

This Opinion is Not a  
Precedent of the TTAB

Hearing: July 25, 2017

Mailed: July 28, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Iron Hill Brewery, LLC*  
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Serial No. 86682532  
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Anthony M. Brichta of Buckley, Brion, McGuire & Morris LLP,  
for Iron Hill Brewery, LLC.

Q Queen, Trademark Examining Attorney, Law Office 111,  
Robert L. Lorenzo, Managing Attorney.

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Before Bergsman, Ritchie and Greenbaum,  
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Iron Hill Brewery, LLC (“Applicant”) seeks registration on the Principal Register of the mark THE CANNIBAL (in standard characters) for “beer,” in Class 32.<sup>1</sup>

The Trademark Examining Attorney refused registration of 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 THE CANNIBAL (standard

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<sup>1</sup> Application Serial No. 86682532 was filed on July 2, 2015, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1052(a), based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as January 1, 2005.

characters) for, *inter alia*, “restaurant services; restaurant services, namely, providing food and beverages for consumption on or off the premises,” in Class 43, as to be likely to cause confusion.<sup>2</sup>

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed, and an oral hearing was held. We reverse the refusal to register.

#### I. Preliminary Issue

In response to the first Office Action, Applicant argued that “the vast majority of breweries do not operate their own restaurants and the vast majority of restaurants do not brew their own beer” citing links to <[restaurant.org/News-Research/Research/Facts-at-glance](http://restaurant.org/News-Research/Research/Facts-at-glance)> and <[brewersassociation.org/insights/400-breweries/](http://brewersassociation.org/insights/400-breweries/)>.<sup>3</sup> Generally, providing only the link without the material attached is not sufficient to introduce evidence into the record. *See In re Fantasia Distrib., Inc.*, 120 USPQ2d 1137, 1143 n.13 (TTAB 2016) (providing link to YouTube video does not suffice to introduce evidence into the record); *In re HSB Solomon Assoc. LLC*, 102 USPQ2d 1269, 1274 (TTAB 2012) (Board will not utilize web address to access site and consider whatever content appears because “the evanescent nature of web content makes it particularly important that a copy of the relevant material be submitted in the record, otherwise, it is impossible to know what the examining

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<sup>2</sup> Registration No. 4388107, registered August 20, 2013.

<sup>3</sup> Applicant’s April 15, 2016 Response to Office Action (TSDR 1 and 4).

attorney viewed while examining the application.”); *In re Planalytics*, 70 USPQ2d 1453, 1458 (TTAB 2004) (providing a link to a website does not suffice to put information in the record because of the transitory nature of the information available through the link). However, in the next Office Action, the Examining Attorney did not object to Applicant’s use of Internet links, did not instruct Applicant that it was improper to refer to Internet links in lieu of a copy of the relevant evidence, and specifically addressed Applicant’s argument.<sup>4</sup>

Specifically applicant argues that consumers would not believe that restaurant services and beer are related because consumers are sophisticated and because the vast majority of breweries do not offer restaurant services because of regulations. It is unlikely that most restaurant goers and beer drinkers are sophisticated enough to know about regulations covering breweries.

Accordingly, we find the Examining Attorney waived any objection to Applicant’s use of Internet links and we consider Applicant’s argument on that point. *Cf. In re City of Houston*, 101 USPQ2d 1534, 1536 (TTAB 2012) (“[T]he examining attorney’s failure to advise applicant of the insufficiency of the listed registrations when it was proffered during examination constituted a waiver of any objection to consideration of that list.”); *In re Broyhill Furniture Indus. Inc.*, 60 USPQ2d 1511, 1513 n.3 (TTAB 2001) (objection considered waived where it was not interposed in response to applicant’s reliance on the evidence in response to the initial Office Action); *In re Boyd Gaming Corp.*, 57 USPQ2d 1944, 1945 n.4 (TTAB 2000) (because Examining Attorney

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<sup>4</sup> May 6, 2016 Office Action (TSDR 2). Citations to TSDR are in .pdf format.

did not object to applicant's list of registration numbers, the Board considered them to be of record).

## II. Likelihood of Confusion.

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) (“*du Pont*”) (cited in *B&B Hardware, Inc. v. Hargis Ind., Inc.*, 135 S. Ct. 1293, 113 USPQ2d 2045, 2049 (2015)); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *du Pont* factor that is relevant and for which there is evidence of record. *See M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re Chatam Int'l Inc.*, 380 F.2d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *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.”); *see also In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015).

