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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Nekki Limited

Serial No. 98767008

Alexander S. Lazouski of Lazouski IP LLC,
for Nekki Limited.

Herb Brown, Trademark Examining Attorney, Law Office 121
Richard White, Managing Attorney.

Before Wellington, Larkin, and O'Connor,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Nekki Limited (“Applicant”) seeks registration on the Principal Register of the standard character mark SPINE – THIS IS GUN FU (with the term GUN FU voluntarily disclaimed) for the following goods and services:

Downloadable computer games software; Downloadable computer gaming software; Downloadable video games software; Downloadable game software programs for arcade video game machines; Downloadable game development software; Downloadable game software; Downloadable computer application software featuring games and gaming; Downloadable computer programs for video and computer games; Video game discs; Blank video tapes; Blank audio cassettes [audio]; Blank compact discs; CD-ROM drives; Recorded data processing software programs recorded on machine-readable data carriers; Sound recordings featuring music; Video recordings featuring music; Downloadable interactive entertainment software for playing video games; Downloadable computer video game software; Downloadable video game software; Downloadable computer software to enhance the audio-visual capabilities of multimedia applications, namely, for the integration of text, audio, graphics, still

images and moving pictures; Downloadable computer software for the administration of on-line games and gaming; Electronic publications, downloadable, in the nature of books, magazines, brochures, articles relating to games and gaming; Downloadable electronic games software; Downloadable computer game software for use with on-line interactive games; Downloadable computer game software for use on mobile and cellular phones; Electronic publications, downloadable, in the nature of books, magazines, brochures, articles in the field of entertainment; Handheld computing devices being computers; Handheld computers; Downloadable computer game software for use on mobile devices, in International Class 9;

Toys, games, and playthings, namely, action figures; Home video game machines; Hand held video games; Hand-held computer games equipment, namely, game consoles; all the above excluding game controllers, in International Class 28; and

Publishing of interactive computer and video game software; Entertainment provided via the internet, namely, online gaming services in the nature of casinos; Entertainment services, namely, providing on-line computer games; Providing online, interactive multi-player computer games via the internet and electronic communication networks; Entertainment services, namely, multi-player matching services in the nature of matching users with computer games; Electronic games services, namely, providing online computer games; Providing online computer games; Providing online entertainment in the nature of computer game tournaments; Providing online entertainment in the nature of fantasy sports leagues; Providing online entertainment in the nature of game shows; Providing on-line information in the field of computer gaming entertainment; Online game services in the nature of casinos provided by means of communications by computer terminals or mobile telephone; Providing information on-line relating to computer games and computer enhancements for games; Online electronic games services in the nature of casinos provided from a computer database or by means of the internet; Electronic games services, including namely, provision of computer games on-line or by means of a global computer network; Provision of on-line electronic publications, namely, books, brochures, newsletters, articles in the field of games and entertainment; Providing online interactive computer games, in International Class 41.¹

¹ Application Serial No. 98767008, filed September 24, 2024, is based on Applicant's ownership of a foreign registration, under Section 44(e), 15 U.S.C. § 1126(e), and a claim of priority based on that registration of August 1, 2024.

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act ("the Act"), 15 U.S.C. § 1052(d), on the ground of likelihood of confusion based on the registered standard character mark GUN FU for the following goods:

Downloadable computer game software via a global computer network and wireless devices, in International Class 9.²

After the Examining Attorney made the refusal final, Applicant filed an appeal. Both Applicant and the Examining Attorney filed briefs. For the reasons explained below, we affirm the refusal.

I. Likelihood of Confusion

Section 2(d) of the Act, in relevant part, 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." 15 U.S.C. § 1052(d). To determine whether confusion is likely, we analyze all probative evidence relevant to the factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) ("*DuPont*"). See *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003).

In every Section 2(d) case, two key *DuPont* factors are the similarity or dissimilarity of the marks and the relatedness of the respective goods or services, because the "fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences

² Registration No. 4939419 issued April 19, 2016; Section 8 declaration received.

in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976). Here, we have considered each *DuPont* factor that is relevant and for which there is evidence and argument of record. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019).

Varying weight may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 1356 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 1206 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”). Ultimately, however, “[e]ach case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 1199 (CCPA 1973).

