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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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Applied for Mark	KOJIMA PRODUCTIONS
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

Applicant: Kojima Productions Co., Ltd.
Mark:



"KOJIMA PRODUCTIONS" (Stylized) and Helmet Design

Serial No.: 79210110
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APPLICANT KOJIMA PRODUCTIONS CO., LTD.'s APPEAL BRIEF

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I. INTRODUCTION

This appeal is brought forth by Kojima Productions Co., Ltd. (hereinafter "Applicant"), owner of U.S. Trademark Application No. 79/210,110 for the mark "KOJIMA PRODUCTIONS" (Stylized) and Helmet Design:



This appeal is in response to the first denial of Applicant's Request for Reconsideration After Final Action, issued on February 26, 2020, and after Applicant's Request to Suspend and Remand for Additional Evidence filed on March 16, 2020, in further response to the second denial of Applicant's Request for Reconsideration After Final Action, issued on April 21, 2020. Applicant, by Counsel, hereby respectfully appeals the Examining Attorney's refusal to register Applicant's "KOJIMA PRODUCTIONS" (Stylized) and Helmet Design mark.

The Trademark Examining Attorney's denial and refusal to register was based on the grounds that a likelihood of confusion exists between Applicant's "KOJIMA PRODUCTIONS" (Stylized) and Helmet Design mark and Konami Corporation's (hereinafter "Konami") "KOJIMA PRODUCTIONS" (Stylized) and Fox Design mark (shown below), identified as U.S. Registration No. 3,531,402, for identical or similar goods and services:



The relevant goods of Konami's cited registration center around video games and are listed in the February 4, 2020 Request for Reconsideration After Final Office Action (hereinafter the "RFR"), Appendix 1 Exhibit 1, TSDR p. 2-4. The original goods of Applicant's application are listed in RFR Appendix 1 Exhibit 6, TSDR p. 13-19, but in the instant appeal, Applicant appeals only the listed goods: "computer game software; computer games programmes; computer games cartridge" and "computer game programs for home video game machines" under International Class 009.¹ Applicant is not appealing the refusal of the remaining goods under International Classes 009, 028, 041, and 042.

As demonstrated below, no likelihood of confusion exists between Applicant's "KOJIMA PRODUCTIONS" (Stylized) and Helmet Design mark and Konami's "KOJIMA PRODUCTIONS" (Stylized) and Fox Design mark because of at least the following established factors: the fame of Hideo Kojima, the namesake of both production companies whose surname appears in both marks; and that the purchasers of video games are sophisticated purchasers who understand the difference between Mr. Kojima's old and new production companies and are able to readily distinguish the two marks based on the dominating design portions of each mark. This consumer sophistication is supported by the evidence provided in the record and submitted for consideration herewith.

II. SUMMARY OF EVIDENCE OFFERED BY APPLICANT

A. THIRD OFFICE ACTION RESPONSE DATED APRIL 15, 2019

- Co-pending U.S. Trademark Application No. 79/204,273 for Helmet Design, now U.S.

Registration No. 5,718,440

- Internet Evidence:
 - MTV Lifetime Achievement Game Award:
<https://www.youtube.com/watch?v=LoCoE2rjtFA>

¹ Applicant had emailed the Examining Attorney on March 23, 2020 when the application was remanded to request amendment of the goods to only the video game goods to reduce the issues for appeal, but the Examining Attorney did not agree.

- GDC Lifetime Achievement Award: <https://www.youtube.com/watch?v=1IwS6gMp3A8>
- D.I.C.E. Hall of Fame Award: <https://www.youtube.com/watch?v=qI9tQff15Bs>
- Industry Icon Award: <https://www.youtube.com/watch?v=ItxghCQEFBI>
- Forbes article: "Hideo Kojima's First Game As 'Kojima Productions' Will Be A PS4 Exclusive [Updated]": <https://www.forbes.com/sites/erikkain/2015/12/16/hideo-kojimas-first-game-as-kojima-productions-will-be-a-ps4-exclusive/#271cd0a9bf5f>
- BBC article: "Metal Gear Solid developer Hideo Kojima launches own studio": <http://www.bbc.co.uk/newsbeat/article/35111926/metal-gear-solid-developer-hideo-kojima-launches-own-studio>
- Sony Interactive Entertainment December 16, 2015 Announcement of Partnership with Kojima Productions Co., Ltd.: <https://www.youtube.com/watch?v=annuTcmB1rw>
- American Game Event (E3) June 13, 2016 trailer of Kojima Productions' video game "DEATH STRANDING": <https://www.youtube.com/watch?v=SI0Sb46g-BE&t=36s>
- The Game Awards December 1, 2016 trailer of Kojima Productions' video game "DEATH STRANDING": <https://www.youtube.com/watch?v=u5ZgaD7Y-jM>
- The Game Awards December 7, 2017 trailer of Kojima Productions' video game "DEATH STRANDING": <https://www.youtube.com/watch?v=PuUQCpCpsk4>
- American Game Event (E3) June 11, 2018 trailer of Kojima Productions' video game "DEATH STRANDING": https://www.youtube.com/watch?v=rP3UngLFou4&t=2s&has_verified=1
- PDF Evidence:
 - Wikipedia Page on Hideo Kojima
 - Wikipedia Page on Kojima Productions
 - SegmentNext article: "Hideo Kojima Has All the Freedom He Needs for Death Stranding Development" dated January 26, 2017