Because the goods and services at issue in this appeal are beer and restaurant services, the Examining Attorney is required to show “something more” than that identical marks are used for food products and for restaurant services. *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003) (quoting *Jacobs v. Int'l Multifoods Corp.*, 668 F.2d 1234, 212 USPQ 641, 642 (CCPA 1982); see also *In re Accelerate s.a.l.*, 101 USPQ2d 2047, 2050 (TTAB 2012); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1992 (TTAB 2011).

In *Coors Brewing*, the Court of Appeals for the Federal Circuit explained why more evidence than just showing restaurants sell beer is required to prove that those goods and services are related:

It is not unusual for restaurants to be identified with particular food or beverage items that are produced by the same entity that provides the restaurant services or are sold by the same entity under a private label. Thus, for example, some restaurants sell their own private label ice cream, while others sell their own private label coffee. But that does not mean that any time a brand of ice cream or coffee has a trademark that is similar to the registered trademark of some restaurant, consumers are likely to assume that the coffee or ice cream is associated with that restaurant. The *Jacobs* case [*Jacobs v. International Multifoods Corp.*, 668 F.2d 1234, 212 USPQ 641 (CCPA 1982)] stands for the contrary proposition, and in light of the very large number of restaurants in this country and the great variety in the names associated with those restaurants, the potential consequences of adopting such a principle would be to limit dramatically the number of marks that could be used by producers of foods and beverages.

*Coors Brewing*, 68 USPQ2d at 1063. In other words, there is no *per se* rule that certain goods and services are related. *Lloyd's Food Products, Inc. v. Eli's, Inc.*, 987 F.2d 766,

25 USPQ2d 2027 (Fed. Cir. 1993) (no per se rule about confusion, where similar marks are used in connection with restaurant services and food products).

The Federal Circuit recognizes that the diversity and expansion of businesses in a modern economy is not, in and of itself, sufficient to support an inference that purchasers are apt to believe that disparate products or services emanate from the same source. *See also In re American Olean Tile Co.*, 1 USPQ2d 1823, 1826 (TTAB 1986). Taking the Examining Attorney's position to its logical extreme, not only would a senior user of a mark for restaurant services have prior rights for that mark for beer, but the senior user of a mark for restaurant services could have prior rights for that mark for other food, beverages and condiments (*e.g.*, wine or spirits, salsa or mustard, and chips or desserts, *etc.*) and a variety of broadly described promotional items (*e.g.*, clothing, glassware, toys, jewelry, sunglasses, paper products, *etc.*).

The Board has found the "something more" requirement to be met under the following circumstances:

- Applicant's mark made clear that its restaurant specialized in registrant's type of goods. *See In re Golden Griddle Pancake House Ltd.*, 17 USPQ2d 1074 (TTAB 1990) (GOLDEN GRIDDLE PANCAKE HOUSE for restaurant services confusingly similar to GOLDEN GRIDDLE for table syrup); *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) (AZTECA MEXICAN RESTAURANT for restaurant services confusingly similar to AZTECA for Mexican food items);
- The record showed that registrant's wines were actually sold in applicant's restaurant. *See In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001) ("the record

in this case reveals that registrant's OPUS ONE wine is offered and served by applicant at its OPUS ONE restaurant.”); and

- Registrant’s mark was found to be “a very unique, strong mark.” *See In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1469 (TTAB 1988) (“the Examining Attorney has indicated that he has been unable to find, in the records of the Patent and Trademark Office, any registration, other than the cited registration, for a mark containing the expression ‘Mucky Duck,’” nor has applicant offered any evidence of third-party use of marks containing the expression.).

We now turn to the likelihood of confusion analysis keeping in mind whether the record includes evidence sufficient to meet the “something more” requirement.

A. The similarity or dissimilarity of the marks.

The marks are identical in sight, sound, connotation and commercial impression.

