

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: March 24, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re 77 Enterprises LLC*  
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Application Serial No. 87639234  
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Griffin C. Klema of Klema Law, P.L. for 77 Enterprises LLC.

Andrew Janson, Trademark Examining Attorney, Law Office 105,  
Jennifer Williston, Managing Attorney.

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Before Cataldo, Bergsman, and Coggins,  
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

77 Enterprises LLC (“Applicant”) seeks registration on the Principal Register of the mark 77 SPORTBAR (in standard characters) for “bar and restaurant services, namely providing of food and beverages for consumption on the premises; restaurant and sports bar services with televisions on premises,” in International Class 43.<sup>1</sup> Applicant disclaims the exclusive right to use the term “Sports Bar.”

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<sup>1</sup> Serial No. 87639234 was filed on October 10, 2017, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s assertion of first use anywhere as early as January 23, 2017, and first use in commerce since at least as early as October 9, 2017.

The Examining Attorney refused to register 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 77 SOCIAL CLUB and design, reproduced below, for "catering services; restaurant and bar services," in International Class 43.<sup>2</sup>



The registration contains the following description of the mark:

The mark consists of the number "77" in stylized form centered within a square below which and adjoining the square is a rectangle containing the words "SOCIAL CLUB."

When we cite to the prosecution history record, we refer to the USPTO Trademark Status and Document Retrieval (TSDR) in the downloadable .pdf format. When we cite to the briefs, we refer to TTABVUE, the Board's docketing system, by docket entry and page number (e.g., 9 TTABVUE 12).

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<sup>2</sup> Registration No. 6307307 registered on March 30, 2021, based on Serial No. 90110022 filed August 12, 2020.

I. Preliminary Issues

A. Applicant's late-filed evidence

Applicant embedded two screen shots of Registrant's website in its brief.<sup>3</sup> Applicant had not previously submitted the screen shots. The Examining Attorney objects to the two screen shots of Registrant's website on the ground that they were not timely submitted.<sup>4</sup> The record in an application should be complete prior to filing an appeal. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d). Because the two screen shots were submitted after the appeal was filed, they are not timely and we sustain the objection. We will not consider the two screen shots of Registrant's website.

B. Whether the USPTO erred by failing to suspend the underlying application for the cited registration

As noted above, the cited registration issued on March 30, 2021, based on an application filed August 12, 2020. Applicant filed its application on October 10, 2017. It is USPTO policy to process conflicting applications in the order of their filing dates, such that the application having the earliest filing date will be the first to proceed toward publication for opposition if it is eligible for registration on the Principal Register.<sup>5</sup> Trademark Rule 2.83(a), 37 C.F.R. § 2.83(a); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1208.01 (July 2022).

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<sup>3</sup> Applicant's Brief, pp. 10-11 (9 TTABVUE 13-14).

<sup>4</sup> Examining Attorney's Brief (13 TTABVUE 3).

<sup>5</sup> When the marks in two or more pending applications filed by different applicants appear to be sufficiently similar that they may ultimately require a refusal of registration under Section 2(d), they are considered "conflicting applications."

Applicant contends that because its application has an earlier filing date than the underlying application for the cited registration, action in the underlying application for the cited registration should have been suspended pending the disposition of Applicant's application. The gravamen of Applicant's argument is that the standard operating procedures discussed above were not followed, and that as a result the refusal issued by the Examining Attorney was improper.

However, once a registration issues, a likelihood-of-confusion refusal that is required by the Trademark Act applies regardless of the filing-date priority of the underlying application. Internal examination procedures do not have primacy over statutory law, and a refusal that is authorized by the Trademark Act will not be considered invalid due to errors in examination procedure.

TMEP § 1208.01 (citing *In re House Beer, LLC*, 114 USPQ2d 1073, 1076 (TTAB 2015)).

