

This Opinion is not a  
Precedent of the TTAB

Mailed: September 30, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Intrepid Studios Inc.*  
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Serial Nos. 87513067 and 87513397<sup>1</sup>

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Stephen McArthur of The McArthur Law Firm, PC,  
for Intrepid Studios Inc.

Amanda Galbo, Trademark Examining Attorney, Law Office 125,  
Heather Biddulph, Managing Attorney.

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Before Shaw, Lynch and Hudis,  
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

Intrepid Studios Inc. (“Applicant”) seeks registration on the Principal Register of  
the marks INTREPID STUDIOS, in standard characters, and



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<sup>1</sup> Because the appeals involve the same issues and nearly identical records, we hereby consolidate them and issue a single opinion for both appeals. Citations to the record are to Serial No. 87513067, unless otherwise noted.

for “Computer game software; Downloadable electronic game software for use on computers; Downloadable software for video games and massively multiplayer online role-playing games (MMORPGs); [and] Video game software,” in International Class 9.<sup>2</sup> Applicant has disclaimed the term STUDIOS in both applications. The description of the mark in Ser. No. 87513397 reads:

The mark consists of a flame design on top of an upside down flame design both in the colors yellow, orange, and red. The stylized wording “INTREPID” is to the right of the flames and the stylized wording “STUDIOS” is in smaller print under the final three letters of “INTREPID”. All wording and design elements are imposed on top of a square background. The color black represents background and shading and is not part of the mark. The color white represents transparent areas and is not part of the mark.

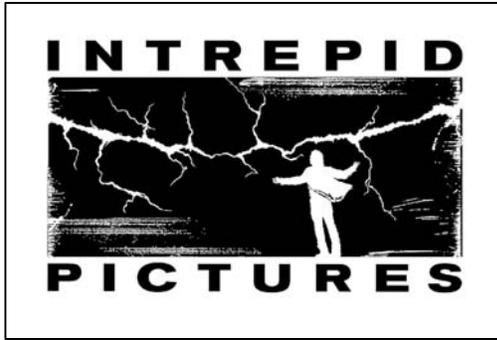
The colors yellow, orange, and red are claimed as a feature of the composite word and design mark.

The Examining Attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s marks, as used in connection with the identified goods, so resembles the mark INTREPID PICTURES,<sup>3</sup> in standard characters, and the following marks with words and designs,

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<sup>2</sup> Application Serial Nos. 87513067 and 87513397, both filed on June 30, 2017, based upon Applicant’s allegation of a *bona fide* intention to use the marks in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1(b).

<sup>3</sup> Registration No. 3360752 issued December 25, 2007, renewed.



<sup>4</sup> and



<sup>5</sup>

all for “Production and distribution of motion pictures,” in International Class 41, as to be likely to cause confusion. All of the cited registrations are commonly owned, and all disclaim PICTURES.

When the refusals were made final, Applicant appealed and requested reconsideration. The Examining Attorney denied the requests for reconsideration, and the appeals resumed. The cases are fully briefed. We affirm the refusals to register.

### Analysis

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also, In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the services and the similarities between the marks. *See Federated Foods, Inc. v. Fort*

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<sup>4</sup> Registration No. 3360754 issued December 24, 2007, renewed.

<sup>5</sup> Registration No. 5113717 issued January 3, 2017. The description of the mark reads: “The mark consists of a human figure of a man standing outside on a cliff with his arms reached out to the side, clouds and lightning in the sky in the background, and the words ‘INTREPID PICTURES’ shown below.”

*Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the differences in the marks.”).

Because the INTREPID PICTURES mark in Registration No. 3360752 and the services identified therein are most similar to Applicant’s marks and its identified goods, we focus our likelihood of confusion analysis on this INTREPID PICTURES mark. If we do not find a likelihood of confusion with this registered mark and its services, then there would be no likelihood of confusion with the marks in the other registrations. *See In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

A. The number and nature of similar marks in use on similar services

We begin with the strength of the cited mark under the sixth *du Pont* factor. *Du Pont*, 177 USPQ at 567. If the evidence establishes that the consuming public is exposed to third-party use of similar marks in connection with similar goods and services, it “is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772*, 396 F.3d 1369, 1373-74, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005). “Third party registrations are relevant to prove that some segment of the [marks] has a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (internal quotation marks omitted). *See also Jack Wolfskin Ausrustung Fur Draussen GmbH v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015).

