

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: January 25, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Brix Cellars LLC dba Brix Wine Cellars
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Serial Nos. 85111647, 85111682 and 85112408
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Michael G. Fletcher of Fletcher Yoder PC,
for Brix Cellars LLC.

Jeffery C. Coward, Trademark Examining Attorney, Law Office 106,
Mary I. Sparrow, Managing Attorney.

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Before Seeherman, Bucher and Masiello,
Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Brix Cellars LLC dba Brix Wine Cellars (“applicant”) seeks registration on the Principal Register of the marks **Brix Wine Cellars** and **Brix Cellars** (*both in standard character format*) and the following special form mark:



The image shows a special form mark consisting of the word "BRIX" in a large, outlined, serif font. To the left of the "B" is a registered trademark symbol (®). Below "BRIX" is a horizontal line that tapers at both ends. Underneath this line, the words "Wine Cellars" are written in a cursive script font.

for services recited as “bar and restaurant services; restaurant; restaurant and bar services; wine bars” in International Class 43.¹ The terms “Wine Cellars” and “Cellars” have been disclaimed in the various applications as appropriate.

The examining attorney has refused registration under Section 2(d) of the Trademark Act on the ground that applicant’s marks, when applied to applicant’s services, so resemble the marks in the following two registrations owned by the same party, as to be likely to cause confusion, to cause mistake or to deceive:

BRIX	for “restaurant and bar services” ² and
BRIXX	for “restaurant services.” ³

When the refusals were made final, applicant appealed and requested reconsideration. After the examining attorney denied the requests for reconsideration, the appeals were resumed. Because the issues in each appeal are substantially the same, we have consolidated all three appeals and are issuing a single opinion, taking into consideration the differences in the three marks as appropriate. We affirm all three refusals to register.

¹ Application Serial Nos. 85111647 (**Brix Wine Cellars**) and 85111682 (**Brix Cellars**) were filed on August 19, 2010, and application Serial No. 85112408 (**Brix Wine Cellars and design**) was filed on August 20, 2010, all based upon applicant’s claim of use anywhere and use in commerce since at least as early as March 6, 2008.

² Registration No. 2070071 issued on June 10, 1997; renewed.

³ Registration No. 3005545 issued on October 11, 2005; Section 8 affidavit accepted and Section 15 affidavit acknowledged.

Likelihood of Confusion

Our determination under Trademark Act § 2(d) is based upon an analysis of the probative facts in evidence that are relevant to the factors bearing on a likelihood of confusion. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imp., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). In considering the evidence of record on these factors, we keep in mind that “[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); see also *In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

A. Relationship of the Services

We turn our attention first to the relationship of the services as they are recited in the applications and registrations. *In re Dixie Rests. Inc.*, 41 USPQ2d at 1534. Here, the services recited in all of the applications and registrations include “restaurant services.” For purposes of our determination under this *du Pont* factor, the services are deemed to be legally identical.

Accordingly, we are not persuaded by applicant’s arguments about aesthetic differences between the establishments of applicant and registrant. For example, ap-

plicant argues that its wine bar “is somewhat dark and sophisticated and has a relatively enclosed atmosphere,” while registrant’s establishment “has a relatively light and airy atmosphere overlooking outdoor vistas.” Apparently applicant’s wine bar prominently features wines, with a select choice of food items available upon request. Applicant argues that by contrast, registrant “is primarily a restaurant” also having wines available. Nonetheless, given the lack of restrictions in any of applicant’s recitations of services, we must presume that applicant’s services encompass restaurant, bar and wine bar services of all types. *See Octocom Systems Inc. v. Houston Computers Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Finally, the examining attorney has also demonstrated with thirty representative third-party registrations that “restaurant and bar services” and “wine bars,” are of a kind that may emanate from a single source under a single mark.

Accordingly, this critical *du Pont* factor weighs in favor of a finding of likelihood of confusion.

B. Trade channels

Applicant argues that registrant operates a restaurant, garden, and wine shop in Napa, California, while by contrast, applicant markets wine bar and restaurant services to customers in Houston, Texas. Furthermore, applicant contends that neither has plans to expand into the territory of the other.

