

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

Hearing  
October 14, 2008

Mailed:  
November 4, 2008

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re QPay, Inc.

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Serial No. 78795221

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Michael I. Santucci of Santucci, Priore & Long LLP for QPay,  
Inc.

Dominic J. Ferraiuolo, Trademark Examining Attorney, Law Office  
102 (Karen M. Strzyz, Managing Attorney).

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Before Bucher, Bergsman and Ritchie de Larena, Administrative  
Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

QPay, Inc. ("applicant") filed a use-based application on  
the Principal Register for the mark \*123, in standard character  
format, for "international telephone calling card services," in  
Class 36.

The Trademark Examining Attorney refused to register  
applicant's mark under Section 2(d) of the Trademark Act of  
1946, 15 U.S.C. §1052(d), on the ground that applicant's mark is  
likely to cause confusion with the following marks, owned by two  
different entities:

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A. Americatel Corporation Registrations.

All of the Americatel Corporation registrations include, *inter alia*, telecommunication services, namely, long distance and international voice transmission, in Class 38.

1. Registration No. 2766392, for the mark shown below.<sup>1</sup>

This registration also includes telecommunications services provided via telephone calling cards, in Class 38.



2. Registration No. 2919773 for the mark 1-800-3030-123 AMERICATEL COLLECT, in typed drawing form.<sup>2</sup> This registration also includes telecommunications services provided via telephone calling cards, in Class 38.

3. Registration No. 2657805 for the mark 1010-123, NUESTRO NUMERO DE LARGA DISTANCIA, in typed drawing form.<sup>3</sup>

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<sup>1</sup> Issued September 23, 2003. Americatel Corporation claimed that "1010-123" has acquired distinctiveness, and it disclaimed the exclusive right to use the word "international."

<sup>2</sup> Issued January 19, 2005, Americatel Corporation claimed that "123" has acquired distinctiveness, and it disclaimed the exclusive right to use "1-800-3030."

<sup>3</sup> Issued December 10, 2002; Sections 8 and 15 affidavits accepted and acknowledged. Americatel Corporation claimed that "1010-123" has acquired distinctiveness, and that the English translation of "Nuestro Numero De Larga Distancia" is "Our Long Distance Number."

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4. Registration No. 2795092 for the mark DIAS 123 DEL 1010-123 DE AMERICATEL, in typed drawing form.<sup>4</sup>

5. Registration No. 2594747 for the mark shown below.<sup>5</sup>



B. Empresa Nacional de Telecomunicaciones S.A. Registrations.

All of the Empresa Nacional registrations are for *inter alia*, telecommunication services, namely long distance and international voice transmission, in Class 38.

1. Registration No. 2709768 for the mark 123.COM, in typed drawing form.<sup>6</sup> This registration also includes the sales of prepaid long distance telephone cards, in Class 35.

2. Registration No. 2789138 for the mark MUNDO123, in typed drawing form.<sup>7</sup> This registration also includes the sales of prepaid long distance telephone cards, in Class 35.

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<sup>4</sup> Issued December 16, 2003. Americatel Corporation claimed that "1010-123" has acquired distinctiveness, and that the English translation of the mark is "Days 123 of 1010-123 of Americatel."

<sup>5</sup> Issued July 16, 2002; Sections 8 and 15 affidavits accepted and acknowledged. Americatel Corporation claimed that "1010-123" has acquired distinctiveness.

<sup>6</sup> Issued April 22, 2003.

<sup>7</sup> Issued December 2, 2003.

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3. Registration No. 2641810 for the mark 123.COM WIRELESS, in typed drawing form.<sup>8</sup>
4. Registration No. 2641811 for the mark 123.COM INALAMBRICO, in typed drawing form.<sup>9</sup>
5. Registration No. 2710483 for the mark 123.COM CELULAR, in typed drawing form.<sup>10</sup>
6. Registration No. 2641812 for the mark 123.COM WAP, in typed drawing form.<sup>11</sup>
7. Registration No. 2651210 for the mark 123.COM PCS, in typed drawing form.<sup>12</sup>
8. Registration No. 2969694 for the mark 123.COM SIN LIMITES, in typed drawing form.<sup>13</sup>

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<sup>8</sup> Issued October 29, 2002. To date, there is no record that registrant has filed a Section 8 affidavit of continued use. The registrant disclaimed the exclusive right to use the word "wireless."