B. The strength of the registered mark, including the number and nature of similar marks in use on similar goods or services.<sup>5</sup>

THE CANNIBAL when used in connection with restaurant services (or beer) is an arbitrary mark and, therefore, inherently distinctive. There is no evidence regarding third-party registrations or use of THE CANNIBAL or similar marks on similar goods or services. Viewing analogous evidence, the Board held that the record was insufficient to find the cited mark to be “a very unique, strong mark.” *See In re Giovanni Food Co.*, 97 USPQ2d at 1992 (JUMPIN JACK’S for “coffee-house services;

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<sup>5</sup> While neither Applicant, nor the Examining Attorney, submitted evidence or argument regarding the strength of the registered mark, we address this factor to determine whether the registered mark is a “very strong, unique” term sufficient to satisfy the “something more” requirement.

and catering services” is not a “very strong, unique” term because there was nothing placed in the record upon which to base such a finding); *compare In re Opus One*, 60 USPQ2d at 1814 (evidence of third-party registrations and use held “insufficient to support any conclusion other than that registrant’s OPUS ONE mark for wine is a strong mark which is entitled to a broad scope of protection.”).

Finally, there is nothing in the record regarding commercial strength of Registrant’s THE CANNIBAL mark based on its marketplace recognition. Commercial strength is the extent to which the relevant public recognizes a mark as denoting a single source. *Tea Board of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006).

While we find that Registrant’s mark THE CANNIBAL is inherently strong, we find that nothing has been placed in the record upon which to base a finding that the mark THE CANNIBAL is a “very strong, unique” term.

C. The similarity or dissimilarity and nature of the goods and services.

Applicant is seeking to register its mark for “beer” and the cited mark is registered for “restaurant services.” In *Coors Brewing*, the Federal Circuit held that the Board’s reliance on (i) evidence from several references discussing the practice of some restaurants to offer private label or house brands of beer, (ii) articles showing that brewpubs, which brew their own beer, often feature restaurant services, and (iii) evidence of several third-party registrations showing that a single mark has been registered for beer and restaurant services to find that beer and restaurant services are related was not supported by substantial evidence. *Coors Brewing*, 68 USPQ2d



at 1063. The Court advised that if registrant's mark had been registered for brewpub services or for restaurant and beer, then "the goods and services associated with the two marks would clearly be related and the case for a likelihood of confusion therefore much stronger." *Coors Brewing*, 68 USPQ2d at 1064.

But the registered mark in this case is simply for restaurant services in general, and the Board's conclusion that restaurant services and beer are related is based on the fact that a tiny percentage of all restaurants also serve as a source of beer, which is a very weak evidentiary basis for a finding of relatedness.

*Coors Brewing*, 68 USPQ2d at 1064.

In the appeal before us, to show that the goods and services are related, the Trademark Examining Attorney submitted copies of 13 use-based, third-party registrations including both beer and restaurant services and excerpts from third-party websites purportedly showing the same mark used to identify beer and restaurant services. Third-party registrations which individually cover the goods and services at issue may have some probative value to the extent that they serve to suggest that the listed 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). The registrations listed below are representative.<sup>6</sup>

<b>Mark</b>	<b>Reg. No.</b>	<b>Goods and Services</b>
MAN FULL OF TROUBLE	3928133	Beer, ale and porter; bar and restaurant services

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<sup>6</sup> May 6, 2016 Office Action (TSDR pp. 13-49).

<b>Mark</b>	<b>Reg. No.</b>	<b>Goods and Services</b>
BURNSIDE BREWING CO.	3960124	Beer; bar and restaurant services; brewpub services
THE DISTILLERY	4130821	Beer; restaurant services; catering services; bar services
FEATHER FALLS CASINO BREWING COMPANY	4026291	Beer; bar and restaurant services; brew pub services
ROCKFORD BREWING COMPANY	4472674	Beer; bar services; restaurant services
LOST COAST BREWERY & CAFE	4375886	Beer; bar services, restaurant services

The Trademark Examining Attorney submitted excerpts from the third-party websites listed below showing the use of the same mark in connection with restaurant services and beer or ale:

- Craft Shack website (craftshack.com) advertises Ballast Point Brewing Co. BALLAST POINT brand ale and Ballast Point website (ballastpoint.com) advertises restaurant services and a “home brew mart”;<sup>7</sup>
- Deschutes Brewery website (deschutesbrewery.com) advertises DESCHUTES brand beer and ale and the DESCHUTES BREWERY “public house” (*i.e.*, a restaurant);<sup>8</sup>

<sup>7</sup> October 16, 2015 Office Action (TSDR 7-9).

<sup>8</sup> October 16, 2015 Office Action (TSDR 10-12).

