

ESTTA Tracking number: **ESTTA499881**

Filing date: **10/12/2012**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85378952
Applicant	Kamagames LTD
Applied for Mark	KG KAMA GAMES
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Submission	Appeal Brief
Attachments	Appeal Brief for Ser No 85378952 for KG KAMA GAMES (stylized and or with design).pdf (15 pages)(1017487 bytes)
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Date	10/12/2012

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Application of:	§ Katherine Chang
Kamagames Ltd.	§ Trademark Attorney
	§
Serial No.: 85/377,970	§ Trademark Law Office 115
	§
Filed: July 22, 2011	§
	§ Attorney Dkt. # 034949-0406023
Mark: KG KAMA GAMES	§
(stylized and/or with design)	§
International Class: 41	§

Commissioner for Trademarks
Attn: Trademark Trial and Appeal Board
P. O. Box 1451
Alexandria, VA 22313-1451

APPLICANT'S APPEAL BRIEF

Pursuant to 37 C.F.R. §2.141 and Trademark Trial and Appeal Board Manual of Procedure ("TBMP") §1201.01, Applicant Kamagames Ltd. ("Kamagames") hereby appeals the final refusal to register the mark KG KAMA GAMES (stylized and/or with design), as shown below, in Class 41, issued January 20, 2012. Respectfully, Applicant contends that the refusal was based on clear error.



BACKGROUND

Kamagames applied to register the mark KG KAMA GAMES (stylized and/or with design) on July 22, 2011, in Class 41 for (as amended):

Entertainment services all featuring online gaming, namely, providing online computer and electronic games; Entertainment services, namely, providing on-line computer games, enhancements within online computer

games, and game applications within online computer games; providing online reviews of computer games, and providing of information relating to computer games; providing an Internet website portal in the field of computer games and gaming; Entertainment services, namely, providing virtual environments in which users can interact through social games for recreational, leisure or entertainment purposes.

On November 15, 2011, the Examining Attorney issued an office action refusing to register the mark based on a likelihood of confusion with the mark KAMA, Reg. No. 3630288 for “video game controllers” in Class 9. The Examining Attorney based the refusal on the argument that, when putting more focus on the “Kama” portion of KG KAMA GAMES, “the dominant portion of applicant’s proposed mark is identical to the registered mark.” The Examining Attorney also claimed, “the goods/services are closely related. Applicant offers online video games and related services. The registrant offers controllers for those games.”

Applicant responded to the office action on December 28, 2011, noting that the *DuPont* factors weighed against a finding of likelihood of confusion, given the differences between Applicant’s services and the cited application’s goods, the differences in the channels of trade, including the types of games, the sophistication of buyers of the respective goods and services, and the differences in look, sound, meaning, and commercial impression of the two marks.

On January 20, 2012, the Examining Attorney issues a final refusal, stating, “A likelihood of confusion was found on the basis of the similar nature of the marks and the relatedness of the goods and services.” The Examining Attorney attached “additional evidence to show that goods of the type identified in the registration are commonly used with services offered by applicant.” She gave short shrift to Applicant’s arguments regarding the sophistication of the respective parties’ consumers and also the dissimilarity of the marks, stating only that Applicant “reads in limitations that are not present in the registration,” without any analysis.

The Examining Attorney ignored the other arguments about the visual differences in the marks and the different commercial impression given by the marks. She also gave little attention to Applicant's argument that the Examining Attorney improperly dissected the KG KAMA GAMES mark, instead arguing a *non sequiter*, that "Marks may be confusingly similar in appearance where there are similar terms or phrases or similar parts of terms of phrases appearing both applicant's and registrant's mark."

Applicant timely filed this appeal and a Request for Reconsideration on July 20, 2012. The Request for Reconsideration was denied on August 10, 2012. The Examining Attorney stated:

In the present case, applicant's request has not resolved all the outstanding issue[sic], nor does it raise a new issue or provide any new or compelling evidence with regard to the outstanding issue in the final Office action. In addition, applicant's analysis and arguments are not persuasive nor do they shed new light on the issues. Accordingly, the request is denied.