A. The Goods and Services; Their Trade Channels and Classes of Consumers

We turn first to the second and third *DuPont* factors, which concern the relatedness of the goods and services, and the channels of trade for the goods and services. *DuPont*, 476 F.2d at 1361. In this analysis, we must consider the goods and services as they are identified in Applicant’s application and the goods in the cited registration. *See Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Houston Comp. Servs. Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990)). In addition to any evidentiary submissions, the involved application and cited registration themselves “may provide evidence of the relationship between the [goods or] services.” *In re OSF Healthcare Sys.*, No.

88706809, 2023 TTAB Lexis 353, at *9, (quoting *Monster Energy Co. v. Lo*, No. 91225050, 2023 TTAB LEXIS 14, at *19).

Moreover, although the Office has the ultimate burden of establishing a likelihood of confusion, we note that Applicant effectively concedes that the second and third *DuPont* factors support a finding of a likelihood of confusion by not addressing the similarity or dissimilarity of the goods and services, or their trade channels, in its appeal brief. See *In re Morinaga Nyugyo K.K.*, No. 86338392, 2016 TTAB LEXIS 448, at *2.

Here, the Examining Attorney did not submit any evidence but argues that the goods and services, as recited in the application and cited registration, are so broad that they are either partially encompassing of one another or that there is a close inherent relationship. The Examining Attorney also argues that “[a]dditionally, the goods and services of [Applicant and Registrant] have no restrictions as to nature, type, channels of trade, or classes of purchasers and are ‘presumed to travel in the same channels of trade to the same class of purchasers,’”³ quoting *In re Viterra Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012).

Because the application contains three classes of goods and services, our assessment of relatedness of the goods and services necessarily involves a separate

³ 6 TTABVUE 11. The Examining Attorney’s construction of the *Viterra* decision is an incorrect statement as it overplays the decision. In *Viterra*, the Federal Circuit first noted that there was no dispute that the goods at issue were identical, and that, in **that** situation, it is proper to presume that the goods would be found in the same trade channels and offered to the same classes of consumers. *Viterra*, 671 F.3d at 1362. In other words, that presumption applies only where the goods or services themselves are identical, which is not the case in every class in this case.

analysis as to each class. *See G&W Labs., Inc. v. G W Pharma Ltd.*, No. 91169571, 2009 TTAB LEXIS 2, at *6 (“[A] multiple-class application can be viewed as a series of applications for registration of a mark in connection with goods or services in each class, combined into one application”). It is also worthwhile to point out that for a finding of likelihood of confusion as to each class of goods or services in the application, it is sufficient if relatedness is established for any one of the recited goods or services within that class in the application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 1336 (CCPA 1981). We thus discuss the relatedness of goods and services by each class in the application vis-à-vis the goods in the cited registration.

Class 9 Goods

Applicant’s goods in Class 9 include “downloadable computer games software” and these goods are legally identical to the “downloadable computer game software via a global computer network and wireless devices” identified in the cited registration.

Moreover, as to the channels of trade, we must presume that these legally identical goods will be offered in the same trade channels to the same classes of consumers. *Viterra*, 671 F.3d at 1362 (even though there was no evidence regarding channels of trade and classes of consumers for identical goods, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *see also Genesco Inc. v. Martz*, No. 91121296, 2003 TTAB LEXIS 123, at *28 (“Given the in-part identical and in-part related nature of the parties’ goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these

clothing items could be offered and sold to the same classes of purchasers through the same channels of trade.”).

Class 28 Goods

Applicant’s goods in this class include “home video game machines” and “hand-held computer games equipment, namely game consoles”

The Examining Attorney argues that “[w]here evidence shows that the goods at issue have complementary uses, and thus are often used together or otherwise purchased by the same purchasers for the same or related purposes, such goods have generally been found to be sufficiently related such that confusion would be likely if they are marketed under the same or similar marks,”⁴ citing *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1567 (Fed. Cir. 1984) (“complementary nature of bread and cheese cannot be ignored”). And, in this case, the Examining Attorney contends that “Registrant’s downloadable computer gaming software frequently requires a gaming device or console to function” and thus “Applicant’s Class 28 goods serve a complementary function and are considered related to registrant’s downloadable gaming software.”⁵ In support, the Examining Attorney cites to prior Board decisions where it was found that “computer hardware products are related to computer software products, such that their marketing under the same or similar marks may be likely to cause source confusion.”⁶

⁴ 6 TTABVUE 10.

⁵ 6 TTABVUE 11.

⁶ 6 TTABVUE 11, citing inter alia *In re TIE/Comm’ns, Inc.*, No. 73501553, 1987 TTAB LEXIS 42, at *4.

