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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 PTT, LLC

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Serial No. 86203092

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Candice Hebden Osnato of High 5 Games, LLC,
for PTT, LLC.

Daniel F. Capshaw, Trademark Examining Attorney, Law Office 110,
Chris Pedersen, Managing Attorney.

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Before Mermelstein, Kuczma and Heasley,
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

PTT, LLC ("Applicant") seeks registration on the Principal Register of the mark WHAT I LIKE ABOUT YOU (in standard characters) for:

> computer game software for gaming machines, namely, slot machines and video lottery terminals in International Class 9.[1]

The Trademark Examining Attorney has refused registration of Applicant's mark under § 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), based on a

[1] Application Serial No. 86203092 was filed on February 25, 2014, based upon Applicant's allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

likelihood of confusion with the mark WHAT I LIKE ABOUT YOU (standard characters) set forth in U.S. Registration Nos. 3164878 and 3406732 owned by Warner Bros. Entertainment Inc., for "entertainment services in the nature of live-action, comedy, drama and animated television series" in International Class 41 and "digital versatile discs featuring music, comedy, drama, action, adventure, and/or animation" in International Class 9, respectively.

When the refusal was made final, Applicant appealed and requested reconsideration. After the request for reconsideration was denied, the appeal was resumed. We affirm the refusal to register.

I. Evidentiary Issue

Applicant has submitted new evidence, attached as Exhibits A and B, with its Appeal Brief. Inasmuch as the Exhibits are dated January 16, 2014, they were in existence well before the filing date of this appeal. The record in an application should be complete prior to the filing of an appeal. Exhibits attached to a brief that were not made of record during examination are untimely, and generally will not be considered. *See In re Fiat Grp. Mktg. & Corp. Commc'ns S.p.A.*, 109 USPQ2d 1593, 1596 (TTAB 2014); *In re Pedersen*, 109 USPQ2d 1185, 1188 (TTAB 2013); 37 CFR § 2.142(d); TBMP §§ 1207.01, 1203.02(e). Because Applicant's evidence attached to its Brief as Exhibits A and B was untimely submitted, it has not been considered.

II. Likelihood of Confusion

Applicant requests reversal of the refusal to register its mark because Registrant's goods and services are not related to Applicant's goods and consumers

would more likely associate Applicant's trademark with the song WHAT I LIKE ABOUT YOU than with Registrant's short-lived live action television show.[2]

Our determination of likelihood of confusion under § 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.,* 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re Majestic Distilling Co.,* 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). Here, the relevant considerations are the similarities between the marks, the relatedness of the goods and services, and the similarity of the customers and trade channels of the goods and services. *See In re St. Helena Hospital*, 774 F.3d 747, 113 USPQ2d 1082, 1084 (Fed. Cir. 2014)*; In re Viterra Inc.*, 671 F. 3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012).

We have considered all of the evidence as it pertains to the relevant *du Pont* factors, as well as Applicant's arguments (including any admissible evidence and arguments not specifically discussed in this opinion). To the extent any other *du Pont* factors for which no evidence or argument were presented may nonetheless be applicable, we treat them as neutral.

A. Similarity of the Marks

Applicant does not dispute that its mark is identical in appearance and sound to Registrant's mark. The fact that the marks are identical "weighs heavily against applicant." *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

[2] 7 TTABVUE 3-4.

Although Applicant does not deny the identity of its mark and Registrant's mark, it contends that its mark WHAT I LIKE ABOUT YOU is "more likely to bring to mind the famous song by The Romantics than the registered marks."[3] While Applicant offers no support for such statement,[4] Applicant's argument misses the point. The issue that must be decided based on the evidence of record is whether Applicant's mark is likely to be confused with Registrant's mark. Given the identity of the marks, it is impossible to conclude anything other than that Applicant's mark is indeed, similar to Registrant's identical mark.

B. Similarity of the Goods and Services and Trade Channels

Next, we turn to the relatedness of Applicant's goods and Registrant's goods and services. The goods and/or services are compared to determine whether they are similar or commercially related or travel in the same trade channels. *See Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722-23 (Fed. Cir. 2012); *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1381 (Fed. Cir. 2002); TMEP §1207.01 (a)(vi).

The goods and/or services 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, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d

[3] 7 TTABVUE 5.

[4] Applicant asserts it uses the "famous" song through license agreements with EMI Entertainment World and K-Tel Music, attached as Exhibits A and B to its Brief. (7 TTABVUE 5). Applicant has not submitted evidence supporting the fame of the song. Additionally, as ruled on above, Exhibits A and B were not timely submitted and are not in evidence.

1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) ("[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods."). The respective goods and/or services 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 and/or services] emanate from the same source." *Coach Servs.,* 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

Applicant's goods are "computer game software for gaming machines, namely slot machines and video lottery terminals," while Registrant's services and goods are a live television series and DVDs featuring music, comedy, drama, action, adventure, and/or animation. Applicant summarily concludes that because its goods are in the gambling field and Registrant's mark has nothing to do with gambling, Applicant's goods would not be confused with Registrant's television show.[5] The question here however, is not whether anyone would confuse the goods and services, but whether there would be confusion as to their source or affiliation of the goods and services.