- Red Rock Brewing Co. website (redrockbrewing.com) advertises its restaurant services and its RED ROCK ales;<sup>9</sup>
- South Park Brewing Company website (southparkbrewing.com) shows SOUTH PARK BREWING COMPANY used to identify both beer and restaurant services;<sup>10</sup> and
- Granite City Food & Brewery (gcfb.com).<sup>11</sup> This excerpt shows that Granite City renders restaurant services and brews beer on the premises. It is not clear whether Granite City uses Granite City to identify beer. On the one hand, the excerpt displays a frosty draft with the Granite City logo on the glass. On the other hand, Granite City advertises its “signature brews,” including “The Duke,” “The Bennie,” “Batch 1000,” “The Northern,” and “Broad Axe.” As displayed on the website, Granite City identifies the restaurant and bar services rather than the beer.

The Trademark Examining Attorney also submitted excerpts from the third-party websites listed below showing that restaurants may serve beer. These websites do not show the same mark used to identify the restaurant used to identify beer or ale:

- Applicant’s website (ironhillbrewery.com) showing Applicant’s restaurant is named the Iron Hill Brewery & Restaurant, not THE CANNIBAL.<sup>12</sup>

Welcome to Iron Hill Brewery & Restaurant, where you’ll find fine handcrafted beers, creative yet informal cuisine, attentive service in a casual, upscale atmosphere.

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<sup>9</sup> October 16, 2015 Office Action (TSDR 13-14).

<sup>10</sup> May 6, 2016 Office Action (TSDR 9).

<sup>11</sup> May 6, 2016 Office Action (TSDR 6).

<sup>12</sup> October 16, 2015 Office Action (TSDR 15).

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Our commitment to support the communities in which we do business goes to the heart of what differentiates Iron Hill from other restaurants.<sup>13</sup>

Moreover, there is nothing in the record that Applicant sells beer identified by an IRON HILL trademark.

- BJ's Restaurant Brewhouse website (bjsrestaurants.com) shows that BJs sells and brews beer; it does not show BJs being used to identify a brand of beer;<sup>14</sup>
- TOPO website (thetopofthehill.com) identifies TOPO as a restaurant, brewery and distillery; it does not show TOPO used to identify beer;<sup>15</sup>
- Blue Jacket website (bluejacket.com) has links to food and beer; it does not show Blue Jacket used to identify beer;<sup>16</sup>
- Smutty Nose Brewing Company website (smuttynose.com) shows SMUTTY NOSE BREWING COMPANY used to identify restaurant services and a brewery; it does not show SMUTTY NOSE BREWING COMPANY used to identify beer;<sup>17</sup> and
- 2<sup>nd</sup> Story Brewing Co. website (2ndstorybrewing.com) shows 2<sup>nd</sup> STORY used to identify restaurant services and a brewery; it does not show 2<sup>nd</sup> STORY used to identify the beer.<sup>18</sup> The website shows 2<sup>nd</sup> Story Brewing Co. identifying its craft beer as "Five Mile Ale," "Root Cellar Helles," "Adultism," *etc.*

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<sup>13</sup> *Id.*

<sup>14</sup> May 6, 2016 Office Action (TSDR 5).

<sup>15</sup> May 6, 2016 Office Action (TSDR 7).

<sup>16</sup> May 6, 2016 Office Action (TSDR 8).

<sup>17</sup> May 6, 2016 Office Action (TSDR 10).

<sup>18</sup> May 6, 2016 Office Action (TSDR 12).

Finally, Applicant submitted excerpts from Registrant's website (cannibalnyc.com) showing that Registrant renders restaurant services and that Registrant's restaurant features beer.<sup>19</sup> For example, the website has a section reporting on the different beers being enjoyed by patrons.

Lisa A. is drinking a Priscilla by Oskar Blues Brewery at the The Cannibal Beer & Butcher.

Jeffery N. is drinking a Lue Gim Gong Citrus White by Cigar City Brewing at The Cannibal Beer & Butcher.

Dan O. is drinking a Cherry-Raspberry Og Berliner Wisse by Greenport Harbor Brewing Company at the The Cannibal Beer & Butcher.<sup>20</sup>

The "About Us" section on Registrant's website describes Registrant as a "butcher's restaurant" "obsessed with beer."