Of course, as noted by the examining attorney, applicant seeks geographically unrestricted registrations. As with registrant’s cited registrations, the owner of a

registration without specified limitations enjoys a presumption of exclusive right to nationwide use of the registered mark under Trademark Act Section 7(b), 15 U.S.C. § 1057(b), regardless of its actual extent of use. *Giant Food, Inc. v. Nation's Food-service, Inc.*, 710 F.2d 1565, 218 USPQ 390, 393 (Fed. Cir. 1983). As a result, nothing precludes either applicant or registrant from expansion into any geographic location in the United States. Thus, the geographical extent of applicant's and registrant's current restaurant services is not relevant to our *ex parte* likelihood of confusion determination. Rather, because the services are legally identical, they are presumed to be rendered in the same channels of trade which would be normal therefor. *In re Elbaum*, 211 USPQ 639 (TTAB 1981). Accordingly, this related *du Pont* factor weighs in favor of a finding of likelihood of confusion.

C. Conditions of Sale

Applicant argues at some length that another *du Pont* factor – the conditions of sale – outweighs the factors focused on the relationship of the services and the channels of trade. Specifically, applicant argues there can be no likelihood of confusion because the potential customers of the services of both applicant and registrant are quite careful and sophisticated. Applicant argues as follows:

For example, wine purchasers typically do not buy on impulse, as wines can be quite expensive. In addition, these establishments (i.e., wine bars and restaurants) often pride themselves on carrying a variety of good wines. Similarly, customers who frequent wine bars and restaurants are often very knowledgeable with respect to wines, and very infrequently select wine bars and restaurants (or wines, for that matter) on impulse. Rather, they often put much thought into not only which wine bars and restaurants to go to, but also which wines to purchase at the

wine bars and restaurants, as the wines can be quite expensive.

... This sort of heightened awareness [in selecting wines and wine establishments] certainly reduces the possibility of confusion between competing marks insofar as the consumer will be more likely to question differences that are perceived between competing marks. Therefore, the degree of sophistication of potential consumers should certainly be considered as an important factor when ascertaining likelihood of confusion between competing marks and, in this instance, suggests a lower likelihood of confusion between the registered marks BRIX and BRIXX and Applicant's mark "Brix Wine Cellars."

Again, the recitation of services in no way excludes from the potential class of consumers less sophisticated purchasers from within the purchasing universe, who will exercise only an ordinary degree of care. Because restaurant and bar services can run the gamut in terms of cost and clientele, we cannot accept applicant's position that only sophisticated individuals will be the patrons of either applicant's or registrant's establishments.

Furthermore, even if we assume, *arguendo*, that the purchasers of applicant's services will be careful and discriminating, it does not serve to obviate the likelihood of confusion. The only difference in the marks, as discussed *infra*, is the presence/absence of words such as "Cellars" and "Wine Cellars," terms having little source-identifying capacity when used in the context of a wine bar. Therefore, even careful, discriminating consumers are not likely to regard the presence or absence of these words as indicating a difference in the source of the respective services. *See Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1841-42 (Fed. Cir. 1990) (even sophisticated purchasers can be confused by very

similar marks). Accordingly, this related *du Pont* factor is, at best for applicant, neutral in our determination of likelihood of confusion.

D. Comparison of the Marks

In comparing the marks, 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); and *Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

Applicant has applied to register the marks **Brix Wine Cellars**, **Brix Cellars**, and . The registered marks are **BRIX** and **BRIXX**, both owned by Yountville Partners, Inc., of Napa, CA. Based upon the totality of the record, we conclude that the word “Brix” (or “Brixx”) is arbitrary for these restaurant and bar services, and presents as a strong mark, both conceptually and commercially.

In comparing the marks, we must consider the marks in their entireties as to appearance, sound, connotation and commercial impression, to determine the similarity or dissimilarity between them. *Palm Bay*, 73 USPQ2d at 1692. The test under this *du Pont* factor 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 that confusion as to the source of the goods or services offered under the respective marks is likely to result. Because the

similarity or dissimilarity of the marks is determined based on the marks in their entireties, the analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

On the other hand, different features may be analyzed to determine whether the marks are similar. *Price Candy Company v. Gold Medal Candy Corporation*, 220 F.2d 759, 105 USPQ 266, 268 (CCPA 1955). In fact, 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 entireties. *In re National Data Corp.*, 224 USPQ at 751. 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).

