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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Lucky Day Entertainment, Inc.

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Serial No. 98391360

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Gene Bolmarcich, of Law Offices of Gene Bolmarcich,
for Lucky Day Entertainment, Inc.

Mark Hill, Trademark Examining Attorney, Law Office 129,
Pamela Y. Willis, Managing Attorney.

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Before Casagrande, Stanley, and O'Connor,
Administrative Trademark Judges.

Opinion by Casagrande, Administrative Trademark Judge:

Lucky Day Entertainment, Inc. (Applicant), appeals the refusal of its application to register the mark LUCKY DAY in standard-character format on the Principal Register for goods identified as "Downloadable software in the nature of a mobile application for playing games of chance; Downloadable computer game programs," in International Class 9.[1]

[1] Application Serial No. 98391360 was filed on February 5, 2024, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming a date of first use anywhere and in commerce of April 1, 2015.

The Examining Attorney bases the refusal on Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), due to likelihood of confusion with the mark MY LUCKY DAY, which is registered on the Principal Register in standard-character format for goods identified as "Machines for playing games of chance," in International Class 28.[2]

After the Examining Attorney made the refusal final,[3] Applicant appealed.[4] Applicant and the Examining Attorney each filed briefs,[5] and Applicant filed a reply brief.[6] The case is now ready for decision. For the reasons explained below, we affirm the refusal to register.

ANALYSIS

A. Section 2(d) refusals generally

Section 2(d) of the Trademark Act prohibits registration of a mark that "so resembles a mark registered in the Patent and Trademark Office … as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive." 15 U.S.C. § 1052(d). We determine whether confusion is likely by analyzing all probative facts in evidence relevant to the likelihood-of-

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[2] Reg. No. 7675317 issued on February 4, 2025, with a date of first use anywhere and in commerce of September 15, 2023.

[3] *See* Aug. 25, 2025, Final Office Action. Citations in this opinion to the application record refer to the version of the documents as downloaded in .pdf format from the Trademark Status and Document Retrieval (TSDR) database of the United States Patent and Trademark Office (USPTO).

[4] *See* 1 TTABVUE. References to the briefs and appeal record cite to the Board's TTABVUE electronic docket system. The number preceding "TTABVUE" represents the docket number assigned to the cited filing in TTABVUE, and any number immediately following "TTABVUE" identifies the specifically-cited page(s), if any.

[5] *See* 4 TTABVUE (Applicant); 6 TTABVUE (Examining Attorney).

[6] *See* 7 TTABVUE.

confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973). *See, e.g.*, *In re Charger Ventures LLC*, 64 F.4th 1375, 1379 (Fed. Cir. 2023). Though *du Pont* lists thirteen numbered factors, we generally address only those that are relevant and material to the case before us. *See, e.g.*, *Shen Mfg. Co. v. Ritz Hotel, Ltd.*, 393 F.3d 1238, 1241 (Fed. Cir. 2004); *Octocom Sys., Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 943 (Fed. Cir. 1990). Typically, those are the factors that the parties address and on which there is relevant evidence in the record. *See, e.g.*, *Dollar Fin. Grp., Inc. v. Brittex Fin., Inc.*, 132 F.4th 1363, 1371-72 (Fed. Cir. 2025); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 946-47 (Fed. Cir. 2000). After making findings on the relevant factors, we then weigh them together to determine if, on balance, they indicate that confusion is likely. *See, e.g.*, *Charger Ventures*, 64 F.4th at 1381; *In re Majestic Distilling Co.*, 315 F.3d 1311, 1319 (Fed. Cir. 2003).

Here, the only factors Applicant addresses on appeal are the first two factors listed in *du Pont*: the similarity or dissimilarity of the marks and the respective goods.

B. Comparison of the marks

We start with "[t]he similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression." *du Pont*, 476 F.2d at 1371. Our primary reviewing court has termed this a "predominant inquiry" in the likelihood of confusion analysis. *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165 (Fed. Cir. 2002); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265 (Fed. Cir. 2002). "Those who comprise the purchasing public for [the] goods ordinarily must depend upon their past recollection of marks to which they were

previously exposed." *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 1007 (CCPA 1981) (citation omitted). Thus, "marks must be considered in light of the fallibility of memory and not on the basis of side-by-side comparison." *In re St. Helena Hosp.*, 774 F.3d 747, 751 (Fed. Cir. 2014) (cleaned up; citation omitted).

