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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 79161731

MARK: GODDESSES HERA



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GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/trademarks/index.jsp>

TTAB INFORMATION:

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>

APPLICANT: Universal Entertainment Corporation

CORRESPONDENT'S REFERENCE/DOCKET NO:

610.093-658

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EXAMINING ATTORNEY'S APPEAL BRIEF

INTERNATIONAL REGISTRATION NO. 1238913

Applicant, Universal Entertainment Corporation, has appealed the trademark examining attorney's final refusal to register the mark **GODDESSES HERA** in standard characters for "Gaming machines; gaming machines with multi-terminals; home video game machines; magnetic card operated arcade video game machines; arcade video game machines with multi-terminals; arcade video game machines; slot machines; coin-operated arcade video game machines; hand-held games with liquid

crystal displays” pursuant to Trademark Act Section 2(d), 15 U.S.C. §1052(d), on the grounds that the mark is likely to be confused with U.S. Registration No. 4329291 for the mark **HERA’S GOLD**, which is registered in connection with “Computer gaming software and computer gaming software downloadable via a computer or wireless network that provides for the play of a game of chance at a device,” in International Class 9 and “Gaming machines, namely, devices which accept a wager,” in International Class 28, all on the Principal Register.

I. FACTS

On January 15, 2015, Universal Entertainment Corporation, (“applicant”) filed a Request for an Extension of Protection to the United States for the mark GODDESSES HERA in standard characters on the Principal Register, for use in connection with “Gaming machines; gaming machines with multi-terminals; home video game machines; magnetic card operated arcade video game machines; arcade video game machines with multi-terminals; arcade video game machines; slot machines; coin-operated arcade video game machines; hand-held games with liquid crystal displays.”

On April 23, 2015, the examining attorney refused registration pursuant to Trademark Act Section 2(d), 15 U.S.C. §1052(d), because of the likelihood of confusion with the mark is U.S. Registration No. 4329291.

On August 25, 2015, applicant presented arguments in response to the Trademark Act Section 2(d) refusal.

On August 29, 2015, after reviewing and considering applicant’s response, the examining attorney issued a final refusal under Trademark Act Section 2(d).

On February 4, 2016, applicant filed a Request for Reconsideration after Final Action and submitted additional arguments in response to the refusal. Contemporaneously with applicant's Request for Reconsideration, applicant filed the present appeal.

On February 29, 2016, the examining attorney denied the Request for Reconsideration and the Trademark Trial and Appeal Board was notified to resume the present appeal.

II. ISSUE ON APPEAL

The sole issue on appeal is whether applicant's mark, when used in connection with the identified goods, so resembles the mark is U.S. Registration No. 4329291 as to be likely to cause confusion, mistake, or deception under Trademark Act Section 2(d).

III. ARGUMENT

THE MARKS OF APPLICANT AND REGISTRANT ARE SIMILAR AND THE GOODS OF THE PARTIES SO CLOSELY RELATED SUCH THAT THERE EXISTS A LIKELIHOOD OF CONFUSION, MISTAKE, OR DECEPTION UNDER SECTION 2(d) OF THE TRADEMARK ACT

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely a potential consumer would be confused, mistaken, or deceived as to the source of the goods of the applicant and registrant. *See* 15 U.S.C. §1052(d). A determination of likelihood of confusion under Section 2(d) is made on a case-by case basis and the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973) aid in this determination. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1349, 98 USPQ2d 1253, 1256 (Fed. Cir. 2011). Not all the *du Pont* factors, however, are necessarily relevant or of equal weight, and any one of the factors may control in a given case, depending upon the evidence of record. *Id.* at 1355.