Applicant argues that the commercial impressions of applicant's two-word ("Brix Cellars") and three-word ("Brix Wine Cellars") marks are substantially different from the commercial impressions engendered by registrant's cited one-word registered marks, BRIX and BRIXX. Applicant takes the position that with its mark, potential customers would be left with the distinct impression of a high-scale wine establishment, while registrant's marks, BRIX or BRIXX, connote nothing other than the meaning that may be ascribed to these individual words.

The examining attorney disagrees with this conclusion, and contends that in the context of restaurant and bar services, the addition of largely non-distinctive words like “Cellars” or “Wine Cellars” does not obviate the overall similar commercial impressions shared with the cited, entirely arbitrary registered marks. Although the additional words “Cellars” or “Wine Cellars” in applicant’s marks result in some differences in appearance and pronunciation, these differences are insufficient to distinguish the marks. Although the words “Cellars” and “Wine Cellars” provide additional information about applicant’s services, because they are descriptive, applicant’s marks and registrant’s marks have essentially the same meaning and convey the same commercial impression. This is true inasmuch as the term BRIX retains its identity as a separately identifiable term in all of applicant’s marks, and, indeed, as the sole term with any real source-identifying significance. The addition of the wording “Cellars” or “Wine Cellars” to registrant’s “Brix” mark in the context of restaurant and bar services is not enough to overcome a likelihood of confusion herein. Accordingly, this critical *du Pont* factor weighs in favor of a finding of likelihood of confusion.

E. Lack of Actual Confusion

Applicant also maintains that there has been no actual confusion between applicant’s marks and the cited marks over three years of contemporaneous usage, despite applicant’s prominent and extensive use of its applied-for marks. Of course, actual confusion is not necessary to show a likelihood of confusion. *See Weiss Associates Inc. v. HRL Associates Inc.* 902 F.2d 1546, 223 USPQ 1025 (Fed. Cir. 1990);

and *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1571, 218 USPQ 390, 396 (Fed. Cir. 1983). Moreover, the lack of actual confusion carries little weight, especially in an *ex parte* context. *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960 144 USPQ 435, 438 (CCPA 1965). In this *ex parte* proceeding, we have had no opportunity to hear from the registrant as to whether it has encountered any instances of confusion. As noted by our primary reviewing Court:

With regard to the seventh *du Pont* factor, we agree with the Board that Majestic's uncorroborated statements of no known instances of actual confusion are of little evidentiary value. *See In re Bissett-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of appellant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight, *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965), especially in an *ex parte* context.

In re Majestic Distilling Co., 65 USPQ2d at 1205. Thus, applicant's assertion of the absence of actual confusion is of little probative value in our determination on the issue of likelihood of confusion, and this *du Pont* factor is neutral in this case.

F. Balancing the factors

In view of the facts that the cited marks are both conceptually and commercially strong, that the services are legally identical, are offered through the same channels of trade, and that the respective marks are quite similar, we find that applicant's registration of these three marks is likely to cause confusion. To the extent that the

record provides any credible evidence on the conditions of sale and the absence of actual confusion, we find these factors are, at best for applicant, neutral.

G. Applicant's request for registration on the Supplemental Register

Applicant contends in its initial appeal brief that, at the very least, its marks should be registered on the Supplemental Register. However, applicant did not amend its applications to the Supplemental Register, and therefore the question of their registrability on this Register is not an issue in this appeal.⁴

Decision: All three refusals to register applicant's marks under Trademark Act § 2(d) are hereby affirmed.

⁴ In any event, applicant should note that marks are not eligible on the Supplemental Register if they are eligible for registration on the Principal Register, and furthermore, marks may not be registered on either the Principal Register or the Supplemental Register if they are likely to cause confusion with a registered mark.