Applicant argues that the term INTREPID is entitled to only a narrow scope of protection because third parties commonly use the term in connection with both goods in class 9 and services in class 41. According to Applicant, “[t]his makes the field of ‘Intrepid’ marks a crowded field, only affording said marks very narrow protection.”<sup>6</sup> In support, Applicant introduced a number of third-party registrations for marks comprising the term INTREPID for use in connection with goods in class 9 or services in class 41.<sup>7</sup>

<b>Reg. No.</b>	<b>Mark</b>	<b>Goods or Services</b>
3794770	INTREPID	Mobile phones; Smartphones (Class 9).
3276868	INTREPIDTRADER	Computer software for trading stocks, futures, commodities, bonds, options and other securities (Class 9).
4358668	INTREPID NETWORKS	Computer software for the integration of mobile communication devices with cloud computing for first responder systems (Class 9).
4274831	NTREPID (stylized)	Computer software for information management, namely, user profile and identification information; Computer software used for ensuring security of customer access to a global computer network; Computer software used for tracking and indexing, capturing, storing, and managing data (Class 9).
4813501	CONTROL CENTER INTREPID	Computer software for administering and controlling security and/or surveillance systems; computer software for tracking and managing alarms from security and/or surveillance systems; computer software for recording video and/or audio from security and/or surveillance systems; computer

<sup>6</sup> Applicant’s Br., p. 12, 8 TTABVUE 13.

<sup>7</sup> Response to Office Action dated April 2, 2018, pp. 76-92. Reg. Nos. 4180758 and 4108125 have been cancelled and have not been considered. Cancelled registrations are evidence of nothing but the fact that they once issued. *See In re Wal-Mart Stores, Inc.*, 129 USPQ2d 1148, 1159 (TTAB 2019).

Reg. No.	Mark	Goods or Services
		software for searching recorded video and/or audio from security and/or surveillance systems; computer software for transmitting and exporting video and/or audio from security and/or surveillance systems; computer software for displaying and analyzing video and/or audio from security and/or surveillance systems (Class 9).
2875503	ONIMUSHA (The English translation of “ONIMUSHA” is “INTREPID WARRIOR”.)	Computer game software (Class 9)
4297934	INTREPID BASTARDS (stylized)	Entertainment in the nature of visual and audio performances by a musical band (Class 41).

Applicant’s evidence regarding third-party registration of INTREPID-formative marks is of little probative value because the registrations do not relate to Applicant’s goods or to the services in the cited registration. *See Omaha Steaks Int’l v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686 (Fed. Cir. 2018) (error to rely on third-party evidence of similar marks for dissimilar goods, as Board must focus “on goods shown to be similar”); *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017) (disregarding third-party registrations for goods in other classes where the proffering party “has neither introduced evidence, nor provided adequate explanation to support a determination that the existence of I AM marks for goods in other classes, ... support a finding that registrants’ marks are weak with respect to the goods identified in their registrations”). Only one of the registrations identifies computer game software. None recite the production and distribution of motion pictures. Instead, the registrations encompass goods such as mobile phones,

stock-trading software, security software, and performances by a musical band. The applicable *du Pont* factor is the “number and nature of similar marks on **similar goods.**” *Du Pont*, 177 USPQ at 567 (emphasis added). The meaning of “similar goods” does not extend to any and all goods in class 9 or services in class 41. Accordingly, Applicant’s examples of Intrepid-formative marks used in connection with unrelated goods and services do not establish that the term INTREPID is weak for the respective goods and services.