- BBC article: "Metal Gear Solid developer Hideo Kojima launches own studio"
 - Forbes article: "Hideo Kojima's First Game As 'Kojima Productions' Will Be A PS4 Exclusive [Updated]"
- B. REQUEST FOR RECONSIDERATION DATED FEBRUARY 4, 2020
- **Appendix 1** is the executed Declaration of Mr. Shinji Hirano.
 - **Appendix 1 Exhibit 1** is a copy of KOJIMA PRODUCTIONS (U.S. Reg. No. 3531402) owned by Konami Digital Entertainment Co., Ltd.
 - **Appendix 1 Exhibit 2** is an article from engadget.com discussing Mr. Kojima receiving the lifetime achievement award from MTV.
 - **Appendix 1 Exhibit 3A-3B** is a screenshot (3A) and video (3B) of the 2009 Game Developments Conference Awards.
 - **Appendix 1 Exhibit 4A-4B** is a screenshot (4A) and video (4B) of Sony's 2015 announcement of partnership with Kojima Productions Co., Ltd.
 - **Appendix 1 Exhibit 5** is a spreadsheet of exemplified trailers, videos, and blogs marketing and discussing Applicant's "DEATH STRANDING" video game.
 - **Appendix 1 Exhibit 6** is a copy of the "KOJIMA PRODUCTIONS" and Helmet Design, U.S. Serial No. 79210110, the applied-for mark.
 - **Appendix 1 Exhibit 7A-7B** is a screenshot (7A) and video (7B) of the 2016 Design, Innovate, Communicate, Entertain Summit "Hall of Fame Award."
 - **Appendix 1 Exhibit 8A-8B** is a screenshot (8A) and video (8B) of the 2016 Game Awards.
 - **Appendix 1 Exhibit 9** is a screenshot of Applicant's You Tube Channel.
 - **Appendix 1 Exhibit 10A-10B** is a screenshot (10A) and video (10B) of BBC's "inside Kojima Productions" released in 2019.

- **Appendix 1 Exhibit 11A-11B** is a screenshot (11A) and video (11B) of an episode of "CONAN" where Conan O'Brien visits Mr. Kojima at his studio.
- **Appendix 1 Exhibit 12** is a screenshot of Mr. Kojima's twitter post about meeting with Conan O'Brien.
- **Appendix 1 Exhibit 13A-13B** is a screenshot and video of an advertisement for the "DEATH STRANDING" video game created by the producers of the television show "Rick and Morty."
- **Appendix 1 Exhibit 14** is an article from time.com reviewing the "DEATH STRANDING" video game.
- **Appendix 1 Exhibit 15** is a blog post about the 2019 Game of the Year winners published on playstation.com.
- **Appendix 2** is the executed Declaration of Mr. Geoff Keighley.
 - **Appendix 2 Exhibit 1** is a copy of the cited registration.
 - **Appendix 2 Exhibit 2** is a post on metalgear.fandom.com describing the "FOX Unit" from the video game series "METAL GEAR SOLID."
 - **Appendix 2 Exhibit 3** is specimens submitted by Konami Digital Entertainment Co., Ltd. in 2008 for the cited registration.
 - **Appendix 2 Exhibit 4** is the specimen submitted by Konami Digital Entertainment Co., Ltd. in 2018 for the cited registration.
 - **Appendix 2 Exhibit 5** is a copy of "KOJIMA PRODUCTIONS" and Helmet Design, U.S. Serial No. 79210110, the applied-for mark.
 - **Appendix 2 Exhibit 6A-6B** is a screenshot (6A) and video (6B) of Sony's 2015 announcement of partnership with Kojima Productions Co., Ltd.
 - **Appendix 2 Exhibit 7A-7B** is a screenshot (7A) and video (7B) of the 2016 world premiere trailer of Applicant's "DEATH STRANDING" video game.

- **Appendix 2 Exhibit 8A-8B** is a screenshot (8A) and video (8B) of the 2016 "DEATH STRANDING" video game trailer in The Game Awards.
- **Appendix 2 Exhibit 9A-9B** is a screenshot (9A) and video (9B) of the 2017 "DEATH STRANDING" video game trailer in The Game Awards.
- **Appendix 2 Exhibit 10A-10B** is a screenshot (10A) and video (10B) of the 2018 "DEATH STRANDING" video game trailer in The Game Awards.
- **Appendix 2 Exhibit 11** is an article from cnet.com about the social media world record broken by Mr. Kojima.
- **Appendix 2 Exhibit 12A-12B** is a screenshot (12A) and video (12B) of fan reactions to Konami Digital Entertainment Co., Ltd. banning Mr. Kojima from receiving an award during The Game Awards in 2015.
- **Appendix 2 Exhibit 13A-13B** is a screenshot (13A) and video (13B) of a fan made video explaining the relationship between Mr. Kojima and Konami Digital Entertainment Co., Ltd. and what lead to Applicant being formed.
- **Appendix 2 Exhibit 14** is a picture of the cover art for the "DEATH STRANDING" video game recently released by Kojima Productions Co., Ltd.
- **Appendix 2 Exhibit 15** is a picture of the cover art for the "METAL GEAR SOLID V: GROUND ZEROES" video game.

C. REQUEST TO SUSPEND AND REMAND FOR ADDITIONAL EVIDENCE DATED MARCH 16, 2020

- **Exhibit 16** is an article from the New York Times Magazine titled "Hideo Kojima's Strange, Unforgettable Video-Game Worlds" and posted on March 3, 2020.
- **Exhibit 17** is an article from the British Academy Film Awards website titled "Hideo Kojima to receive BAFTA Fellowship" and posted on February 27, 2020.