Applicant essentially asks us to interpret the TMEP and the Trademark Rules in a way that is inconsistent with the governing statute, Section 2(d) of the Trademark Act; that is, Applicant asks us to find that a refusal that is clearly authorized by Section 2(d) is invalid because certain examination procedures were not followed during the independent examinations of Applicant's application and the underlying application for the cited registration. We cannot give the internal examining procedures of the USPTO primacy over statutory law. Agency rules and the effect of implementing them must be consistent with the language of the governing statute. *House Beer*, 114 USPQ2d at 1076 (citing *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 6 USPQ2d 1897, 1902 (1988) (citing *Bd. of Governors, FRS v. Dimension Fin.l Corp.*, 474 U.S. 361, 368 (1986) (quoting *Chevron USA Inc. v. Nat.*

*Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984))). The specific examining procedures at issue are not expressly required by the terms of the Trademark Act. Strict compliance with those procedures is by no means a prerequisite to issuing a refusal that Section 2(d) of the Act requires.

Because the USPTO issued a federal trademark registration, that registration is entitled to the presumptions of Section 7(b) of the Act, 15 U.S.C. § 1057(b), including the validity of the registered mark and of the registration of the mark, of Registrant's ownership of the mark, and of Registrant's exclusive right to use the registered mark in commerce on or in connection with the services specified in the certificate.

For these reasons, the Examining Attorney's refusal, being required by the express terms of Section 2(d), is not rendered invalid by the procedural situation described above.<sup>6</sup> We turn, therefore, to the merits of the Examining Attorney's refusal.

## II. Likelihood of Confusion

Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), prohibits the registration of a mark that:

[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.

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<sup>6</sup> Applicant was not without remedy when the cited mark advanced. Applicant could have opposed registration when the mark was published for opposition or filed a petition for cancellation once the mark registered, if it had a valid basis for doing so.

We base our determination under Section 2(d) on an analysis of all 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) (setting forth factors to be considered, referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). “Whether a likelihood of confusion exists between an applicant’s mark and a previously registered mark is determined on a case-by-case basis, aided by application of the thirteen *DuPont* factors.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1689 (Fed. Cir. 2018). “In discharging this duty, the thirteen *DuPont* factors ‘must be considered’ ‘when [they] are of record.’” *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019) (quoting *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997) and *DuPont*, 177 USPQ at 567). “Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances. Any single factor may control a particular case.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, at \*3 (Fed. Cir. 2020) (citing *Dixie Rests.*, 41 USPQ2d at 1533).

“Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973). “Two key factors in every Section 2(d) case are the first two factors regarding the similarity or dissimilarity of the marks and the goods or services, because 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.” *In re Embiid*, 2021 USPQ2d 577, at \*10 (TTAB 2021) (quoting *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)). See also *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004).

A. The similarity or dissimilarity and nature of the services

Applicant is seeking to register its mark for “bar and restaurant services, namely providing of food and beverages for consumption on the premises; restaurant and sports bar services with televisions on premises.” The mark in the cited registration is registered for, inter alia, “restaurant and bar services.” Accordingly, the services are identical because Registrant’s “restaurant and bar services” encompass Applicant’s bar and restaurant services. Where services are broadly identified in an application or registration, “we must presume that the services encompass all services of the type identified.” *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015) (where the services in an application or registration are broadly described, they are deemed to encompass all the activities of the nature and type described therein); *In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily

encompasses Registrant's narrowly identified 'residential and commercial furniture.'").

B. Established, likely-to-continue channels of trade and classes of consumers

Because the services described in the application and the cited registration are identical, we presume that the channels of trade and classes of purchasers are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (identical goods are presumed to travel in same channels of trade to same class of purchasers) (cited in *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) ("With respect to similarity of the established trade channels through which the goods reach customers, the TTAB properly followed our case law and 'presume[d] that the identical goods move in the same channels of trade and are available to the same classes of customers for such goods....'")); *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1745 (TTAB 2018), *aff'd mem.* (No. 18-2236) (Fed. Cir. September 13, 2019) ("Because the services described in the application and the cited registration are identical, we presume that the channels of trade and classes of purchasers are the same."); *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1033 (TTAB 2016) ("Given the identity of the services, at least in part, and the lack of restrictions on trade channels and classes of consumers in the recitations of services, we presume that these services travel through the same channels of trade . . .").

