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Mailed: March 27, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Mason

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Serial No. 77959377

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Louis C. Paul of Louis C. Paul & Associates, PLLC for Anastasia Mason.

Ernest Shosho, Trademark Examining Attorney, Law Office 117 (J. Brett Golden,
Managing Attorney).

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Before Bucher, Taylor and Wellington, Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Annastasia Mason (applicant) seeks to register on the Principal Register the mark MISS COSMOS (in standard characters) for services identified as “Arranging of contests; Entertainment in the nature of beauty pageants; Entertainment services, namely, conducting contests.”¹

Registration has been refused by the examining attorney under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant’s mark, as applied to applicant’s services, so resembles the mark MISS CHINESE COSMOS PAGEANT and design, shown below,

¹ Application Serial No. 77959377 filed March 15, 2010, and alleging January 12, 2006, as the date of first use of the mark anywhere and January 18, 2008 as the date of first use of the mark in commerce.



for

Conducting and organizing of beauty pageants; organization and production of live shows; presentation of live show performances and presentation of live performances by a musical band; conducting and organizing entertainment beauty contests; education and entertainment services in the nature of content preparation, production of live or recorded audio, visual or audiovisual material through film or videotape, and distribution of motion picture films, television and radio programs for others; entertainment services provided by means of the Internet, namely, providing a web site featuring musical performances, musical videos, related film clips, photographs, and other multimedia materials featuring beauty pageant and entertainment information about musicians, actors, celebrities; providing news in the nature of current event reporting; providing information on education and entertainment

in International Class 41 as to be likely to cause confusion, or to cause mistake, or to deceive.² The non-Latin characters that mean “Chinese” and “Pageant” and the English words “Chinese” and “Pageant” have been disclaimed.

When the refusal was made final, applicant appealed and requested reconsideration of the refusal. That request was denied and the appeal resumed on December 1, 2011.

² Registration No. 3841848 registered August 31, 2010, and asserting May 25, 2003 as the date of first use of the mark anywhere and in commerce. The registration includes the following statements: “The mark consists of stylized design of a female figure surrounded by Chinese characters, and English words, ‘MISS CHINESE COSMOS PAGEANT,’ written beneath the figure and the Chinese characters.”; “Color is not claimed as a feature of the mark.”; and “The non-Latin character(s) in the mark transliterates into ‘ZHONG-HUA XIAO-JIE HUAN-QIU DA-SAI,’ and this means ‘MISS CHINESE COSMOS PAGEANT’ in English.” The registration also includes services in International Class 38, but these services were not referenced by the examining attorney in his refusal.

Applicant and the examining attorney filed briefs. For the reasons discussed below, we affirm.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of 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 Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks”). These factors, and any other relevant *du Pont* factors in the proceeding now before us, will be considered in this decision.

We consider first the relatedness of the services. We note that the examining attorney focused his discussion on conducting and organizing of beauty pageants, conducting and organizing entertainment beauty contests, and providing a web site featuring musical performances, musical videos, related film clips, photographs, and other multimedia materials featuring beauty pageants. We further focus our discussion on registrant’s conducting and organizing of beauty pageants and contests, because we find these services are those which are closest to applicant’s, and we compare those services to applicant’s arranging of contests, entertainment in the nature of beauty pageants and entertainment services, namely, conducting

contests. With particular regard to applicant's arrangement of contests services, the specimens of record reveal that the contests are in the nature of beauty contests and pageants. As such, despite the minor differences in wording of the respective recitations, it is clear that both the cited registrant and applicant provide beauty pageants and contests. We thus find applicant's services to be legally identical to registrant's. Notably, applicant did not argue otherwise and, in fact, her brief is silent with respect to the relatedness of the services.