Applicant attempts to argue that the goods/services are different based on a purported difference between video and computer/online games. See attached excerpts showing that there is no such distinction.

The Board resumed the appeal on August 13, 2012.

ARGUMENT

A. The Examining Attorney Failed to Establish that there is a *Likelihood of Confusion Between Applicant's KG KAMA GAMES Mark and Registrant's KAMA Mark*

The Examining Attorney based her refusal to register the KG KAMA GAMES (stylized and/or with design) mark on Section 2(d) – that it is likely to cause confusion with the Registered KAMA mark. The refusal was based on the arguments that the marks were similar, when comparing the "dominant" feature of KG KAMA GAMES and the KAMA marks, and based on

the relatedness of the goods and services offered under those marks. As demonstrated below, both of those conclusions were in error.

While it may be true that the marks have a similarity (the term “Kama”), and that both marks are used for goods and services in the field of games, the differences in the sights, sound, meaning, and commercial impression of the marks (especially when not improperly dissected), included with the fact that the goods and services are not related, the differences in channels of trade of the respective goods and services, and the sophistication of relevant purchasers, it is not likely that consumers will be confused as to source or sponsorship of the various goods or services.

The TMEP states, “The issue is not whether the respective marks themselves, or the goods or services offered under the marks, are likely to be confused but, rather, whether there is a likelihood of confusion as to the source or sponsorship of the goods or services because of the marks used thereon.” Respectfully, because the examining attorney failed to demonstrate a **likelihood** that sophisticated consumers will confuse the source or sponsorship of video game controllers and unrelated and incompatible online games, the refusal was based on clear error and should be reversed.

B. The Examining Attorney Determined that the Goods/Services of the Respective Parties were Related Based on an Incorrect Assumption and Inapposite “Evidence”

The Examining Attorney’s focus during the prosecution history has been on the “relatedness” of Applicant’s entertainment services in connection with online games and Registrant’s goods – i.e. “video game controllers.” However, the Examining Attorney

incorrectly determined that the goods and services were related based on an incorrect assumption and inapposite “evidence.”

The incorrect assumption is apparent in the wording of the initial office action. There, the Examining Attorney stated that “the goods/services are closely related. Applicant offers online video games and related services. The registrant offers controllers for those games.” This is simply untrue.

As demonstrated during the prosecution history, Registrant’s KAMA mark is used in connection with accessories for video game controllers made only for use with the Nintendo Wii home video game console. The controllers are not compatible with any video game that is played in any other format besides on the Nintendo Wii device. Applicant’s games are computer and smartphone-based online games that are incompatible with the Nintendo Wii and cannot possibly be controlled by Wii controllers or their peripherals. Likewise, the KAMA video game controller peripherals are incompatible with games offered by Kamagames. As such, it is completely incorrect to suggest that Registrant “offers controllers for [Applicant’s] games.” In other words, the Examining Attorney incorrectly concluded that a consumer would believe that the KAMA mark is used in connection with the sales of video game controllers is somehow sourced from the same maker as the games offered under the KG KAMA GAMES mark.

That incorrect assumption carried over into the evidence attached by the Examining Attorney that ostensibly showed registrations for marks used in connection with both online video games and video game controllers.

While the overwhelming majority of the registrations attached in fact failed to show this connection¹, one example provided was Reg. No. 4,029,838 for the mark CALL OF DUTY

¹ None of the registrations cited by the Examining Attorney include only video game controllers in Class 9 and online games in Class 41 – those that include both also include a myriad of other goods and

services. Additionally, a number of the registrations **do not** include **both** video game controllers and online games, which further undermines their value as evidence put forward by the Examining Attorney when used to allegedly prove that consumers might encounter video game controllers and online games under the same mark.

Reg. No. 2792029 for the mark DESTINEER in connection with “Interactive entertainment computer software and game software for use with personal computers, video game consoles, cable and satellite accessible video controllers and portable video displays and transmission via global computer network” in Class 9 and “Providing on-line interactive entertainment software and game software for use with personal computers, video game consoles, cable and satellite accessible video controllers and portable video displays via a global computer network” in Class 41. As such, this registration covered *software* in Class 9 and online games in Class 41, not video game *controllers* and online games.

