384.25	307.40	0
USLS-SS012-23	22-1/16 x 26-5/8 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	387.89	310.31	0
USLS-SS012-24	22-3/8 x 34-5/8 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	511.58	409.27	0
USLS-SS012-25	22-3/8 x 36 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	531.90	425.52	0
USLS-SS012-26	22 x 26-1/2 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	384.97	307.98	0
USLS-SS012-27	22 x 26-3/8 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	383.46	306.53	0
USLS-SS012-28	23 x 29 1/8 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	442.34	353.87	0
USLS-SS012-29	23-13/16 x 29-1/8 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	457.97	366.37	0
USLS-SS012-30	23-13/16 x 29-5/16 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	460.92	368.73	0
USLS-SS012-31	23-15/16 x 28-3/4 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	454.44	363.55	0
USLS-SS012-32	23 3/16 x 24 7/8 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	388.87	304.70	0
USLS-SS012-33	23 3/4 x 29 1/8 - 60 Single Sided Conventional Offset	456.76	365.41	0

Plates - .012 Gauge - Straight Edge				
USLS-SS012-34	23 5/8 x 28 3/4 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	448.54	358.81	0
USLS-SS012-35	23 5/8 x 28 3/8 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	442.66	354.13	0
USLS-SS012-36	23 7/16 x 28 1/2 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	441.08	352.87	0
USLS-SS012-37	23 x 30 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	455.63	364.50	0
USLS-SS012-38	24 1/16 x 32 1/2 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	516.40	413.12	0
USLS-SS012-39	24 1/4 x 28 1/2 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	456.37	365.10	0
USLS-SS012-40	24-3/4 x 36 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	588.36	470.69	0
USLS-SS012-41	25-1/2 x 36 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	606.19	484.95	0
USLS-SS012-42	25 x 29 15/16 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	428.18	342.55	0
USLS-SS012-43	26-3/4 x 31 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	547.58	438.07	0
USLS-SS012-44	26 5/8 x 29 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	509.86	407.89	0

USLS-SS012-45	26 x 32-1/16 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	550.47	440.38	0
USLS-SS012-46	27 1/4 x 28 5/8 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	515.00	412.06	0
USLS-SS012-47	27 1/4 x 30 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	539.82	431.86	0
USLS-SS012-48	27-1/8 x 32-1/4 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	577.65	462.12	0
USLS-SS012-49	27 x 30 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	534.87	427.90	0
USLS-SS012-50	27 x 36-1/4 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	646.30	517.04	0
USLS-SS012-51	28-1/2 x 37 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	696.32	557.06	0
USLS-SS012-52	28 1/4 x 36 7/16 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	679.72	543.78	0
USLS-SS012-53	28 1/4 x 37 1/2 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	699.54	559.63	0
USLS-SS012-54	28-1/8 x 35-1/4 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	654.66	523.73	0
USLS-SS012-55	28-1/8 x 38-1/2 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	715.02	572.01	0
USLS-SS012-56	28-1/8 x 39-1/2 - 60 Single Sided Conventional Offset	733.50	586.87	0

USLS-SS012-57	Plates - .012 Gauge - Straight Edge 28-3/4 x 23-3/8 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	443.76	355.01	0
USLS-SS012-58	28-3/4 x 38-1/2 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	730.91	584.73	0
USLS-SS012-59	28-3/8 x 37-1/2 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	702.64	562.11	0
USLS-SS012-60	28 x 32 1/2 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	600.90	480.72	0
USLS-SS012-61	29-1/2 x 38-3/4 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	754.84	603.87	0
USLS-SS012-62	30-1/2 x 40-3/4 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	820.71	656.57	0
USLS-SS012-63	30-1/2 x 40-9/16 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	816.94	653.55	0
USLS-SS012-64	30-1/4 x 40-1/2 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	808.99	647.19	0
USLS-SS012-65	30-13/16 x 41-1/8 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	836.75	669.40	0
USLS-SS012-66	30-15/16 x 40-9/16 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	828.65	662.92	0
USLS-SS012-67	30-3/16 x 40-1/2 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	807.32	645.86	0