The Examining Attorney has submitted copies of third-party web pages that show it is entirely common for slot machines to be television-show themed. The

[5] While Applicant argues that the TV show "What I Like About You" was "short-lived," (7 TTABVUE 6), the evidence shows that the four seasons of the show are available for sale in DVD format and for online streaming. *See* December 3, 2014 Final Office Action pp. 84-104. Page numbers correspond to the documents displayed with the first page of the Office Action designated as page 1. Every page thereafter has a subsequent page number.

evidence of record submitted by the Examining Attorney also shows the popularity of TV show and movie-themed slot machines.[6] Additionally, the third-party web pages and registrations submitted by the Examining Attorney make clear that producers of television shows and movies either produce or license gaming equipment under the same mark as a television show or movie, and register the names of TV shows as trademarks for gaming equipment.[7]

In view of the foregoing, consumers viewing Applicant's slot machine would therefore likely understand that there is a connection between the slot machine and

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[6] *See* December 3, 2014 Final Office Action p. 15 Cavalcade of Awesome *http://blog.paxholley.net/2011/09/08/18-slot-machines-based-on-movies-and-tv-shows/* ("An appropriately large video display for the hugely popular reality show."), p. 23 Casino-goers flock to TV-themed slot machines *http://www.latimes.com/travel/la-trw-trvrail3-wk2-story.html* ("… Even when people are gambling at a casino, the pull of favorite TV shows is irresistible."), p. 27 Slots in Vegas.com TV/Television Show Slot Machines *http://www.slotinvegas.com/themes/tv/* ("…TV themed slots have exploded in popularity over the last decade."), p. 40 Slots in Vegas.com Sex and the City Slots Machine *http://www.slotsinvegas.com/igt/sex-and-the-city/* (Sex and the City Slots Machine "… is based on the famous television series and subsequent films of the same name."), p. 44 Slots in Vegas.com CSI Slots Machine *http://www.slotsinvegas.com/igt/csi* ("Slot games like CSI are mostly based on famous television serials, popular icons, or famous movies."), p. 47 Television-themed slots – Casino games based on TV game shows, dramas, etc. *http://www.liveslotsdirect.com/themes/television/* ("…at the dawn of online casinos as we know them, was the most popular TV show in the world."), p. 54 TV shows, movies again the main theme them at G2E *http://www.reviewjournal.com/business/casinos-gaming/tv-shows-movies-again-main-theme-g2e* ("As has been the case in recent years, popular television shows and movies were the main theme of G2E."), p. 64 Want to see a classic movie or TV show? Newfangled slot machines may be your ticket *http://www.minnpost.com/listing-slightly/2011/12/want-see-classic-movie-or-tv-show-newfangled-slot-machines-may-be-your-tick* ("– or a wide variety of games offering popular TV show themes." …).

[7] *See* December 3, 2014 Final Office Action, American Idol pp. 131-132, 138; The Twilight Zone pp. 137, 147, 154-155; Willy Wonka pp. 141-142, 160-161; The Beverly Hillbillies p. 149; The Walking Dead p. 165-166; The Price is Right pp. 105, 108-110, 115-116, 117-118, 124-126; Bewitched pp. 106-107, 144-145; Sex and the City pp. 111-112, 134-135, 157-158, 163; The Sopranos pp. 113-114, 127 (The Sopranos Welcome to the Family), 129 (The Sopranos Play to Get Made), 151-152.

the television series of the *identical* name leading to confusion as to source or sponsorship. Thus, the goods and services of Applicant and Registrant are related.

Applicant relies on *In re Coors Brewing Company*, 343 F.3d 1340, 68 USPQ2d 1059 (Fed. Cir. 2003) in arguing that "something more" in proving likelihood of confusion is required in this case. In *Coors*, the court found that the relatedness of restaurant services and beer may not be assumed. Thus, the evidence of record must show "something more" than that similar or even identical marks are used for food products and for restaurant services. 68 USPQ2d at 1063. Here, the evidence of record establishes a relationship between Applicant's goods and the goods and services in the cited Registrations.

Moreover, in cases such as this, where Applicant's mark is identical to the cited registered mark, the degree of relatedness between the respective goods and services that is necessary to support a finding that the goods and services are related under the second *du Pont* likelihood of confusion factor is less than it would be if the marks were not identical. It is only necessary that there be a viable relationship between the respective goods and services in order to support a holding of likelihood of confusion. *See In re Shell Oil Co.,* 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); *In re Iolo Technologies LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010); *In re Opus One Inc.,* 60 USPQ2d 1812, 1815 (TTAB 2001); *In re Concordia Int'l Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983).