However, applicant, during the prosecution of the application, argued that registrant's beauty pageant contestant services are "specifically for Chinese women" and that consumers would distinguish the marks due to this limitation. It is unclear whether applicant intended to continue this argument in her brief. In any case, we are constrained to compare the services as they are identified in the respective application and cited registration. Because there are no limitations as to classes of consumers in the recitation of services of the cited registration or, for that matter, in the recitation of services in applicant's application, we must presume that both applicant's and registrant's services will be offered in the same channels of trade and to the same classes of purchasers. *See In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

In view of the above, the *du Pont* factors of the relatedness of the services, channels of trade and classes of consumers strongly favor a finding of likelihood of confusion.

We turn then to the marks. In determining the similarity or dissimilarity thereof, we must consider the marks in their entirety in terms of sound,

appearance, meaning and commercial impression. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). As applicant acknowledges, although the marks must be considered in their entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *See In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). For instance, “that a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark....” *Id.* at 224 USPQ at 751. Moreover, 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 their entireties that confusion as to the source of the services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general, rather than a specific impression of trademarks. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Finally, we are mindful that where, as here, the services are identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the services. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

Applicant maintains that the dissimilarity of the marks in their entireties as to appearance, sound and connotation is the single determinative *du Pont* factor that, even when considered apart from the other factors, unequivocally supports the conclusion that there is no likelihood of confusion. Applicant specifically argues that the examining attorney improperly dissected the cited mark and “effectively simplified a relatively elaborate and intricate composite mark ... into a single word mark COSMOS – the smallest word in the whole applied-for composite mark.” Applicant’s br. p. 6. Applicant further argues that the word COSMOS is not the dominant portion of the cited mark.

We agree with applicant that the single word COSMOS does not dominate the cited mark and, although maintaining his position that the marks are confusingly similar in light of the common terms in the literal portions of the marks, the examining attorney appears to have backed off from his former position. Nonetheless, because both marks include the terms MISS and COSMOS, in the same order, there are significant similarities in terms of sound, connotation and commercial impression. The addition of the disclaimed terms CHINESE and PAGEANT do not serve to distinguish the marks to avoid a likelihood of confusion. The generic term PAGEANT, while not present in applicant’s mark, adds little to the overall commercial impression as it merely identifies the type of services provided under the mark. As regards the term CHINESE; it is defined, in relevant part, as “a person of Chinese descent”³ or “of or relating to China or its peoples,

³ We take judicial notice of the definition of “Chinese” taken from the Merriam-Webster Online Dictionary (11th ed.), and retrieved at www.merriam-webster.com on January 31, 2013. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*,

languages, or cultures.”⁴ Under these definitions, the word CHINESE, when used with MISS and PAGEANT, may suggest a pageant featuring contestants of Chinese descent or a pageant themed with the customs of the Chinese people. Even if we were to assume that purchasers did note the difference in the marks because of the words CHINESE and PAGEANT in the registered mark, in view of the strong similarities stemming from the identical terms MISS and COSMOS, and in view of the fact that the marks are used in connection with legally identical services, purchasers are likely to believe that they are variants of each other and that they identify services emanating from the same source. For example, the examining attorney made of record the following third-party registrations for variant marks owned by the same entity for pageant services: MISS UNIVERSE (Registration No. 1182063); MISS UNIVERSE U.S. VIRGIN ISLANDS (Registration No. 3894421).⁵

We also find the “stylized design of a female figure” – which appears to be dressed in an evening gown – insufficient to distinguish applicant’s mark from the registrant’s mark. Although the design element is admittedly a prominent visual element in the cited mark, it simply reinforces the pageant aura surrounding

213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

⁴ The American Heritage Dictionary of the English Language [online edition], retrieved at <http://education.yahoo.com/reference/dictionary/entry/Chinese> on January 31, 2013.

