

TRADE MARKS ORDINANCE (Cap. 559)

APPLICATION : 300735066

NO.



**APPLICANT : KABUSHIKI KAISHA SONY COMPUTER ENTERTAINMENT
(SONY COMPUTER ENTERTAINMENT INC.)**


CLASS : 9

STATEMENT OF REASONS FOR DECISION

Background

1. On 6 October 2006, Kabushiki Kaisha Sony Computer Entertainment (Sony Computer Entertainment Inc.) (“the applicant”) filed an application for the



registration of  (“the subject mark”), a 3-dimensional shape, pursuant to the provisions of the Trade Marks Ordinance (Cap.559) (“the Ordinance”). The description of the subject mark in the application form reads “*The mark consists of a 3-dimensional shape*” and it was depicted by eight pictures showing the shape from different perspectives. The application was filed in respect of various goods in class 9, including “controllers for video

games”.

2. At the examination stage, objections were raised against the application under section 11(1)(b) and 11(3)(b) of the Ordinance as well as section 7(4) of the Trade Marks Rules (Cap. 559, sub. leg.) (“the Rules”) on the grounds that the subject mark is devoid of any distinctive character, that it consists exclusively of the shape of goods that is necessary to obtain a technical result, and that the applicant did not have an intention to use the subject mark, being the shape of an analog controller for video games, on the other goods applied for. Subsequently, the specification was restricted to “controllers for video games” only and the objection raised under section 7(4) of the Rules was waived as a result. As regards the other objections raised, despite submissions made on behalf of the applicant and the filing of evidence by way of a statutory declaration made by Mahito Niya (“Niya Declaration”), they were maintained by the Registrar.
3. The applicant requested a hearing on the registrability of the subject mark. The hearing was fixed to be held on 26 January 2010. Messrs. Lovells (“the Agents”) filed Form T12 on 2 December 2009 on behalf of the applicant but subsequently indicated that the applicant no longer wished to deal with the issue of registrability at a hearing. Pursuant to rule 75(b) of the Trade Mark Rules (Cap.559, sub leg), I now proceed to decide the matter without a hearing.

Grounds of refusal under section 11

4. The absolute grounds for refusal of an application for registration of a trade mark are set out in section 11 of the Ordinance. The relevant parts of subsections (1), (2) and (3) read as follows:

“(1) Subject to subsection (2), the following shall not be registered –

...

(b) trade marks which are devoid of any distinctive character;...

- (2) A trade mark shall not be refused registration by virtue of subsection (1)(b), (c) or (d) if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it.

(3) A sign shall not be registered as a trade mark in relation to goods if it consists exclusively of –

...

(b) The shape of goods that is necessary to obtain a technical result; ...”

Decision

Section 11(3)(b)

5. Section 11(3)(b) of the Ordinance is not a new provision. It is couched in the same terms as section 12(3)(b) of the old Trade Marks Ordinance (Cap.43) which was repealed upon the coming into effect of the Ordinance. Guiding principles on the interpretation of this provision can be drawn from the case of ***Koninklijke Philips N.V. v Remington Consumer Products Ltd*** [2006] FSR 30. On the test for applying section 3(2)(b) of the UK Trade Marks Act of 1994 (equivalent to section 11(3)(b) of the Ordinance), the UK Court of Appeal had this to say, at paragraph 38:-

“The first step is to identify the “essential characteristics or features” of the shape of the goods in issue. Once they have been determined, the next step is to determine whether the essential characteristics or features consisting “solely” of the shape of goods are attributable only to the technical result.”

6. The subject mark is the shape of an analog controller for playing video games, with two short round legs connected by a rung. The two short round legs afford a good grip of the controller to the hands of the user. Buttons can be found at one end of each of those legs, where they are joined by the rung. With a user holding the two legs of the shape in his hands and with the end with the buttons away from himself, the buttons can be divided into two sets, one set on the left side of the user and the other on the right side. Each set is suitably within reach of the fingers of the user when he is gripping the two short round legs. In each set of the buttons, there are a group of four smaller buttons and one bigger one in the form of a toggle. The positions of the two toggles allow each of them to be easily maneuvered by the thumbs of the respective lateral sides of the user. I find the features described above to be essential characteristics of the shape of the goods in question.