In this case, the following factors are the most relevant: similarity of the marks, similarity and nature of the goods and similarity of the trade channels of the goods. *See In re Viterra Inc.*, 671 F.3d 1358, 1361-62, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); TMEP §§1207.01 *et seq.*

The overriding concern is not only to prevent buyer confusion as to the source of the goods, but to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. *See In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). Therefore, any doubt regarding a likelihood of confusion determination is resolved in favor of the registrant. TMEP §1207.01(d)(i); *see Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002).

a. **THE MARKS ARE CONFUSINGLY SIMILAR IN SOUND, APPEARANCE AND COMMERCIAL IMPRESSION**

Marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F. 3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)); TMEP §1207.01(b)-(b)(v). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re 1st USA Realty Prof’ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007); TMEP §1207.01(b). Here, the marks at issue are **GODDESSES HERA** and the registered **HERA’S GOLD**.

1. THE MARKS ARE SIMILAR IN SOUND AND APPEARANCE

Marks may be confusingly similar in appearance where similar terms or phrases or similar parts of terms or phrases appear in the compared marks and create a similar overall commercial impression. *See Ava Enters. v. Audio Boss USA, Inc.*, 77 USPQ2d 1783 (TTAB 2006) (finding AUDIO BSS USA and design similar in appearance to BOSS AUDIO SYSTEMS (stylized)); *In re Lamson Oil Co.*, 6 USPQ2d 1041

(TTAB 1987) (finding TRUCOOL and TURCOOL confusingly similar in appearance); TMEP §1207.01(b)(ii)-(iii). Here, both marks share the identical term HERA. The mark in the cited registration uses the possessive form of HERA as HERA'S. Applicant's argues that "the Examining Attorney has used an adaptation of the Registered mark in analyzing the respective marks in order to attempt to assert that there are similarities between the respective marks." Applicant's Brief p. 9. However, the possessive "S" has little, if any, trademark significance and does not otherwise affect the overall similarity of the marks in terms of commercial impression. See *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009) (noting that "[t]he absence of the possessive form in applicant's mark . . . has little, if any, significance for consumers in distinguishing it from the cited mark"), *In re Curtice-Burns, Inc.*, 231 USPQ 990, 992 (TTAB 1986) (finding the marks MCKENZIE'S and MCKENZIE "virtually identical in commercial impression"). Thus, the marks share a nearly identical term, and HERA, found in applicant's mark is fully contained within the cited registration, which makes the marks similar in sound and appearance.

In addition to this term, each mark contains an additional term that begins with a "G". The cited registration contains the term GOLD and applicant's mark contains the word GODDESSES. Applicant argues that "[t]he inclusion of the formative GODDESSES before HERA in the applied-for mark creates a very distinct appearance when compared to HERA'S GOLD of the registered mark" Applicant's Brief p. 6. However, consumer confusion has been held likely for marks that do not physically sound or look alike but that convey the same idea, stimulate the same mental reaction, or may have the same overall meaning. See *H. Sichel Sohne, GmbH v. John Gross & Co.*, 204 USPQ 257, 260-61 (TTAB 1979) (holding BLUE NUN for wines likely to be confused with BLUE CHAPEL for the same goods); TMEP §1207.01(b). Here, as in *H. Sichel Sohne*, each mark is two words, one of which is nearly identical and is combined with another word that produces a similar commercial impression. Here, HERA was a goddess who was referred to "golden-throned." See *The Oxford Dictionary of Classical Myth and Religion*, at February 29, 2016 Denial of Request for Reconsideration p.3. Moreover, when comparing marks, the test is not

whether the marks can be distinguished in a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs., Inc. v. Truimph Learning LLC*, 668 F.3d 1356, 1368, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)); TMEP §1207.01(b). In this case, the marks share a nearly identical term, each have one additional term in the mark that begins with a “G”, are used in a manner that gives the marks a highly similar overall commercial impression and the cited registration is strong in connection with the goods at issue.

2. THE MARKS HAVE HIGHLY SIMILAR OVERALL COMMERCIAL IMPRESSIONS

The marks at are issue convey highly similar overall commercial impressions. HERA is a mythological goddess. See August 29, 2015, Office action pp. 48-55, February 29, 2016 Denial of Request for Reconsideration pp. 3-21. Hera was known for golden items, including sitting on a golden throne. See *id* at 3. Thus, applicant’s use of GODDESSES reinforces the impression that HERA was a goddess.