<sup>9</sup> Issued October 29, 2002. To date, there is no record that registrant has filed a Section 8 affidavit of continued use. The English translation of the word "inalambrico" is "wireless," and therefore the registrant disclaimed the exclusive right to use "inalambrico."

<sup>10</sup> Issued April 29, 2003. The registrant disclaimed the exclusive right to use the word "cellular."

<sup>11</sup> Issued October 29, 2002. To date, there is no record that registrant has filed a Section 8 affidavit of continued use. The registrant disclaimed the exclusive right to use the term "WAP."

<sup>12</sup> Issued November 19, 2002. To date, there is no record that registrant has filed a Section 8 affidavit of continued use. The registrant disclaimed the exclusive right to use the term "PCS."

<sup>13</sup> Issued July 19, 2005.

Our determination of likelihood of confusion 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 issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks").

A. The Americaltel Registrations.

We will focus our likelihood of confusion analysis of the Americatel Corporation registrations on Registration No. 2766392, for the mark shown below, for *inter alia*, telecommunication services, namely, long distance and international voice transmission, and telecommunications

services provided via telephone calling cards, because it is most similar to applicant's mark.<sup>14</sup>



1. The similarity or dissimilarity and nature of the services as described in the application and registrations at issue.

Applicant is seeking to register its mark for "international telephone calling card services," and, as indicated above, the cited mark has been registered for telecommunication services, namely, long distance and international voice transmission and telecommunications services provided via telephone calling cards. "International telephone calling card services" and "telecommunications services provided via telephone calling cards" are essentially identical.

2. The similarity or dissimilarity of likely-to-continue trade channels and classes of consumers.

Because the services identified in the application and the cited registration are in part identical, we must presume that the channels of trade and classes of purchasers are the same.

*See Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003)

("Given the in-part identical and in-part related nature of the

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<sup>14</sup> By focusing our analysis on this registration, we are not suggesting an absence of likelihood of confusion with the other Americateel registrations.

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parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade"); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers").

3. The similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 9 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1988). In comparing the marks, we are mindful that where, as here, the services are in part identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Real Estate*

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*One, Inc. v. Real Estate 100 Enterprises Corporation*, 212 USPQ 957, 959 (TTAB 1981); *ECI Division of E-Systems, Inc. v. Environmental Communications Incorporated*, 207 USPQ 443, 449 (TTAB 1980).

In addition, in comparing the marks, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than a specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). In this case, the relevant public comprises consumers who use long distance calling cards.

Applicant contends that the marks are not similar because when compared side-by-side the only common feature are the numbers "123." Specifically, the first feature of applicant's mark is the asterisk, or "distinctive 'star' symbol," and the

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Americatel marks include other matter.<sup>15</sup> However, we are not persuaded by applicant's arguments because we find that the number sequence "123" is the dominant part of both registrant's mark and applicant's mark.

In analyzing the marks in their entireties, a particular feature or portion of the mark may be given greater weight if it makes an impression upon purchasers that would be remembered and relied upon to identify the services. *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987). *See also In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ("there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of the mark, provided the ultimate conclusion rests on consideration of the marks in their entireties").

That applicant thinks the asterisk or star design is a distinctive element is beside the point because applicant cannot control with certainty how consumers will perceive the mark. *Cf Trak Inc. v. Traq Inc.*, 212 USPQ 846, 850 (TTAB 1981) ("It is not possible for the trademark owner to control with certainty how purchasers will vocalize their trademarks"). Indeed, applicant has not submitted any evidence of its advertising or marketing materials that show applicant emphasizing the "star design" by directing consumers to focus on its "star 123" brand

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<sup>15</sup> Applicant's Brief, p. 16.