Moreover, the third party registrations fall short of the “voluminous” evidence required to establish that INTREPID is so commonly used that the public will look to other elements to distinguish the source of the goods or services. *Cf. Juice Generation*, 115 USPQ2d at 1673; *Jack Wolfskin* 116 USPQ2d at 1136 (discussing “voluminous evidence” of registration and use of paw print design elements). *See also Primrose Retirement Communities, LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030 (TTAB 2016) (weakness found based on at least 85 actual uses of ROSE-formative marks for similar services, eight similar third-party registrations, expert testimony and other evidence regarding the common nature of ROSE-formative marks in the industry, and testimony by opposer that it did not vigorously enforce its mark).

We find that the cited mark is not weak, and we accord it a normal scope of protection.

B. The similarity or dissimilarity of the marks in their entireties in terms of appearance, sound, connotation and commercial impression.

Next, we consider the *du Pont* factor relating to the similarity of the marks. In comparing the marks we must consider their appearance, sound, connotation and

commercial impression. *Palm Bay Imports*, 73 USPQ2d at 1692. The emphasis of our analysis must be on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. Although we consider the mark as a whole, “in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Beginning with a comparison of INTREPID STUDIOS in standard characters and INTREPID PICTURES, we find the marks to be highly similar in appearance, sound, connotation and commercial impression. In appearance, they both begin with the dominant word INTREPID, followed by a single descriptive word, STUDIOS or PICTURES, respectively. *See Presto Prods. Inc. v. Nice-Pak Prods., 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”); *see also See In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (appropriate to give less weight to disclaimed generic term in mark). In sound, in addition to having the same first word, the marks have a similar number of syllables and a similar cadence.

Both marks also are similar in meaning and connotation. The word STUDIOS in Applicant’s mark is sometimes used in the names of motion picture companies, e.g., Atlanta Film Studios, Entertainment Studios, Walt Disney Studios, and Fox

Studios.<sup>8</sup> In some instances, the terms STUDIOS and PICTURES are used interchangeably: Disney Pictures is also referred to as the Walt Disney Studios;<sup>9</sup> and Sony Pictures is also referred to as Sony Pictures Studios.<sup>10</sup> Accordingly, we find Applicant's mark, INTREPID STUDIOS, to be similar to the cited mark, INTREPID PICTURES.

Regarding Applicant's mark combining the same words in its standard-character mark with a flame design,



we do not find that the addition of the design element significantly changes the sound, connotation or commercial impression of the mark as compared to the cited mark. Where, as here, a mark consists of words and design, the wording is normally accorded greater weight in determining whether the marks are similar because it would be more likely to be impressed upon a customer's memory and used by customers to request the services. *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983); *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1267-68 (TTAB 2011); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999). In addition,

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<sup>8</sup> Office Action of October 3, 2017, pp. 17-31, Office Action of April 25, 2018, pp. 9-17, and Denial of Request for Reconsideration of December 11, 2018, pp. 4-32.

<sup>9</sup> Office Action of October 3, 2017, p. 21; Office Action of December 11, 2108, p. 31.

<sup>10</sup> Office Action of April 25, 2018, p. 8; Office Action of December 11, 2108, p. 37.

the prominence of the term INTREPID in a larger font reinforces the dominance of the term. Given that Registrant's mark is in standard characters, it could be used in a typeface and background that is similar in appearance to Applicant's mark. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 (Fed. Cir. 2012). Accordingly, we find Applicant's word and design mark to be similar to the cited mark as well.

We find that when the marks are compared in their entirety, they are similar overall in sound, appearance, meaning, and commercial impression. This *du Pont* factor favors a finding of likelihood of confusion.