Again, the Examining Attorney did not submit evidence to show the relatedness of Applicant's goods in Class 28 with those in the cited registration. Rather, the Examining Attorney appears to rely instead on other decisions to fill this evidentiary void. As we frequently point out, mainly to applicants that argue against a finding of relatedness by relying on other decisions, we are not bound by factual determinations made in other proceedings with different evidentiary records. *Cf., In re Nett Designs, Inc.*, 236 F.3d 1339, at 1342 (Fed. Cir. 2001) ("Even if some prior registrations had some characteristics similar to Nett Designs' application, the [US]PTO's allowance of such prior registrations does not bind the Board or this court."). *See also, In re Embiid*, No. 88202890, 2021 TTAB LEXIS 168, at *34 ("noting the limited utility of reliance, in lieu of supporting evidence, on past decisions in which the Board has or has not found [goods] to be related"); *In re Finisar Corp.*, No. 76300876, 2006 TTAB LEXIS 57, at *12 (each application for registration must be considered on its own).

Nevertheless, we take judicial notice that it is common knowledge that video game machines and hand-held computer games equipment, including game consoles, frequently use computer game software. It is also common knowledge that much of today's computer software, including gaming software, may be downloaded via the Internet. Indeed, there is a strong inherent relationship between these goods because a "computer game" is one "that you play on a computer or on a small portable piece of electronic equipment."⁷

⁷ Definition of "Computer Game" from COLLINS COBUILD ADVANCED LEARNER'S DICTIONARY. Collins English Dictionary Copyright Harper Collins Publishers. We take judicial notice of this definition and the definition of "marketing. We take judicial notice of

Given these established facts, we agree with the Examining Attorney to the extent that “home video game machines” and “hand-held computer games equipment, namely game consoles ...,” like those described in the application, have a close intrinsic and complementary relationship with “downloadable computer game software via a global computer network and wireless devices,” like those identified in the cited registration. Put simply and in terms of the marks and goods involved herein, consumers that own Applicant’s SPINE – THIS IS GUN FU branded gaming machines may look to download gaming software for use on those machines, including Registrant’s GUN FU branded downloadable game software.

Again, the Examining Attorney did not submit any evidence and thus we cannot conclude that these particular goods may be found in the same trade channels.

Class 41 Services

With respect to Applicant’s Class 41 services, the Examining Attorney contends that the “online gaming services,” as listed in the application, “serve an identical function to ... Registrant’s Class 9 downloadable gaming software, as they are merely a non-downloadable version of the same software.”⁸ We also observe that Applicant’s “electronic games services, including namely, provision of computer games on-line or by means of a global computer network,” bear a very close and self-evident relationship to Registrant’s “downloadable computer game software.” Indeed,

this definition. *See Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, No. 91061847, 1982 TTAB LEXIS 146, at *7, *aff’d*, 703 F.2d 1372 (Fed. Cir. 1983); *In re Red Bull GmbH*, No. 75788830, 2006 TTAB LEXIS 136, at *7.

⁸ 6 TTABVUE 11.

although Applicant is rendering a service by providing the computer games online, the same consumer who enjoys these services may seek to download Registrant's computer game software for the same purpose of enjoyment, namely, playing the computer game.

For the aforementioned reasons, Applicant's services in Class 41, particularly its "online gaming" and online "provision of computer games" are very closely related to Registrant's downloadable computer game software.

Conclusion – Relatedness of the Goods and Services; Trade Channels

In sum, we find Applicant's goods and services in all three classes are, at the very least, very closely related to Registrant's downloadable computer game software. In particular, Applicant's Class 9 goods are, in part, legally identical to Registrant's goods and such identical goods will be found in the same channels of trade.

Accordingly, the second and third *DuPont* factors also weigh strongly in favor of finding confusion likely with respect to Class 9 of the application. And the second *DuPont* factor weighs in favor of a likelihood of confusion with respect to Classes 28 and 41; and because we make no findings as to the trade channels for these classes, the third *DuPont* factor is neutral with respect to these classes.

Finally, we note that Applicant's goods and services in all three classes and Registrant's goods may be offered to the same class of consumers, namely, anyone interested in playing computer games either online or by downloading the game software.