C. Strength of Registrant's mark

The strength of Registrant's mark affects the scope of protection to which it is



entitled. Thus, we consider the inherent or conceptual strength of Registrant's mark based on the nature of the mark itself and its commercial strength based on marketplace recognition of the mark. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("A mark's strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength."); *Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017); *Top Tobacco, L.P. v. N. Atl. Operating Co., Inc.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength); *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006) (market strength is the extent to which the relevant public recognizes a mark as denoting a single source); 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:80 (5th ed. March 2023 update) ("The first enquiry is for conceptual strength and focuses on the inherent potential of the term at the time of its first use. The second evaluates the actual customer recognition value of the mark at the time registration is sought or at the time the mark is asserted in litigation to prevent another's use.").

At a minimum, Registrant's mark 77 SOCIAL CLUB and design has been registered on the Principal Register without a claim of acquired distinctiveness and, therefore, it is inherently distinctive and entitled to the benefits accorded registered mark under Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b) (registration is prima facie evidence of the validity of the registration and registrant's exclusive right to use the mark in commerce).

Applicant contends that because there are numerous third-party registrations with a numeric component for goods and services related to restaurant and bar services and because there is widespread third-party use of 77 for bar and restaurant services, 77 is a weak term when used in connection with restaurant and bar services and, therefore, it is entitled to only a narrow scope of protection.<sup>7</sup>

While third-party registrations are not evidence of what happens in the marketplace, they may be probative to show the sense in which a mark is used in ordinary parlance (i.e., that some segment of the mark has a normally understood and well-recognized descriptive or suggestive meaning). *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015). In other words, third-party registrations may be used to show the meaning of a mark in the same way that dictionaries are used. *Id.* (quoting *Textronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976)).

To show that the numeral 77 in Registrant's mark 77 SOCIAL CLUB and design is an inherently or conceptually weak term, Applicant submitted copies of 30 third-party registrations that include the numeral 7 or 77 or the word "seven" for restaurant, bar, or other related services.<sup>8</sup> However, there are only two registrations with the numeral 77: Registration No. 4960688 for the mark OLD NO. 77 HOTEL & CHANDLERY for "hotel services";<sup>9</sup> and Registration No. 4640265 for the mark GREY

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<sup>7</sup> August 10, 2019 Request for Reconsideration (TSDR 23-31).

<sup>8</sup> *Id.* at TSDR 52-81.

<sup>9</sup> *Id.* at TSDR 62.

LADY NO. 77 DELANCEY NEW YORK 10002 and design reproduced below for restaurant services.<sup>10</sup>



In sum, there is one registration for a mark consisting in part of the numeral “77” for hotel services rather than restaurant and bar services. A third-party registration that does not cover the same services as the registration at issue has limited, if any, probative value. *See Omaha Steaks Int’l*, 128 USPQ2d at 1694 (error to rely on third-party evidence of similar marks for dissimilar goods, as Board must focus “on goods shown to be similar”); *i.am.symbolic*, 123 USPQ2d at 1751 (disregarding third-party registrations for other types of goods where the proffering party had neither proven nor explained that they were related to the goods in the cited registration); *TAO*

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<sup>10</sup> *Id.* at TSDR 63. The registrant disclaimed the exclusive right to use “No. 77 Delancey New York 10002” presumably because it is an address. In any event, the USPTO cancelled this registration effective June 25, 2021, because the registrant failed to file a Section 8 declaration of use. A cancelled or expired registration has no probative value other than to show that it once issued and it is not entitled to any of the statutory presumptions of Section 7(b) of the Trademark Act. *In Re Ginc UK Ltd.*, 90 USPQ2d 1472, 1480 (TTAB 2007). *See also Action Temp. Servs. Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) (“[A] cancelled registration does not provide constructive notice of anything.”).

*Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1058 (TTAB 2017) (third party registrations in unrelated fields “have no bearing on the strength of the term in the context relevant to this case.”).

Assuming arguendo that hotel services are related to restaurant and bar services and that a cancelled registration has some probative value, two registrations are well short of the volume of evidence found probative in *Juice Generation*, 115 USPQ2d at 1674-5 and *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015).

Applicant’s third-party registration evidence fails to show that the numeral “77” has been so commonly registered in connection with restaurant and bar services that it is descriptive or suggestive and, therefore, an inherently or conceptually weak term when used as a trademark. Applicant’s third-party registration evidence does not detract from the inherent or conceptual strength of Registrant’s mark 77 SOCIAL CLUB and design. We find Registrant’s mark to be inherently strong.

Applicant also submitted screen shots from 23 third-party websites showing entities using 77-formative marks in connection with restaurant and bar services.<sup>11</sup> Evidence of extensive third-party use of a term, in connection with the same or similar services in the relevant marketplace, is probative of the term’s weakness as a trademark. See *Omaha Steaks Int’l*, 128 USPQ2d at 1693 (“The purpose of introducing evidence of third-party use is to show that customers have become so

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<sup>11</sup> August 10, 2019 Request for Reconsideration (TSDR 83-292, 270-292, and 304-319). Because **No. 77** at TSDR 191 is located in Caxton, England, we do not consider it.

conditioned by a plethora of such similar marks that customers have been educated to distinguish between different [such] marks on the bases of minute distinctions.”) (internal quotations and quotation marks omitted omitted)); *Jack Wolfskin*, 116 USPQ2d at 1136 (holding that “evidence of third-party use of similar marks on similar goods can show that customers have been educated to distinguishing between different marks on the basis of minute distinctions”) (internal quotation and quotation marks omitted)); *In re FCA US LLC*, 126 USPQ2d 1214, 1224 (TTAB 2018) (“Evidence of third-party use may reflect commercial weakness.”); *In re Morinaga Nyugyo K.K.*, 120 USPQ2d 1738, 1745 (TTAB 2016). The websites listed below are representative:

- 77 Asian Kitchen;<sup>12</sup>
- 77 Bar and Grill;<sup>13</sup> and
- 77 Chicken & Dessert Cafe.<sup>14</sup>

We note that PIER 77 Restaurant is located at 77 Pier Road, Kennebunkport, Maine,<sup>15</sup> and that CLUB 77 is located at 77 West Wacker Drive, Chicago, Illinois.<sup>16</sup> Thus, in those instances, 77 refers to the users’ street address.

Applicant contends that as a result of the widespread use of “77” in the food, bar, and restaurant industries, the cited registration should be accorded a narrower scope

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<sup>12</sup> *Id.* at TSDR 83.

<sup>13</sup> *Id.* at TSDR 93.

<sup>14</sup> *Id.* at TSDR 96.

<sup>15</sup> *Id.* at TSDR 212.

<sup>16</sup> *Id.* at TSDR 163.