C. The nature and similarity or dissimilarity of the goods and services.

We next consider the similarity of the goods and services. We base our evaluation on the goods and services as they are identified in the applications and registration. *Octocom Sys., Inc. v. Houston Computer Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). It is settled that it is not necessary that the respective goods and services be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis. That is, the issue is not whether consumers would confuse the goods and services themselves, but rather whether they would be confused as to their source. *See In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984). The respective goods and services need only be "related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

The Examining Attorney argues that Applicant's goods and the services in the cited registration are related "because gaming software goods and production and distribution of motion pictures services are commonly provided by the same entity and marketed using the same trademark."<sup>11</sup> In support, the Examining Attorney introduced evidence showing that movie studios provide movie production services and video game software under the same mark. Examples include:<sup>12</sup>

- Nick.com, showing that Nickelodeon offers video games, mobile games, and movies under the same mark;
- Lucasfilm.com, showing that Lucas Film offers interactive entertainment across multiple platforms and genres, namely, games in the nature of console, PC, and mobile games, as well as production of motion picture films;
- Capcom.com, IMDBPro.com, and Streetfighter.com, showing that Capcom offers games and filmography (being film production) under the same mark;
- Sony.com, showing that Sony offers Sony branded PlayStation video games and movies under the Sony mark;
- Marvel.com and IMDb.com, showing that Marvel offers games, movies, and production company services under the same mark;
- Disney.com and IMDb.com, showing that Disney offers video games, movies, and production company services under the same mark; and

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<sup>11</sup> Examining Attorney's Br., p. 13, 10 TTABVUE 13.

<sup>12</sup> Office Action of October 3, 2017, pp. 17-31, Office Action of April 25, 2018, pp. 9-17, and Denial of Request for Reconsideration of December 11, 2018, pp. 4-32.

- Lego.com, and IMDb.com, showing that LEGO offers video games, mobile games, mini movies, and production company services under the same mark.

The foregoing evidence establishes that consumers are exposed to the same entity commonly providing the relevant goods and services and marketing them under the same mark. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (this type of evidence weighs in favor of relatedness). Applicant nevertheless argues that these examples are not representative because the identified companies “are among the largest entertainment corporations in the entire world. To say their practices are indicative of the market, or the industry as a whole would conflate the business practices of every small business [with] the largest multinational corporations in the world.”<sup>13</sup> We disagree. The fact that some of the world’s largest and best-known media companies also produce computer games in association with their movies suggests that the consuming public is more likely to believe that the goods and services emanate from a common source, not less likely. Applicant also argues that the foregoing evidence is diminished in probative value because some of these studios license their marks to video game production companies who then produce the video games. The fact that some of these companies license their marks to others for use in connection with video games does not diminish the consumer impact of these marks. Use by licensees inures to the benefit of the trademark owner. *See Pnutek, Inc. v. Scherr*, 211 USPQ 824, 833 (TTAB 1981).

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<sup>13</sup> Applicant’s Br., p. 18, 8 TTABVUE 19.

Applicant nevertheless argues that the relevant goods and services are not related and points to a number of third-party registrations for different marks purporting to show “that the Office has registered the same mark to different parties for the goods at issue.”<sup>14</sup> (Quoting *In re G.B.I. Tile and Stone, Inc.*, 92 USPQ2d 1366, 1367 (TTAB 2009)). An applicant may submit third-party registrations for the same or similar marks registered to different owners for the respective goods and services to show that the listed goods and services are of a type that may emanate from different sources. See *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 16 (TTAB 2009) (“[A]pplicant has submitted copies of 13 sets of registrations for the same or similar marks for different types of trailers owned by different entities arguing, in essence, that the third-party registrations serve to suggest that the listed goods are of a type which may emanate from different sources.”).

The sets of third-party registrations introduced by Applicant include registrations in which the identifications of goods or services include the wording “video; games; software; or multimedia” on the one hand and “motion picture” on the other hand. The following registrations are representative:<sup>15</sup>

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<sup>14</sup> Applicant’s Br., p. 14, 8 TTABVUE 16.

<sup>15</sup> Applicant’s response of April 2, 2018, pp. 93-140. We have not considered registrations not based on use in commerce. Third-party registrations not based on use in U.S. commerce lack probative value in showing whether the involved goods and services may emanate from a given source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993) (“[T]hird-party registrations which have issued under Section 44(e) of the Act, 15 U.S.C. 1126(e), without any use in commerce basis, have very little persuasive value” to suggest that the listed goods and/or services are of a type which may emanate from a single source); *In re 1st USA Realty Prof’s. Inc.*, 84 USPQ2d 1581, 1583 (TTAB 2007).

