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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	79161731
Applicant	Universal Entertainment Corporation
Applied for Mark	GODDESSES HERA
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application No.: **79/161,731** : Law Office: **104**
Filed: **January 15, 2015** : Examining Attorney:
Applicant and Appellant: : **Michael Eisnach**
 Universal Entertainment Corporation :
Mark: **GODDESSES HERA** :

REPLY BRIEF

Universal Entertainment Corporation (hereinafter “Applicant”) replies to the Examining Attorney’s Appeal Brief of June 20, 2016

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ISSUE PRESENTED

Whether Applicant's mark GODDESSES HERA is confusingly similar to the registered mark HERA'S GOLD?

THE MARKS ARE NOT CONFUSINGLY SIMILAR

1. LEGAL BASIS

An important factor in this case is the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *In re E.I. Du Pont de Nemours & Co.*, 177 USPQ 563, 567 (CCPA 1973). In comparing the marks, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 196 USPQ 1, 3 (CCPA 1977). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

2. POSSESSIVE FORM OF REGISTRANT'S MARK IMPACTS OVERALL
SIMILARITY OF THE RESPECTIVE MARKS

The Examining Attorney has asserted that the possessive "S" in Registrant's mark has "little, if any, trademark significance and does not otherwise affect the overall similarity of the marks in terms of commercial impression." Applicant respectfully disagrees.

Registrant's mark HERA'S GOLD provides the connotation of "gold possessed by Hera," which is distinct from the impression created by GODDESSES HERA. The applied-for mark provides a suggestion or connotation of Hera, the deity, while the Registered mark indicates an inanimate object, namely gold. Therefore, the present comparison is distinguishable from the cases cited by the Examining Attorney. *In re Binion*, involved a comparison between BINION and BINION'S ROADHOUSE. 93 USPQ2d 1531 (TTAB 2009). In that case, BINION was considered to be primarily merely a surname, and accordingly it is unsurprising that the possessive form of the name would not significantly change its commercial impression. *Id.* at 1537. However, in the present case, the possessive form of HERA in the Registered mark is used to identify an object, the gold, and not the deity, as in the applied-for mark. Accordingly, the impression created by the Registered mark is that of a valuable object, due to gold's perceived and actual value, while the impression created by the applied-for mark is that of a deity or mythical being. Therefore, contrary to the assertions of the Examining Attorney, in the present case, the possessive "S" in the Registered mark does affect the similarity of the marks in terms of commercial impression. *See e.g. In re Best Prods. Co.*, 231 USPQ 988, 990 (TTAB 1986) (BEST JEWELRY *and design* (with "JEWELRY" disclaimed) for retail jewelry store services, and JEWELERS' BEST for bracelets, not likely to cause confusion).

3. “GOLD” AND “GODDESSES” DO NOT PRODUCE SIMILAR COMMERCIAL IMPRESSION

The Examining Attorney has asserted that the respective marks are each two words, “one of which is nearly identical and is combined with another word that produces a similar commercial impression.” The Examining Attorney attempts to analogize the present case to *H. Sichel Sohne, GmbH v. John Gross & Co.*, in which BLUE NUN and BLUE CHAPEL were found confusingly similar. 204 USPQ 257 (TTAB 1979). In that case, it was determined that “NUN” and “CHAPEL” were both words of religious implication, and when combined with the identical term “BLUE,” conveyed a similar commercial impression. *Id.* at 260. However, “GOLD” and “GODDESSES” do not convey the same implications, and therefore these terms serve to distinguish the respective marks from each other by not producing a similar commercial impression. *See e.g. Kellogg Co. v. Pack'em Enters. Inc.*, 21 USPQ2d 1142, 1144-46 (Fed. Cir. 1991) (on summary judgment, held that no likelihood of confusion exists between mark FROOTIE ICE and elephant design for packages of flavored liquid frozen into bars and mark FROOT LOOPS); *see also Keebler Co. v. Murray Bakery Prods., Inc.*, 9 USPQ2d 1736 (Fed. Cir. 1989) (PECAN SHORTIES not likely to cause confusion with PECAN SANDIES for cookies).