Applicant's brief expends little energy on this factor. The sum total of its argument is this:

> "LUCKY DAY" is a highly suggestive phrase frequently used in connection with games of chance. The addition of "MY" in the cited mark changes the impression from a general statement of fortune (LUCKY DAY) to a personal exclamation (MY LUCKY DAY). Given the weakness of the common term LUCKY DAY, even identical wording does not create source confusion absent overlapping trade channels or goods.[7]

We are not persuaded. First, Applicant points us to no evidence that the possessive adjective "my" changes the meaning of "lucky day" from its normal meaning, nor do we see any. A consumer viewing MY LUCKY DAY and LUCKY DAY in connection with goods that both relate to games of chance will take away the same meaning: I may be lucky and win if I play a game of chance today.

Second, we don't see evidence showing that the phrase LUCKY DAY is particularly weak.[8] The cited registered mark, MY LUCKY DAY, was registered without a claim of acquired distinctiveness under Section 2(f) of the Act, 15 U.S.C. § 1052(f). So we presume it's inherently distinctive as a source identifier for the

[7] 4 TTABVUE 4.

[8] Generally, weakness arguments are assessed under the sixth *du Pont* factor: "(6) The number and nature of similar marks in use on similar goods." 476 F.2d at 1361. But Applicant neither mentions the sixth factor nor points us to any third-party use of similar marks on similar goods.

identified goods. *See, e.g.*, *Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 17 F.4th 129, 146 (Fed. Cir. 2021). Nor is there a disclaimer of the words "LUCKY DAY." Applicant does not point us to any evidence of weakness of the mark in the record; it merely asserts in conclusory fashion that "'LUCKY DAY' is a highly suggestive phrase frequently used in connection with games of chance."[9] While we agree that the phrase "LUCKY DAY" is suggestive of "Machines for playing games of chance" and sits on the weaker end of the spectrum of inherently distinctive marks, we find no persuasive basis to find that it is "highly" suggestive. In any event, if we were to assume LUCKY DAY is highly suggestive, even weak marks registered on the Principal Register are statutorily entitled to protection against likely confusion. *See, e.g.*, *Conde Nast Publ'ns, Inc. v. Miss Quality, Inc.*, 507 F.2d 1404, 1406 (CCPA 1975).

We find the marks nearly identical overall. This factor will weigh in favor of a conclusion that confusion is likely when we weigh all the factors upon which we've made findings.

C. Comparison of the goods

We next examine "[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration." *du Pont*, 476 F.2d at 1361. "The [goods or] services need not be identical—the evidence need only establish that the respective products are related in some manner and/or that the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source." *Apex Bank v. CC Serve Corp.*, 156 F.4th

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[9] 4 TTABVUE 4.

1230, 1234 (Fed. Cir. 2025) (cleaned up; citation omitted); *accord Hewlett-Packard*, 281 F.3d at 1267; *In re Rsch. & Trading Corp.*, 793 F.2d 1276, 1278 (Fed. Cir. 1986).

When analyzing the second *du Pont* factor, the Federal Circuit has mentioned in several cases that goods (or services) sometimes can be “intrinsically related.” *See, e.g.*, *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 1363, n.3 (Fed. Cir. 2022); *Majestic Distilling*, 315 F.3d at 1315; *In re Shell Oil Co.*, 992 F.2d 1204, 1207 (Fed. Cir.1993); *Philip Morris Inc. v. K2 Corp.*, 555 F.2d 815, 816 (CCPA 1977). Here, the respective goods, as identified, allow consumers to play games of chance. Applicant offers software for computers and mobile devices for playing these games. The cited registration identifies machines (which may well contain software) for playing games of chance. To that extent, the goods are “intrinsically related.”

In addition to this intrinsic relationship between the goods as set forth in the application and registration, the record reveals that at least two companies offer the goods in the registration and the application under the same overarching mark. That is another type of evidence of relatedness. *See, e.g.*, *Naterra Int’l, Inc. v. Bensalem*, 92 F.4th 1113, 1117 (Fed. Cir. 2024); *In re Detroit Athl. Co.*, 903 F.3d 1297, 1306 (Fed. Cir. 2018); *Hewlett-Packard*, 281 F.3d at 1267. Here, the record contains evidence from the IGT/Everi website (everi.com), which shows the following:

- Under the “DIGITAL” menu (i.e., software), individually-named games are offered under marks IGT and IGT/Everi;[10]
- Under the “GAMES” menu, individually-named game machines (cabinets) are offered under the marks IGT and IGT/Everi;[11]

[10] July 23, 2025, Nonfinal Office Action, at TSDR 15.