USLS-SS012-68	30-3/32 x 40-9/16 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	606.05	644.84	0
USLS-SS012-69	30-3/4 x 40-9/16 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	623.63	658.91	0
USLS-SS012-70	30-3/4 x 41-1/8 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	635.05	668.04	0
USLS-SS012-71	30-3/8 x 40-3/4 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	617.35	653.88	0
USLS-SS012-72	30-5/16 x 40 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	600.65	640.52	0
USLS-SS012-73	30-5/16 x 40-3/4 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	615.67	652.53	0
USLS-SS012-74	30-7/8 x 40-9/16 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	626.98	661.58	0
USLS-SS012-75	30-7/8 x 41-1/8 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	638.45	670.76	0
USLS-SS012-76	31-1/2 x 38-1/2 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	600.92	640.66	0
USLS-SS012-77	31-1/2 x 40-3/4 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	647.62	678.10	0
USLS-SS012-78	31-1/2 x 40-9/16 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	643.72	674.98	0
USLS-SS012-79	31 1/8 x 38 3/8 - 60 Single Sided Conventional Offset	788.72	630.97	0

	Plates - .012 Gauge - Straight Edge			
USLS-SS012-80	31-1/8 x 40-1/2 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	832.39	665.91	0
USLS-SS012-81	31 1/8 x 41 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	842.67	674.13	0
USLS-SS012-82	31 1/8 x 41 1/2 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	852.94	682.36	0
USLS-SS012-83	31-1/8 x 41-1/8 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	845.24	676.19	0
USLS-SS012-84	31-5/8 x 40-9/16 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	847.07	677.65	0
USLS-SS012-85	31 x 41-1/8 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	841.84	673.47	0
USLS-SS012-86	32 1/4 x 40 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	851.83	681.46	0
USLS-SS012-87	32 1/4 xs 40 1/2 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	862.48	689.98	0
USLS-SS012-88	32-1/4 x 40-1/8 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	854.49	683.59	0
USLS-SS012-89	32 1/8 x 35 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	742.46	593.97	0
USLS-SS012-90	32 1/8 x 35 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	742.46	593.97	0

USLS-SS012-91	32 x 41 1/4 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	871.64	697.31	0
USLS-SS012-92	34 7/8 x 38 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	875.11	700.09	0
USLS-SS012-93	35 5/16 x 41 7/8 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	976.44	781.15	0
USLS-SS012-94	36 1/2 x 44 1/2 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	1072.55	858.04	0
USLS-SS012-95	40 x 50 3/8 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	1330.57	1064.46	0
USLS-SS012-96	47 1/4 x 60 - 60 Single Sided Conventional Offset Plates - .012 Gauge - Straight Edge	1872.04	1497.64	0

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Mailed:
July 7, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Apollo Colors, Inc.

Serial No. 75942300

Joseph V. Norvell of Brinks Hofer Gilson & Lione for Apollo Colors, Inc.

Tina L. Snapp, Trademark Examining Attorney, Law Office 116 (M. L. Hershkowitz, Managing Attorney).

Before Seeherman, Zervas and Kuhlke, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Apollo Colors, Inc. has appealed from the final refusal of the Trademark Examining Attorney to register APOLLO as a trademark for "color pigments for use in the graphic arts industry."¹ Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles

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the mark APOLLO, previously registered for "dye stuffs and their intermediates, pigments and mordants for use in the manufacture of textile, leather and paper,"² that, as used on applicant's identified goods, it is likely to cause confusion or mistake or to deceive.

The appeal has been fully briefed.³ Applicant did not request an oral hearing.

We reverse the refusal of registration.

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

¹ Application Serial No. 75942300, filed March 13, 2000, and asserting first use and first use in commerce on July 1, 1970.

² Registration No. 1810363, issued December 14, 1993; Section 8 and 15 affidavits accepted and acknowledged; renewed.

³ With the denial of applicant's request for reconsideration the Examining Attorney submitted materials taken from certain third-party websites. In its brief applicant stated that the printouts submitted by the Examining Attorney of two of the websites were incomplete, and attached additional pages from these same websites. Because applicant had no opportunity to submit these pages prior to the filing of its appeal brief, we have treated these additional pages as of record. See *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986).

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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).