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international telephone calling card services. Thus, consumers may or may not use the asterisk, or star design, to refer to applicant's services. Contrary to applicant's position, it is clear to us that the number sequence "123" is the dominant element of applicant's mark because the asterisk is displayed as a superscript character appearing before the larger numbers. Accordingly, consumers are as likely to refer to applicant's mark as "123" as they are to refer to it as "star 123." See *Marshall Field & Co. v. Mrs. Fields Cookies*, 25 USPQ2d 1321, 1333 (TTAB 1992) ("companies are frequently called by shortened names"). See also *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ2d 215, 219 (CCPA 1978) (Rich, J., concurring) ("the users of language a universal habit of shortening full names - from haste or laziness or just economy of words").

With respect to the registered mark , the numbers "123" are a significant, if not dominant, element of the mark because they are displayed in large, prominent print. The numbers "123" grab the attention of the viewer. Moreover, "The International Code for Huge Savings" at the bottom of the mark is analogous to "look for advertising" because it directs the viewers' attention to the numbers.

Even if upon close examination of the marks, consumers could differentiate between them, that would not be sufficient

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to dispel the initial similarity between the marks. As stated above, it is well-settled that the similarity or dissimilarity of the marks is not determined by a side-by-side comparison; rather, the issue is based on the overall commercial impression engendered by the marks. In this case, we believe that the consumers will remember and/or refer to the services of both the applicant and the registrant as "123."

In reaching this conclusion, we are cognizant of the fact that the registrant claimed that "1010-123" has acquired distinctiveness presumably because that number sequence originally was not inherently distinctive. Also, we note that during the prosecution of its application, applicant argued that \*123 is not merely descriptive, and it did not assert that the numbers "123" without the asterisk were, in fact, descriptive or highly suggestive, thereby entitling applicant to register its mark.<sup>16</sup> Even if the numbers "123" were descriptive, marks with shared descriptive terms can be similar for purposes of determining likelihood of confusion especially where a descriptive term is prominently displayed. *In re Hal Leonard Publishing Corp.*, 15 USPQ2d 1574, 1575-1576 (TTAB 1990). See also *Bose Corp. v. QSC Audio Products*, 293 F.3d 1367, 63 USPQ2d

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<sup>16</sup> Applicant did argue that the numbers "123" are commonly used and therefore weigh against a finding that there is a likelihood of confusion. See the discussion *infra*.

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1303, 1305 (Fed. Cir. 2002) (POWERWAVE for amplifiers is likely to cause confusion with ACOUSTIC WAVE and WAVE for loudspeaker systems because the use of the word "wave" gives the marks a similar "sound wave" meaning); *TBC Corp. v. Holsa Inc.*, 126 F.3d 1470, 44 USPQ2d 1315, 1317-1318 (Fed. Cir. 1997) (GRAND AM and GRAND SLAM both used to identify tires are similar even though the word "grand" is laudatory); *Specialty Brands, Inc. v Coffee Bean Distributors, inc.*, 748 F.2d 669, 223 USPQ 1281, 1283 (Fed. Cir. 1984) ("Arguments to the effect that one portion of a mark possesses no trademark significance leading to a direct comparison between only what remains is an erroneous approach"). In this case, "1010-123" in the registered mark has acquired distinctiveness pointing uniquely and exclusively to registrant as the source of its services and those numbers, especially the numerical sequence "123," are displayed as the dominant feature of registrant's mark.

In view of the foregoing, we find that the similarities of the marks outweigh the dissimilarities, and therefore the similarity of the marks is a factor that favors finding that there is a likelihood of confusion.

B. The Empressa Nacional Registrations.

We will focus our likelihood of confusion analysis of the Empressa Nacional registrations on Registration No. 2709768 for the mark 123.COM for sales of prepaid long distance telephone

cards and telecommunication services, namely long distance and international voice transmission because it is most similar to applicant's mark.<sup>17</sup>

1. The similarity or dissimilarity and nature of the services as described in the application and registrations at issue.

Applicant is seeking to register its mark for "international telephone calling card services," and, as indicated above the cited mark has been registered for sales of prepaid long distance telephone cards and telecommunication services, namely long distance and international voice transmission. The registrant's combination of selling long distance telephone cards and providing long distance and international voice transmission services encompasses applicant's international telephone calling card services.