III. STATEMENT OF THE ISSUES

Is Kojima Production Co., Ltd.'s applied-for mark "KOJIMA PRODUCTIONS" (Stylized) and Helmet Design for various goods and services in International Class 009 confusingly similar to Konami's

registered "KOJIMA PRODUCTIONS" (Stylized) and Fox Design mark for the goods "computer game software; computer games programmes; computer games cartridge; computer game programs for home video game machines", in violation of the Trademark Act Section 2(d)?

IV. FACTUAL BACKGROUND

Mr. Hideo Kojima was an employee of Konami when it sought registration of the cited U.S. Registration No. 3,531,402 for the mark "KOJIMA PRODUCTIONS" (Stylized) and Fox Design. Mr. Kojima's fame as a preeminent video game producer and developer grew largely as a result of his direction, beginning in 1987, of the creation, production, and development of the "METAL GEAR" video game series, to the point where the majority of the "METAL GEAR" video games produced by Mr. Kojima for Konami included the phrase "A Hideo Kojima Game" printed on the packaging of the games themselves. *See* the Declarations of Mr. Shinji Hirano and Mr. Geoff Keighley, Appendices 1 and 2, respectively. *See also*, the Wikipedia Page on Hideo Kojima. The word portion "KOJIMA PRODUCTIONS" of the cited registration was named after Mr. Hideo Kojima's surname, a fact that is omitted on the cited registration issued in 2008. The Fox Design portion of the cited registration was inspired by the "FOX unit," which was first introduced in 2004 in the game "METAL GEAR SOLID 3: SNAKE EATER" written and directed by Mr. Kojima. *See* RFR Appendix 2, Exhibit 2 TSDR p. 61-68.

Mr. Kojima left Konami in 2015. Speculation surrounding his departure from Konami was widely publicized by fans and media stations alike. This speculation was all but confirmed on December 3, 2015 during The Game Awards, where voice actor Kiefer Sutherland accepted the award of "Best Action/Adventure" game on behalf of Mr. Kojima for the game "Metal Gear Solid V: The Phantom Pain." It was announced by Mr. Keighley, the host of The Game Awards, that attorneys for Konami informed Mr. Kojima he would not be allowed to personally accept the award. Evidence of the public's speculation and reactions to these events are presented as RFR Appendix 2, Exhibits 12-13, TSDR p. 96-99.

After his departure, Mr. Kojima then re-formed his production studio - Kojima Productions Co., Ltd. - as an independent company, the Applicant of the mark at issue. The re-formation of this studio was

announced in conjunction with the CEO of Sony Interactive Entertainment on December 16, 2015. See Appendix 1, Exhibit 4, and the Wikipedia Page on Hideo Kojima. Fans of Sony and Mr. Kojima alike rejoiced, and anticipation of Mr. Kojima's first release under this new independent production company quickly grew.

Publicity of Mr. Kojima's newest project increased even further upon the release of the first trailer for the video game "DEATH STRANDING" on June 13, 2016, submitted as Exhibit 7 to the Keighley Declaration. See RFR Appendix 2, Exhibit 7, TSDR p. 83-84. Several other trailers followed in the upcoming months, and major television and social media networks held interviews, gave behind-the-scenes content, and provided further advertising for the eventual release of "DEATH STRANDING." See RFR Appendix 1, Exhibits 5, and 9-14, and Appendix 2, Exhibits 7-10, TSDR p. 11-12, 24-37, and 83-90.

The release of "DEATH STRANDING" was met with overwhelming approval, having received more than sixty (60) Game of the Year Awards, as publicized on Sony's website. See Appendix 1, Exhibit 15. Reviews by major companies (such as TIME USA LLC; RFR Appendix 1, Exhibit 14, TSDR p. 34-37) were largely positive, and covered Mr. Kojima's backstory regarding his split from Konami and the eventual release of "DEATH STRANDING." As a result, no video game consumer that purchased and played "DEATH STRANDING" had done so without prior knowledge of Mr. Kojima's parting from Konami, his status as the most revered video game producer and developer of the past few decades, and his continued efforts to produce exceptional games through his own production company, Kojima Productions Co., Ltd.

The packaging of the newly-released "DEATH STRANDING" video game is clearly marked as holding an Entertainment Software Rating Board ("ESRB") rating of "M," indicating that the game is meant for mature audiences only (i.e., persons age 17 years or older). See RFR Appendix 2, Exhibit 14, TSDR p. 100-101. Likewise, Konami's only video games sold under the cited registration are equally marked with an ESRB rating of "M" for mature, as evidenced by the specimens submitted by Konami in 2008 and 2018. See RFR Appendix 2, Exhibits 3-4, TSDR p. 68-73 respectively. Purchasers are generally

required to show retailers their photo identification as proof that they are at least 17 years of age prior to being able to purchase the aforementioned products, or any other products with an ESRB rating of "M."

More recently, Mr. Kojima was the subject of a March 3, 2020 article in the New York Times Magazine ("the NYT Article") (March 16, 2020 Request to Suspend and Remand for Additional Evidence (hereinafter the "RAE", Exhibit 16) that provides independent corroboration that potential purchasers would not be confused by the source of video games labeled as "Kojima Productions" emanating from Konami when Hideo Kojima was an employee thereof, and those labeled as "Kojima Productions" emanating from the later-formed Applicant. The NYT Article notes the unusual knowledge and enthusiasm that video game consumers have for Mr. Kojima, and their awareness and knowledge that video games labeled as "Kojima Productions" emanate from two different sources. The article states in relevant part:

- "Kojima is one of a very few video-game developers who can generate enormous anticipation for a game based on his name alone" (p.2)
- "Now, as everyone in the audience knew, Kojima was on his own after a spectacular breakup with Konami" (p.2)
- "He had started an independent studio" (p.2)

These observations and conclusions were made by an independent writer who has observed the phenomenon of Mr. Kojima throughout his career, and describes familiarity with average video game consumers and their knowledge and ability to understand the two different sources of "Kojima Productions"-labeled video games.