7. There are a few other items notable from the pictures depicting the subject mark. One such item is the line running along the side of the two legs which indicates that the legs may be formed by assembling parts that fit with each other. There are also a few places marked by dots on the picture showing the underside of the shape where nuts and bolts for holding the parts together can be found. On the top side of the rung where all the buttons can clearly be seen, there are three more spots in the middle part of the rung, each in different shape, one rectangle, one triangle and one circle. The size of each of these shapes is rather small when compared with the subject mark as a whole. The rectangle and the triangle are blank inside but the circle has a device inside. However, the design of this device is barely decipherable. These aforesaid additional features – the lines on the sides, the dots on the underside, the shapes on the top side and the device inside the circular shape – do not have any significant impact on the overall impression that consumers of the goods applied for will have of the shape that constitutes the subject mark.

8. Having identified the essential characteristics or features of the shape of the controllers, I then have to determine whether they are attributable only to the technical result. In describing each of the essential characteristics mentioned above, I have set forth the functional purposes served by each of them – the rendering of a good grip, the affording of control to the fingers and the enabling of maneuver of the toggles by the thumbs. The technical result to be achieved by a controller for video games is to allow the user to play the games through signals transmitted upon activation of the buttons and the switches on it. The essential characteristics in the shape are therefore attributable to the technical result. That being the case, I find the subject mark to consist exclusively of the shape of the goods that is necessary to obtain a technical result and is thus precluded from registration under section 11(3)(b) of the Ordinance.

9. The main argument relied upon by the applicant is the presence of the device inside the circular shape mentioned in paragraph 7 above and which is referred to by the applicant as the “PS logo”. The PS logo is a mark which has been registered by the applicant in respect of various goods and services, including the goods applied for in this application. A clear representation of the PS logo from one of the registrations held by the applicant is set out in Part A of Appendix 1

hereto. By reason of its presence in the subject mark, the applicant submits that the subject mark is not one that consists *exclusively* of the shape of goods that is necessary to achieve a technical result.

10. In the Work Manual of the Trade Marks Registry, there is a chapter (available at www.ipd.gov.hk/eng/intellectual_property/trademarks/regsitry.htm) with the title “Shape marks” which relates to the practice on the examination of marks consisting of a shape. It is clearly stated in that chapter that a wholly indistinctive shape may be accepted for registration on the basis of other distinctive (non-shape) elements if the distinctive elements are immediately apparent in the representation and make up a significant part of the mark. In such a case, the mark should be described as consisting of “a three-dimensional shape with the word(s)/device(s) appearing on it”. Although the discussions referred to are concerned with the assessment of distinctiveness, they demonstrate the importance of the description and the representation of the mark when registration is applied for.
11. As noted in paragraph 1 above, the description of the subject mark has made no reference whatsoever to the PS logo. Further, with the representations of the subject mark filed by the applicant, the image of the PS logo is blurred and it is difficult to make out the appearance of it. An enlarged copy of the pictorial representation showing the top side of the controller is reproduced in Part B of Appendix 1 hereto. On the basis of the description and the representations of the subject mark as filed, there is no basis to regard the PS logo as an essential characteristic of the shape in question at all.
12. The applicant has also referred me to the interpretation of the word “technical” in the case of *Mega Bloks Inc. v Kirkbi A/S* [2005] ETMR (87) OHIM and the adoption of the interpretation by Reyes J. in the case of *Sony Computer Entertainment Inc. v The Registrar of Trade Marks* (CFI 2616-2621 of 2006, 18 May 2007). In the *Mega Bloks Inc.* case, the word “technical” was construed in the same way as under patent law, where an invention is considered “technical” if it is in a field of technology. In reliance on these cases, the applicant submits that the function of enabling a user to play video games by manipulating buttons on the controller is not technical in nature since that does not involve any degree of technology or technical results.