The marks, of course, are identical, which is a factor that favors a finding of likelihood of confusion. Applicant has argued that APOLLO is a weak mark, based on a search of USPTO records showing 498 registrations (of which 123 are "live") for marks which include the term APOLLO. The submission from the USPTO TESS database lists the marks, registration numbers, and whether the registration is "live" or "dead." This mere listing of registrations numbers and marks is not sufficient to make the registrations of record. See *In re Duofold Inc.*, 184 USPQ 638 (TTAB 1974) (the submission of a list of registrations is insufficient to make them of record). Furthermore, even if the Examining Attorney had treated the list of record (and she did not), it is of no probative value, since it does not indicate the goods or services for which the marks are registered. Thus, we cannot ascertain whether APOLLO has a suggestive significance with respect to the goods listed in the cited registration of the subject application. We also take issue with applicant's statement that this list indicates that APOLLO has been diluted

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through widespread use. Third-party registrations are not evidence that the marks shown therein are in use. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

The only third-party registration that is of record is for APOLLO-COAT for "coatings in the nature of interior and exterior paints, sealer coatings for use on boats, varnish, wood stain, enamels in the nature of house paints, and automobile finishing solutions."⁴ The Examining Attorney had cited this registration against applicant's application, and then withdrew this refusal. On the basis of this single third-party registration, we cannot conclude that the cited registration for APOLLO is weak and entitled to only a limited scope of protection.

Despite this, however, we believe that the differences in the channels of trade and the customer's for the applicant's and the registrant's goods are sufficient to avoid any confusion.

The goods of applicant and registrant, as set forth in the respective identifications, are very specific as to their customers. Applicant's pigments are for use in the graphic arts industry; the registrant's goods are for use in the manufacture of textile, leather and paper. There is no evidence that textile, leather and paper manufacturers

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are also engaged in the graphic arts industry. The Examining Attorney points to a definition of "graphic arts" submitted with her appeal brief, and of which we take judicial notice, as "the fine and applied arts of representation, decoration, and writing or printing on flat surfaces together with the techniques and crafts associated with them."⁵ Based on this definition, the Examining Attorney contends that the graphic arts industry "might include manufacture of printing media of all kinds including paper, leather, textiles or other flat surfaces." Brief, p. 4. However, we think the Examining Attorney goes too far in asserting, without any evidence, that the "flat surfaces" referred to in the definition of "graphic arts" would encompass anything that is flat, including leather or textiles. More importantly, the pigments that are identified in the cited registration are used in the manufacture of leather, textiles and paper; they are not for use on leather, textiles and paper. Thus, even if graphic arts were to encompass printing on all flat

⁴ Registration No. 2554483.

⁵ Merriam-Webster OnLine, www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=graphic+arts. 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).

surfaces, the registrant's pigments would not be used by those in the graphic arts industry to do such printing.

Because of the different industries in which applicant's and the registrant's pigments are used, and the different customers, the channels of trade for the goods must also be considered to be different.

The Examining Attorney has made of record third-party registrations in an attempt to show that goods of the type identified in the application and the cited registration may be sold under a single mark by a single source. Third-party registrations which individually cover a number of different items and which are based on use in commerce may have some probative value to the extent that they serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, supra at 1785-86 (TTAB 1993). The following registrations have been highlighted by the Examining Attorney in her brief, and are therefore the ones she presumably believes are most persuasive:⁶

⁶ The Examining Attorney also highlighted a registration, No. 2121979, for the BAYER logo. We have not listed the goods in that registration because it is clear that the logo is in the nature of a house mark, registered for goods in Classes 1, 2, 3, 4, 5, 6, 17, 22 and 23, ranging from wire ropes to pesticides to industrial oils to tanning agents for use in the manufacture of leather to general purpose adhesives for mending broken articles. Obviously this registration, for a wide variety of goods, is of

FLEXOBRITE for "colourants for use in paint, textiles, ink, plastics, and rubber; mordants for use in paint, textiles, inks, plastics, and rubber; color pigments and color pigment compositions; printing inks; aqueous and non-aqueous pigment dispersions for leather finishing, textile printing, the printing and mass coloration of materials, and for use in paint manufacture";⁷

PIGMENTS FOR THE IMAGINATION for "color pigments, colorants for use in the manufacture of printers ink, textiles, plastics, synthetic fibers, paints and papers; printers ink; pigment dispersions in aqueous or non-aqueous forms for use in the manufacture of printers ink, textiles, paints and papers; color concentrate compounds for use in the manufacture of printers ink, plastics, synthetic fibers, textiles and paints";⁸

HILTON DAVIS for "paints, coloring matter, colorants, pigment concentrates, technical dyes and dyestuffs, color dispersion products and certified drug and cosmetic

no probative value to show that the goods listed therein are related.