On February 27, 2020, the British Academy of Film and Television Arts ("BAFTA") announced its Fellowship award to Hideo Kojima (RAE Exhibit 17), which is the highest accolade bestowed upon an individual in recognition of an outstanding and exceptional contribution to film, games or television. The BAFTA Announcement makes reference to the following:

- "Hideo Kojima is a revered Japanese video game designer, writer, director and producer with over 20 years of experience within the industry. Widely considered as the father figure of the stealth genre, he is also credited with innovating both story-telling and cinematic presentation in video games at large."

- "In 1987, during his tenure at Konami, Kojima designed and wrote Metal Gear, a game that laid the foundations for stealth games and the Metal Gear series."
- "In 2015, Kojima Productions became an independent studio"

These statements of a prestigious body in film, video games and television illustrate the widespread knowledge held by the video game community with regards to Mr. Kojima, and describe the community's familiarity with his transition from Konami to an independent production studio.

VII. ARGUMENT

Salient *du Pont* factors weigh in Applicant's favor to support a finding of no likelihood of confusion under Section 2(d) between Applicant's "KOJIMA PRODUCTIONS" (Stylized) and Helmet Design mark and Konami's cited registration for the "KOJIMA PRODUCTIONS" (Stylized) and Fox Design mark.

A. THE SOPHISTICATION OF VIDEO GAME CONSUMERS WEIGHS HEAVILY AGAINST A FINDING OF SOURCE CONFUSION

Extraordinary consumer sophistication is a major factor in Applicant's favor that supports a finding of no likelihood of confusion. The *du Pont* case identified this factor to be considered as the conditions under which and buyers to whom sales are made, i.e. "impulse" vs. careful, sophisticated purchasing.

The reasonably prudent video game consumer, in this case a "mature" video game purchaser, is well aware that the originating source of the goods identified by the cited "KOJIMA PRODUCTIONS" (Stylized) and Fox Design U.S. Registration No. 3,531,402 is actually Hideo Kojima, the world-famous video game developer, and that he has re-established his company Kojima Productions Co., Ltd., the Applicant here, as an independent production studio.

As established abundantly by the record in this case, the 17-year and older purchasers of the video and online games at issue are well aware of the differences between those of Applicant and those offered by Konami, the owner of the cited registration. As such, consumers of Applicant's video games

and online games offered under the "KOJIMA PRODUCTIONS" (Stylized) and Helmet Design mark would not be confused with those that Konami offered under the mark shown in the cited registration.

The Hirano Declaration, Keighley Declaration, and their respective Exhibits now present before the Board, strongly evidence the video game consumer's sophistication in purchasing Applicant's "KOJIMA PRODUCTIONS" (Stylized) and Helmet Design products, and lack of confusion with those products of Konami offered under the mark shown in the cited registration. Mr. Kojima's separation from Konami was widely publicized and closely followed by video game consumers at least as early as 2015. See RFR Appendix 1, Exhibit 12, TSDR p. 30-31, and Appendix 2, Exhibits 6 and 13, TSDR p. 81-82, 98-99. See also RAE Exhibit 16.

The news of Kojima Production Co., Ltd.'s independence established after leaving Konami was also taken up widely in the mass media, which included widespread dissemination of Applicant's "KOJIMA PRODUCTIONS" (stylized) and Helmet Design mark. See Appendix 1, RFR Exhibits 9-14, TSDR p. 24-37. A spreadsheet providing links to 85 additional instances of media coverage concerning Mr. Kojima, Kojima Productions Co., Ltd., Applicant's "KOJIMA PRODUCTIONS" (stylized) and Helmet Design mark, and/or the "DEATH STRANDING" video game was also attached as RFR Appendix 1, Exhibit 5, TSDR p. 11-12.

Purchasers of video games and online games are well aware that Mr. Kojima uses his new "KOJIMA PRODUCTIONS" (Stylized) and Helmet Design mark to separate his new products now developed independently from those previously developed under Konami and sold under the different design element mark of the cited registration. In fact, the "METAL GEAR" video game series sold by Konami were credited specifically as "A Hideo Kojima Game" printed on the front cover of the majority of such games and, beginning in 2005, used the KOJIMA PRODUCTIONS (Stylized) and Fox Design trademark of the cited registration. See RFR Appendix 1, Exhibit 1 and Appendix 2, Exhibits 2-4, TSDR p. 2-4, 61-73.

The evidence of record leads to no other conclusion except that purchasers of video and online games are and will be well aware of the differences in source of origin between those video games sold by Konami, owner of the cited registration, and those sold by the Applicant under its new, independent "Kojima Productions" company. These include the "least sophisticated potential purchasers" that have been referenced by the Examining Attorney, taken from *In re FCA US LLC*, 126 USPQ2d 1214, 1222 (TTAB 2018) (citing *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1325, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014)).

In *In re FCA US*, the goods were "passenger automobiles" and customers included not only off-road enthusiasts that may be sophisticated customers, but also customers that are "merely interested in obtaining a reliable mode of transportation and have little understanding of how the car works or the limits of its performance." 126 USPQ2d at 1222. In *Stone Lion Capital Partners*, while the "investment advisory services" and "capital investment consultation" services encompassed sophisticated investors, they also included "ordinary consumers seeking to invest in services with no minimum investment requirement," who were deemed to be less sophisticated. 746 F.3d at 1325, 110 USPQ2d at 1163.