4. OVEREMPHASIS ON USERS

The Examining Attorney has focused on the users of the goods as being equivalent to the actual purchasers of such goods, and stated, “the relevant class of purchasers in a likelihood of confusion analysis should include the ultimate end user, e.g., the players on casino floors.”

An over emphasis on users, to the exclusion of actual consumers, does not conform to the Lanham Act. The Lanham Act seeks to prevent consumer confusion that enables a seller to pass

“off his goods as the goods of another.” *Programmed Tax Systems, Inc. v. Raytheon Co.*, 197 USPQ 509 (S.D.N.Y.1977) (quoting *Jean Patou, Inc. v. Jacqueline Cochran, Inc.*, 133 USPQ 242 (S.D.N.Y. 1962), *aff'd*, 136 USPQ 236 (2d Cir. 1963)). In *Programmed Tax Systems*, the court explained that the relevant confusion is that which affects “the purchasing and selling of the goods or services in question.” *Id.* The proper inquiry is directed to “a likelihood that an appreciable number of ordinarily prudent purchasers are likely to be misled, or indeed simply confused, as to the source of the goods in question.” *New Sensor Corp. v. CE Distribution LLC*, 71 USPQ2d 1828, 1832 (E.D.N.Y.2004).

The Examining has relied upon dicta from a non-precedential decision. There is clearly articulated reasoning in *In re Aristocrat Technologies Australia PTY Limited* for refusing registration of the mark RED BARON for gaming machines, the marks were identical, RED BARON. Serial No. 7640411 (November 3, 2005) [non-precedential]. There was no difference in commercial impression. The goods were different, though related, gaming machines for the applicant, computer games for the Registrant. The Board determined who the actual consumers would be of Registrant’s products, and decided that there was a likelihood that those consumers would be confused, if confronted with the identical RED BARON mark appearing on the applicant’s gaming machine.

Here, a similar overlap with the general public as consumers does not exist. Neither party sells gaming machines to the public at large. As the Board must give due consideration to “actual market conditions”, it is those consumers who should be considered in determining a likelihood of confusion.

5. THE SOPHISTICATION OF THE BUYERS

The Examining Attorney has asserted that “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.” The more sophisticated and careful the average consumer of a product is, the less likely it is that similarities in trademarks will result in confusion concerning the source or sponsorship of the product. *Bristol-Myers Squibb Co. v. McNeil-P.P.C. Inc.*, 24 USPQ2d 1161, 1170 (2d Cir.1992).

Gaming machines are made available to the adult general public, but only properly licensed buyers may purchase gaming machines. These professionals “know the market and are less likely than untrained consumers to be misled or confused by the similarity of different marks.” *Virgin Enterprises Ltd. v. Nawab*, 67 USPQ2d 1420 (2d Cir.2003) retail customers are not expected to exercise the same degree of care as professional buyers, who are expected to have greater powers of discrimination).

In addition, these professional buyers operate in the entertainment industry, purchasing gaming machines which prominently display their various trademarks, and there is no basis to allege that these buyers are unsophisticated in the field of trademarks. Rather, the contrary is true. These buyers, by necessity, must be knowledgeable about trademarks in order to make purchasing decisions. Buyers of such gaming machines have to understand trademark rights, and such buyers would not be confused as to source by the marks in issue here.

6. CONCLUSION

Given the knowledge, care and deliberation required of buyers within the gaming industry in making the purchasing decisions with respect to Applicant’s and the Registrant’s

goods, the noticeably distinguishable differences in appearance, sound and meaning in the applied-for mark GODDESSES HERA and the Registered mark HERA'S GOLD creating completely distinct commercial impressions, it is clear that confusion between the respective marks is unlikely.

Consequently, Applicant respectfully requests that the refusal to register the mark GODDESSES HERA be reversed.

Respectfully submitted,

Dated: July 7, 2016

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