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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 85192690

MARK: TRU TOUCH MONITOR



CORRESPONDENT ADDRESS:

GOKALP BAYRAMOGLU

BAYRAMOGLU LAW OFFICES LLC

8275 SOUTH EASTERN AVENUE SUITE 200-611

LAS VEGAS, NV 89123

GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/trademarks/index.jsp>

TTAB INFORMATION:

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>

APPLICANT: TPK U.S.A., LLC

CORRESPONDENT'S REFERENCE/DOCKET NO:

GBTPKUSA001

CORRESPONDENT E-MAIL ADDRESS:

in@bayramoglu-legal.com

EXAMINING ATTORNEY'S APPEAL BRIEF

I. INTRODUCTION

Applicant, TPK U.S.A., LLC, has appealed the trademark examining attorney's final refusal to register the mark "TRU TOUCH MONITOR" and design in International Class 9 for "Amusement apparatus adapted for use with an external display screen or monitor; Amusement apparatus and games adapted for use with television receivers or with video or computer monitors; Amusement machines, namely, hand-held electronic game units adapted for use with an external display screen or monitor; Anti-glare filters for televisions and computer monitors; Computer monitor frames; Computer monitors; Computer screens; Computer software, namely, game engine software for video game development and operation." Registration was refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark, as applied to applicant's goods, so resembles the marks "TRUETOUCH" in U.S. Registration No. 3944837 for "Capacitive touch screen products and solutions, namely, computer and telephone touch screens, touch sensors for computer and telephone monitors and integrated circuits" in International Class 9 and TRU in U.S. Registration No. 4181663 and TRU in U.S. Registration No. 4188770 in standard characters and stylized font respectively, both for among other things "computer games software; software incorporating computer games; software incorporating computer games for mobile phones" in International Class 9, that it is likely to cause confusion, or to cause mistake, or to deceive.

II. FACTS

On, December 7, 2010, the present application was filed to register the mark "TRU TOUCH MONITOR" and design for the following goods in Class 9, "Amusement apparatus adapted for use with an external display screen or monitor; Amusement apparatus and games adapted for use with television receivers or with video or computer monitors; Amusement machines, namely, hand-held electronic game units adapted for use with an external display screen or monitor; Anti-glare filters for televisions and computer monitors; Computer monitor frames; Computer monitors; Computer peripheral

equipment; Computer peripherals; Computer screens; Computer software, namely, game engine software for video game development and operation.” Registration was initially refused based on a disclaimer requirement and a mark description requirement. It was also noted that there were three prior pending applications that if registered, would present a bar to the registration of applicant’s mark. Applicant responded on August 24, 2011 by providing the required disclaimer and mark description and presenting arguments against a potential Section 2(d) refusal. The arguments were found unpersuasive, and the application was placed in suspension on August 25, 2011, pending the registration or abandonment of Application Serial No(s). 85180226 and 85180189. It was also noted that prior pending application Serial No. 77619968 had matured into Registration No. 3944837. By September 26, 2012, the prior pending applications had matured into registrations and registration of applicant’s mark was refused under Section 2(d) based on a likelihood of confusion with the marks in Registration No(s). 3944837, 4188770 and 4181663. On March 26, 2013, applicant responded by deleting the wording “computer peripheral equipment” and “computer peripherals” and by presenting additional arguments against the Section 2(d) refusal with respect to Registration No. 3944837. Applicant did not contest the likelihood of confusion with respect to the marks in Registration Nos. 4188770 and 4181663, and the arguments were found unpersuasive with respect to the likelihood of confusion with the mark in Registration No. 3944837. This appeal follows the examining attorney’s April 15, 2013 final refusal under Section 2(d) based on a likelihood of confusion with the marks in U.S. Registration Nos. 3944837, 4188770 and 4181663.

III. ARGUMENT

THE MARKS OF APPLICANT AND REGISTRANT ARE HIGHLY SIMILAR, AND THE GOODS DESCRIBED IN THE APPLICATION AND REGISTRATION ARE LEGALLY IDENTICAL IN PART AND VERY CLOSELY RELATED IN REMAINING PART, SUCH THAT THERE EXISTS A LIKELIHOOD OF CONFUSION UNDER SECTION 2(d) OF THE TRADEMARK ACT.