Unlike the mix of sophistication of the *FCA US* and *Stone Lion Capital Partners* customers, the "mature" purchasers of Konami's and Applicant's video games are enthusiasts invested in not only the video games, but also the creator(s) of the games, in this case Hideo Kojima. There is no evidence of record that consumers of Konami's and Applicant's video games are casual purchasers that have "little understanding" of the product as in *FCA US*, or are looking for products or services with "no minimum investment" as in *Stone Lion Capital Partners*. The evidence overwhelmingly shows that Konami's and Applicant's consumers not only have a deep understanding of the video games themselves, but also of the new source of Hideo Kojima's "Kojima Productions" video games - previously from the "Kojima Productions" that was part of Konami and now from the "Kojima Productions" that re-formed as his own independent company. The evidence of record establishes that the consumers in issue, including those

"least sophisticated," are not subject to source confusion between the past and present "Kojima Productions."

Other courts have previously found the "least sophisticated potential purchaser" argument proffered by the Examining Attorney in the instant case to be without merit. *See Kinbook, LLC v. Microsoft Corp.*, 866 F.Supp.2d 453, 468 (E.D. Penn. 2012) ("Kinbook's argument regarding the least sophisticated consumer is equally without merit...the 'target' age range for Kinect for XBOX 360 users is 5 to 80 years of age. ... [I]t would be completely unreasonable to assign a 5 year-old as 'the reasonably prudent purchaser' for the purpose of this analysis.") Likewise, the products Applicant sells under the "KOJIMA PRODUCTIONS" (Stylized) and Helmet Design are in a similar realm of goods as those presented in *Kinbook*— mainly, video game related goods and services.

Based on the only evidence of record, one must presume that a hypothetical purchaser of Applicant's goods is at least 17 years of age, as the products in question were developed for this minimum target age, and individuals below this target age would not be able to purchase these products from participating online and retail stores. The vast dissemination of Applicant's advertising and stories related to Hideo Kojima (as shown in the evidence) has undoubtedly educated any "least sophisticated" 17 year-old that possessed even a modicum of social media experience of the differences between Applicant's mark and the cited registration, and what products each mark represents.

Regardless, the proper approach is instead that of the "reasonably prudent purchaser." *Id.* The evidence of mass media coverage and knowledge of Kojima Production Co., Ltd.'s history in the video game community indicates how the reasonably prudent purchaser - someone knowledgeable and interested in video games - would not be confused as to the source of goods between Applicant's mark and the cited registration. Importantly, Applicant's mark is at its strongest when presented to the same relevant consumer in the same relevant market.

Accordingly, it is clear that purchasers of video and online games are, and will continue to be, well aware of the differences in source of origin between those goods sold by Konami and those sold by the Applicant under the applied-for "KOJIMA PRODUCTIONS" (Stylized) and Helmet Design mark.

B. THE CITED KONAMI "KOJIMA PRODUCTIONS" (STYLIZED) AND FOX DESIGN REGISTRATION IS WEAK IN THE PRESENT CONTEXT

The *du Pont* factor relating to the fame or strength of the prior mark is important to consider when analyzing the marks in issue here, and also weighs in favor of Applicant. To the non-video game consumer, the cited "KOJIMA PRODUCTIONS" (Stylized) and Fox Design registration might seem to embody the strongest type of mark possible, since the Fox Design portion is objectively imaginative and the word "KOJIMA" has no meaning in English or Japanese. To the uninitiated, the term "KOJIMA" in the word portion of the mark would also appear to be a totally arbitrary term - normally given the highest level of strength and protection.

However, the record in this case establishes that the word portion of the mark is weak when viewed by the targeted consumers of the goods - reasonably prudent consumers of video games - because they are keenly aware that there are two (2) different "Kojima Productions" - the old one owned by Konami responsible for the development of the "Metal Gear Solid" series, and the new one independently re-formed and owned by Mr. Kojima himself, responsible for the new "Death Stranding" series. Moreover, the word portion of the cited mark is also the weakest type of mark as against anyone with the surname of "Kojima," particularly as against the very individual for whom Konami's mark is named, Hideo Kojima, the owner of the Applicant here.

1. Applicant's principal has a right to register his own surname for the video game goods for which he is famous

The good faith and legitimate use of the Applicant's principal's surname "KOJIMA" is clearly evident in Applicant's mark. Mr. Kojima continues to use his creativity and skills in producing and developing exceptional quality video games, under a mark which in its entirety is not confusingly similar

to the cited registration, where the similar word portions are presented in entirely different fonts and text sizes. Mr. Kojima, through his new company, continues to use his own surname in this mark in a manner that evidences no intent to "palm off their preparation as that of [Konami Corporation]" with the result that "they have a right to such use." See *Brown Chem. Co.*, 139 U.S. 540 at 547.

Abundant Supreme Court precedent and other case law supports Mr. Kojima's right to use his own surname in a trademark, provided that the mark as a whole is not likely to be confused with senior marks.² The common law also recognizes that surnames are shared by more than one individual, each of whom may have an interest in using his surname in business. See *In re Etablissements Darty et Fils*, 759 F.2d 15, 17, 225 USPQ 652, 653 (Fed. Cir. 1985).