of protection than that to which inherently distinctive marks are normally entitled.<sup>17</sup> However, the entities using 77-formative marks are local restaurants and bars indicating consumers are unlikely to encounter multiple restaurant and bars bearing 77-formative marks in the same trading area and, thereby distinguish among them by looking at features other than the numeral 77. *See Anthony's Pizza & Pasta Int'l, Inc. v. Anthony's Pizza Holding Co., Inc.*, 95 USPQ2d 1271, 1278 (TTAB 2009), *aff'd*, 415 F. App'x. 222 (Fed. Cir. 2010). However, there are six 77-formative marks in Los Angeles, California: 77 Asian Kitchen (North Hollywood),<sup>18</sup> 77 Kentucky (Koreatown),<sup>19</sup> Seventy7 Lounge (Culver City),<sup>20</sup> Seventy7 North (Studio City),<sup>21</sup> 77 Chicken & Dessert Cafe (Glendale),<sup>22</sup> and Company 77 Pizza Fire Truck (Irvine).<sup>23</sup> In addition, there are two 77-formative marks in Queens, New York: Compadres77 Mexican Restaurant (Forest Hills)<sup>24</sup> and Espresso 77 (Jackson Heights).<sup>25</sup> Nevertheless, Los Angeles spans a very large geographic area and Applicant did not provide any information as to whether the trading areas of the restaurants overlap.

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<sup>17</sup> *Id.* at TSDR 31.

<sup>18</sup> *Id.* at TSDR 83.

<sup>19</sup> *Id.* at TSDR 116.

<sup>20</sup> *Id.* at TSDR 228.

<sup>21</sup> *Id.* at TSDR 237.

<sup>22</sup> *Id.* at TSDR 96.

<sup>23</sup> *Id.* at TSDR 270.

<sup>24</sup> *Id.* at TSDR 166.

<sup>25</sup> *Id.* at TSDR 181.

On the record before us, Applicant’s evidence regarding the third-party use of 77-formative marks in connection with restaurants and bars does not detract from the commercial strength of Registrant’s mark 77 SOCIAL CLUB and design. Accordingly, we find that the commercial strength is a neutral factor.<sup>26</sup>

D. The similarity or dissimilarity of the marks

Applicant is seeking to register the mark 77 SPORTBAR in standard characters, and the mark in the cited registration is 77 SOCIAL CLUB and design reproduced below.



The numeral “77” is the dominant part of Registrant’s mark because of its size and location. We often have said, the lead element in a mark has a position of prominence; it is likely to be noticed and remembered by consumers and so as to play a dominant role in the mark. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (finding “the identity of the marks’ two initial words is particularly significant because consumers typically notice those words first”); *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Fondée En 1772*, 396

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<sup>26</sup> The owner of the cited registration is not a party to this proceeding and thus cannot introduce evidence regarding its use of the mark protected thereby. *See In re Thomas*, 79 USPQ2d 1021, 1027, n. 11 (TTAB 2006) (“Because this is an *ex parte* proceeding, we would not expect the examining attorney to submit evidence of fame of the cited mark”).

F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word).

In addition, the design element is basic, it serves as a border for “77 Social Club,” and it does not have much source indicating significance. Although we assess each mark in its entirety, wording often is considered the dominant feature of a mark comprising both literal and design elements because it is most likely to indicate the source of the services. *See Jack Wolfskin*, 116 USPQ2d at 1134; *Viterra*, 101 USPQ2d at 1908. “In the case of marks, such as [Registrant’s], consisting of words and a design, the words are normally accorded greater weight because they are likely to make a greater impression upon purchasers, to be remembered by them, and to be used by them to request the goods.” *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018).

There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, such as a common dominant element, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Viterra*, 101 USPQ2d at 1908; *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

With respect to Applicant’s mark 77 SPORTBAR, the numeral “77” is also the dominant part of the mark because of its location as the first part of the mark. In



addition, the term “Sportbar” is descriptive and Applicant has disclaimed the exclusive right to use the term “Sports Bar.”<sup>27</sup> It is well-settled that disclaimed, descriptive matter may have less significance in likelihood of confusion determinations because consumers will tend to focus on the more distinctive parts of marks. *See In re Detroit Athletic Co.*, 128 USPQ2d at 1050 (citing *In re Dixie Rests., Inc.*, 41 USPQ2d at 1533-34); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.’”) (quoting *In re Nat’l Data Corp.*, 224 USPQ at 752); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001)