<b>Marks with goods in class 9 (with identifications including the words video; games; software; or multimedia)</b>	<b>Marks with services in class 41 (with identifications including the wording motion picture)</b>
ALL IN and design for mobile phone software for interactive games	ALL TOLD for motion picture production services
ANGEL GREEN and design for video surveillance cameras	ANGEL AIR and design for motion picture production services
ASPEN PROJECTION and design for movie projectors	ASPEN PRODUCTIONS for motion picture film production
BANDLAB for software for making, editing, storing, and sharing music	BANDPOP for motion picture production
BATTLE MOBILE for computer game software	BATTLE MOUNTAIN FILMS for motion picture production
BORN TO GAME for software for setting up or updating computer hardware functions; video-receivers	BORN TO RIDE for motion picture production
EVERYTHING BUT THE EVERYDAY for video recordings	EVERYTHING BUTT for motion picture film production
FIREFAN for game software	FIREKID for arranging and conducting motion picture films
FOREVER DONUTS for game software	FOREVER CURRENT for motion picture media production
KIDD AMBITION for video recordings	KID GENIUS for providing children's motion pictures
SHADOW KNIGHTS STUDIO for video game software	SHADOW NATION for motion picture film production

The third-party registrations for allegedly similar marks with goods in class 9 or services in class 41 are of little probative value because, in most cases, the marks are not the same and have significantly different connotations or commercial impressions. Also, most of the marks share only a single common word, whose strength is unknown, combined with other wording or designs. Because we have no evidence regarding the strength of the common words in these marks, it is impossible to gauge the relatedness of the respective goods and services. Simply put, we cannot conclude from these registrations that the goods and services in this case are not

related because the third-party marks are simply too dissimilar or of unknown strength. *See Thor Tech, Inc.*, 90 USPQ2d at 1637 (considering same or similar marks for different types of goods).

Applicant also argues that there is no likelihood of confusion because there is insufficient evidence to establish that the goods and services are related. Relying on *In re Giovanni Food Co., Inc.* 97 USPQ2d 1990 (TTAB 2011), Applicant states that “the Examining Attorney must show ‘something more’ in order to establish that Applicant’s goods are related to the Registrants [sic].”<sup>16</sup> In *Giovanni Food*, the Board held that in order to establish the relatedness of food products and catering services, the Examining Attorney must show “something more” than the fact that similar or even identical marks are used for the goods and services. *Id.* at 1991.

The Federal Circuit, however, has explained that where the goods or services are well known or generally recognized as having a common source, the burden to establish relatedness is easier to satisfy and “something more” is not required. *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1087 (Fed. Cir. 2014).

In this case, the association between movie production services and video games is not obscure or uncommon, as supported by the evidence noted above. Most, if not all, of the video games shown in the Examining Attorney’s evidence are based on or associated with movies. This establishes that video games are commonly produced in association with popular movies. For example, the Spiderman and Avenger video games are based on Marvel Studios’ movies by the same name; the Cars video game

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<sup>16</sup> Applicant’s Br., p. 21, 8 TTABVUE 22.

is based on the Disney Studios' Cars movies; the Lego video game is based on the Lego movies; and the Star Wars video games are based on Lucasfilm's Star Wars movies. Thus, consumers are used to seeing movie-based video games emanate from the same studios that produced the movie. This evidence establishes that, unlike the relationship between catering services and food products, the relationship between video games and motion picture production services is not obscure or uncommon and does not require "something more."

Even assuming, *arguendo*, that "something more" is required here, the Examining Attorney's evidence establishes that video games and motion picture production services often involve the same underlying creative work and are advertised and offered to consumers via common marketing channels. Therefore, they are likely to be "generally recognized as having a common source of origin." *St. Helena Hospital*, 113 USPQ2d at 1087.