Reg. No. 3493626 for GOLDEN BALLS in connection with over 50 goods in Class 9, including “Computer software and firmware for games of chance,” “slot machines,” “video lottery terminals,” “CD’s, video tapes, laser disks, DVD’s and CD Roms featuring sports, music, fashion, game shows, films, news, entertainment news and theatre,” “sunglasses,” and “tabletop units for playing electronic games other than in conjunction with a television or computer ;” a number of apparel items in Class 25, a number of toys and sports goods in Class 28; and approximately 20 services in Class 41, none of which include an online game. As such, the registration, which covers a wide range of goods and services, does not cover both video game controllers and online games.

Reg. No. 4016202 for REALORE in connection with “Game software; computer game consoles for use with an external display screen or monitor; computer game discs; computer game equipment containing memory devices, namely, discs; computer game programs, cartridges, and cassettes; computer programs for video and computer games; downloadable electronic games via wireless devices; game controllers for computer games; games adapted for use with television receivers; hand-held electronic games adapted for use with television receivers only; hand-held units for playing electronic games for use with external display screen or monitor; interactive multimedia computer game programs; video and computer game programs; video game cartridges and discs; virtual reality game software” in Class 9 and “Education services, namely, providing classes and workshops in the fields of computers and games; providing of training in the fields of computers and video games, entertainment, namely non-downloadable ringtones, pre-recorded music, video and graphics presented to mobile communications devices via a global computer network and wireless networks; organizing community sporting and cultural events” in Class 41 (along with services in Class 38 and 42, none of which involve online games). As such, the registration does not cover both video game controllers and online games.

Reg. No. 3870933 for CYWEE in connection with “Game machines, namely game controllers, external display screen and computer game software associated therewith; electronic video game software and video game machines; interactive video game programs; computer game software; computer and video game discs; video game software; communication software for connecting online games and 3-dimensional communication media” in Class 9 (emphasis added). In other words, the mark is used in connection with Game machines that include controllers, a display screen, and associated software. The registration does not cover video game controllers as a stand-alone good.

Reg. No. 3828376 for DRAGON QUEST was registered under a §44(e) filing basis for both “video game controllers” in Class 9 and “providing on-line computer games” in Class 41, meaning there is no evidence that consumers in the United States ever encountered the same mark used on both a video game controller and an online game.

BLACK OPS, which was used in connection with:

Computer game software; computer game software and related instruction manual sold together as a unit; interactive video game programs; computer game cartridges; computer game discs; downloadable computer game software; video game controllers; **interactive video game comprised of a cartridge or DVD sold as a unit with a video game controller**; fitted plastic films known as skins for covering and protecting electronic apparatus, namely, mobile phones, smart phones, portable music players, and personal digital assistants; mice; mouse pads; headsets for use with computers. (in Class 9) (emphasis added)

Entertainment services, namely, providing an on-line computer game; online entertainment in the nature of computer game tournaments; providing online news and information in the field of computer games; entertainment services, namely, conducting contests online; providing a website for organizing, planning and conducting exhibitions and special events between computer game players and interest groups for entertainment purposes (in Class 41).

As such, with this and similar Registrations included in the office action (*e.g.* BUZZ, MISSION TO PLANET 429, SQUARE ENIX, etc.), the Examining Attorney attempted to demonstrate that consumers might have experienced a company offers an online computer game as well as packaging in which a video game is sold along with a special controller for that video game. In other words, the Examining Attorney put forward evidence to support her false assumption – that consumers might have seen a trademark used in connection with a video game and that same mark used in connection with a controller with which to play that game.

Here, there is no such situation. Instead, the Applicant offers online games that are completely incompatible with the Registrant's video game controllers, including the fact that such controllers are marketed under a different trademark. Respectfully, because the Examining

Reg. Nos. 3279704 and 3286091 for INTELLIVISION, both of which recite the same services in Class 41: "Providing information on-line relating to video and computer games; and publishing of computer and video game instruction booklets, operation manuals, owner's manuals, and catalogs." As such, neither of these registrations covers online games.