2. The similarity or dissimilarity of likely-to-continue trade channels and classes of consumers.

Because there are no restrictions in the description of services in the application or cited registration, we may presume that registrant's sales of prepaid long distance telephone cards and long distance and international voice transmission services and applicant's international telephone calling card services move in all channels of trade normal for

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<sup>17</sup> Again, by focusing on this registration, we are not suggesting that there is an absence of a likelihood of confusion with the other Empressa registrations.

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those services and are sold to all classes of prospective purchasers for those services. *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). In fact, the sales of prepaid long distance telephone cards and international telephone calling card services would be sold in the same channels of trade and to the same classes of consumers. Likewise, long distance and international voice transmission services and international telephone calling card services would also move in the same channels of trade and be sold to the same classes of consumers.

Moreover, as we discussed in the analysis of Americatel's channels of trade and classes of consumers, because applicant's services and registrant's services are so closely related, if not identical, we must presume that the services move in the same channels of trade and are sold to the same classes of consumers.

3. The similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.

The registered mark 123.COM is substantially similar to applicant's mark \*123. The ".com" portion of the registered has no trademark significance. *In re Microsoft Corp.*, 68 USPQ2d 1195, 1203 (TTAB 2003) ("The combination of the specific term and TLD at issue, *i.e.*, OFFICE and .NET, does not create any double entendre, incongruity, or any other basis upon which we can find the composite any more registrable than its separate

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elements. The combination immediately informs prospective purchasers that the software includes 'office suite' type software and is from an Internet business, *i.e.*, a '.net' type business"); *In re CyberFinancial.Net, Inc.*, 65 USPQ2d 1789, 1792 (TTAB 2002) ("Applicant seeks to register the generic term 'bonds,' which has no source-identifying significance in connection with applicant's services, in combination with the top level domain indicator ".com," which also has no source-identifying significance. And combining the two terms does not create a term capable of identifying and distinguishing applicant's services"); *In re Martin Container, Inc.*, 65 USPQ2d 1058, 1061 (TTAB 2002) ("[N]either the generic term nor the domain indicator has the capability of functioning as an indication of source, and combining the two does not result in a compound term that has somehow acquired this capability"). Accordingly, the number sequence "123" is the dominant part of the registered mark.

Likewise, as indicated in the *Americatel* discussion, the number sequence "123" in applicant's mark \*123 is also the dominant portion of applicant's mark. Accordingly, we find that applicant's mark and the registered mark are very similar in terms or appearance, sound, meaning, and commercial impression.

C. General Arguments By Applicant.

1. Cancelled Registration No. 1972069 for the mark \*123.

Applicant contends that Registration No. 1972069 for the mark \*123, shown below, registered by Southwestern Bell Mobile Systems, Inc. for "telecommunication services, namely interactive cellular telephone service by which customers can access information on sports, traffic conditions, weather, entertainment, and other subjects," in Class 38, is evidence that the marks at issue are not likely to cause confusion.<sup>18</sup>

 **123**

According to applicant, while the above-noted registration was valid and subsisting, 123.COM WAP, MUNDO123, 123.COM PSC, 123.COM INALAMBRICO, 123.COM WIRELESS were registered by Empresa Nacional, and 1010-123 NUESTRO NUMERO DE LARGA DISTANCIA and 1010-123 A AMERICATEL were registered by Americatel. In addition, the Empresa mark DIAS 123 DEL 1010-123 DE AMERICATEL and the Americatel marks 123.COM and 123.COM CELULAR were published for opposition before the registration was canceled. Applicant asserts that the registration of the Empresa and Americatel marks shows that the number sequence "123" is commonly used in connection with telecommunications

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<sup>18</sup> Issued May 7, 1996; cancelled under Section 8.

services, and that, in essence, the Office is now estopped from refusing registration under Section 2(d).<sup>19</sup>

We are not persuaded that the registration of the number sequence "123" by Empresa Nacional and Americatel demonstrates that "123" has been so commonly used in connection with telecommunication services that consumers will look to the other elements of the marks for purposes of identifying the source of the services. While we may draw some inferences from the third-party registration (e.g., the mark has some well-understood meaning, a third-party has adopted the mark to express that meaning, and that consumers would be likely to attribute that meaning to the mark),<sup>20</sup> a third-party registration is not evidence that the mark has been used. *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973) (without any evidence of use, a third-party registration provides no basis for asserting that the mark has any effect on consumers). See also *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992) (third-party registrations are not evidence of what happens in the marketplace). Applicant did not submit any evidence regarding

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<sup>19</sup> Applicant's Brief, p. 11.

