

This Opinion is not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Universal Entertainment Corp.
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Serial No. 79161731

Keith R. Obert of Ware Fressola Maguire & Barber LLP
for Universal Entertainment Corp.

Michael Eisnach, Trademark Examining Attorney, Law Office 104,
Dayna Browne, Managing Attorney.

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Before Zervas, Cataldo, and Gorowitz,
Administrative Trademark Judges.

Opinion by Gorowitz, Administrative Trademark Judge:

Universal Entertainment Corp. (“Applicant”) seeks registration on the Principal
Register of 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,” in International Class 28.¹

¹ Application Serial No. 79161731, filed January 15, 2015, is a request for extension of protection of International Registration No. 1238913, pursuant to the Madrid Protocol, Trademark Act § 60, *et. seq.*, 15 U.S.C. § 1141, *et seq.* The International Registration date is

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles the registered mark HERA'S GOLD (in standard characters) for

“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 [sic] a device,” in International Class 9; and

“gaming machines, namely, devices which accept a wager,” in International Class 28²

as to be likely to cause confusion, mistake or deception.

After the Trademark Examining Attorney made the refusal final, Applicant appealed and filed a request for reconsideration. When the request for reconsideration was denied, the appeal was instituted. We affirm the refusal to register.

I. Likelihood of Confusion.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also, In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the

January 15, 2015, and the USPTO was notified of the request for extension on March 12, 2015. Pursuant to Trademark Act § 67, 15 U.S.C. § 1141g, Applicant claims a priority date of December 12, 2014.

² Registration No. 4329291, issued on April 30, 2013.

similarities between the marks and the similarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). *See also, In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

A. Similarity of goods, channels of trade and class of customers.

We start our analysis with the second and third *du Pont* factors, the similarity of the goods, the channels of trade, and the class of customers. When determining the relationship between the goods,

[i]t is well settled that the issue of likelihood of confusion between applied-for and registered marks must be determined on the basis of the goods as they are identified in the involved application and cited registration, rather than on what any evidence may show as to the actual nature of the goods, their channels of trade and/or classes of purchasers.

In re Total Quality Group Inc., 51 USPQ2d 1474, 1476 (TTAB 1999). *See also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-1162 (Fed. Cir. 2014). Applicant's identification of goods is:

“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.”

The “gaming machines” in Applicant's identification of goods encompass the “gaming machines” in the cited registration, namely, devices which accept a wager. As such, the goods are in-part identical.

In addition, to establish the close relationship between other goods in the Application and cited registration, the Examining Attorney submitted copies of a number of use-based third-party registrations, each of which includes “gaming machines” and other game products which serves to suggest that the goods are of a kind that may emanate from a single source.

Use-based third-party registrations that individually cover a number of different items and that are based on use in commerce may have some probative value to the extent that they serve to suggest that the listed goods and/or services are of a type that may emanate from a single source. *See In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.6 (TTAB 2015); *See also In re RiseSmart Inc.*, 104 USPQ2d 1931, 1934-1935 (TTAB 2012); *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993). These use-based registrations were attached to the Office Action dated August 29, 2015 and the Denial of Request for Reconsideration dated February 29, 2016. For example:

- Registration No. 4772981 for the mark HELENA for computer game software for gaming machines, namely, slot machines with or without video output; arcade game machines for amusement arcades; gaming machines; gaming machines for casinos (August 29, 2015 Office Action, TSDR pp. 24-25);³
- Registration No. 2450074 for the FRUIT COCKTAIL for gaming machines and related software for playing a game of chance; stand-alone video game machines; hand-

³ TSDR is the Trademark Status and Document Retrieval database, which is the source of all documents filed by an applicant during the prosecution of an application, as well as Office actions issued by an examining attorney.

held unit for playing electronic games (February 29, 2016 Denial of Request for Reconsideration, TSDR pp. 33-32);

- Registration No. 4489101 for the mark 5 GHOSTS for, *inter alia*, gaming machines; hand-held gaming units; apparatus for electronic games; and electronic gaming machines, namely devices which accept a wager (February 29, 2016 Denial of Request for Reconsideration, TSDR pp. 39-41); and
- Registration No. 4881961 for the mark NVIDIA SHIELD for, *inter alia*, hand-held units for playing electronic, computer, interactive, and video games; and electronic gaming machines for use with an external display screen or monitor (February 29, 2016 Denial of Request for Reconsideration, TSDR pp. 42-44).

These registrations establish that there is a close relationship between Applicant's other goods and Registrant's gaming machines that accept wagers. Accordingly, we find that Applicant's goods are in-part identical and otherwise closely related to Registrant's goods.

Applicant's goods are also closely related to the other goods in the cited registration, "computer gaming software and computer gaming software downloadable via a computer or wireless network that provides for the play of a game of chance on a device."

It is well established that absent restrictions in the application and registration, identical goods are presumed to travel in the same channels of trade to the same class of purchasers. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d, 1905, 1908 (Fed. Cir. 2012). Here, because the goods are in-part identical, they are presumed to travel in the same channels of trade to the same classes of purchasers.