Attorney failed to consider the reality of the situation, her analysis was skewed and therefore inapplicable.

The evidence attached by the Examining Attorney to the second/final office action is likewise inapposite. There, she attached documents showing controllers that can be used to play games on an iPhone or iPad (notably, this alleged evidence does not suggest that such controllers can be used in connection with online games), and a product called the “Konami Live! Online Game Controller” which appears to plug into a computer and allow the purchaser to download specific Konami games that are compatible with the Konami controller. This mirrors the above incorrect assumption – that because consumers might have experienced a situation in which a company provides online games and a controller for playing those games, consumers might believe that unrelated and incompatible online games and Wii controllers, sold under different marks, are from the same source. This is simply implausible.²

An analysis without this false assumption demonstrates that Applicant’s online games and Registrant’s video game controllers are not related.

According to the Trademark Manual of Examining Procedure (8th Ed.) §1207.01(a)(i):

[I]f the goods or services in question are not related or marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source, then, even if the marks are identical, confusion is not likely. *See, e.g., Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1244-45, 73 USPQ2d 1350, 1356 (Fed. Cir. 2004) (reversing TTAB’s holding that contemporaneous use of RITZ for cooking and wine selection classes and RITZ for kitchen textiles is likely to cause confusion, because the relatedness of the respective goods and services was not supported by substantial evidence); *Local Trademarks, Inc. v. Handy Boys Inc.*, 16 USPQ2d 1156, 1158 (TTAB 1990) (finding liquid drain opener

² In denying the Request for Reconsideration, the Examining Attorney produced evidence ostensibly to show that there is no difference between online games and video games. It is not clear to Applicant how the proffered evidence shows what the Examining Attorney included it to prove, nor is it clear how the proffered evidence demonstrates that a consumer would believe an online game and a completely incompatible Wii controller would be at all related.

and advertising services in the plumbing field to be such different goods and services that confusion as to their source is unlikely even if they are offered under the same marks); *Quartz Radiation Corp. v. Comm/Scope Co.*, 1 USPQ2d 1668, 1669 (TTAB 1986) (holding QR for coaxial cable and QR for various apparatus used in connection with photocopying, drafting, and blueprint machines not likely to cause confusion because of the differences between the parties' respective goods in terms of their nature and purpose, how they are promoted, and who they are purchased by).

Further, the TMEP specifically states that there is no “per se” rule regarding similarity of goods or services in TMEP § 1207.01(a)(iv):

The facts in each case vary and the weight to be given each relevant *du Pont* factor may be different in light of the varying circumstances; therefore, there can be no rule that certain goods or services are *per se* related, such that there must be a likelihood of confusion from the use of similar marks in relation thereto. *See, e.g., In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009) (regarding alcoholic beverages); *Info. Res. Inc. v. X*Press Info. Servs.*, 6 USPQ2d 1034, 1038 (TTAB 1988) (**regarding computer hardware and software**); *Hi-Country Foods Corp. v. Hi Country Beef Jerky*, 4 USPQ2d 1169, 1171–72 (TTAB 1987) (regarding food products); *In re Quadram Corp.*, 228 USPQ 863, 865 (TTAB 1985) (**regarding computer hardware and software**); *In re British Bulldog, Ltd.*, 224 USPQ 854, 855-56 (TTAB 1984) (regarding clothing); *see also M2 Software, Inc. v. M2 Commens, Inc.*, 450 F.3d 1378, 1383, 78 USPQ2d 1944, 1947–48 (Fed. Cir. 2006) (noting that relatedness between software-related goods may not be presumed merely because the goods are delivered in the same media format and that, instead, a subject-matter-based mode of analysis is appropriate).

(emphasis added).