On the other hand, applicant argues that “[t]he applied-for mark...conveys one particular meaning, namely, the Greek goddess of women, marriage and childbirth, and the wife and sister of Zeus. In contrast, the Registered mark as a whole has a meaning ‘gold possessed by Hera.’” Applicant’s brief p. 10. Applicant’s arguments are an attempt to limit the meaning and connotation of the registered mark.

Rather than attempting to limit the meaning of either mark to one impression, the evidence of record demonstrates that applicant’s mark has an overall similar commercial impression – not that the marks make identical impressions.

Applicant also argues that “[the registered mark] does not convey the impression of the goddess Hera herself.” Applicant Brief at 12. However, Hera is understood as a mythological goddess. Hera is defined as “a powerful goddess, the wife and sister of Zeus and the daughter of Cronus and Rhea” by the Oxford Dictionaries. August 29, 2015 Office action p. 52. Finally, reinforcing the argument that the marks convey similar impressions, a depiction of a goddess is used on registrant’s goods in connection with the mark HERA’S GOLD. See February 29, 2016, Denial of Request for Reconsideration p. 25. Accordingly, as demonstrated by the evidence of record, the marks have highly similar overall commercial impressions.

3. THE CITED REGISTRATION IS STRONG IN CONNECTION WITH THE GOODS AT ISSUE

HERA, in connection with the goods at issue is strong. The cited registration is the only registered mark on either the Principal or Supplemental registers in International Class 28, where gaming machines are classified or with “gaming” in the identification of goods and services. See August 29, 2015 Office action pp. 46-47; see also February 29, 2016 Denial of Request for Reconsideration p. 2. Moreover, there is no evidence of record of other third parties using this mark. Accordingly, the cited registration is a strong mark in connection with the goods at issue. See, e.g., *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 1340, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004) (defining an arbitrary mark as “a known word used in an unexpected or uncommon way”).

Finally, where the goods of an applicant and registrant are identical or virtually identical, the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as in the case of diverse goods. See *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016); TMEP §1207.01(b).

b. APPLICANT'S GOODS ARE HIGHLY RELATED TO REGISTRANT'S GOODS

The goods of the parties need not be identical or even competitive to find a likelihood of confusion. See *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000). The respective goods need only be “related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the goods] emanate from the same source.” *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007); TMEP §1207.01(a)(i).

I. RELATEDNESS OF THE GOODS AT ISSUE

Applicant’s and registrant’s goods are related because the goods of both parties include “gaming machines.” Further, applicant’s broadly identified “gaming machines” encompasses the registrant’s more narrowly identified “gaming machines, namely, devices which accept a wager.” In addition, in its brief, applicant does not argue that the goods at issue are unrelated.

Moreover, the Trademark Trial and Appeal Board has recently held that the identical goods at issue in Class 28 were “legally identical in part and otherwise closely related....” *In re Universal Entertainment Corporation* (U.S. Application Serial No. 79153067, dated May 24, 2106, TTAB 2016) [non-precedential]. Although this case is not binding upon the Board, the goods at issue are strikingly similar. See TMBP §1203.02(f) (2015).

II. THE GOODS MAY EMANATE FROM A SINGLE SOURCE AND SHARE COMMON TRADE CHANNELS

The goods at issue are also related because they commonly come from a single source and move in the same channels of trade to the same purchasers. The Internet evidence of record establishes that the same entity commonly manufactures various types of gaming machines and markets these goods under the same mark. Moreover, the identification set forth in the application and registration has no restrictions as to nature, type, channels of trade, or classes of purchasers. Therefore, it is presumed that these goods “travel in the same channels of trade to the same class of purchasers.” *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)). Therefore, applicant’s and registrant’s goods are considered related for likelihood of confusion purposes. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009).