13. It is the submission of the applicant that the fact that a shape has functionality does not render it necessary to achieve a technical result, thereby bringing it under the exclusion of section 11(3)(b) of the Ordinance. Rather, it is essential to look at the specific individual elements of the mark. Further, it is the expectation of ordinary consumers that goods on the market have a commercial source and that the essence of competition drives and inspires manufacturers to create products that will distinguish their goods from those of other manufacturers and which will identify themselves in an appealing way which will generate goodwill and sales. In the opinion of the applicant, it is unrealistic to assume that consumers do not expect the shape of goods to be designed to distinguish the manufacturer's goods from those of others.
14. Against the aforesaid submissions, the applicant suggests that the subject mark is a hybrid of functionality and distinctiveness. In particular, the features of deliberate individuality are considered to have provided the subject mark with the necessary degree of distinctiveness required for registration. The applicant has also stressed that, in a minimalistic design like the subject mark, small differences stand out, catch the eye and are retained in the memory. Furthermore, the elements of individuality are inherently present and embodied in the subject mark and no teaching or education is necessary to alert the public to those features.
15. On the issue whether the subject mark achieves a technical result, the applicant points out that the function of the controller is to allow a game player to play video games by controlling movements on screen by manipulating the switches on the controller. Since other alternatives like a keyboard or a panel of buttons can serve the same purpose without enabling the user to hold it with his hands, the technical result of a controller is not obtained by the shape constituting the subject mark. Further, the applicant considers the presence of diversely shaped controllers in the market as indicative of the fact that the shape in question is not necessary for the purposes of serving the function as a controller.
16. The case of *Sony Computer Entertainment Inc. v The Registrar of Trade Marks*, *supra*, actually concerns the applications by the same applicant as in the present case for the registration of six shape marks, two of which were the

shapes of two different versions of controllers for the PlayStation video game systems. The shapes of these controllers are similar to the subject mark and the representations of these shapes are set out in Appendix 2 hereto.

17. The reference to a field of technology in the interpretation of the word “technical” does not mean that the technical solution involved has to be in a very specialized field. Despite the adoption of such interpretation of the word “technical”, Reyes J had no difficulty in finding that registration of the shapes of the controllers in that case should be refused under section 12(3)(b) of the Trade Marks Ordinance (Cap. 43) (equivalent to section 11(3)(b) of the Ordinance). In paragraphs 69 to 73 of his judgment, Reyes J concluded that the essential shape of “two short round legs connected by a rung” with or without two toggles as a means of resolving the functional problem of enabling a user to hold a unit securely and comfortably with both hands while enabling him to control a game with the fingers of both hands. The subject mark shares the same essential characteristics as the shapes of the two controllers considered in the case of *Sony Computer Entertainment Inc. v The Registrar of Trade Marks*, supra. The case thus actually supports my finding that the essential characteristics of the shape in question are necessary to obtain a technical result.
18. As regards the applicant’s insistence on the relevance of the other elements in the shape that constitutes the subject mark and the expectation of the consumers of the goods in question, I find the following passages from the case of *Koninklijke Philips N.V. v Remington Consumer Products Ltd*, supra to be helpful –

“52. As in other areas of trade mark law the important factor is the impact of the mark on the eye of the average customer. The perception of the average customer for the goods in question does not depend on the dissection of the mark and on an examination of each feature of the mark. It turns on the feature which contributes most to the overall impression created by the whole mark. We do not accept Mr. Carr’s contention that any feature which contributes to the overall impression is an essential feature of the mark. Not every feature of the mark has the same visual impact. The question of essential feature was one of fact and degree for the judge ...”

“61. In summary, Philips’ case was that, as all essential features of the

mark must be attributable only to a technical result for section 3(2)(b) to apply and as parts of an essential feature are non-functional, then it could not be said that the essential features of that shape are attributable only to the technical result ...

“62. Like the judge we do not accept the submissions of Philips on this point... Fragmentation of a mark is not the proper approach, either with functionality or with distinctiveness. In order to decide whether the shape of the goods in question is necessary to obtain a technical result the court must consider the mark as a whole. That is how the relevant section of the purchasing public would perceive it. A trade mark is not treated by the public or by the court as a mere assembly of component parts. The individual parts may, of course, be looked at for the purpose of making the overall assessment of the impression created by the whole. Taking account of the essential elements of the mark, an assessment has to be made as to its functionality...”