Our focus on the registrations highlighted by the Examining Attorney does not mean we have not considered the other third-party registrations that were submitted. However, they are not persuasive of a different result herein. Most of the registrations are based on Section 44 of the Act, rather than use in commerce. Some are for pigments used in goods that are specifically different from those identified in the application and cited registration. See, for example, Registration No. 2721075 for "colorants and color pigments for use in the manufacture of food, beverages, cosmetics and pharmaceuticals." Other registrations identify pigments that are used in the textile industry, but make no mention of graphic arts, or are for use in printing but make no mention of textiles, paper or leather.

⁷ Registration No. 2266097.

⁸ Registration No. 2418769.

colorants for use in the manufacture of consumer and industrial products in the textiles, paints, food products, cosmetics, pharmaceuticals, printing and plastics industries";⁹

CLARIANT for "dyestuffs for use in the manufacture and finishing of textiles, leather, metal, and paper; color pigments; mordants for use in the textile, leather, metal, and paper industries; lacquers in the nature of a coating";¹⁰ and

HISPERSE for "color pigments, pigment dispersions and dyestuffs for printing and dyeing of fibers and textile materials."¹¹

The registration for HISPERSE is for pigments used for printing and dyeing fibers and textiles, and makes no mention of use in the graphic arts industry. Thus, this registration is of no value in demonstrating relatedness of the involved goods. The registration for HILTON DAVIS is for pigment concentrates for use in the manufacture of products in the textile and printing industries. Applicant's goods, as identified, are for use in the graphic arts industry, and applicant has further explained that its products are sold to graphic arts companies, who use them in lithographic printing applications. An identification listing pigments for use in the manufacture

⁹ Registration No. 1975942.

¹⁰ Registration No. 2349316.

¹¹ Registration No. 2115379.

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of a product that is then used in the printing industry is not the same as an identification listing a pigment actually used in the graphic arts industry.

The registrations for FLEXOBRITE and PIGMENTS FOR THE IMAGINATION include colorants for use in textiles and, in the case of FLEXOBRITE, colourants for use in inks and, in the case of PIGMENTS FOR THE IMAGINATION, colorants and pigment dispersions for use in the manufacture of printers ink. While ink or printers ink could be considered a product used in the graphic arts industry, the colorants used to manufacture ink would not be such a product. As for the printing inks and printers ink itself, which are also identified in these registrations, these goods are different from the color pigments for use in the graphic arts industry which are identified in applicant's application.

Applicant has pointed out that, of the third-party registrations submitted by the Examining Attorney, only one registration, No. 2721889 for DAY GLO, specifically refers to graphic arts in its identification, namely, "phosphorescent color pigments and dispersions for use in paints, plastics, coatings and graphic arts." This registration also includes "plastics, textiles, coatings and tracer applications," a listing that frankly puzzles us

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as it appears to be missing some words, since "plastics" and "textiles" do not belong in Class 2. Because of the question regarding this listing, we cannot view this registration as showing the relatedness of applicant's and the cited registrant's goods.