[11] *Id.* at 16.

- On its "Cabinets" page, IGT offers "server-based gaming ready cabinets," i.e., gaming machines that use gaming software;[12] and
- Under the "MOBILE" menu (i.e., for smartphones), individually-named games that "seamlessly integrate[ ] into existing casino systems" inducing consumers who play those games to "return to the casino venue to play more" are offered under the IGT and IGT/Everi marks.[13]

The record also contains evidence from the KONAMI website, which shows the following:

- Use of the KONAMI mark to sell individually-named games on Google Play on a Windows PC;[14] and
- Use of the KONAMI mark to sell game cabinets (which bear the KONAMI mark as well as the mark for the cabinet model and which have a video display showing the names of the individual games for the game software loaded into the cabinets).[15]

Applicant contends that this doesn't count as evidence of relatedness, because, for both third parties, the common mark is a house mark and the individual games they offer each have different game names.[16] But companies commonly use more than one source identifier for their goods or services. To take an everyday example, car companies sell their vehicles under the overarching car-company name and have individual marks for each model of vehicle they offer. And, indeed, Applicant's

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[12] *Id.* at 13.

[13] Aug. 25, 2025, Final Office Action, at TSDR 7.

[14] July 23, 2025, Nonfinal Office Action, at TSDR 8-9; *see also* Aug. 25, 2025, Final Office Action, at TSDR 8.

[15] *Id.* at 10.

[16] *See* 4 TTABVUE 2-3; 7 TTABVUE 2. The factual premise of this argument is inconsistent with the record. The record reflects that KONAMI doesn't just use KONAMI as a house mark apart from the individual game apps for its PC and mobile-phone offerings, but also uses overarching product-line marks "My KONAMI Slots" and "The Official KONAMI Casino" with these individual game offerings. *See* Aug. 25, 2025, Final Office Action, at TSDR 8-9.

specimen shows the mark LUCKY DAY used in conjunction with another mark for a game called LUCKY DOG. Thus, we find that these two third-party sites provide another type of evidence—besides the intrinsic relationship—that consumers will see the goods as related.

Applicant also argues that these webpages reflect that these two companies market their goods only to "casinos and gaming operators," not to individual consumers, which Applicant claims is its focus.[17] We reject this argument. This imports trade channel limitations into the application and cited registration, neither of which is limited at all. The "downloadable computer game programs" portion of Applicant's identification in particular is not limited to use by individual consumers to the exclusion of casinos/gaming operators. And Registrant's identification is not limited to casino operators, and thus covers home-gaming machines. *See, e.g.*, *In re i.am.symbolic, llc*, 866 F.3d 1315, 1325 (Fed. Cir. 2017) ("[W]e consider the applicant's goods as set forth in its application, and the [registrant's] goods as set forth in its registration. Likelihood of confusion must be resolved on the basis of the goods named in the registration and, in the absence of specific limitations in the registration, on the basis of all normal and usual channels of trade and methods of distribution.") (citations omitted); *accord Octocom Sys.*, 918 F.2d at 942; *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 963-64 (CCPA 1965).

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[17] *See* 7 TTABVUE 2.

Applicant next argues that its "apps are stand-alone mobile games played on phones or tablets, not software that controls or interfaces with gaming machines."[18] This argument, too, is inconsistent with the goods identified in the application and cited registration. While the application identifies "Downloadable software in the nature of a mobile application," it separately lists "Downloadable computer game programs." And KONAMI offers gaming software on the Google Play retail site for playing on Windows personal computers. Similarly, IGT/Everi offers digital games for download, including for mobile phones, as well as gaming cabinets (machines) that run on gaming software.