19. It is clear from the passages quoted that the objection under section 11(3)(b) of the Ordinance holds so long as the essential characteristics of the subject mark are necessary to obtain a technical result, notwithstanding the presence of other features that are not attributable to such functionality. This is so even if there are particular elements of individuality when the proper approach is an overall assessment, rather than fragmentation, of the mark as a whole.
20. That leaves the applicant’s argument that there are other alternatives that can serve the same purpose of allowing the user to play the video games by controlling the movements on screen through the manipulation of the switches on the controller. It is well established by UK and ECJ decisions that such a state of matter is no help to an objection raised under the corresponding provision in the UK Act and EC Directive. In the local arena, Reyes J in the case of *Sony Computer Entertainment Inc. v The Registrar of Trade Marks*, *supra*, also rejected the argument made by the counsel of the applicant that because there were other forms of controllers in the market, the shapes under consideration in the case were not necessary to achieve a technical result.
21. For the reasons stated above, the subject mark is precluded from registration under section 11(3)(b) of the Ordinance as it consists exclusively of the shape of

the goods that is necessary to obtain a technical reason. Unlike section 11(1)(b), the objection under section 11(3)(b) cannot be overcome by evidence of use. There is thus no need for me to deal with the objection to the registration of the subject mark under section 11(1)(b). Nonetheless, for the sake of completeness, I shall proceed to do so.

Section 11(1)(b)

22. The subject mark is objected to under section 11(1)(b) on the ground that since it represents the common shape of an analog controller for video games, it will not be perceived by the average consumer as a sign that distinguishes the goods of one trader from that of other traders. The applicable test for considering whether a mark has any distinctive character has been considered in many UK cases. The test is formulated by Jacob J in the case of *British Sugar Plc v James Robertson and Sons Ltd* [1996] RPC 281, at page 306, as follows –

“What does devoid of distinctive character mean? I think the phrase requires consideration of the mark on its own, assuming no use. Is it the sort of word (or other sign) which cannot do the job of distinguishing without first educating the public that it is a trade mark?”

23. In the case of *Nestle SA’s Trade Mark Application (Have a Break)* [2004] FSR 2 (at paragraph 23), the test is phrased as follows –

“The distinctiveness to be considered is that which identifies a product as originating from a particular undertaking. Such distinctiveness is to be considered by reference to goods of the class for which registration is sought and consumers of those goods. In relation to the consumers of those goods the court is required to consider the presumed expectations of reasonably well informed, and circumspect consumers.”

24. In assessing the distinctiveness of a mark, the question to consider is whether the mark will be perceived as a badge of trade origin. The assessment is to be carried out in respect of the subject mark, with reference to the goods of the class for which registration is sought, as well as the consumers of those goods, who are reasonably well informed and circumspect.

25. The goods in question are “controllers for video games”. Such goods are household goods and hence the relevant consumers are members of the general public. The goods are not items of everyday purchase but the average consumer does not pay attention to every detail. With the subject mark being the shape of the goods applied for, the first and foremost impression that the relevant consumers have of it will be that of the goods itself rather than an indicator of trade source. A blurred image of the PS logo does appear on the subject mark, but it is almost impossible to make out its form. Further, the size of the PS logo, in relation to the subject mark as a whole, is very small. It will not cast any strong impression on the relevant consumers. The subject mark is therefore devoid of any distinctive character and is precluded from registration under section 11(1)(b) of the Ordinance.
26. The applicant takes the view that the specific configuration of the shape, being comprised of the various visual features, is sufficiently varied and unusual to render the subject mark distinctive. These features include the specific curved configuration of the “two short legs”, the dimensions and positioning of the buttons on the device, the view of the “legs” from the bottom view, the profiling of the device and the PS logo in the centre of the top side of the shape. According to the applicant, each element of the subject mark contributes some spark of individuality which adds up to the overall character and all such features should be considered when assessing the registrability of the subject mark. The applicant considers it wrong to ignore, downplay or dismiss any feature of the subject mark by way of a subjective presumption that the ordinary consumer would do so.
27. In particular, the applicant stresses that consumers of computer game controllers spend greater care in the purchase of such goods, being more expensive, than everyday supermarket purchases and they pay greater attention to details. The applicant also points out that the range of competing products is not large and that shape is used by traders to distinguish their respective goods where it is not part of functionality, emphasizing in the meantime that the controllers of the applicant are not in the same shape as those of the other controllers in the market. Reference has also been made to features that enable core functionality of a product and features that create individuality and it is the applicant’s submission

that both types of features contribute to the overall impression that the average consumer will have of a mark. He will therefore be able to recognize the overall configuration of a shape mark as well as recall its specific traits of individuality, and hence differentiate it from other shapes.

