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PRECEDENT OF THE TTAB

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April 25, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re DLMW-BBQ, LLC*

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Serial No. 86457938

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Luke Brean of Breanlaw, LLC for DLMW-BBQ, LLC.

Howard B. Levine, Trademark Examining Attorney, Law Office 115 (John Lincoski, Managing Attorney).

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Before Kuhlke, Ritchie, and Masiello, Administrative Trademark Judges.

Opinion by Masiello, Administrative Trademark Judge:

DLMW-BBQ, LLC (“Applicant”) has filed an application to register the mark BLACK BARK in standard characters for “Restaurant services,” in International Class 43.<sup>1</sup>

The Trademark Examining Attorney refused registration under § 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, as used in connection with Applicant’s services, so resembles the registered mark BLACK

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<sup>1</sup> Application Serial No. 86457938, filed November 18, 2014 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), on the basis of Applicant’s asserted *bona fide* intention to use the mark in commerce.

BARK BRISKET as to be likely to cause confusion, or to cause mistake, or to deceive. The cited mark is registered on the Supplemental Register in standard characters for “Meat; Prepared meat,” in International Class 29.<sup>2</sup> When the refusal was made final, Applicant appealed. Applicant and the Examining Attorney have filed briefs.

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 as set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

1. The marks.

We first consider the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (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) (internal

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<sup>2</sup> Reg. No. 4657885, issued December 16, 2014. No claim is made to the exclusive right to use BRISKET apart from the mark as shown.

quotation marks omitted). While we consider each mark in its entirety, 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 that our ultimate conclusion rests upon a comparison of the marks in their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). “Indeed, this type of analysis appears to be unavoidable.” *Id.*

In appearance and sound the two marks are substantially similar, inasmuch as they share the term BLACK BARK. The additional word BRISKET in Registrant’s mark is a point of visual and phonetic difference.

With respect to meaning, in both marks the term BLACK BARK would be understood to have the same meaning. The Examining Attorney has shown that, in the field of barbecued meats, BARK is understood to mean the desirable crust that develops on meat that has been properly cooked (“the deep dark, rich, sweet, chewy, crusty, jerky-like rind suffused with incredible complex flavor”).<sup>3</sup> The evidence also shows that such “bark” can be black in color, and that such a color is desirable:

Smoke particles stick to the goo and change its color. “Without smoke, bark usually becomes a dark mahogany red, depending on what is in the rub” says Blonder. “With smoke and enough time, it can be transformed into a licorice-black, shiny lacquer. ... Burnt ends, the tasty candylike parts of brisket that aficionados fight over, aren’t really burnt, they are just bite size cubes of beef covered in dark bark.”<sup>4</sup>

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<sup>3</sup> Office Action of March 11, 2015 at 9. *See also id.* at 8-32.

<sup>4</sup> *Id.* at 9.

I am on my 10<sup>th</sup> brisket and have had good success with getting the meat tender but the thing I crave almost as much is that thick, crispy black crust on the outside.<sup>5</sup>

Thus, in the relevant fields, Applicant's mark BLACK BARK would be understood to mean the black-colored crust on a smoked piece of meat; and Registrant's mark BLACK BARK BRISKET would be understood to mean a piece of brisket meat having such a black-colored crust. These are substantially similar, but not identical, meanings.

In overall commercial impression, Registrant's mark, as applied to meat, describes a brisket meat that is cooked or barbecued in such a way that it has a black-colored crust; and Applicant's mark, as applied to restaurant services suggests the availability of meat that is cooked or barbecued so as to have a black-colored crust. We find these commercial impressions to be similar, although not identical.

Considering the similar appearance, sound, meaning and overall commercial impressions of the marks, we find that the *du Pont* factor of the similarity or dissimilarity of the marks weighs in favor of a finding of likelihood of confusion.

2. The goods and services.

We next consider the similarity or dissimilarity of the services and goods as identified in the application and the cited registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-1162 (Fed. Cir. 2014); *Octocom Syst. Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). We must determine whether such goods and

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<sup>5</sup> *Id.* at 30.

services are related in such a way that using similar marks in connection with them could give rise to the mistaken belief that they originate from or are in some way associated with the same producer. *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1410 (TTAB 2010); *Schering Corporation v. Alza Corporation*, 207 USPQ 504, 507 (TTAB 1980); *Oxford Pendaflex Corporation v. Anixter Bros. Inc.*, 201 USPQ 851, 854 (TTAB 1978).

Although in specific cases likelihood of confusion has been found where similar marks are used in connection with food on the one hand and restaurant services on the other, there is no *per se* rule to this effect. See *Lloyd's Food Prods., Inc. v. Eli's, Inc.*, 987 F.2d 766, 768, 25 USPQ2d 2027, 2030 (Fed. Cir. 1993). "To establish likelihood of confusion a party must show *something more* than that similar or even identical marks are used for food products and for restaurant services." *Jacobs v. Int'l Multifoods Corp.*, 668 F.2d 1234, 1236, 212 USPQ 641, 642 (CCPA 1982) (emphasis added). See also *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003).