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<sup>27</sup> Although Applicant’s mark 77 SPORTBAR is presented without a space between “Sport” and “Bar,” consumers are likely to view and verbalize it as SPORT BAR, based on normal English pronunciation. Thus, the presence or absence of a space between the two words is an inconsequential difference that even if noticed or remembered by consumers would not serve to distinguish the two terms. *In re Iolo Tech., LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010) (finding ACTIVECARE and ACTIVE CARE are similar); *Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1025 (TTAB 2009) (finding that petitioner’s mark DESIGNED2SELL is phonetically identical to respondent’s mark DESIGNED TO SELL and the “marks are also highly similar visually” in part because “the spaces that respondent places between the words do not create a distinct commercial impression from petitioner’s presentation of his mark as one word.”); *Seaguard Corp. v. Seaward Int’l, Inc.*, 223 USPQ2d 48, 51 (TTAB 1984) (SEA GUARD and SEAGUARD are “essentially identical”).

In addition, there is no material difference between Applicant’s use of SPORTBAR – sport being singular – and SPORTS BAR – where “Sports” is plural. *See Wilson v. Delaunay*, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957) (finding no material difference between the singular and plural forms of ZOMBIE such that the marks were considered the same mark); *Weidner Publ’ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1355 (TTAB 2014); *In re Pix of Am., Inc.*, 225 U.S.P.Q. 691, 692 (TTAB 1985) (noting that the pluralization of “Newport” is “almost totally insignificant in terms of the likelihood of confusion of purchasers.”).

(disclaimed matter is often “less significant in creating the mark’s commercial impression.”).

As noted above, Applicant’s mark 77 SPORTBAR is presented in standard characters. Marks presented in standard characters are not limited to any particular depiction. The rights associated with a mark in standard characters reside in the wording, and not in any particular display. Thus, Applicant seeks registration of a mark that might be depicted in any manner, regardless of the font style, size, or color, and might at any time in the future be displayed in a manner similar to Registrant’s mark. *Viterra*, 101 USPQ2d at 1909-11; *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (rejecting argument that for purposes of determining whether two marks are similar, a mark in a typed drawing (equivalent to modern standard character format) is distinct from such mark in a logo format; “[b]y presenting its mark in a typed drawing, a *difference* cannot legally be asserted by that party” (emphasis in original)); *Aquitaine Wine USA*, 126 USPQ2d at 1186-87 (TTAB 2018); *In re RSI Sys., LLC*, 88 USPQ2d 1445, 1448 (TTAB 2008); *In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988). For example,



SPORTBAR

Because the marks are used in connection with identical services, consumers familiar with Registrant's 77 SOCIAL CLUB services encountering Applicant's 77 SPORTBAR may mistakenly believe Applicant's mark identifies a service line extension. *See, e.g., Schieffelin & Co. v. Molson Cos., Ltd.*, 9 USPQ2d 2069, 2073 (TTAB 1989) ("Those consumers who do recognize the differences in the marks may believe that applicant's mark is a variation of opposer's mark that opposer has adopted for use on a different product."); *cf. In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (VANTAGE TITAN "more likely to be considered another product from the previously anonymous source of TITAN medical diagnostic apparatus, namely, medical ultrasound devices.").

We find that Applicant's mark 77 SPORTBAR is similar to the registered mark 77 SOCIAL CLUB in appearance sound, meaning and commercial impression.

#### E. Conclusion

Because the marks are similar, the services are identical and we presume that the identical services are offered in the same channels of trade to the same classes of consumers, we find that Applicant's mark 77 SPORTBAR for "bar and restaurant services, namely providing of food and beverages for consumption on the premises; restaurant and sports bar services with televisions on premises" is likely to cause confusion with the registered mark 77 SOCIAL CLUB and design for, inter alia, "restaurant and bar services."

**Decision:** We affirm the refusal to register Applicant's mark 77 SPORTBAR.