28. The applicant claims that, with all the specific features, the subject mark is unique and unusual and thus serves as a badge of origin. The applicant also places emphasis on the presence of the PS logo which in its view, being in the centre of the top side of the shape and of a size comparable to the buttons on either side of the face of the controller, has an immediate visual impact which makes the subject mark as a whole even more distinctive. Furthermore, the applicant points to the fact that the PS logo appears on the side of the shape that is most prominently featured in the sales, marketing and promotion of the controllers and hence most exposed to the consumers.
29. In addition, as the test of distinctiveness to be applied to a shape mark is the same as that for other marks, the applicant seeks to draw analogy from the acceptance for registration of minor variations of known words, stylized letter marks and combinations of letter marks and suggests that the combination of arbitrary shape elements to form the subject mark should be considered sufficient to endow it with the requisite degree of distinctiveness for registration. The applicant also refers to the principle enunciated in various decisions that the threshold for distinctiveness is not high and that a combination of non-distinctive elements can create a distinctive mark.
30. I accept that the shape of the controller forming the subject mark has a number of individual features and they should all be taken into account in considering the overall impression that the relevant consumers will have of the subject mark. That does not however mean that the variations in these features from other brands will always be noticed by the consumers of the goods in question or that they will be regarded as identifiers of trade source. Even if the customers are to try out the controllers before they decide whether they want to buy a particular one, they are likely to do so for the purpose of checking out the functionality of the various features of the controllers. Controllers of different traders are invariably marketed under their different brand names and without having been educated of the function of the shape of the controllers to serve as indicator of

trade provenance, consumers will naturally rely on the brand names to distinguish the goods of one trader from those of another.

31. I also agree that the tendency of consumers to pay more attention where the articles of purchase are of relatively greater value is a factor to be taken into account. That cannot however be equated with attributing trade mark significance to the shapes of controllers. With the shapes of controllers for video games, the purchasers are more concerned with the comfort and feel of the grip and the performance of the controllers. They may be able to tell which controller best suits their needs, yet what they regard as the guarantee of trade source is the brand name under which the controller is sold rather than the shape of the controller. To them, variations in the shape mean different functionality rather than different source. I would add that although the possibility that aficionados of computer games being able to identify even minute variations in the features of one controller from another cannot be ruled out, it is not proper to impute such knowledge to the average consumer, whose natural inclination is to regard the shape in question merely as what it is, that is, that of the shape of the goods itself.
32. In response to the submission that shape is used by traders to distinguish their respective goods and the controllers of the applicant are not in the same shape as those of the other controllers in the market, the Registrar has, during the examination stage, referred the applicant to various examples of use of similar shapes as controllers for video games that were found on the internet. Details of these examples are set out in Appendix 3 hereto. Further, although there are controllers in other shapes that are not similar to that of the subject mark, the test of distinctiveness is not whether the shape is used by other traders, but whether the relevant consumers will regard it as a badge of trade origin.
33. Although the threshold for distinctiveness is not high, an application for the registration of a shape of the goods applied for can pass the test only if the relevant consumers will regard the shape as an indicator of trade source. For the reasons stated above, I am not satisfied that, without first having been educated, the relevant consumers will so regard the subject mark. The subject mark is thus devoid of distinctive character.