<sup>20</sup> For purposes of determining likelihood of confusion, neither the examining attorney, nor the applicant, presented any evidence or argument regarding any meaning for the numerical sequence "123" when used in connection with telephone calling card services.

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the nature or extent of the use of the canceled, registered mark.

Moreover, the listed services in the canceled, third-party registration ("telecommunication services, namely interactive cellular telephone service by which customers can access information on sports, traffic conditions, weather, entertainment, and other subjects") are different than the services in the application at issue ("international telephone calling card services"). The Office should not be barred from examining the registrability of applicant's mark when the applicant seeks to register a mark for services that are different than the services identified in the third-party registration. See *In re Sunmarks Inc.*, 32 USPQ2d 1470, 1472 (TTAB 1994).

Finally, each case must be decided on its own merits based on the evidence of record. We are not privy to the record in the files of the registered mark, and we are not bound by the results of another case. This Board has the authority and duty to decide an appeal from a final refusal to register, and this duty may not be delegated by adopting the conclusion reached by another examining attorney on a different record. *In re Sunmarks Inc.*, 32 USPQ2d at 1472, quoting *In re BankAmerica Corp.*, 231 USPQ 873, 876 (TTAB 1986). Accordingly, the

canceled, third-party registration for a similar mark for different services has no bearing on our analysis.

2. Evidence of actual confusion.

Applicant argues that "it has been using its \*123 mark in commerce since as early as 2005 and there have been no reported incidents of consumer confusion with the marks of record, no demands to 'cease-and-desist,' and no actions filed for infringement or unfair competition relative to either the Americatel Marks or the Empressa Marks. Therefore, this factor weighs against a likelihood of confusion in the future."<sup>21</sup> However, in the context of an *ex parte* appeal, applicant's reliance on the lack of any reported instances of actual confusion carries little, if any, weight. See *In re Majestic Drilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003) ("The lack of evidence of actual confusion carries little weight"). First, the registrants are not parties to the appeal, and therefore they have not had the opportunity to present any evidence of confusion that may have occurred. Second, because there is no evidence regarding the nature and extent of either applicant's use of its mark or the registrants' use of their marks, we cannot determine whether there has been an opportunity for confusion to have occurred. *In re Kangaroos*, 223 USPQ 1025, 1026-1027 (TTAB 1984).

3. Strength of the registered marks.

Applicant argues that "[t]he use of the numerical sequence "123" is exceedingly common and weighs heavily against a finding of likelihood of confusion." Applicant identified Registration No. 3122485 for the mark RING-123 NEW YORK PHONE CARD for "prepaid telephone calling cards, not magnetically encoded," as well as the cited registrations, as evidence that the numerical sequence "123" is a weak term entitled to only a narrow scope of protection.<sup>22</sup>

Applicant's contention that the registered marks are weak because of the third-party registrations is not persuasive. Absent evidence of actual use of those marks, the third-party registrations are entitled to little weight in our likelihood of confusion analysis. *In re Hub Distributing, Inc.*, 218 USPQ 284, 285 (TTAB 1983).

[I]t would be sheer speculation to draw any inferences about which, if any of the marks subject of the third party (sic)

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<sup>21</sup> Applicant's Brief, p. 12.