There are some registrations, including the registration for CLARIANT and FLEXOBRITE, which list "color pigments" per se. The Examining Attorney points to these registrations, which do not limit the uses for the color pigments, and argues that the presumptions of Section 7(b) of the Act require us to treat this identification as encompassing all uses for color pigments. We do not agree. Clearly, a determination of the issue of likelihood of confusion between the applied-for and registered marks must be made on the basis of the goods as they are identified in the involved application and registration. In such circumstances, if there are no limitations in the identification, we must presume that the "registration encompasses all goods of the nature and type described, [and] that the identified goods move in all channels of trade that would be normal for such goods." In re Elbaum, 211 USPQ 639, 640 (TTAB 1981). However, when third-party registrations are being submitted for the purpose of showing that goods are related, the same Section 7(b)

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presumptions do not apply. As noted previously, third-party registrations are not evidence that the marks shown therein are in use, or that consumers are familiar with them. They simply "serve to suggest that the listed goods and/or services are of a type which may emanate from a single source." In re In re Albert Trostel & Sons Co., supra at 1786 (emphasis added). Therefore, we think the Examining Attorney gives too broad a reading to a listing of "color pigments" in a registration by asserting that such a listing shows that the registrant is using these pigments in both the graphic arts industry and in the manufacture of textile, leather and paper. On the other hand, we also recognize that broad identifications of goods may be permissible in certain instances, see TMEP § 1402.03, and we do not mean to suggest that, unless the identification in a third-party registration mimics exactly the identification in the application and the cited registration, it is of no probative value.

What we are left with, then, is that none of the third-party registrations specifically covers the identical goods identified in applicant's application and the cited registration. Although there are a few registrations which arguably could be viewed to include the same goods, we find that these registrations are not sufficient to demonstrate

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that companies generally sell both the goods identified in the application and the goods identified in the cited registration under a single mark.

The Examining Attorney has also submitted evidence of third-party websites. Again, we concentrate on the excerpts from these websites that the Examining Attorney quoted in her brief, and which she characterizes as "the relevant parts":

Sun Chemical Corporation's Colors Group is one of the worlds [sic] leading producers of organic pigments and dispersions for use as colorants in printing inks, plastics, paints, cosmetics, textiles and specialities. www.sunpigments.com/aboutus.htm

...you can save on your total pigment cost without sacrificing opacity, consistency or color. Coatings applications for HITOX encompass alkyds, acrylic urethanes, high solids systems, water reducibles, water bases, and powder coatings. Plastics uses include PCV pipe and conduit, color concentrates, and vinyl siding. HITOX also finds uses in inks, adhesives, paper, foundry products, and building materials. www.tormineral.com

Please note that we offer pigments suitable for a wide range of end use application(s) ie. Offset inks, aqueous flexographic inks, solvent flexo, malic, polyamide, vinyl and NC/PA based inks, PVS, LDPE, JDPE, PP, ABS, cable grade (plastics), air drying enamel paints, industrial (OEM) water based

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paints, textiles, leather, rubber and
paper.
www.amantech.com/index1.html

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of the fastest growing companies in the
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www.anarchem.com

Reviewing these excerpts and the underlying materials
in order, we note that the information about Sun Chemical
Corporation and its Colors Group describes the history of
the group, which originally was two separate companies.
There is no indication about the trademark or trademarks
under which this entity's pigments are sold, or whether the
pigments for various purposes are all sold under a single
trademark. Nor do the materials indicate that the pigments
are directed to the graphic arts industry.

The second excerpt, for HITOX TiO₂, appears to use
HITOX as a trademark for a pigment that can be used in inks
and paper. However, "inks" is mentioned only tangentially;
and it is not clear to what industry the inks are marketed,
or whether the pigments would be sold to those in the
graphic arts industry.

The web materials from which the third excerpt is
taken lists AMANTACH PIGMENTS at the top of the page, and

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also lists pigments by color and "C.I. number" (e.g., Pigment Orange 5), as well as by what appears to be other generic names (e.g., cadmium, synthetic iron oxide). The uses for these specific pigments is not indicated, but it does appear that only AMANTECH PIGMENTS is used to identify the source of the pigments.

The website from which the fourth excerpt is taken uses separate pages to list the categories of uses of its dyes. For example, there is a page headed "Textiles" which states that it is "one of the leading manufacturers of textile dyes and offers comprehensive ranges for all segments of the modern textile finishing industry." Another page is headed "Leather" and discusses its specialty dyes for leather, and lists the dyes by CI name. Yet another page is headed "Inks" and states that "Anar has introduced good quality of dyes and pigments for Ink markets." The additional pages from the website, submitted by applicant, show that this company is located in India. Based on this, applicant argues that there is no evidence that this company's goods are sold in the United States.