At its most primal sense The Cannibal is a butcher's restaurant. The menu has the sense that your neighborhood butcher, who happens to be obsessed with beer, has decided to make dinner. Rite with every conceivable animal part the menu will drive a fine line between meat centric and meat crazy. Large primal cuts like whole roasted lamb shoulder, braised pig heads, and whole racks of prime dry aged beef are the way it will utilize all of the whole animals received daily. Seasonality

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<sup>19</sup> Applicant's November 4, 2016 Request for Reconsideration (4 TTABVUE 12-17 and 20-21). *See also* 4 TTABVUE 5-11 and the November 21, 2016 Office Action (5 TTABVUE 5-10).

The Cannibal is three things at once. It is an artisanal butcher shop, ... It is a beer store; refrigerators by the entrance are stocked with hundreds of brands, most of them obscure, with funky labels that make trophies of empties. Finally, it is a barroom, where you can partake of all that beer and meat.

Newyorker.com (5 TTABVUE 5).

<sup>20</sup> November 4, 2016 Request for Reconsideration (4 TTABVUE 5-6).

is how the vegetables find their way onto the menu, we prefer to wait for mother nature to deliver the goods...

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So in short, The Cannibal is meat and beer with a smattering of cycling, it's your local ride up, sit-in beer and butcher shop and is brought to you through the inspiration and by the good work of Messrs. Christian Pappanicholas and Cory Lange, ably abetted by one Chef Francis Derby.<sup>21</sup>

Although Registrant's restaurant features beer, nothing in the record indicates that Registrant manufactures or sells THE CANNIBAL brand beer, and indeed, there is no reason to believe that Registrant would do so as a business decision if it had any reason to be concerned about a likelihood of confusion with Applicant's beer sold under an identical mark.<sup>22</sup>

On the other hand, Applicant argued that only a small percentage of restaurants brew their own beer.

Due state and federal regulations, the vast majority of restaurants do not brew their own beer. According to the United States National Restaurant Association, there are more than 1,000,000 restaurants in the United States. See <http://www.restaurant.org/News-Research/Research/Facts-at-a-Glance>. In contrast, according to the National Brewers Association, there are approximately 4,000 licensed brewers in the United States. See <https://www.brewersassociation.org/insights/4000-breweries/>.

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<sup>21</sup> November 4, 2016 Request for Reconsideration (4 TTABVUE 13).

<sup>22</sup> At the oral hearing, the Examining Attorney asserted that Registrant could sell Applicant's beer. However, we assume Registrant, a reasonable restaurateur, would not purchase Applicant's THE CANNIBAL beer for sale at Registrant's restaurant (e.g., Lisa A. is drinking THE CANNIBAL by Iron Hills Brewery, LLC at The Cannibal Beer & Butcher) if Applicant feared that Registrant's THE CANNIBAL beer would be likely to cause confusion with THE CANNIBAL restaurant. *Compare In re Opus One Inc.*, 60 USPQ2d at 1815 (applicant served Registrant's wine at Applicant's restaurant).

The requirement to show “something more” has not been met. In light of the large number of restaurants in the United States, the facts that a single mark is sometimes used identify restaurant services and beer, that some restaurants are associated with breweries, and that restaurants may sell beer are not sufficient to establish a relationship between restaurant services in general and beer. *See In re Giovanni Food Co.*, 97 USPQ2d 1990 (JUMPIN’ JACKS for “barbeque sauce” is not likely to cause confusion with JUMPIN JACK’S for “coffee-house services; and catering services” because the “something more” requirement has not been met); *compare In re Accelerate s.a.l.*, 101 USPQ2d 2047, 2050-51 (TTAB 2012) (COLUMIANO COFFEE HOUSE for “providing food and drink” is related to COLUMBIAN for “coffee”).

This *du Pont* factor weighs against finding that there is a likelihood of confusion.

D. Established, likely-to-continue channels of trade.

The above-noted evidence establishes that beer and restaurant services may be encountered by the same consumers in the same marketing milieu and, therefore, supports a finding that beer and restaurant services may move in the same channels of trade.

E. Analyzing the factors.

Despite the fact that the marks are identical and the goods and services may move in the same channels of trade, because the goods and services are not sufficiently related, we find that Applicant’s mark THE CANNIBAL for “beer” is not likely to cause confusion with the registered mark THE CANNIBAL for “restaurant services;

restaurant services, namely, providing food and beverages for consumption on or off the premises.”

**Decision:** The refusal to register Applicant’s mark THE CANNIBAL is reversed.