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely a potential consumer would be confused, mistaken, or deceived as to the source of the goods and/or services of the applicant and registrant. See 15 U.S.C. §1052(d). A determination of likelihood of confusion under Section 2(d) is made on a case-by case basis and the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973) aid in this determination. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1349, 98 USPQ2d 1253, 1256 (Fed. Cir. 2011) (citing *On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1085, 56 USPQ2d 1471, 1474 (Fed. Cir. 2000)). Not all the *du Pont* factors, however, are necessarily relevant or of equal weight, and any one of the factors may control in a given case, depending upon the evidence of record. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d at 1355, 98 USPQ2d at 1260; *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); see *In re E. I. du Pont de Nemours & Co.*, 476 F.2d at 1361-62, 177 USPQ at 567.

In this case, the following factors are the most relevant: similarity of the marks, similarity and nature of the goods and/or services, and similarity of the trade channels of the goods and/or services. See *In re Viterra Inc.*, 671 F.3d 1358, 1361-62, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1595-96 (TTAB 1999); TMEP §§1207.01 *et seq.*

In any likelihood of confusion determination, two key considerations are similarity of the marks and similarity or relatedness of the goods and/or services. *Syndicat Des Proprietaires Viticulteurs De Chateaufneuf-Du-Pape v. Pasquier DesVignes*, 107 USPQ2d 1930, 1938 (TTAB 2013) (citing *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 USPQ 24, 29 (C.C.P.A. 1976)); *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010); see TMEP §1207.01. That is, the marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *In re E. I. du Pont de*

Nemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973)); TMEP §1207.01(b)-(b)(v).

Additionally, the goods and/or services are compared to determine whether they are similar or commercially related or travel in the same trade channels. See *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369-71, 101 USPQ2d 1713, 1722-23 (Fed. Cir. 2012); *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165, 64 USPQ2d 1375, 1381 (Fed. Cir. 2002); TMEP §1207.01, (a)(vi).

A. Applicant's Arguments Regarding Third-Party Registration Evidence

As a preliminary matter, the examining attorney notes that applicant's arguments that the proposed mark would not cause a likelihood of confusion with the various third-party registrations attached to the final office action are inapposite.¹ As indicated in the final office action, these third-party registrations were attached to demonstrate that the various goods made by both applicant and registrant are of a kind that emanate from a single source under a single mark, and these records were not cited as bars to registration under Trademark Act Section 2(d).

B. The Marks Are Substantially Similar

Applicant's mark "TRU TOUCH MONITOR" and design is substantially similar to the registered marks "TRUETOUCH" in standard characters and "TRU" in both standard characters and stylized font.

U.S. Registration No. 3944837 TRUETOUCH

Applying the above analysis, the marks are substantially similar. Applicant's mark contains the wording "TRU TOUCH" which is a virtually identical phonetic equivalent to the dominant and recognizable portion of the registered mark "TRUETOUCH". While the applicant's mark has removed

¹ See Pages 8 and 9 of Applicant's 12/16/2013 Appeal Brief.

the letter “E” at the end of the word “TRU”, the marks still look and sound similar. Similarity in sound alone may be sufficient to support a finding that the marks are confusingly similar. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *see In re 1st USA Realty Prof’ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007); TMEP §1207.01(b)(iv).

Moreover, whether unitary or two separate words, the commercial impression is the same, namely, “true touch”. *See, e.g., In re L.C. Licensing Inc.*, 49 USPQ2d 1379, 1381 (TTAB 1998); *Harvey Hubbell, Inc. v. Red Rope Industries, Inc.*, 191 USPQ 119 (TTAB 1976) (“the marks “DATAOK” and “DATA . LOK”, although used by the parties in different graphic presentations, create the same general commercial impression and are, for all purposes herein, legally identical”).