Accordingly, the second and third *du Pont* factors favor a finding of likelihood of confusion.

B. Similarity or dissimilarity of the marks.

We next determine the similarity or dissimilarity of the marks in their entirety, keeping in mind that “[w]hen marks appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likelihood of confusion declines.” *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

In comparing the marks we must consider the appearance, sound, connotation and commercial impression of the marks at issue. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted).

The marks at issue here are the composite marks GODDESSES HERA and HERA’S GOLD in standard character form. When comparing composite marks, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entirety. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

In this case, both marks incorporate the word HERA, which the Applicant and the Examining Attorney agree is the name of a Greek goddess.⁴ In the cited mark, the word HERA is in the possessive form. The Applicant argues that the use of the possessive form creates a mark that is visually and phonetically different from the name HERA and that “the respective meanings are also different. HERA identifies an entity or individual, while HERA’S signifies possession.” Appeal Brief, 10 TTABVUE p. 9. We are not persuaded by Applicant’s argument but agree with the Examining Attorney that “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.” Examining Attorney’s Brief, 12 TTABVUE p. 6. *Cf. 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”). We find that the dominant element of Applicant’s mark is HERA and the dominant element of registrant’s mark is HERA’S. In Applicant’s mark, the additional word “GODDESSES” does not impart anything

⁴ Applicant provided the following description of HERA from Wikipedia: “Hera, a Greek Goddess.”

[https://en.wikipedia.org/w/index.php?title=Hera\(disambiguation\)&oldid=589197119](https://en.wikipedia.org/w/index.php?title=Hera(disambiguation)&oldid=589197119).

Exhibit to Response dated August 25, 2015, TSDR at p. 9.

The Examining Attorney provided the following description from Oxford Dictionaries: “a powerful goddess, the wife and sister of Zeus and the daughter of Cronus and Rhea...”

www.oxforddictionaries.com/us/definition/american_english/Hera

Exhibit to Office Action dated August 29, 2015, TSDR at p.57

additional to the mark because consumers are already aware that HERA is a goddess. In the cited mark, the primary reference is to HERA, with GOLD simply functioning as a reference to her wealth. When we compare the marks in their entireties, and give greater weight to the reference to HERA, which is the dominant elements of each mark, we conclude that the marks are similar in appearance, sound, and meaning. *See Palm Bay Imports., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, at 1692 (affirming TTAB's holding that contemporaneous use of appellant's mark, VEUVE ROYALE, for sparkling wine, and appellee's marks, VEUVE CLICQUOT and VEUVE CLICQUOT PONSARDIN, for champagne, is likely to cause confusion, noting that the presence of the "strong distinctive term [VEUVE] as the first word in both parties' marks renders the marks similar, especially in light of the largely laudatory (and hence non-source identifying) significance of the word ROYALE"); *In re Chatam Int'l Inc.*, 380 F.3d 1340, 1343, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) ("Viewed in their entireties with non-dominant features appropriately discounted, the marks [GASPAR'S ALE for beer and ale and JOSE GASPAR GOLD for tequila] become nearly identical."); and *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1266, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (finding that even though applicant's mark PACKARD TECHNOLOGIES (with "TECHNOLOGIES" disclaimed) does not incorporate every feature of opposer's HEWLETT PACKARD marks, a similar overall commercial impression is created).

Accordingly, we find that the first *du Pont* factor favors a finding of likelihood of confusion.

C. Sophistication of purchasers.

Applicant argues, without evidentiary support, that “only licensed buyers may purchase the gaming machines of the Applicant and the Registrant, because the gaming industry is highly regulated. The purchasing decision thus has to be made with due care and deliberation, and the buyers of gaming machines, such as those sold by the Applicant and the Registrant, are sophisticated purchasers. When the purchasers of a product are highly trained professionals, they know the market and are less likely than untrained consumers to be misled or confused by any perceived similarities of different marks.” Appeal Brief, 10 TTABVUE 14.

While we agree that the purchasers of the gaming equipment are sophisticated and are less likely than untrained consumers to be misled or confused, since the goods are identical and the marks are similar, even sophisticated purchasers may be confused. *In re Research and Trading Corp.*, 793 F2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986). (The fact that “the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar goods. Human memories even of discriminating purchasers . . . are not infallible.”)

Further, in addition to covering identical goods, namely, gaming machines that accept wagers, the application includes other goods, i.e. hand-held games with liquid crystal displays,” which are the kind of goods that may be sold to an individual member of the general public, who is not a sophisticated purchaser. The subject matter of these hand-held games may be the same as the gaming machines that

accept wagers. Since the hand-held games are for casual amusement, they could be the subject of impulse purchasing.

According, the sixth *du Pont* factor is neutral.

D. Conclusion.

Having considered all the evidence and argument on the relevant *du Pont* factors, we find that there is a likelihood of confusion between Applicant's 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”

and the cited mark HERA'S GOLD (in standard characters) for

“gaming machines, namely, devices which accept a wager, and computer gaming software and computer gaming software downloadable via a computer or wireless network that provides for the play of a game of chance on a device

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