

<p>This Opinion is not a Precedent of the TTAB</p>
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Kopla Games Ltd.

Serial No. 87004917

Aric S. Jacover of Jacover Law LLC,
for Kopla Games Ltd.

Howard B. Levine, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.

Before Zervas, Wolfson and Greenbaum,
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Kopla Games Ltd. (“Applicant”) seeks registration on the Principal Register of the
standard character mark NONSTOP KNIGHT for

“Computer game software; Downloadable computer game
software via a global computer network and wireless
devices; Downloadable electronic game software for use on
mobile phones, tablets, wireless devices, and mobile
devices; Interactive multimedia computer game programs;
Video game software” in International Class 9; and

“Entertainment services, namely, providing online video games; Providing online non-downloadable game software; Providing a website featuring non-downloadable game software; Provision of information relating to electronic computer games provided via the Internet” in International Class 41.¹

The Examining Attorney refused registration of Applicant’s mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on Registration No. 4422755 for the standard character mark NONSTOP GAMES on the Principal Register for

“Computer game software; video game programs; computer software platforms for online gaming and social networking; interactive video game programs; electronic game programs and computer software platforms for online gaming and social networking which may be accessed via the Internet, computers and wireless devices; computer software for providing electronic media or information in the fields of virtual communities and electronic online gaming” in International Class 9; and

“Online computer and electronic games, enhancements within online computer and electronic games, and game applications within online computer and electronic games; information relating to computer games provided online; virtual environments in which users can interact through social games for recreational, leisure or entertainment purposes” in International Class 41.²

Registrant disclaimed the word GAMES.

After the Examining Attorney made the refusal final, Applicant appealed to this Board. Both Applicant and the Examining Attorney filed briefs. We affirm the refusal to register.

¹ Application Serial No. 87004917, filed on April 18, 2016, pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

² Registration No. 4422755, registered October 22, 2013.

I. Evidentiary Issue

Applicant submitted new evidence with its appeal brief (located at Exh. C to Applicant's brief), to which the Examining Attorney has objected. Because the record in an application should be complete prior to the filing of an appeal, Trademark Rule 2.142(d), 37 C.F.R. §2.142(d), the Examining Attorney's objection is sustained and we give no further consideration to this new evidence.

II. Likelihood of Confusion

Our determination under Section 2(d) of the Trademark Act is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on a likelihood of confusion. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); *see also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that “[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *see also In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014). “Not all of the [*du Pont*] factors are relevant to every case, and only factors of significance to the particular mark need be considered.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1719 (Fed. Cir. 2012) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)).

A. The Goods and Services, Trade Channels and Purchasers

We turn first to the similarity between the respective goods and services, trade channels and purchasers, and consider the goods and services as they are identified in the application and the cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014) (goods as identified in involved application and cited registration compared); *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). The goods and services, although worded slightly differently, are essentially identical. For example, Applicant's identification of goods includes "video game software" and registrant's identification of goods includes "computer game software" and "video game programs," which are essentially the same goods. There is little difference, too, between Applicant's "Entertainment services, namely, providing online video games; Providing online non-downloadable game software; Providing a website featuring non-downloadable game software; Provision of information relating to electronic computer games provided via the Internet" and registrant's online computer and electronic games, and information relating to computer games provided online. Applicant has not disputed the Examining Attorney's contention that the respective goods and services are essentially identical.

When the respective identifications of goods and services are essentially identical and without restrictions as to nature, type, channels of trade, or classes of purchasers - as is the case here - the identified goods and 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, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002) (citing *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198 (Fed. Cir. 1983) (“absent restrictions in the application and registration, goods and services are presumed to travel in the same channels of trade to the same class of purchasers.”). Thus, we presume the trade channels and classes of purchasers are the same for both Applicant’s and registrant’s goods and services.

B. The Marks

We now compare the marks for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1692. 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 that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1721. Under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must rely upon their imperfect recollections. *Dassler KG v. Roller Derby Skate Corp.*, 206 USPQ 255, 259 (TTAB 1980). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Assoc. of the United States Army*, 85 USPQ2d 1264 (TTAB 2007); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, the analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. Vv. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). On the other hand, different features may be analyzed to determine whether the marks are similar. *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1430 (TTAB 2013) (citing *Price Candy Co. v. Gold Medal Candy Corp.*, 220 F.2d 759, 105 USPQ 266, 268 (CCPA 1955)). In fact, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re Nat'l Data Corp.*, 224 USPQ at 751.

Finally, where, as in the present case, the marks would appear on virtually identical goods and services, the degree of similarity between the marks that is necessary to support a finding of likely confusion declines. *Bridgestone Ams. Tire Operations LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

In this case, both two-word marks begin with the term NONSTOP and hence have similarities in appearance and sound. Consumers are generally more inclined to focus on the first word, prefix, or syllable in any trademark or service mark, which in this case, are identical. *See Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”); *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1692 (“VEUVE ... remains a ‘prominent feature’ as the first word in the mark and the first word to appear on the label”). Also, in the case of registrant’s mark, the term NONSTOP is followed by the generic term GAMES; consumers are unlikely to accord source-identifying significance to a generic term (which registrant has disclaimed). *See In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (affirming Board’s finding that “DELTA,” not the disclaimed generic term “CAFE,” is the dominant portion of the mark THE DELTA CAFE).