Section 11(2)

34. Although evidence of use is of no assistance to an objection raised under section 11(3)(b), it may be of use to overcome an objection raised under section 11(1)(b). A statement of the relevant principle applicable to section 11(2) of the Ordinance can be found in the case of *Windsurfing Chiemsee Produktions-und Vertriebs GmbH v Boots-und Segelzubehor Walter Huber and Franz Attenberger* [1999] E.T.M.R. 585. The case is concerned with Article 3(3) of the First Council Directive 89/104/EEC which is broadly similar to section 11(2) of the Ordinance. The Court of Justice of the European Communities said in that case, at paragraph 54 –

“...a trade mark acquires distinctive character following the use which has been made of it where the mark has come to identify the product in respect of which registration is applied for as originating from a particular undertaking and thus to distinguish that product from goods of other undertakings.”

35. By way of the Niiya Declaration, the applicant filed evidence to show that the subject mark has acquired distinctiveness through the use that has been made of it in Hong Kong. The Niiya Declaration gives details of the production and sale of the computer game software and hardware systems marketed under various trade names, including “PlayStation” and I shall refer to them by this name. There are three generations of PlayStation and for simplicity sake, I shall refer to them as “PS1”, “PS2” and “PS3”.
36. According to paragraphs 8-11 of the Niiya Declaration, PS1, PS2 and PS3 were first released in Japan in 1994, November 2000 and November 2006 respectively and in Hong Kong, they were officially launched in December 1996, December 2001 and November 2006 respectively. There are a number of peripherals for PlayStation and these include the controllers, of which there are two types – the digital controllers and the DualShock controllers. The subject mark is deposed to as being formed by the three-dimensional shape and features of the DualShock controllers, along with the PS logo.
37. The deponent has averred to the continuous use of the subject mark in Hong Kong since November 1997. The launch dates of controllers bearing the

subject mark in Hong Kong are a bit different from those of the computer game systems. In paragraph 16 of the Niiya Declaration, the subject mark is said to be first introduced in Hong Kong in November 1997, about a year after the launch of PS1 in Hong Kong. Another version was introduced in December 2001 as the peripheral for PS2 and a third version, the SIXAXIS wireless controller, was subsequently released as a peripheral to PS3. The date of the first introduction of this third version has not been given, but since the SIXAXIS version is a peripheral of PS3, it would not have been introduced before the launch of PS3 in Hong Kong in November 2006. Copies of photographs of the controllers of each generation of PlayStation are shown in Exhibit “MN-1” of the Niiya Declaration.

38. Despite the claim by the applicant that controllers incorporating the shape that forms the subject mark have been sold in Hong Kong since 1997, a review of the photographs in Exhibit “MN-1” shows that the features on the controllers for PS1 and PS2 are different from that of the subject mark. As pointed out in paragraph 7 above, on the top side of the rung that connects the two short legs, there are three spots in the middle, one rectangular, one triangular and one circular. In the earlier versions of the controllers that were sold as peripherals of PS1 and PS2, there is no circular spot on the top side of the rung. In its place are two rectangular shapes, one on top of another. The larger one on top has the word “ANALOG” printed right above it but the smaller one below has no label near it. In the controller for the PS3 version, the PS logo is found inside the circular spot whereas in the earlier versions, it is placed in the space between the other rectangular spot and the triangular spot.
39. Thus, from what is disclosed by the applicant in the Niiya Declaration, the shape forming the subject mark only began to be used by the applicant on or after PS3 had been launched in Hong Kong in November 2006. Thus, although information about the sales of the DualShock controllers and advertising expenditure prior to the filing of this application has been provided, such information can only relate to the use of the earlier versions of the controllers and not that which incorporates the shape constituting the subject mark. Since use of the subject mark did not commence until or after November 2006, the evidence filed can be of no assistance to the applicant’s case.

40. I wish to add that it is clear from the samples of use exhibited that other marks of the applicant have been used in conjunction with the shape of the controllers. These marks include the word marks “SONY” and “PlayStation” and also the PS logo. There is nothing in the Niiya Declaration which shows that the relevant consumers have been educated of the intended function of the shape of the controllers as a sign to distinguish the goods of the applicant from those of other traders. Hence, even if there had been use of the subject mark prior to the date of the filing of this application, a case of acquired distinctiveness could not have, on the strength of the evidence filed, been established.