The Examining Attorney dismissed these cases on the grounds that "[a]t issue in this case is registration, rather than use, of the applied-for mark." However, the Supreme Court in *B&B Hardware Inc.* settled that question when it made it clear that the law regarding likelihood of confusion in infringement cases involving use of a trademark applies equally to registration of a trademark:

The real question, therefore, is whether likelihood of confusion for purposes of registration is the same standard as likelihood of confusion for purposes of infringement. We conclude it is There is no reason to think that the same district judge in the same case should apply two separate standards of likelihood of confusion.

B&B Hardware Inc. v. Hargis Industries, Inc., 575 U.S. 138, 135 S.Ct. 1293, 113 U.S.P.Q.2d 2045 (2015) (footnote omitted). Thus, case law that deals with similarity of word portions of marks that do not involve an individual's own name are not as relevant here. The same likelihood of confusion

² *Brown Chemical Co. v. Meyer*, 139 U.S. 540, 544, 11 S. Ct. 625 (1891) ("A man's name is his own property, and he has the same right to its use and enjoyment as he has to that of any other species of property."); *Avery Dennison Corp. v. Sumpton*, 189 F.3d 868 (9th Cir. 1999) ("A long-standing principle of trademark law is the right of a person to use his or her own name in connection with a business." (citing *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U.S. 118, 140, 25 S.Ct. 609, 49 L.Ed. 972 (1905)); *Brown Chem. Co. v. Meyer*, 139 U.S. 540, 542, 11 S. Ct. 625, 626, 35 L. Ed. 247 (1891) ("It is hardly necessary to say that an ordinary surname cannot be appropriated as a trade-mark by any one person as against others of the same name, who are using it for a legitimate purpose . . ."); *Gottdiener v. Joe's Restaurant, Inc.*, 111 Fla. 741, 746, 149 So. 646 (Fla. 1933) ("... but where the only confusion created is that which results from the similarity of [the person's] names, the court will not interfere.")

standards that ensure an individual's right to use his or her own name in a mark also require that that individual be permitted registration of his or her own name.

Since the only confusion between the cited registration and Applicant's mark "...is that which results from the similarity of the names, the court will not interfere." *See Gottdiener*, 111 Fla. 741 at 746.

2. The strength of the word portion of the cited Konami mark is significantly weakened as the relevant consumers know it is Hideo Kojima's surname

The Court of Appeals for the Federal Circuit has recognized that weak word portions of a composite mark may be entitled to a narrower scope of protection than an entirely arbitrary or coined word. *See Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1338-39, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015) (Case remanded where Board gave inadequate consideration to strength or weakness of "PEACE & LOVE" word portion of a composite mark.) Here, the word portion of registrant's mark is not strong because "Productions" has been disclaimed in both marks, and video game consumers know that the "Kojima" in "Kojima Productions" is the surname of the founder of Applicant, who is no longer affiliated with the registrant.

The strength of a mark " 'ultimately depends on the degree to which the designation is associated by prospective purchasers with a particular source.' " *See Estee Lauder Inc. v. The Gap, Inc.*, 108 F.3d 1503, 1510, 42 U.S.P.Q.2d 1228 (2d Cir.1997) (quoting Restatement (Third) of Unfair Competition § 21 cmt. i (1995)) (holding district court's conclusion that mark was moderately strong to be clearly erroneous). Surnames are not considered to be inherently distinctive, and the fact that the term "KOJIMA" in the cited registration is the surname of an individual, Hideo Kojima, associated with Applicant as the founder, is evidence of the surname significance of the term.³ See TMEP § 1211.02(b)(iv). As stated by McCarthy:

³ Although the cited registrant Konami Corporation did not make of record the fact that the "KOJIMA" portion of its mark was the name of a living individual or indicate Mr. Kojima's consent to registration of his name, Applicant has made Mr. Kojima's consent to registration of record in the instant application.

The fact that a trademark is the subject of a federal registration that has ripened into incontestable status should not dictate the conclusion that the mark is 'strong' with no further analysis. Even though secondary meaning is conclusively presumed for a mark with an incontestable registration, that does not automatically transfer into a conclusive presumption of strength in a likelihood of confusion analysis.

J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 11:82 (5th ed. 2019) (internal quotation marks and citation omitted).

Although the cited registration does not identify Hideo Kojima as an individual, the specimens submitted by Konami in 2008 and 2018 explicitly reference the famous designer himself. See RFR Appendix 2, Exhibit 3, TSDR p. 68-71, where the leftmost side of the game packaging claims "Metal Gear Solid...is an all-new action game in Hideo Kojima's legendary Metal Gear Solid series..." and RFR Appendix 2, Exhibit 4, TSDR p. 72-73, where the phrase "A Hideo Kojima Game" is clearly printed on the front of the box above the title.

As stated in ¶23 of the Declaration of Geoff Keighley, the founder, producer and host of The Game Awards show:

The video game consumer is well aware of the difference between Konami Corporation's "Kojima Productions" and Mr. Kojima's new "Kojima Productions" under Kojima Productions Co., Ltd., thus the phrase "Kojima Productions" seen on both marks hold less importance to them. The stylized portions are viewed as distinguishing the games produced by the respective companies, and thus the video game consumer can differentiate what games were produced by Mr. Kojima while under the employ of Konami, and what games were produced by Mr. Kojima under his own independent company Kojima Productions Co., Ltd.

Given that the word portions of both Applicant's and Konami's marks are directed to the surname of the same individual, Hideo Kojima, who is well known to have two different production companies, the word portion of the cited registration is inherently weak as a distinguishing trademark to the relevant video game purchasers. Accordingly, the strength of the marks - and the likelihood of confusion analysis - must hinge substantially on the predominant design elements of the marks instead.