⁵ The pending applications having “UNIVERSE” variant marks have no persuasive value. They only signify that such applications have been filed. In addition, we find the other four sets of registrations for variant marks that the examining attorney placed into the record show common ownership of a variety of marks for pageant services but otherwise are not analogous to the instant case because the marks vary by gender, age and marital status as opposed to geographic origin or descent.

registrant's mark. Further, it is the literal portion MISS CHINESE COSMOS PAGEANT that would be used by consumers when calling for or discussing registrant's services. Thus, it would make a greater impression on consumers and it is the portion that is more likely to be remembered as the source-signifying portion of applicant's mark. *See e.g., In re Appetito Provisions Co., Inc.*, 3 USPQ2d 1553 (TTAB 1987).

We also do not find the Chinese characters present in the cited registered mark distinguishing. Consumers who are familiar with the written Chinese language will understand the Chinese characters translate into the English language as MISS CHINESE COSMOS PAGEANT, having the same connotation as the English words. Consumers who are unfamiliar with the Chinese language are likely to view the characters as nondescript decorative background elements.

Accordingly, while there are obvious dissimilarities in the appearance of the respective marks, these differences are more than outweighed by the substantial similarity in connotation and commercial impression.

Thus, the factor of the similarity of the marks favors a finding of likelihood of confusion.

Applicant also maintains that the sophistication of the consumers significantly favors a finding of no likelihood of confusion. That is, that the consumers are sophisticated enough to distinguish the services of applicant and registrant. The problem with this argument is that applicant has limited the "relevant" consumers to beauty pageant and beauty contest participants and financial sponsors of beauty pageants and contests. However, applicant has left out an entire class of consumer,

namely members of the general public who would avail themselves of entertainment component of both applicant's and registrant's services. When the relevant consumers includes both professionals and members of the general public, the standard of care for purchasing the services is that of the least sophisticated purchaser. *See Alfacell Corp. v. Anticancer, Inc.*, 71 USPQ2d 1301, 1306 (TTAB 2004). There is simply nothing on the record that supports a finding that members of the general public are sufficiently sophisticated to distinguish the very similar marks given their use on identical services.

Moreover, even if we assume, and we do not, that the purchasers of applicant's and registrant's services are limited to discriminating consumers who are sophisticated when it comes to their buying decisions, it is settled that even sophisticated purchasers are not immune from source confusion. *See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), citing *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) ("Human memories even of discriminating purchasers ... are not infallible."). *See also In re Decombe*, 9 USPQ2d 1812 (TTAB 1988). The similarities between the marks and identity of services offered thereunder outweigh any benefit of sophisticated purchasing decisions. *See HRL Associates, Inc. v. Weiss Associates, Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff'd*, *Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods). *See also Refreshment Machinery Inc. v. Reed Industries, Inc.*, 196 USPQ 840, 843 (TTAB 1977) (selling to a sophisticated purchaser does not

automatically eliminate the likelihood of confusion because “[i]t must also be shown how the purchasers react to trademarks, how observant and discriminating they are in practice, or that the decision to purchase involves such careful consideration over a long period of time that even subtle differences are likely to result in recognition that different marks are involved”). We thus find this *du Pont* factor is neutral.

Finally, we note that applicant cites to a number of precedential and non-precedential decisions in its brief, as well as throughout the prosecution of the application, to support her position that the marks are not confusingly similar. While we acknowledge that our precedent provides guidance on applying the legal principles governing the similarity/dissimilarity of marks, the Board must decide each case on its own facts and record. *In re Netts Design Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); *In re International Taste Inc.*, 53 USPQ2d 1604, 1606 (TTAB 2000). In this case, for the reasons explained above, we find the marks confusingly similar.

In conclusion, after careful consideration of the arguments and all of the evidence of record, even if not specifically addressed, we conclude that in view of the substantial similarity of the marks, their contemporaneous use in connection with identical services is likely to cause confusion as to the source or sponsorship of such services. To the extent that any of applicant’s points raises a doubt about likelihood of confusion, that doubt is required to be resolved in favor of the prior registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988).

Decision: The refusal to register under Section 2(d) of the Trademark Act is affirmed.