Applicant points out that its mark is “alliterative”; and “[t]his creates a memorable impression and encourages consumers to perceive Applicant’s mark as a whole rather than focus just on the shared word NONSTOP.”³ While the initial consonant sounds of the two terms are the same, the initial letters of the two words are not the same. The mere fact that Applicant’s mark is alliterative in sound does not suffice to distinguish the marks.

³ Applicant’s brief at 7, 4 TTABVue 8.

With regard to meaning, “nonstop” is defined as “happening, done, or held without a stop or pause or without offering relief or respite” in the Random House Dictionary (Random House, Inc. 2018).⁴ Applicant argues that “NONSTOP in the cited mark would be perceived as a modifier of the plural word GAMES”; and the “combination of these words strongly suggests that the mark is being used as a company name that perhaps is working ‘nonstop’ to create and develop new games, as opposed to the name of a specific game featuring a ‘nonstop’ moving knight character.”⁵ As for its mark, Applicant argues “the word NONSTOP modifies the word KNIGHT such that in the context of Applicant’s goods and services it would be understood as the title of a computer game featuring a knight as the main player-controlled character. Thus, the meaning of the word NONSTOP in Applicant’s mark is suggestive of the continuous movement of the player’s knight character throughout the game.”⁶ NONSTOP in both marks connotes continuousness. The second terms in each mark do not alter the meaning of the identical first term. Due to the shared suggestion of continuousness in both marks when they are considered as a whole, they are similar in connotation. In addition, consumers familiar with registrant’s NONSTOP GAMES games, upon encountering Applicant’s games, will mistakenly believe that Applicant’s games are another of registrant’s games, featuring a KNIGHT character.

⁴ <http://www.dictionary.com/browse/nonstop?s=t>. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

⁵ Applicant’s brief at 9, 4 TTABVUE 10.

⁶ Applicant’s brief at 8, 4 TTABVUE 9.

Next, we find the commercial impressions of the marks considered as a whole to be similar in view of the similarity in connotation, and because the two-word marks begin with the same term.

In view of the foregoing, we find that the *du Pont* factor regarding the similarity of the marks favors a finding of likelihood of confusion.⁷

C. Third Party Uses and Registrations

Applicant argues that “NONSTOP is widely used as a suggestive term in connection with numerous other mobile computer games”; that the “third-party uses demonstrate that the term NONSTOP is not particularly distinctive and therefore should not be afforded much weight when comparing the marks at issue”; and that the common elements are weak.⁸ This argument pertains to the sixth *du Pont* factor, the number and nature of similar marks in use on similar goods.

Evidence of third-party use is relevant to show that a term “may have a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that [term] is relatively weak, and can show that customers have been educated to distinguish between different marks on the basis of minute distinctions.” *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1036 (TTAB 2016) (quotations omitted). The Court of Appeals for the Federal Circuit,

⁷ Applicant has noted “[n]umerous cases comparing two-word marks in the context of Section 2(d) have found that marks with different second words are sufficient to avoid a likelihood of confusion.” Applicant’s brief at 10-12, 4 TTABVUE 11-13. Such cases were decided under facts dissimilar to those facts before us in this appeal.

⁸ Applicant’s brief at 10, 4 TTABVUE 11.

has instructed that evidence of extensive use and registration of a term by others as a mark can be “powerful on its face,’ even where the specific extent and impact of the usage has not been established.” *Jack Wolfskin Ausrüstung Fur Draussen GmbH v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015), *cert. denied*, 136 S. Ct. 982 (Jan. 25, 2016) (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015)).

Applicant’s evidence demonstrates over twenty titles for “iPhone Apps” located on a screenshot from the App Store, including the following:⁹

IDLE MONSTER; NON-STOP	NON-STOP HERO
SUPER CAR NON-STOP RACING	NON STOP EXTREME RACING
MOJJE NON STOP	NON STOP!
NONSTOP FISH	NONSTOP RUNNER 3D
NONSTOP NINJA	KNIGHT INVADERS – NON STOP
NON STOP CAR RACING	NONSTOP BATTLE
NONSTOP SQUARE	NONSTOP MILLIONAIRE

The owners of the different games are not identified, and we cannot discount the possibility that one or a handful of entities are the source of such games. Applicant did submit description and information pages for six of such games which identify different “Seller[s].” There is no information on these pages, or in the record, about the significance of the “Seller” designation and particularly whether the “Seller” is more than a retailer and actually the source of the games. For five of the six games featured, the “Seller” and the identified copyright owner have different names.

Because the pages from the App Store do not indicate the source(s) of the games, and in particular whether the source(s) of the games is/are the same entity as the

⁹ Feb. 2, 2017 Resp. TSDR 14.

“Seller,” Applicant’s evidence has limited probative value and does not support Applicant’s contention that NONSTOP is a weak source indicator for the goods and services identified in the registration. While we find NONSTOP in registrant’s mark to be suggestive of a feature of registrant’s goods and services, on this record, it is not so weak as to permit the registration of a similar mark for essentially the same goods and services.

D. Conclusion

Applicant’s and registrant’s goods and services are essentially identical and the trade channels and classes of purchasers for such goods and services are the same. The marks are similar in sound, meaning, appearance and commercial impression and Applicant has not established any significant weakness in the cited mark. Under these circumstances, we find Applicant’s mark for its goods and services is likely to be confused with registrant’s mark for its goods and services.

Decision: The refusal to register under Section 2(d) is affirmed for both the goods in International Class 9 and the services in International Class 41.