Other matters

41. The applicant has, in the letter of the Agents dated 12 October 2007, referred to the registration of a few 3-dimensional marks that have been accepted for registration, and which are combinations of a 3-dimensional shape with logo(s) or word(s) and requested the subject mark to be examined on the same basis. It is clear from the descriptions of those marks that those colours, devices and/or words that appear on the representations of the marks have been claimed as elements of the mark. That is not the case with this application. In any event, it is a well established principle that the registrability of a mark is to be assessed on the basis of its own merits and not by reference to the state of the register.

42. The applicant also refers to the registration of the subject mark in many places around the world. Copies of the registration certificates of the subject mark in USA and Japan have been submitted. The reasons for the acceptance of the subject mark in those places are not known to me. I therefore do not consider these registrations to be of assistance to this application.

Conclusion

43. I have considered all the documents and evidence filed by the applicant together with all the written submissions made in respect of the application. For the reasons stated above, I find that, in respect of the goods applied for, the subject mark is precluded from registration under section 11(1)(b) of the Ordinance for being devoid of any distinctive character and under section 11(3)(b) of the Ordinance since it consists exclusively of the shape of the goods that is necessary

to obtain a technical result. The application is accordingly refused under section 42(4)(b) of the Ordinance.

Caroline Chow
for Registrar of Trade Marks
27 April 2010

Appendix 1

Part A



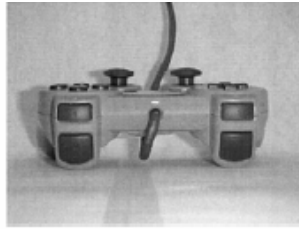
Part B



Appendix 2



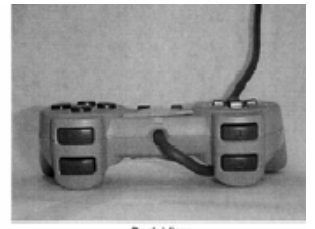
Top View



Back View



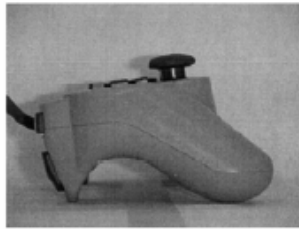
Top View



Back View



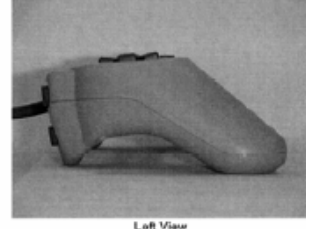
Bottom View



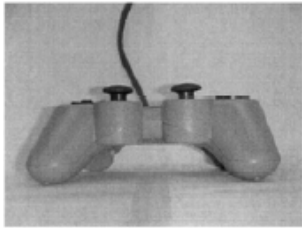
Left View



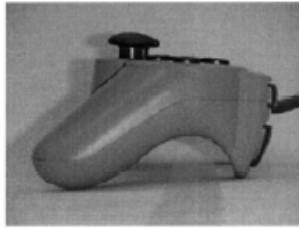
Bottom View



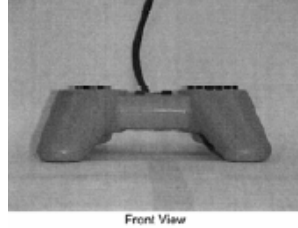
Left View



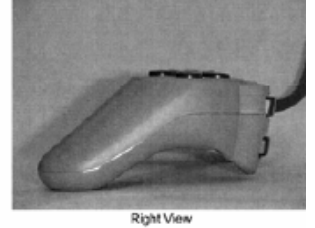
Front View



Right View



Front View



Right View

Appendix 3

1. <http://www.lockergnome.com/bargain/2005/12/12/logitech-cordless-action-controller-game-pad-2799/>

Logitech Cordless Action Controller Game Pad



2. <http://www.flickr.com/photos/mrbeng/306345633/>

Nintendo Wii with Game Cube Controllers



3. <http://shopproducts.howstuffworks.com/Saitek-P2500-RumblePad-Game-Pad/SF-1/PID-24001343>

Saitek P2500 RumblePad Game Pad



4. <http://shopproducts.howstuffworks.com/Mad-Catz-MOV-547160-for-Xbox-360/SF-1/PID-29212402>

Mad Catz (MOV-547160) for Xbox 360