B. Alleged Weakness of GUN FU

Before we discuss the first *DuPont* factor, a key factor in any likelihood of confusion analysis because it involves the similarity of the marks, we address Applicant's argument and evidence regarding the claimed weakness of the registered GUN FU mark. *See, e.g., Heil Co. v. Tripleye GmbH*, No. 91277359, 2024 TTAB LEXIS 494, at *47 ("Because it affects the scope of protection to which it is entitled, we commence by addressing the strength or weakness of Opposer's registered ... mark.").

Indeed, Applicant's main argument on appeal is that the marks are dissimilar because not only did Applicant disclaim the term GUN FU in its mark, but also because Applicant "introduced evidence on record [showing] that GUN FU is merely descriptive."⁹ Accordingly, even though the cited registered mark, GUN FU, is a term within Applicant's mark, this term "is not intended to be the dominant element and, therefore, does not contribute to confusion with the cited mark."¹⁰

Applicant submitted Internet evidence from two websites.¹¹ The first, from a TV Tropes website, describes "Gun Fu" as "a catch-all term for stylized firearm-based combat styles in fictional visual media that combines martial arts with guns."¹² The second, from the Wikipedia online encyclopedia website, defines "Gun Fu" as:¹³

... a portmanteau of *gun* and *kung fu* (also known as *gun kata*, bullet ballet, gymnastic gunplay or bullet arts), [] a style of sophisticated close-quarters gunfight resembling a martial arts combat that combines firearms with

⁹ 4 TTABVUE 6.

¹⁰ 4 TTABVUE 7.

¹¹ Attached to Applicant's Response to Office Action, filed June 19, 2025.

¹² Response to Office Action, filed June 19, 2025, at TSDR p. 21.

¹³ Response to Office Action, filed June 19, 2025, at TSDR p. 25.

hand-to-hand combat and traditional melee weapons in a roughly 50/50 ratio. It can be seen in Hong Kong action cinema, and in American action films influenced by it.

Essentially, Applicant is attacking the distinctiveness of the cited registered mark.

The sixth *DuPont* factor involves “two prongs of analysis for a mark’s strength . . . : conceptual strength and commercial strength.” *Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023) (citation omitted).¹⁴ “Conceptual strength is a measure of a mark’s distinctiveness . . . and distinctiveness is often classified in categories of generally increasing distinctiveness[:] . . . (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful.” *Id.* (citation and quotation and quotation marks omitted). “Distinctiveness is relevant to a mark’s overall strength in the likelihood of confusion analysis.” *Id.* (citation omitted).

In this case, the cited mark is registered on the Principal Register, without a claim of acquired distinctiveness, and is thus deemed to be inherently distinctive. *Heil Co. v. Tripleye GmbH*, No. 91277359, 2024 TTAB LEXIS 494, at *48-49 (when a mark is “registered on the Principal Register, with no claim of acquired distinctiveness under Section 2(f), we presume it is inherently distinctive, i.e., that it is at worst suggestive of the goods [or services].” (citing 15 U.S.C. § 1057(b)). *See also, Tea Bd. of India v. Republic of Tea, Inc.*, No. 91118587, 2006 TTAB LEXIS 330, at *62. We cannot entertain Applicant’s assertion that the registered mark is

¹⁴ Specifically, the sixth factor involves the consideration of “[t]he number and nature of similar marks in use on similar goods [or services].” *DuPont*, 476 F.2d at 1361.

descriptive, as this would be an impermissible collateral attack on the registration.¹⁵ See *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1408 (Fed. Cir. 1997); *In re Nat'l Data Corp.*, 753 F.2d 1056, 1059-60 & n.8 (Fed. Cir. 1985).

Nevertheless, we may consider Applicant's evidence because it may show the cited mark is suggestive. Indeed, as the Federal Circuit has instructed, where a mark that is shown to be "highly suggestive," it may be entitled to an abbreviated scope of protection because that mark is less likely to cause confusion over source identification as opposed to "more fanciful" marks. *Spireon*, 71 F.4th at 1362-63.

Applicant's evidence helps demonstrate that some of the public will understand "Gun Fu" as evoking a genre of "fictional visual media that combines martial arts with guns," as the TV Tropes website explains. The Wikipedia entry also helps show "Gun Fu" has a similar meaning in connection with films. In the context of media combining the use of guns with martial arts, it is certainly strongly suggestive of the subject matter. As such, Applicant's evidence, albeit from only two websites, is probative and tends to show the registered mark has some conceptual weakness.