Applicant argues that Registrant's television series and DVDs "do not pass through similar channels as slot machine goods." According to Applicant, slot

machine software is presented to consumers in gambling areas while television programming goods are marketed through the television and through disc sales in retail stores and on websites. Therefore, inasmuch as a consumer should not be presented with Applicant's software products on television or in a retail store, and television programming is not advertised nor presented for purchase on casino floors, Applicant concludes that the two goods are not marketed in the same trade channels and consumers are never presented goods from the two categories in similar outlets.[8]

Applicant also notes that its mark "is used in a highly regulated field that cannot target children – the target of the Registered Marks – but must only target adults over the age of 21."[9] Because of these differences and market restrictions, Applicant concludes that a child consumer of television shows is unlikely to confuse products marked with Applicant's mark as being associated with the Registered mark's television show (in part because they would not be exposed to the Applicant's mark). Similarly, Applicant also concludes, that adult gamblers are unlikely to confuse products marked with the registered mark as being associated with gambling products.[10]

While the identification of Applicant's goods does not restrict the goods to certain consumers, it is well-known that gaming goods and services are legally restricted to persons of at least 18-21 years of age. Applicant attempts to limit the channels of

[8] 7 TTABVUE 7.

[9] Response to May 15, 2014 Office Action, p. 2.

[10] Response to May 15, 2014 Office Action, p. 2.

trade of the Registrant's goods and services to children or teenagers by characterizing Registrant's goods and services as related to an off-the-air "tween" television show.[11] However, the identifications of Registrant's goods (DVDs) and services (television shows) are not restricted to persons of a certain age. Therefore, both Applicant's goods, and Registrant's goods and services, are available to at least part of the same group of consumers, *i.e.*, those consumers who are old enough to gamble. In view of the foregoing, such consumers viewing Applicant's slot machine would understand a connection between the slot machine and the television series of the same name leading to confusion as to source or sponsorship. Thus, the goods and services of Applicant and the Registrant are related. As a result, consumers viewing Applicant's mark for slot machines and video lottery terminals are likely to believe that there is an association or connection as to source, such as through a licensing agreement, when they see the identical mark for a television series and DVDs.

Moreover, absent restrictions in the application and registrations, the identified goods and services are "presumed to travel in the same channels of trade to the same class of purchasers." *In re Viterra Inc.*, 101 USPQ2d at 1908 (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)). Additionally, unrestricted and broad identifications, such as Registrant's TV shows and DVDs, are presumed to encompass all goods and services of the type described which would travel in normal channels of trade to all classes of

[11] November 14, 2014 Response to Office Action p. 2.

prospective purchasers; they are therefore not limited to viewers of a particular age. *See In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (citing *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981)); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). Notably, no limits on the channels of trade are set forth in the identification of goods and services of the Registrant.

C. Conclusion

Generally, where the marks of the respective parties are identical, as here, the relationship between the relevant goods and/or services need not be as close to support a finding of likelihood of confusion. *See In re Shell Oil Co.*, 26 USPQ2d at 1689; *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202 (TTAB 2009); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1636 (TTAB 2009).

Applicant's mark WHAT I LIKE ABOUT YOU may, for some consumers, bring to mind the song by The Romantics as argued by Applicant.[12] Based on the lack of evidence, however, we are not convinced that the song is so well known that the overwhelming majority of consumers would associate Applicant's mark solely with the song. An appreciable number of consumers would simply view Applicant's mark -- as well as Registrant's identical mark -- as identifying Registrant's TV show. Likewise, even for the consumers who do make a connection between Applicant's mark and the song, at least some of those consumers are likely to view Applicant's mark as also identifying Registrant's TV show of the same name.

[12] 7 TTABVUE 5.

Given the identity of the marks, this Board is of the view that the phrase WHAT I LIKE ABOUT YOU to be used by two separate entities for a TV show and slot machines is likely to cause confusion, mistake or deception. The issue is not whether Applicant's mark itself or the goods offered under the mark are likely to be confused, but rather, whether there is a likelihood of confusion as to the source or sponsorship of the goods because of the mark used thereon. Consumers viewing Applicant's mark for slot machines are likely to believe that there is an association or connection as to source, such as through a licensing agreement, when they see the identical mark for Registrant's TV shows and DVDs.

Moreover, the overriding concern is not only to prevent buyer confusion as to the source of Applicant's 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.*, 26 USPQ2d at 1690. In deciding the issue of likelihood of confusion, it is the policy of this Board -- as mandated by the Court of Appeals for the Federal Circuit -- to resolve doubts against the Applicant in favor of the Registrant. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 395 (Fed. Cir. 1983); *see In re White Swan Ltd.*, 8 USPQ2d 1534, 1536 (TTAB 1988). Therefore, any doubt regarding a likelihood of confusion determination is resolved in favor of the Registrant. *In re Shell Oil Co.*, 26 USPQ2d 1691; *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

Decision: The refusal to register Applicant's mark WHAT I LIKE ABOUT YOU is affirmed.