<sup>22</sup> Applicant's Brief, pp. 13-14 and 15. The market strength of a mark is determined by analyzing "the number and nature of similar marks in use on similar goods." *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. See also *NCTA v. American Cinema Editors*, 937 F.2d 1572, 19 USPQ2d 1424, 1430 (Fed. Cir. 1991) (use of term by unrelated companies on numerous goods and services does not require a finding that the term is a weak mark because even in a common word may stand alone in the relevant market); *In re Vroman Foods, Inc.*, 224 USPQ 242, 244 (TTAB 1984) (third-party registrations not persuasive because none them were as close to the registrant's products as applicant's description of goods). Accordingly, we did not consider the other third-party registrations that were unrelated to telecommunications or telephone calling card services.

registrations are still in use. Because of this doubt, third party (sic) registration evidence proves nothing about the impact of the third-party marks on purchasers in terms of dilution of the mark in question or conditioning of the purchasers as their weakness in distinguishing source.

*Id.* at 286.

Moreover, one third-party registration and the cited registrations owned by two different entities (essentially three other purported users of the numerical sequence "123") does not prove that the numerical sequence "123" is so commonly used in connection with telephone calling card services that consumers have become conditioned to look other elements of the marks as a means of distinguishing source. *Cabot Corp. v. Titan Tool, Inc.*, 209 USPQ 338, 344 (TTAB 1980). See also *In re Denisi*, 225 USPQ 624, 625 (TTAB 1985) (the existence of one other registration is insufficient to support an inference that "Perry's" is non-distinctive); *Tony Lama Co., Inc. v. Di Stefano*, 206 USPQ 176, 185 (TTAB 1980) (two third-party registrations insufficient to prove that the mark is weak).

Finally, even if we were to consider applicant's weakness of the mark argument, third-party registrations will not aid an applicant to register its mark if it is likely to cause confusion with the cited registrations. *Independent Grocers' Alliance v. Potter-McCune Co.*, 404 F.2d 622, 160 USPQ 46, 46 (CCPA 1968) (if applicant's mark is likely to cause confusion

with a previously registered mark, third-party registrations are not controlling); *In re Hamilton Bank*, 222 USPQ 174, 177 (TTAB 1984) (third-party registrations cannot assist an applicant in registering a mark that is likely to cause confusion with a registered mark).<sup>23</sup>

4. The degree of consumer care.

Applicant contends that the degree of consumer care is a factor that favors finding no likelihood of confusion<sup>24</sup> because "[t]he goods and services involved here are not impulse purchases. Rather, they involve the purchase of international long distance telecommunications service, which can be a significance expense. Thus, the relevant consumers are likely to approach these services with a greater degree of care, research, and discrimination. Therefore, these types of sophisticated buyers are not as likely to be confused as to source and will be able to distinguish between the Applicant's and Registrant's products."<sup>25</sup>

Even though we can make certain suppositions about the degree of care consumers exercise when selecting international

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<sup>23</sup> While we are not persuaded by applicant's argument that the numerical sequence "123" is a weak term entitled only entitled to a narrow scope of protection or exclusivity of use, nevertheless, we note that in his brief and at the oral hearing the examining attorney was unprepared and unable to explain why multiple registrations for the same term by different entities did not diminish consumers' attribution of source to a single entity.

<sup>24</sup> Applicant's Brief, p. 14.

<sup>25</sup> Applicant's January 22, 2007 Response.

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telephone calling card services, as with the other *du Pont* factors, the degree of care cannot be "supposed," it must be supported by evidence. The issue of care includes the degree to which consumers consider the marks, the process by which consumers select international calling card services and the manner in which such services are marketed. Unfortunately, there is no such evidence in the record, and consequently, there is no evidence regarding the degree of care exercised by relevant consumers.

Moreover, because applicant's services and the registrants' services are rendered in all channels of trade and to all classes of consumers normally expected of international telephone calling card services, such services would be sold to discriminating purchasers and purchasers who are not so discriminating (e.g., consumers interested only in the lowest price). Therefore, not all of applicant's purchasers can be expected to be as highly discriminating as applicant contends. *In re Pierce Foods Corp.*, 230 USPQ 307, 309 (TTAB 1986).

D. Balancing the factors.

In view of the facts that the marks are similar and that the applicant's services are essentially identical to the registrants' services, and because we must presume that the services move in the same channels of trade and are sold to the same classes of consumers, we find that applicant's registration

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of the mark \*123 for "international telephone calling card services" is likely to cause confusion with both the Americatel registrations and the Empressa Nacional registrations.

Decision: The refusal to register is affirmed.