Below are examples of this Internet evidence from the record:

- The evidence of record, from registrant Bally Technologies, shows that various gaming machines and devices which accept a wager and slot machines are sold under the same mark. This evidence also shows that gaming machines are sold under the same mark as gaming software. *See* August 29, 2015, Office action, pp. 23-29.
- The evidence of record from Aristocrat shows that various gaming machines and devices which accept a wager, including gaming machines with multi-terminals are sold under the same mark. This evidence also shows that gaming machines are sold under the same mark as gaming software. *See* August 29, 2015, Office action, pp. 30-38.
- The evidence of record from IGT shows that various gaming machines and devices which accept a wager, including that gaming machines are sold under the same mark as gaming software. *See* August 29, 2015, Office action, pp. 39-40.
- The evidence of record from Ortiz Gaming shows that various gaming machines and devices which accept a wager are sold under the same mark. This evidence also shows

that gaming machines are sold under the same mark as gaming software. See August 29, 2015, Office action, pp. 41-45.

As to the other various gaming machines in the instant application, trademark examining attorney has attached evidence to the August 29, 2015 Office action (pp. 2-22) and the February 29, 2016 Denial of Request for Reconsideration (pp. 28-45) from the USPTO's X-Search database consisting of a number of third-party marks registered for use in connection with the same or similar goods as those of both applicant and registrant in this case. This evidence shows that the goods listed therein, namely various types of gaming machines including arcade games and handheld gaming machines as well as computer gaming software are of a kind that may emanate from a single source under a single mark. See *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (citing *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988)); TMEP §1207.01(d)(iii). Specifically, the registrations in the chart below are the most relevant.

Mark	Goods	U.S. Reg. No.
FRUIT COCKTAIL	Class 9: gaming machines and related software for playing a game of chance Class 28: stand alone video game machines; hand-held unit for playing electronic games	2450074
MAZU	Class 9: Computer hardware; computer software, namely, computer software for gaming purposes on any computerized platform, including online gaming, dedicated gaming consoles, mobile devices, and wireless devices; computer software, namely, gaming software for video game development and operation, including game assets, mathematics, game play, sound effects, and other items embedded in electronic memory devices; gaming software for mobile devices; gaming software for wireless devices; interactive multimedia computer gaming programs; and electronic control systems for linking gaming machines Class 28: Gaming machines; hand-held gaming units for use with external display screen or monitor; and apparatus for electronic	4319911

	<p>games other than those adapted for use with television receivers; electronic gaming machines, namely, devices which accept a wager</p> <p>Class 41: Entertainment services, namely, casino gaming; providing a web-based system and on-line portal for customers to participate in online gaming and mobile device gaming; gaming services in the nature of casino gaming; entertainment services, namely, providing online electronic games; entertainment services, namely, providing games in mobile wireless form; providing a web-based system and online portal for customers to participate in online gaming, operation and coordination of game tournaments, leagues and tours; providing an online mobile device-based system and mobile device portal for customers to participate in mobile device gaming, operation and coordination of game tournaments, leagues and tours; provision of advisory, information and consultancy services in the field of online casino gaming; gaming services in the nature of leasing casino games; gaming services in the nature of leasing of gaming machines; and multimedia publishing of books, magazines, journals, online journals, blogs, software, games, music, and electronic publications in the field of gaming</p>	
HELENA	<p>Class 9: Computer game software for games and gaming machines, namely, slot machines with or without video output</p> <p>Class 28: Arcade game machines for amusement arcades; Gaming machines; Gaming machines for casinos</p>	4772981
NVIDIA SHIELD	<p>Class 9: Computer hardware; electronic game streaming devices; high performance computer hardware with specialized features for enhanced game playing ability; electronic, computer, interactive and video game software; mobile digital computing devices, namely, portable digital audio, video and multimedia players, transmitters and receivers for use with text, audio, video, images, still and motion pictures, graphics, computer games, video games, signals, messages, multimedia files, and other digital data, and for accessing global computer and communication networks; hand held electronic devices, namely, portable digital audio, video and multimedia players, transmitters and receivers for use with text, audio, video, images, still and motion pictures, graphics, computer games, video games, signals, messages, multimedia files, and other digital data, and for accessing global computer and communication networks; electronic publications recorded on computer media in the nature of books, manuals, magazines, e-zines, and newsletters</p>	4881961