C. APPLICANT'S MARK AND THE CITED KONAMI MARK ARE NOT CONFUSINGLY SIMILAR WHEN CONSIDERED IN THEIR ENTIRETIES

Only after full consideration is taken of the sophistication of the reasonably prudent video game consumer, and the weakness of Applicant's founder's surname in the cited registration, can the *du Pont* factor of the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation, and commercial impression be appropriately analyzed. "As should be clear from the foregoing, there is no mechanical test for determining likelihood of confusion and 'each case must be decided on its own facts.'" *du Pont*, 476 F.2d at 1361, 177 USPQ at 567. In some cases, a determination that there is no likelihood of confusion may be appropriate, even where the marks are similar and the goods/services are related because these factors are outweighed by other factors..." See TMEP § 1207.01

The Examining Attorney has refused registration on the basis that "the word portion is normally accorded greater weight because it is likely to make a greater impression upon purchasers, be remembered by them, and be used by them to refer to or request the goods and/or services," citing *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (citing *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012)).

It is significant that the Examining Attorney's citation to *In re Viterra, Inc.* is incomplete. While the Federal Circuit in *In re Viterra, Inc.* did indeed state that the word portion of a mark may be accorded greater weight, they further clarified this statement in a later case: "However, '[t]his is not to say that the Board cannot, in appropriate circumstances, give greater weight to the design component of a composite mark.'" *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1135 (Fed. Cir. 2015). Further case law precedent supports this proper approach to composite marks.⁴

⁴ "More dominant features will, of course, weigh heavier in the overall impression of a mark ... There is no general rule as to whether letters or design will dominate in composite marks; nor is the dominance of letters or design dispositive of the issue. No element of a mark is ignored simply because it is less dominant, or would not have trademark significance if used alone." *In re Electrolyte Laboratories, Inc.*, 929 F.2d 645, 647, 16 U.S.P.Q.2d 1239 (Fed. Cir. 1990).

The CCPA has previously found the most prominent features of marks to be the design portions instead of the word portions: *See Application of Computer Communications, Inc.*, 484 F.2d 1392 (CCPA 1973) (The Board found that "while the goods of applicant and the goods set forth in the cited registrations are not identical, they are closely related products which could be sold to the same class of purchasers through the same channels of trade." The Board properly considered both marks in their entireties, and was of the view that the design portion of appellant's mark was its most visually prominent feature.). "That marks must be considered in their entireties in determining whether there is likelihood of confusion or mistake is a basic rule in comparison of marks." *Massey Junior College, Inc. v. Fashion Institute of Technology*, 492 F.2d 1399, 1402, 181 USPQ 272, 273-74 (CCPA 1974) (reversing Board and holding that F.I.T. (stylized) not confusingly similar to FIA and design). When viewed in their entireties, the design portions of Applicant's and Konami's marks are most prominent and are clearly distinguishable.

The Court of Appeals for the Federal Circuit has likewise held that marks must be considered in the way they are perceived by the relevant public, in determining likelihood of confusion. (*See In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed.Cir.1985) ("likelihood of confusion cannot be predicated on dissection of a mark, that is, on only part of a mark"). The law forbids the type of dissection proposed by the Examining Attorney in the instant application. *See, Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 1358, 56 USPQ2d 1351, 1354 (Fed. Cir. 2000) ("The ultimate conclusion of similarity or dissimilarity of the marks must rest on consideration of the marks in their entirety.").

This case is precisely the type in which the Board should give greater weight to the design component of a composite mark.⁵ The source differentiation by consumers between the Konami

⁵ *See, e.g., In re Covalinski*, 113 USPQ2d 1166 (TTAB 2014) (holding confusion unlikely between REDNECK RACEGIRL and design of large, double-letter RR configuration and registered mark RACEGIRL, even when used on in-part identical goods); *In re White Rock Distilleries Inc.*, 92 USPQ2d 1282 (TTAB 2009) (holding VOLTA for vodka infused with caffeine, and TERZA VOLTA and vine shoot design for wines, not likely to cause confusion).

registration and the instant application, evident initially by differences in typeface of "Kojima Productions," is compounded by the even more significantly different Fox and Helmet Designs, which each dominate their respective marks. Once the dominant Fox and Helmet Designs are considered (which must be done to consider the marks in their entireties), it is clear that Applicant uses the mark in a manner that distinguishes Mr. Kojima's current products from those produced during his tenure at Konami.

The case law that emphasizes the word portion in a combined word-plus-design mark, where the word is not the individual's name, as proffered by the Examining Attorney, is simply not relevant given the facts of the instant situation, where the "KOJIMA" in "KOJIMA PRODUCTIONS" is the surname of the individual video game designer, Hideo Kojima. The term "Productions" is of no consequence, since it has been disclaimed in both marks. While both marks may use these similar words, the design portions of each dominate impression of the respective marks, and these dominating designs are completely different.

The Fox Design of the cited registration is described in the USPTO records as including:

"sparks (jagged lines); lightning; electricity; concentric ovals; concentric ovals and ovals within ovals; ovals within ovals; ovals, concentric ovals that are completely or partially shaded; miscellaneous designs with overall oval shape, including amoeba-like shapes and irregular ovals; oval shape (miscellaneous overall shape)"

By contrast, Applicant's Helmet Design portion is described as including:

"a design of a skull facing left, centered on the design of a helmet, with complete and incomplete circles and multiple lines throughout the overall design"

Neither of these Design elements are remotely similar, as evidenced by the fact that Applicant has been issued U.S. Registration No. 5,718,440 for the *identical* Helmet Design mark, without words.