Indeed, as the Board has held, “because the products of the parties may be used in connection with computer or video games does not automatically mean that they are ‘related.’” *Monster Cable Prods., Inc. v. Tecmo, Ltd.*, Oppo. Nos. 91154125, 91154136, and 91158681; Canc. No. 92041581 (T.T.A.B. 2007) [non-precedential]³ (citing *Electronic Data Systems Corp. v. EDSA Micro Corp.*, 23 U.S.P.Q. 2d 1460, 1463 (T.T.A.B. 1992)). In *Monster Cable*, the Board found that accessories for use with video game consoles like the PlayStation 2, and video games that could be played on the PlayStation 2 were not related. Notably, the Board credited

testimony that “neither Monsters nor their competitors sell video games, that Monsters are unaware of any software manufacturers that sell products in the gaming aftermarket, and that Monsters do not consider Tecmo to be a competitor.”

The same is true here but even more so due to the complete lack of similarity between the devices used to play the Applicant’s games and the devices required to use the Registrant’s controllers. In *Monster Cable*, the accessories were for use with video game consoles, and video games that could be played on the *very same* video game console were held to be *not related*. Registrant’s controller (accessory) is for use on a video game console, yet the Applicant’s games are all played online and can never be played on that video game console. The Registrant does not sell video games, let alone provide online games. Further, the Examining Attorney has not put forward any evidence showing that online game developers like the Applicant, sell products in the console gaming aftermarket (like Registrant’s KAMA Wii controller). In fact, the Applicant does not compete with Registrant. As such, as in *Monster Cable*, entertainment services in the nature of online games and video game controllers are not related.

Because the Examining Attorney erred in finding the goods and services related, the refusal should be overturned and the mark should be allowed to register.

C. The Examining Attorney Improperly Dissected the KG KAMA GAMES Mark

In her initial refusal, the Examining Attorney claimed that she was considering the KG KAMA GAMES mark in its entirety. However, she appeared to give short shrift to this requirement (*see* TMEP §1207.01(b)) and found that “the dominant portion of applicant’s proposed mark is identical to the registered mark.” She did this without considering what effect the “kg” or “games” portions of the mark might have on a typical consumer, instead only

³ Available at <http://ttabvue.uspto.gov/ttabvue/v?pno=91158681&pty=OPP&eno=25>

comparing the middle part of the Applicant's total mark - "kama" to the Registrant's entire mark - "kama."

Missing from this analysis is reliance on the axiom that "The basic principle in determining confusion between marks is that marks must be compared in their entireties and must be considered in connection with the particular goods or services for which they are used. It follows from that principle that likelihood of confusion cannot be predicated on dissection of a mark, that is, on only part of a mark." *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 224 U.S.P.Q. 749, 750-51 (Fed. Cir. 1985) (footnotes omitted) (citations omitted); TMEP 1207.01(b).

While a proper analysis might have put more weight on the fact that both marks contain "kama," it was clear error for the Examining Attorney to stop the analysis there. Consumers will likely view the KG KAMA GAMES mark in connection with online games differently than they view the KAMA mark in connection with video game controllers. The Examining Attorney did not put forth any evidence showing that consumers would see a mark that includes the term "games" and believe that it is a company that makes Wii controller peripherals. As such, the "KG" and "GAMES" portions of Applicant's mark cannot simply be ignored.

D. The Examining Attorney Failed to Consider the Differences in Sight, Sound, Meaning, and Commercial Impression of the Two Marks

In its response to the Office action and its Request for Reconsideration, Applicant put forward evidence showing that the KG KAMA GAMES and KAMA marks are different in terms of sight, sound, meaning, and commercial impression.

In her second/final office action, the Examining Attorney did not address any of this evidence, except to state that she had not improperly dissected Applicant's mark.

The simple truth remains that KG KAMA GAMES (stylized and/or with design) and KAMA are different in terms of sight and sound. The Examining Attorney, in virtually ignoring “kg,” “games,” and stylization does not consider or analyze any of these important differences.