	featuring information regarding electronic game devices and electronic games; software used for gaming and the storage of electronic data; computer game software; electronic game software; video game software; audio and video receivers; digital audio and video players Class 28: Hand-held units for playing electronic, computer, interactive, and video games; electronic gaming machines for use with an external display screen or monitor	
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Although applicant did not put forth arguments that the goods at issue or the trade channels of the goods are different, applicant did state in its brief that “[t]he Registrant’s goods and Applicant goods include gaming machines sold into the highly regulated gaming industry.” Applicant’s Brief p.13. Applicant continues, stating that, “[o]nly licensed buyers may purchase the gaming machines of Applicant and Registrant...” *Id.* Thus, it appears that applicant concedes that the goods are related and share a common trade channel.

IV. SOPHISTICATION OF THE CONSUMER

Finally, applicant argues that purchasers of the goods at issue are highly trained, licensed professionals who make purchasing decisions with “due care and deliberation” and therefore the refusal should be withdrawn. *Id.* However, the Trademark Trial and Appeal Board has previously held that with respect to gaming devices, even if the initial purchasers are highly trained and licensed professionals, the relevant class of purchasers in a likelihood of confusion analysis should include the ultimate end user *e.g.*, the players on casino floors. *See In re Aristocrat Technologies Australia PTY Limited*, Serial No. 76460411 (November 3, 2005) [non-precedential] *citing In Re Artic Electronics Co., Ltd.*, 220USPQ 836 (TTAB 1983) (although the initial purchasers, *i.e.*, owners of arcades, are sophisticated and careful purchasers of arcade games and coin and bill changer equipment, in determining likelihood of confusion

consideration must also be given to the ultimate users of the arcade games and coin and bill changers, *i.e.*, the arcade's customers who are the end users of the goods.).

Thus, the relevant consumer includes ordinary consumers who do not exercise more than an ordinary degree of care in deciding to play or choosing gaming devices. When the relevant consumer includes both professionals and the general public, the standard of care for purchasing the goods is that of the least sophisticated potential purchaser. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d. 1317, 1325, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014).

On the other hand, applicant argues that "it is irrelevant that the general consuming public may ultimately use the gaming machines, because Applicant is not attempting to register its mark GODDESSES HERA for gaming related services..." Applicant's Brief p.14. In support of this argument, applicant relies on *Cont'l Plastic Containers Inc. v. Owens-Brockway Plastic Prods. Inc.*, 46 USPQ2d 1277 (Fed. Cir. 1998). However, the facts of that case are distinguishable from those in the instant case. In *Cont'l Plastic Containers*, the goods at issue were "gallon sized containers suitable for juice" that were "empty bottles" sold to wholesalers "without labels or lids." *Id.* at 1278, 1282. Thus, the goods in *Cont'l Plastic Containers* were different from the initial sale to when the goods ultimately appeared as juice sold in bottles to the ordinary consumer. *See id.* at 1282-83. Here, there has been no evidence presented that the goods purchased by the licensed buyers are different from the goods that are ultimately played by ordinary consumers on casino floors.

Finally, even though the standard of care is that of the least sophisticated potential purchaser, with regard to the licensed purchasers at issue in this case, the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. TMEP §1207.01(d)(vii); *see, e.g., Top Tobacco LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011).

IV. CONCLUSION

For the aforementioned reasons, the marks at issue are similar and the goods are highly related. Consumers encountering applicant's mark and the mark in the cited registration are highly likely to believe that the goods emanate from a common source. For the foregoing reasons, the refusal to register under Section 2(d) of the Trademark Act should be affirmed

Respectfully submitted,

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