Finally, as to Applicant's reliance on the fact that it voluntarily disclaimed the wording IS GUN FU, this is of no real importance in this proceeding. "The technicality of a disclaimer in [an] application to register its mark has no legal effect on the issue of likelihood of confusion. The public is unaware of what words have been disclaimed during prosecution of the trademark application at the PTO." *Nat'l Data*, 753 F.2d

¹⁵ An ex parte appeal is not the proper forum for such allegations; they should be brought in a formal cancellation proceeding. See, e.g., *In re Calgon Corp.*, 435 F.2d 596 (CCPA 1971).

1056, 1059.

In sum, the cited registered mark, GUN FU, is inherently distinctive. However, “Gun Fu” has some conceptual weakness when used in connection with media or subject matter that involves guns used in martial art combat. We keep these findings in mind when weighing the other *DuPont* factors and in our ultimate decision as to whether confusion is likely.

C. Comparison of the Marks

We turn now to the first *DuPont* factor, which focuses on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression. *See Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondee en 1772*, 396 F.3d 1369, 1371 (Fed. Cir. 2005) (quoting *DuPont*, 476 F.2d at 1361). Similarity as to any one of these elements may be sufficient to support a finding that the marks are confusingly similar. *See Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 732 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”); *accord In re Inn at St. John’s, LLC*, No. 87075988, 2018 TTAB LEXIS 170, at *13, *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019).

There is no rule that marks are automatically considered similar where one mark encompasses the entirety of another; however, the fact that Registrant’s mark GUN FU is subsumed within Applicant’s mark SPINE – THIS IS GUN FU is a significant point of similarity between them. *See, e.g., In re Mighty Leaf Tea*, 601 F.3d 1342, 1347-48 (Fed. Cir. 2010) (applicant’s mark ML is similar to registrant’s mark ML MARK LEES). In addition, while the marks have differences in sight and sound, they

also possess strong visual and aural similarities as a result of Applicant's inclusion of Registrant's entire mark. Thus, while the initial part of Applicant's mark looks and sounds different from Registrant's mark, the latter phrase THIS IS GUN FU is very similar in those aspects of the marks. Importantly, the words THIS IS further draw attention to and directly emphasize the GUN FU element.

In terms of meaning, the term SPINE that begins Applicant's mark has no demonstrated significance in connection with the involved goods or services. It is clearly a point of difference in terms of connotation. Furthermore, we acknowledge that Applicant is correct to the extent that an initial arbitrary element of a party's mark generally will play a stronger role in the mark's overall commercial impression. Nevertheless, we find the following phrase THIS IS GUN FU, separated by a hyphen, helps convey a fundamental similarity in terms of the marks' source-indicating commercial impressions. This is because the phrase THIS IS GUN FU is likely to be understood by consumers as projecting a connection or source-affiliation with Registrant's GUN FU branded goods. In other words, consumers familiar with Registrant's mark, GUN FU, are likely to mistakenly believe Applicant's goods and services, being sold under SPINE – THIS IS GUN FU, are a version or extension of the Registrant's goods. *See, e.g., Double Coin Holdings*, 2019 TTAB LEXIS 347, at *23 (“ROAD WARRIOR looks, sounds, and conveys the impression of being a line extension of WARRIOR.”)

Accordingly, we find the marks are similar and the first *DuPont* factor weighs in favor of a conclusion that confusion is likely.

II. Conclusion

The first *DuPont* factor favors a conclusion of a likelihood of confusion because Applicant's mark, SPINE – THIS IS GUN FU, and the cited mark, GUN FU, are overall similar in sight, sound and connotation. In addition, the second and third *DuPont* factors also strongly support a conclusion that confusion is likely as to Class 9 because certain goods listed in Class 9 of the application encompass or are encompassed by Registrant's goods and these legally identical goods are presumably found in the same trade channels. In addition, the second *DuPont* factor also supports a conclusion that confusion is likely for Classes 28 and 41 because Applicant's goods and services in these classes have a close intrinsic relationship to the Registrant's goods. The goods and services in each of these classes will target the same class of consumers, namely, the general public interested in playing computer games, whether through downloading or playing online.

Finally, we also keep in mind Applicant's showing that the registered mark, GUN FU, has some conceptual weakness to the extent Registrant's computer games may involve subject matter that combines guns with martial arts. On the other hand, we must also bear in mind that the registered mark is presumed to be inherently distinctive.

Upon weighing all of the aforementioned factors, we conclude that Applicant's mark is likely to cause confusion with the registered mark.

Decision: The refusal under Trademark Act Section 2(d) to register Applicant's mark is affirmed.