Further, it is appropriate in this case to give less weight to the term “MONITOR” in the applicant’s mark because it merely identifies a type of good sold by applicant and has been disclaimed in the application. Although marks are compared in their entireties, one feature of a mark may be more significant or dominant in creating a commercial impression. *See In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985); TMEP §1207.01(b)(viii), (c)(ii). Disclaimed matter that is descriptive of or generic for an applicant’s goods and/or services is typically less significant or less dominant when comparing marks. *See In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Nat’l Data Corp.*, 753 F.2d at 1060, 224 USPQ at 752 ; TMEP §1207.01(b)(viii), (c)(ii).

Finally, while applicant’s mark contains a design component, when a composite mark contains both words and a design, the word portion may be more likely to be impressed upon a purchaser’s memory and to be used when requesting the goods and/or services. *Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1431 (TTAB 2013) (citing *In re Dakin’s Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999)); TMEP §1207.01(c)(ii); *see In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d

1905, 1908, 1911 (Fed. Cir. 2012) (citing *CBS Inc. v. Morrow*, 708 F. 2d 1579, 1581-82, 218 USPQ 198, 200 (Fed. Cir 1983)). Thus, although such marks must be compared in their entireties, the word portion is often considered the dominant feature and is accorded greater weight in determining whether marks are confusingly similar, even where the word portion has been disclaimed. *In re Viterra Inc.*, 671 F.3d at 1366, 101 USPQ2d at 1911 (Fed. Cir. 2012) (citing *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1570-71, 218 USPQ2d 390, 395 (Fed. Cir. 1983)). Therefore, in this case it is appropriate to give more weight to the literal portion of applicant's mark.

Applicant contends that "consumers will recognize the differences between the marks and will be able to distinguish between the marks."² However, as indicated above, the addition of the generic term "MONITOR" to the wording "TRU TOUCH" is insufficient to distinguish the marks or to obviate the likelihood of confusion. The dominant portion of both marks is the wording "TRU TOUCH" or "TRUETOUCH" which evoke virtually identical commercial impressions of screens and monitors that function accurately based on where the user touches the screen. The addition of the term "MONITOR" merely indicates to consumers a type of product that the applicant makes and has no source indicating significance.

Therefore applicant's mark "TRU TOUCH MONITOR" and design is substantially similar to the registered mark "TRUETOUCH".

U.S. Registration Nos. 4181663 TRU (standard characters) and 4188770 TRU (stylized)

Applicant's mark "TRU TOUCH MONITOR" is also substantially similar to the registered marks "TRU" in both standard characters and stylized lettering because the dominant and recognizable portion of applicant's mark is the word "TRU" which is identical to the dominant and recognizable portion of the registered marks. In the instant case, it is appropriate to give more weight to the "TRU" portion of

² See Page 8 of Applicant's 12/16/2013 Appeal Brief

applicant's mark because of the descriptive nature of the wording "TOUCH MONITOR" when used in connection with monitors and devices that respond to touch. Although marks are compared in their entireties, one feature of a mark may be more significant or dominant in creating a commercial impression. See *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985); TMEP §1207.01(b)(viii), (c)(ii). Disclaimed matter that is descriptive of or generic for an applicant's goods and/or services is typically less significant or less dominant when comparing marks. See *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Nat'l Data Corp.*, 753 F.2d at 1060, 224 USPQ at 752 ; TMEP §1207.01(b)(viii), (c)(ii).

In addition, it is also appropriate to treat the term "TRU" as the dominant and recognizable portion of applicant's mark because the term is featured prominently in larger font above the smaller wording "TOUCH MONITOR" and thus dominates the overall appearance of the mark. As such the word "TRU" would be the term mostly likely to be used by consumers when calling for the goods.

Moreover, a mark in typed or standard characters may be displayed in any lettering style; the rights reside in the wording or other literal element and not in any particular display or rendition. See *In re Viterra Inc.*, 671 F.3d 1358, 1363, 101 USPQ2d 1905, 1909 (Fed. Cir. 2012); *In re Mighty Leaf Tea*, 601 F.3d 1342, 1348, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); 37 C.F.R. §2.52(a); TMEP §1207.01(c)(iii). Thus, a mark presented in stylized characters and/or with a design element generally will not avoid likelihood of confusion with a mark in typed or standard characters because the marks could be presented in the same manner of display. See, e.g., *In re Viterra Inc.*, 671 F.3d at 1363, 101 USPQ2d at 1909; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 1041, 216 USPQ 937, 939 (Fed. Cir. 1983) (stating that "the argument concerning a difference in type style is not viable where one party asserts rights in no particular

display”). Therefore, the mark in Registration No. 4181663 could be presented in the exact same stylized font and color as the applicant’s mark.