The website materials provide some tenuous evidence that a single company may sell pigments used in textiles and pigments for markets that could include the graphic arts industry. However, this evidence is quite limited,

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and is insufficient for us to find that applicant's and the registrant's goods are related.

Even if we were to conclude from the third-party registrations and Internet evidence that pigments used in both the graphic arts industry and pigments, dye stuffs and mordants for use in the manufacture of textile, leather and paper emanate from a single source, that does not necessarily demonstrate that the goods are related, such that confusion is likely to result from the use of the same or a confusingly similar mark on both.

As the Examining Attorney has pointed out, in quoting In re International Telephone and Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978), it "is sufficient for purposes herein that the respective goods of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could because of the similarity of the marks used therewith, give rise to the mistaken belief that they originate from or are in some way associated with the same producer." (emphasis added). Here, we find that there is insufficient evidence to show that the goods would be encountered by the same persons. There is no evidence that people who are engaged in the graphic arts industry

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are also engaged in the manufacture of textile, leather and paper, such that the same purchasers would buy both products. As a result, it is highly unlikely that there would be an opportunity for confusion to occur, even from the use of identical marks, on these goods that are sold to consumers in different industries. The goods at issue are not ordinary consumer goods that might be displayed and sold together in the same retail stores; rather, they are highly specialized goods sold to sophisticated purchasers who are engaged in very different businesses.

We recognize that pigments can be sold through the Internet, and that, in view of some of the website evidence submitted by the Examining Attorney, we think it possible that a company who wishes to purchase pigments for use in the graphic arts industry could access a website that also sells pigments for the manufacture of textiles, leather or paper. However, there is no evidence that the products of multiple companies are offered on a single website, where consumers might encounter both applicant's APOLLO pigments for the graphic arts industry and the registrant's APOLLO pigments for the manufacture of textiles, leather and paper. This possibility for confusion strikes us as being merely theoretical or de minimis. See *Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713,

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21 USPQ2d 1388, 1391 (Fed. Cir. 1992), "We are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations."

The Examining Attorney also argues that she must consider any goods in the registrant's normal fields of expansion, and that the registrant is entitled to protection against the registration of a similar mark on a product that might reasonably be expected to be produced by it in the normal expansion of its business. In support of this position, she points to the third-party registrations and the third-party web pages. Although it might be possible to argue that it is a normal expansion if a company that has used its mark on pigments used in a wide variety of industries began to use its mark on pigments for the graphic arts industry, that is not the situation here. Rather, the cited registration is for a very limited identification--dye stuffs and their intermediates, pigments and mordants for use in the manufacture of textile, leather and paper. There is no evidence that the registrant uses its mark on pigments used in other industries; on the contrary, here the cited registration issued in 1993, and there is no suggestion that the registrant has expanded the use of its mark since that date. Nor is there evidence that companies that sell

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pigments only for use in the manufacture of textile, leather and paper expand to use their marks on pigments in the graphic arts industry.

In conclusion, we find that, in view of the differences in the consumers and channels of trade for the goods, there is no likelihood of confusion between applicant's use of the mark APOLLO for color pigments for use in the graphic arts industry, and registrant's mark APOLLO for dye stuffs and their intermediates, pigments and mordants for use in the manufacture of textile, leather and paper.

Decision: The refusal of registration is reversed.

2002 WL 987344 (Trademark Tr. & App. Bd.)

*1 THIS DISPOSITION IS NOT CITABLE AS
PRECEDENT OF THE T.T.A.B.

Trademark Trial and Appeal Board
Patent and Trademark Office (P.T.O.)
IN RE INKTEC CO., LTD.

Serial No. 75/531,517

May 14, 2002
Hearing: March 14, 2002

William H. Logsdon for INKTEC CO., LTD.
Martha Santomartino

Citing Section 2(d) of the Trademark Act, the Examining Attorney has refused registration on the basis that applicant's mark, as applied to applicant's goods, is likely to cause confusion with the mark INKOTECH, previously registered in typed drawing form for "printing inks" (Class 2) and "ultraviolet acrylic coating for use on compact disks, printing paper and as insulation on fiber optic cable" (Class 17). Registration No. 2,203, 121 registered November 10, 1998.