The Examining Attorney also ignores the evidence Applicant introduced that the marks have a different meaning and offer a different commercial impression. As the TMEP instructs:

The meaning or connotation of a mark must be determined in relation to the named goods or services. Even marks that are identical in sound and/or appearance may create sufficiently different commercial impressions when applied to the respective parties’ goods or services so that there is no likelihood of confusion. *See, e.g., In re Sears, Roebuck & Co.*, 2 USPQ2d 1312, 1314 (TTAB 1987) (holding CROSS-OVER for bras and CROSSOVER for ladies’ sportswear, not likely to cause confusion, noting that the term "CROSS-OVER" was suggestive of the construction of applicant’s bras, whereas “CROSSOVER,” as applied to registrant’s goods, was “likely to be perceived by purchasers either as an entirely arbitrary designation, or as being suggestive of sportswear which “crosses over” the line between informal and more formal wear . . . or the line between two seasons”). . .

TMEP §1207.01(b)(v).

Similarly, the meaning of the two marks is different. Consumers will likely see the KG KAMA GAMES mark as suggestive of Applicant’s services in providing entertainment services related to online games. Consumers meanwhile will view KAMA as arbitrary when used in connection with video game controllers. The Examining Attorney did not address these issues, which is clear error.

E. The Examining Attorney Improperly Ignored the Sophistication of Purchasers of the Respective Goods and Services

Applicant put forth evidence and argument showing that purchasers of the respective parties’ goods and services are sophisticated because of their specific interest and expertise in video games systems, accessories and software, as well as online games.

The Examining Attorney did not rebut this evidence. Instead, the Examining Attorney merely stated, “The fact that purchasers may be 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.” While this is true, it completely fails to address the issue. In fact, the Examining Attorney simply decided not to address whether purchasers are sophisticated, and the impact such sophistication might have on their view of the respective marks, or on whether it reduced the likelihood of confusion.

As the TMEP makes clear, “circumstances suggesting care in purchasing may tend to minimize the likelihood of confusion. *See, e.g., In re N.A.D., Inc.*, 754 F.2d 996, 999-1000, 224 USPQ 969, 971 (Fed. Cir. 1985) (concluding that, because only sophisticated purchasers exercising great care would purchase the relevant goods, there would be no likelihood of confusion merely because of the similarity between the marks NARCO and NARKOMED); *In re Homeland Vinyl Prods., Inc.*, 81 USPQ2d 1378, 1380, 1383 (TTAB 2006).” TMEP §1207.01(d)(vii).

The TMEP §1207.01 states, “The following factors may also be relevant in an ex parte likelihood-of-confusion determination and **must be considered** if there is pertinent evidence in the record: The conditions under which and buyers to whom sales are made, i.e. “impulse” vs. careful, sophisticated purchasing...” (emphasis added).

The Examining Attorney’s failure to consider this factor is clear error and requires that the final refusal be overturned.

F. The Examining Attorney Improperly Ignored the Dissimilarity of Established, Likely-to-Continue Trade Channels

In her second/final refusal, the Examining Attorney stated, “In this case, neither the application nor the registration contains any limitations as to the nature, type, **channels of trade or classes of purchasers**. Therefore, the limitations that applicant reads in are improper.” (emphasis added). This is also clear error.

The TMEP §1207.01 states, “The following factors may also be relevant in an ex parte likelihood-of-confusion determination and **must be considered** if there is pertinent evidence in the record: The similarity or dissimilarity of established, likely-to-continue trade channels ...” (emphasis added). The Examining Attorney’s failure to consider this factor is also clear error and also requires the final refusal be overturned.

CONCLUSION

For these reasons, the conclusion that Applicant’s KG KAMA GAMES mark in connection with entertainment services related to online games is likely to cause confusion with the KAMA mark for video game controllers is incorrect. Applicant respectfully requests the Board consider all of the arguments made below and overturn the refusal to register the KG KAMA GAMES mark.

Respectfully submitted,

Kamagames Ltd.

Date: October 12, 2012

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CERTIFICATE OF ELECTRONIC TRANSMISSION

DATE OF DEPOSIT: October 12, 2012

I hereby certify that this correspondence is being transmitted to the United States Patent and Trademark Office Trademark Trial and Appeal Board using the Electronic System for Trademark Trials and Appeals (ESTTA) on the date indicated above.

/s/ Jenna F. Karadbil _____

Jenna F. Karadbil