Applicant's final argument is that the examining attorney put too little evidence into the record.[19] And we agree there's not a lot. We have generally come to expect examining attorneys to provide more evidence than this concerning product relatedness. But it is well settled that all the Office needs to do is make out a prima facie case for a refusal. *See generally In re Pacer Tech.*, 338 F.3d 1348, 1350 (Fed. Cir. 2003). A prima facie case requires the Office to "set forth a 'reasonable predicate' for its position." *See id.* at 1351. The purpose of the prima facie case requirement is "simply to provide sufficient notice to the applicant to facilitate his effective submission of information" in rebuttal. *Hyatt v. Dudas*, 492 F.3d 1365, 1370 (Fed. Cir. 2007); *see also In re Jung*, 637 F.3d 1356, 1362 (Fed. Cir. 2011) (examiner

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[18] *See* 4 TTABVUE 4; *see also* 7 TTABVUE 4.

[19] *See* 4 TTABVUE 3.

"satisfies its initial burden of production by adequately explaining the shortcomings it perceives so that the applicant is properly notified and able to respond").

We cannot say that the evidence put in by the Examining Attorney failed to meet this standard. Applicant knew and knows the precise nature of the refusal, and thus has had a full opportunity to respond and provide evidence in rebuttal. After an applicant responds, the Office's registrability determination must take into account all the evidence, including whatever evidence an applicant offers. *See, e.g.*, *In re Kao*, 639 F.3d 1057, 1066 (Fed. Cir. 2011); *In re Glaug*, 283 F.3d 1335, 1338 (Fed. Cir. 2002); *In re Oetiker*, 977 F.2d 1443, 1445-46 (Fed. Cir. 1992). But Applicant put in no evidence—literally nothing—to counter or dispel the notion that, notwithstanding the respective identifications of goods and these two third parties, consumers would not view the goods as related.[20] Applicant simply carped that the record the Examining Attorney made was too thin and should count for nothing.

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[20] Applicant argued that the registrant sells only a "machine" that lacks software, providing a copy of the specimen in the file of the registered mark: a photo of some sort of contraption containing color balls and bearing script saying "MY LUCKY DAY." *See* July 23, 2025, Response to Nonfinal Office Action, at TSDR 4. But Applicant's response is devoid of any averment of personal knowledge of the registrant's business, does not provide a basis to find that the good depicted does not contain any software, and does not say that the product depicted is the only product the registrant sells under the mark. More important, even if Applicant had provided such averments, the identified goods in the registration are not limited to gaming machines lacking software; the registration has no limitation. *See, e.g.*, *Cunningham*, 222 F.3d at 948 ("Our precedent requires the Board to look to the registration to determine the scope of the goods/services covered by the contested mark. Proceedings before the Board are concerned with registrability and not use of a mark. Accordingly, the identification of goods/services statement in the registration, not the goods/services actually used by the registrant, frames the issue.") (citations omitted); *CBS Inc. v. Morrow*, 708 F.2d 1579, 1581 (Fed. Cir. 1983) ("although a registrant's current business practices may be quite narrow, they may change at any time"). So we may not narrow the scope of the goods identified in the cited registration based on Applicant's say-so.

There's nothing invalid about responding in that manner. But it's risky: if we find that the Examining Attorney's evidence is probative enough to provide a "reasonable predicate" for refusal, putting an applicant on notice of the specific refusal, then a "provide no evidence in rebuttal" tactic will fail. That's this case: though the quantum of the Examining Attorney's evidence is disappointingly small—consisting of the respective identifications of goods and excerpts from two third-party websites—it's persuasive evidence, and even a small amount of persuasive evidence outweighs nothing.

In sum, we find the goods related. This factor will weigh in favor of a conclusion that confusion is likely.

D. Conclusion as to whether confusion is likely

Having made findings on the two likelihood-of-confusion factors Applicant addresses, our final step is to assess these findings together to determine if, on balance, they indicate that confusion is likely. *See, e.g.*, *Charger Ventures*, 64 F.4th at 1384. Here, we found the marks to be nearly identical overall. This is a "predominant" factor in the calculus. *See, e.g.*, *Herbko Int'l*, 308 F.3d at 1165; *Hewlett-Packard*, 281 F.3d at 1265. We also found the goods related, another important factor. *See, e.g.*, *Pink Lady Corp. v. L.N. Renault & Sons, Inc.*, 265 F.2d 951, 953 (CCPA 1959) ("logically a factor of considerable importance to be given much weight in reaching the ultimate conclusion") (citation omitted). With the only two relevant factors indicating that confusion is likely and nothing to counterbalance them, there's

no real balancing to be done. On the record here, we have no difficulty concluding that confusion is likely.

Decision: The refusal to register Applicant's mark is affirmed.