In order to show that customers would likely believe that meat and prepared meat emanate from the same business that offers restaurant services, the Examining Attorney has made of record excerpts from several websites of restaurants or food trucks that specialize in barbecue. Aside from offering menus of restaurant fare (e.g., items classified as "plates," "sides," "drinks," and "desserts"), many of these establishments also offer meats by the pound or half-pound. We note in particular the following:

Kerlin BBQ. Website states, “Pre ordering also available. Skip the line and guarantee we’ll have the meat you want. Call us at 512-412-5588.”<sup>6</sup>

The Salt Lick. Offering at bottom of menu, “— Meat by the Pound — Brisket, Ribs, Sausage or Turkey.”<sup>7</sup>

Central Texas Smoked Meats Menu offers plates, sides, desserts, drinks, and “CRAFT MEATS (PER POUND).”<sup>8</sup>

Stiles Switch BBQ Brew Menu offers plates, sandwiches, sides and meats “BY THE HALF POUND.”<sup>9</sup>

The Examining Attorney’s purpose is to show that restaurants operated under a particular mark also sell meat, branded with the same mark, *as goods* and not merely as an aspect of the service of providing food and drink to guests in a restaurant. Two of the above establishments (Kerlin BBQ and The Salt Lick) do appear to offer meat as a product, and not merely as an item on the menu. However, we find the other website evidence to be ambiguous. In those cases, the offering of meat “by the pound” or “by the half pound” might simply indicate that diners in the restaurant are asked to order their meals by indicating what quantity of meat they would like. On another website cited by the Examining Attorney, for Franklin Barbecue restaurant,<sup>10</sup> this interpretation is particularly clear because, aside from the offered sandwiches and sides, it appears that the only way to order meats in this restaurant is “By the Pound,” *i.e.*, what is offered is a restaurant meal

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<sup>6</sup> Office Action of May 13, 2015 at 14-16.

<sup>7</sup> *Id.* at 17-19.



<sup>8</sup> *Id.* at 8-10.

<sup>9</sup> *Id.* at 10-13.

<sup>10</sup> *Id.* at 6-7.

purchased by weight, as opposed to retail or wholesale branded meats sold as goods. The ambiguous evidence discussed above fails to make the Examining Attorney’s point, leaving only two examples that (arguably) support the Examining Attorney’s position. We have given no weight to the website of La Barbecue,<sup>11</sup> because it lacks sufficient detail to determine what is being offered. We also cannot determine what type of establishment is advertised on the website of John Mueller Meat Co.,<sup>12</sup> which might be either a restaurant that sells sandwiches and meat dishes or a butcher shop that sells sandwiches (*i.e.*, not a restaurant).


The Examining Attorney has also submitted six use-based, third-party registrations that cover restaurant services and meat products, as shown below.<sup>13</sup>

<u>Reg. No.</u>	<u>Mark</u>	<u>Relevant Goods</u>	<u>Relevant Services</u>
3252399		Barbecue meat products, namely, chicken, brisket, sausage and ribs, not for sale in grocery stores, delis or food service distribution.	Restaurant services, catering services.
4011167	A KENTUCKY TRADITION	Meats.	Restaurant services, catering services.
4430800		Meat products, namely, beef, pork, chicken, sausage, and game.	Restaurant services featuring barbeque; catering services featuring barbeque.

<sup>11</sup> *Id.* at 22-24.

<sup>12</sup> *Id.* at 20-21.

<sup>13</sup> Office Action of March 11, 2015 at 33-50.

4469060		Prepared meats, namely, pork, beef and poultry.	Catering services; restaurant services.
4462362	BEST LITTLE PORK HOUSE IN ALABAMA	Meat.	Catering services; restaurant services.
4693640	SECOND CITY PRIME	Steaks, namely, beef; Meat; Poultry; Sausages; Hot Dogs; Fish, not live.	Catering; Mobile restaurant services; Providing of food and drink via a mobile truck.

Third-party registrations that are based on use in commerce and that individually cover a number of different goods or services may serve to suggest that the listed goods or services are of a type which may emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786; *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). However, as we noted above, in this case “something more” is needed to show relatedness of the goods and services.

We also bear in mind, in performing our analysis, the evidence of record showing that the cited registered mark is a relatively weak source indicator for meat products because it is merely descriptive of a feature of the goods. “Marks that are descriptive or highly suggestive are entitled to a narrower scope of protection, *i.e.*, are less likely to generate confusion over source identification, than their more fanciful counterparts.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015).



We find the Kerlin BBQ and Salt Lick websites, the relatively small number of third-party registrations, and the other ambiguous website evidence to be insufficient to demonstrate, under the “something more” standard, that customers would be likely to mistakenly believe that meats sold under a weak mark like BLACK BARK BRISKET and restaurant services offered under the mark BLACK BARK emanate from the same business entity. Accordingly, we find that the *du Pont* factor of the similarity or dissimilarity of the goods and services weighs against a finding of likelihood of confusion.

3. Trade channels.

We note the Examining Attorney’s contention that similarity of trade channels is one of the most relevant *du Pont* factors in this case. The website evidence bears upon this issue, as evidence of this type might demonstrate that meat products, *as goods*, travel through the trade channel of restaurant establishments. However, inasmuch as we have found the website evidence largely ambiguous for that purpose, the similarity of trade channels has not been proven and this factor remains neutral.

4. Conclusion.

We have considered all of the arguments and evidence of record, including those not specifically discussed herein, and all relevant *du Pont* factors. On the present record, we find that the Examining Attorney has not demonstrated a likelihood of confusion as to source as between Applicant’s services and Registrant’s goods.

Decision: The refusal to register is reversed.