Finally, even if potential purchasers realize the apparent differences between the marks, they could still reasonably assume, due to the overall similarities in sound, appearance, connotation, and commercial impression in the respective marks, that applicant’s goods sold under the “TRU TOUCH MONITOR” mark constitute a new or additional product line from the same source as the goods sold under the “TRU” marks with which they are acquainted or familiar, and that “TRU TOUCH MONITOR” is merely a variation of the above. *See, e.g., SMS, Inc. v. Byn-Mar Inc.* 228 USPQ 219, 220 (TTAB 1985) (applicant’s marks ALSO ANDREA and ANDREA SPORT were “likely to evoke an association by consumers with opposer’s preexisting mark [ANDREA SIMONE] for its established line of clothing.”).

Therefore, applicant’s mark “TRU TOUCH MONITOR” is substantially similar to the registered marks “TRU” in both standard characters and stylized form.

The examining attorney notes that as of this stage of the prosecution, applicant has yet to present any argument with respect to the likelihood of confusion with the marks in U.S. Registration Nos. 4188770 and 4181663.

C. Applicant’s and Registrants’ Goods Are Legally Identical In Part And Otherwise Closely Related

U.S. Registration No. 3944837 TRUETOUCH

Applicant’s goods, “Amusement apparatus adapted for use with an external display screen or monitor; Amusement apparatus and games adapted for use with television receivers or with video or computer monitors; Amusement machines, namely, hand-held electronic game units adapted for use with an external display screen or monitor; Anti-glare filters for televisions and computer monitors;

Computer monitor frames; Computer monitors; Computer screens; Computer software, namely, game engine software for video game development and operation” are in part legally identical and otherwise closely related to registrant’s “Capacitive touch screen products and solutions, namely, computer and telephone touch screens, touch sensors for computer and telephone monitors and integrated circuits” because applicant’s goods include computer screens and products related to computer screens and monitors that travel through the same trade channels to the same classes of purchasers.

Specifically, applicant’s “computer screens” are legally identical to the various types of screens used in connection with the registered mark. With respect to applicant’s and registrant’s goods and/or services, the question of likelihood of confusion is determined based on the description of the goods and/or services stated in the application and registration at issue, not on extrinsic evidence of actual use. *See, e.g., Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369-70, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012); *Octocom Sys. Inc. v. Hous. Computers Servs. Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Absent restrictions in an application and/or registration, the identified goods and/or services are “presumed to travel in the same channels of trade to the same class of purchasers.” *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)). Additionally, unrestricted and broad identifications are presumed to encompass all goods and/or services of the type described. *See In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (citing *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981)); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992).

In this case, the identification set forth in the application and registration has no restrictions as to nature, type, channels of trade, or classes of purchasers. Therefore, it is presumed that these goods and/or services travel in all normal channels of trade, and are available to the same class of purchasers.

Further, the application use(s) the broad wording “computer screens” to describe a portion of the goods and this wording is presumed to encompass all goods of the type described, including those in registrant(s)’s more narrow identification such as “computer and telephone touch screens.”

Where the goods and/or services of an applicant and registrant are “similar in kind and/or closely related,” the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as in the case of diverse goods and/or services. *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987); *see Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1242, 73 USPQ2d 1350, 1354 (Fed. Cir. 2004); TMEP §1207.01(b).

Applicant’s remaining goods are closely related to the registrant’s goods because the evidence of record shows that various types of computer screens, monitors, touch screens, and associated products such as anti-glare filters travel in the same channels of trade and commonly emanate from the same source. Specifically, the record contains registration information on numerous third-party marks registered in connection with the types of goods listed above. Such evidence shows that the goods and/or services listed therein, are of a kind that may emanate from a single source under a single mark. *See In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988); TMEP §1207.01(d)(iii). Some examples are listed below:

- Registration No. 2024499 “CYBERTOUCH” for computer touch screens, touch monitors, shielded windows, optical filters, electronic interface scanners, computer keyboard emulators, computer mouse emulators, computer drivers, computer controllers, serial and parallel interface boards (April 15, 2013 Office Action, p. 19).
- Registration No. 4250578 “CNTOUCH” for Touch input devices, namely, touch pads, touch panels, and touch screen video and computer monitors (April 15, 2013, Office Action, pp. 20 and 21).
- Registration No. 3981524 “DELTATOUCH” for Video monitors; computer monitors; touch screen and touch sensitive video monitors (April 15, 2013, Office Action, pp. 22 and 23).