In another case of similar import, despite the fact that the applicant and registrant used an identical word for legally identical goods and had overlapping trade channels, the Board found no likelihood of confusion where the word mark was weak, the stylization and design elements of Applicant's and registrant's marks had substantially different appearances, and the purchasers were sophisticated. See *In re Box Solutions Corp.*, 79 USPQ2d 1953 (TTAB 2006) (precedential) ("despite the legal identity of the goods and the overlap in trade channels and customers, the marks are sufficiently

dissimilar, particularly in view of the very weak nature of the common element BOX and the nature of the overlapping goods, which are not impulse-purchase items and are bought by sophisticated purchasers, such that confusion is not likely between applicant's BOX SOLUTIONS in stylized form mark and the cited registrant's BOX and design mark.")

As evidenced in the Hirano and Keighley Declarations, Appendices 1 and 2, reasonably prudent purchasers and consumers of video games and online games are very well aware that Mr. Kojima no longer works for Konami, and has re-formed his own company, Kojima Productions Co., Ltd., into an independent operation. Accordingly, these consumers place less reliance on the "KOJIMA PRODUCTIONS" portion of Applicant's mark and cited registration when purchasing their respective products, and instead place more reliance on the clearly dominant design elements. The Helmet Design of Applicant's mark indicates to these consumers that they are purchasing the latest generation of games produced by Applicant's newly established independent operation, and not those previously produced by Konami. As stated by Mr. Keighley in ¶28 of his Declaration:

[T]he video game consumer can and does distinguish between Konami Corporation's KOJIMA PRODUCTIONS and Fox Design mark, and the Applicant's KOJIMA PRODUCTIONS and Helmet Design mark, with the understanding that the former is associated with "METAL GEAR" video games sold by Konami Corporation, and the latter is associated with Mr. Kojima's independent production company and the "DEATH STRANDING" video game

In view of the well-established case law in this area, Applicant submits that the evidence of record shows that the 'relevant public' would readily distinguish the source of origin of video games bearing the respective marks as a whole.

Thus, the dissimilarities of the marks in their entireties as to appearance, sound, connotation and commercial impression, after consideration of what is properly deemed to be the dominant portion of each mark, heavily favor Applicant in a finding of no likelihood of confusion.

D. THE MARKET INTERFACE BETWEEN APPLICANT AND THE OWNER OF THE CITED MARK INDICATES NO LIKELIHOOD OF CONFUSION

Another *du Pont* factor weighing in favor of the Applicant is "[t]he market interface between applicant and the owner of a prior mark[.]" *du Pont*, 476 F.2d at 1361.

In the denial of Applicant's request for Reconsideration, the Examining Attorney took the position that any doubt regarding a likelihood of confusion determination is resolved in favor of the registrant, citing TMEP § 1207.01(d)(i); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464-65, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

However, the evidence of record supports the conclusion that the registrant Konami has not objected to Applicant's use of its instant mark. Mr. Hirano, Applicant's current President, and formerly President of Konami Digital Entertainment America, stated unequivocally:

At no time since I became associated with Kojima Productions Co., Ltd. has Konami Corporation objected to Mr. Kojima's or Kojima Productions Co., Ltd.'s use of the KOJIMA PRODUCTIONS and Helmet Design trademark in any manner.

See Appendix 1. This is despite the heavy promotion of record of Applicant's "DEATH STRANDING" video game under its mark "KOJIMA PRODUCTIONS" (Stylized) and Helmet Design, of which Konami is undoubtedly aware.

Although there is no consent of record in this application by Konami, the guidance of the Court of Customs and Patent Appeals in the *du Pont* case is instructive, where the Court stated:

It is at least difficult to maintain a subjective view that confusion will occur when those directly concerned say it won't. A mere *assumption* that confusion is likely will rarely prevail against uncontroverted evidence from those on the firing line that it is not.

476 F.2d at 1363, 177 USPQ at 568. The significant and uncontroverted evidence here from the executive "on the firing line" overcomes any presumption that the likelihood of confusion determination should be resolved in favor of the registrant.⁶

⁶ In any event, Konami and others will still have an opportunity to oppose registration of Applicant's mark when the application is published.

E. THE LENGTH OF TIME DURING AND THE CONDITIONS UNDER WHICH THERE HAS BEEN CONCURRENT USE WITHOUT EVIDENCE OF ACTUAL CONFUSION

An additional *du Pont* factor in favor of Applicant is "[t]he length of time during and conditions under which there has been concurrent use without evidence of actual confusion." *du Pont*, 476 F.2d at 1361. Notwithstanding the fact that the video game on which Applicant uses the instant mark was not released until November 8, 2019, Applicant has heavily promoted its newly acquired independence since at least 2015 and its new "DEATH STRANDING" video game since at least 2016. The evidence of record that consumers are well aware of the difference in source of origin between Hideo Kojima's work at registrant Konami and his work at Applicant, his newly re-formed company and its new video game venture, establishes that there has been concurrent use of the two different "KOJIMA PRODUCTIONS" portion of the marks for at least five (5) years without evidence of actual confusion. Consequently, this factor should be determined to be in Applicant's favor.

VI. CONCLUSION

In view of the relevant *du Pont* factors which heavily favor Applicant, Applicant respectfully requests that the Board entered judgment in favor of registration of the mark "KOJIMA PRODUCTIONS" (Stylized) and Helmet Design.

Respectfully submitted,

KOJIMA PRODUCTIONS CO., LTD.

Date: June 22, 2020

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