To the extent the Examining Attorney's evidence may not address all of the items in Applicant's identification, we note that relatedness does not have to be established for every good or service. It is sufficient for a finding of likelihood of confusion if, as here, relatedness is established for any or some items encompassed by the identification within a particular class in an application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981). Here, relatedness has been established for computer and video games and movie production services.

In sum, we find Applicant's computer and video game software and the motion picture production services in the cited registration are closely related because they are of a kind that may emanate from a single source under a single mark. For these reasons, we find that the *du Pont* factor relating to the similarity of the goods and services, weighs in favor of finding a likelihood of confusion.

D. Conditions of sale

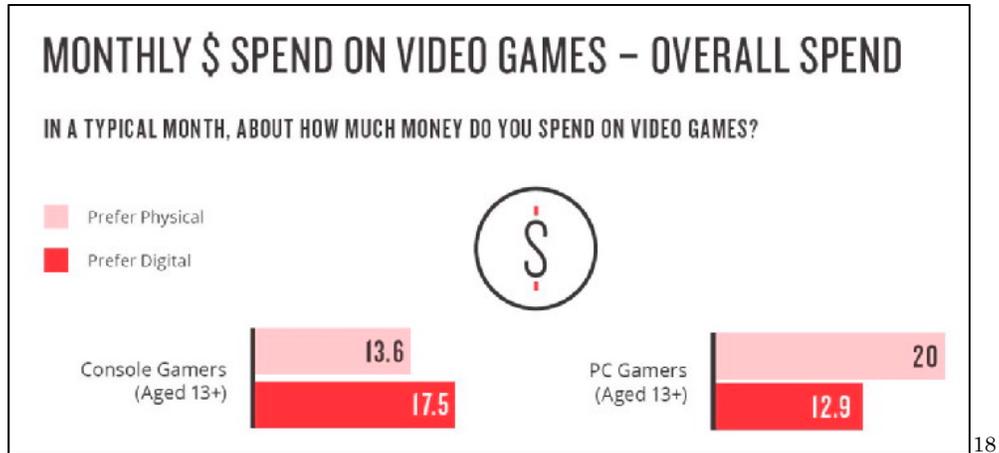
We next consider Applicant's arguments under the fourth *du Pont* factor: the conditions under which and buyers to whom sales are made, i.e., "impulse" vs. careful, sophisticated purchasing. *Du Pont*, 177 USPQ at 567. Applicant argues that video game consumers are sophisticated consumers who "are able to readily discern between providers of video games versus providers of services related to the production of motion pictures."<sup>17</sup> Applicant points to the \$60 average price of video games as well as the existence of specialized websites discussing and rating specific types of games. *Id.*

We find Applicant's arguments unavailing. Our precedent requires that we base our decision on the least sophisticated potential purchasers of the identified goods. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014). This would include purchasers who do not use specialized websites to investigate their prospective video game purchases. Further, prices for game software are not so high that consumers will exercise care in every case. If the average price of software is \$60, then some software is sold for more and some is sold

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<sup>17</sup> Applicant's Br., p. 22, 8 TTABVUE 23.

for less. The report on video game trends submitted by Applicant indicates that game players spend between \$14 and \$20 per month on video games:



Indeed, some players get their software for free. According to the same report, “30% of gamers who spent less year-on-year said they play free games or take advantage of free trials.”<sup>19</sup>

We do not find that consumers will exercise an elevated degree of care in their video game software purchasing decisions. This *du Pont* factor is neutral.

#### E. Conclusion

We have considered all of the arguments and evidence of record, including any not specifically discussed herein, as they pertain to the relevant *du Pont* likelihood of confusion factors. Applicant’s marks, including its mark with the flame design, are highly similar to the cited mark, and Applicant’s computer and video game software is closely related to the cited mark’s motion picture production services. We conclude

<sup>18</sup> Games 360 U.S. Report 2017, Exh. 6 to Applicant’s Response of April 2, 2018, p. 58.

<sup>19</sup> *Id.* at 64.

that there is a likelihood of confusion between Applicant's marks and the mark in the cited registration.

***Decision:*** The refusals to register the marks under Sections 2(d) are affirmed