- Registration No. 4203028 “NGX” for video touch screens and video display monitors (April 15, 2013, Office Action, pp. 24 and 25).
- Registration No. 4246673 “FINGERTOUCHE” for optical computer touch screens; electronic pens for monitors; mobile phones; notebook computers; tablet personal computers; computer monitors; video game consoles for use with an external display screen or monitor; computer game consoles for use with an external display screen or monitor (April 15, 2013, Office Action, pp. 26-28).

The Internet evidence of record also establishes that the same entity commonly provides computer screens, monitors, touch screens, etc. These goods are sold or provided through the same trade channels and used by the same classes of consumers in the same fields. In particular, please see the following excerpts:

- ELO TOUCH SOLUTIONS™ specializes in the sale and manufacture of touch monitors, touch displays and components therefor (September 26, 2012 Office Action, pp. 15-19).
- PLANAR® manufactures all types of display monitors and screens for a variety of applications including touch screens and touch screen monitors (September 26, 2012 Office Action, pp. 20-22).
- TOUCHWINDOW™ is an on-line retailer of all types of touch screens, touch screen monitors and accessories therefor (September 26, 2012 Office Action, pp. 23-28).

Applicant contends that “touch monitors and touch screens are two different products and it is very easy to differentiate these products from each other.”³ However, aside from the fact that portions of applicant’s identification such as “computer screens” would logically include items in the registrant’s identification such as “computer touch screens”, the examining attorney notes that applicant has provided no evidence to support this contention. As the Board has previously held, “[a]ttorney argument is no substitute for evidence.” *Enzo Biochem Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005). Further, the evidence of record referenced above, demonstrates that the

³ See Page 8 of Applicant’s 12/16/2013 Appeal Brief

items made by both applicant and registrant in this case commonly emanate from a single source and travel in the same trade channels to the same groups of consumers.

Therefore, because registrant's goods logically encompass several items in the applicant's identification and because the evidence of record shows that the remaining items are closely related, the goods must be considered in part legally identical and otherwise closely related in a likelihood of confusion analysis under Trademark Act Section 2(d).

U.S. Registration Nos. 4181663 TRU (standard characters) and 4188770 TRU (stylized)

Applicant's goods, "Amusement apparatus adapted for use with an external display screen or monitor; Amusement apparatus and games adapted for use with television receivers or with video or computer monitors; Amusement machines, namely, hand-held electronic game units adapted for use with an external display screen or monitor; Computer software, namely, game engine software for video game development and operation" are in part legally identical and otherwise closely related to registrant's "computer games software; software incorporating computer games; software incorporating computer games for mobile phones."

Specifically, applicant's "computer software, namely, game engine software for video game development and operation" is legally identical to the registrant's "computer games software; software incorporating computer games; software incorporating computer games for mobile phones." The remaining goods are closely related because amusement apparatus for playing games/gaming consoles and game software are made by the same companies and sold in the same trade channels to the same groups of consumers.

The record contains registration information on numerous third-party marks registered in connection with the types of goods listed above. Such evidence shows that the goods and/or services

listed therein, are of a kind that may emanate from a single source under a single mark. *See In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988); TMEP

§1207.01(d)(iii). Some examples are listed below:

- Registration No. 4165097 “NINTENDO 3DS” for Video game consoles for use with an external display screen or monitor; computer game programs for consumer video game apparatus, computer game programs for hand-held game apparatus with liquid crystal displays, electronic game software, downloadable multimedia files, namely, games; downloadable computer game programs; downloadable computer game software; downloadable electronic game programs; downloadable electronic game software; downloadable interactive electronic game programs; downloadable interactive game software; downloadable video game programs (September 26, 2012 Office Action, pp. 38-41).
- Registration No. 4158603 “GEYAO” for Amusement apparatus adapted for use with an external display screen or monitor, Computer game software, Computer software for computer system and application development, deployment and management, Video game software (September 26, 2012 Office Action, pp. 42-44).
- Registration No. 4195658 “VICTORIAN VILLIAN” for Amusement apparatus and games adapted for use with television receivers or with video or computer monitors; Amusement machines, namely, hand-held electronic game units adapted for use with an external display screen or monitor, Computer game consoles for use with an external display screen or monitor; Computer game programmes; Computer game programmes downloadable via the Internet; Computer game programs; Computer game software (September 26, 2012 Office Action, pp. 48-50).
- Registration No. 4178012 “G SHANDA GAMES” for Computer game software; Computer game software downloadable from a global computer network; Amusement apparatus for games adapted for use with an external display screen or monitor; Amusement apparatus adapted for use with an external display screen or monitor (September 26, 2012 Office Action, pp. 51-53).
- Registration No. 4199678 “TWISTGIST” for Computer game programs; Computer game software; Computer game software downloadable from a global computer network, Computer game software for use on mobile and cellular phones; Computer game software for use with personal computers, home video game consoles used with televisions and arcade-based video game consoles; Computer software, namely, game engine software for video game development and operation (September 26, 2012 Office Action, pp. 54-56).
- Registration No. 4196950 “CITY BUILDER” for Amusement apparatus and games adapted for use with television receivers or with video or computer monitors; Computer game discs; Computer game programs; Computer game software (September 26, 2012 Office Action, pp. 57 and 58).

The Internet evidence of record also establishes that the same entity commonly provides video gaming consoles, amusement apparatus for use with external displays, hand-held gaming consoles and various types of game software for use with the consoles. These goods are sold or provided through the same trade channels and used by the same classes of consumers in the same fields. In particular, please see the following excerpts:

- NINTENDO® is a gaming company that makes a wide variety of gaming consoles and game software (April 15, 2013 Office Action, pp. 2-7).
- XBOX® specializes in the manufacture of gaming consoles and game software (April 15, 2013 Office Action, pp. 8-12).
- PLAYSTATION® makes all types of game consoles including handheld video game units and game programs and software (April 15, 2013 Office Action, pp. 13-18).

For the above reasons, applicant's goods are in part legally identical and otherwise closely related to the registrant's goods.

Again, the examining attorney reiterates that as of this stage of the prosecution, applicant has yet to present any argument with respect to the likelihood of confusion with the marks in U.S. Registration Nos. 4188770 and 4181663.

Finally, the examining attorney notes that the bulk of applicant's brief is dedicated to the faulty premise that there is only "a merely theoretical possibility of a likelihood of confusion"⁴ in this case. While the applicant is correct that confusion must be likely and more than just possible in order to support a rejection under Trademark Act Section 2(d), a detailed application of the law to the facts in this case moves well beyond the realm of a mere possibility of confusion and demonstrates that there is in fact a likelihood of confusion.

⁴ See Page 6 of Applicant's 12/16/2013 Appeal Brief

In summary, because the marks are substantially similar and the goods are in part legally identical and otherwise closely related, purchasers and potential purchasers are likely to mistakenly believe that applicant's goods sold under the "TRU TOUCH MONITOR" mark come from the same source or are affiliated with the same entity as the goods sold in connection with the "TRUETOUCH" and "TRU" marks.

IV. CONCLUSION

The foregoing demonstrates that applicant's mark "TRU TOUCH MONITOR" is likely to cause confusion with the marks in Registration Nos. 3944837 "TRUETOUCH", 4188770 "TRU" (stylized) and 4181663 "TRU" (standard characters). Therefore, the examining attorney respectfully requests that the refusal to register under Trademark Act Section 2(d), 15 U.S.C. §1052(d), be affirmed.

Respectfully submitted,

/Blake Lovelace/

James B. Lovelace

Examining Attorney

Law Office 119

(571) 270-1533

james.lovelace@uspto.gov

J. Brett Golden

Managing Attorney

Law Office 119