When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs, and were present at a hearing held on March 14, 2002.

In any likelihood of confusion analysis, two key, although not exclusive considerations, are the similarities of the marks and the similarities of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPO 24, 29 (CCPA 1976) ("The 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.")

Considering first the marks, we note that marks are

Trademark Examining Attorney
Law Office 112
(Janice O'Lear, Managing Attorney)

Before Hanak, Quinn and Walters
Administrative Trademark Judges
Opinion by Hanak
Administrative Trademark Judge

INKTEC CO., LTD. (applicant) seeks to register INKTEC in the stylized form shown below for "ink cartridges for computer printers" (Class 2) and "computer peripherals and computer printers" (Class 9). The intent-to-use application was filed on August 5, 1998.

compared in terms of visual appearance, pronunciation and connotation, if any. In terms of visual appearance, the two marks are only somewhat similar in that the letters in applicant's mark are depicted with some portions in white and other portions in black. We recognize that the registered mark is in typed drawing form, and that therefore we must consider all reasonable manners in which the registered mark could be depicted. Phillips Petroleum Co. v. C.J. Webb, 442 F.2d 1376, 170 USPO 35, 36 (CCPA 1971). Thus, we would have to visualize the registered mark as being depicted in, for example, all capital letters, all lower case letters or a mixture of capital and lower case letters. However, it is not reasonable to assume that the letters in the registered mark would be depicted in different colors, as are the letters in applicant's mark.

In terms of pronunciation, we find that the letter "O" in the middle of the registered mark would clearly be pronounced, and thus would cause the registered mark (INKOTECH) to be somewhat dissimilar from applicant's mark INKTEC.

*2 Finally, in terms of connotation, we note that the Examining Attorney has not contended that either mark has any connotation. (Examining Attorney's brief pages 4 and 5). However, both marks suggest "ink technology." Nevertheless, this similarity in

connotation is outweighed by the differences in visual appearance and pronunciation.

In sum, applicant's mark and the registered mark are by no means identical. There are obvious differences in visual appearance and pronunciation that would enable even ordinary consumers to distinguish the two marks.

Turning to a consideration of applicant's goods and registrant's goods, we note that the Examining Attorney has not even discussed registrant's "ultraviolet acrylic coating for use on compact disks, printing paper and as an insulation on fiber optic cable." (Examining Attorney's brief pages 7 and 8). Rather, the Examining Attorney argues that there exists a likelihood of confusion resulting from the contemporaneous use of registrant's mark INKOTECH on "printing inks" and applicant's stylized mark INKTEC on "ink cartridges for computer printers" and "computer printers." (Examining Attorney's brief pages 7 and 8).

The problem with the argument set forth by the current Examining Attorney is the fact that the prior Examining Attorney failed to make of record any evidence showing that even one company manufactures, on the one hand, printing inks and, on the other hand, ink cartridges for computer printers and computer printers. To be clear, the prior Examining Attorney made of record advertisements showing that large stores such as Staples and Office Depot sold computer printers, cartridges and pens. Even if we assume that the reference to "cartridges" is a reference to "ink cartridges for computer printers," and even if we assume that any store that sold pens would sell ink for pens, there are two problems with this evidence. First, merely because very large stores carry both applicant's goods and registrant's goods does not mean that the goods are related. It is common knowledge that today's very large stores carry a wide array of goods which are totally dissimilar. Second, the Examining Attorney has made of record no evidence showing that even these large stores sell to consumers "printing inks," the only one of registrant's goods discussed by the Examining Attorney. While "printing inks" might well be sold in bulk to manufacturers of "ink cartridges for computer printers," the purchasers of the "printing inks" would be sophisticated, professional buyers, namely, the manufacturers of the "ink cartridges for computer printers." Thus, based upon this record, the prior Examining Attorney has failed to make of record any evidence showing that there are common purchasers of "printing inks" and "ink cartridges for computer printers." Without such

common purchasers, there is no chance for likelihood of confusion to occur. Electronic Design & Sales Inc. v. Electronic Data Systems Corp., 954 F.2d 713, 21 USPO2d 1388, 1391-92 (Fed. Cir. 1992).

*3 Decision: The refusal to register is reversed.

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