

This Opinion is Not a  
Precedent of the TTAB

Hearing: December 6, 2018

Mailed: January 23, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re RRRAWI Corp.*  
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Serial No. 86767410  
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Scott G. Warner and John B. Crosetto of Garvey Schubert Barer,  
for RRRAWI Corp.

Erin M. Falk, Trademark Examining Attorney, Law Office 101,  
Ronald R. Sussman, Managing Attorney.

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Before Zervas, Taylor and Lynch,  
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

RRRAWI Corp. (“Applicant”) seeks registration on the Principal Register of the standard character mark MBAR for “restaurant and bar services” in International Class 43.<sup>1</sup>

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<sup>1</sup> Application Serial No. 86767410, filed on September 24, 2015 pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), asserting a bona fide intent to use the mark in commerce.

The Examining Attorney refused registration pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so

resembles the previously registered mark  for “restaurant and bar services, excluding Italian cuisine and macrobiotic cuisine” in International Class 43 that, as used in connection with Applicant's identified services, it is likely to cause confusion or mistake or to deceive.<sup>2</sup>

After the refusal was made final, Applicant requested reconsideration and appealed to this Board. The Examining Attorney denied reconsideration and the Board resumed proceedings. The appeal is fully briefed and the Board conducted an oral hearing. We affirm the refusal to register.

#### I. Likelihood of Confusion

Our determination under Section 2(d) of the Trademark Act is based on 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) (“*du Pont*”); *see also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). 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

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<sup>2</sup> Registration No. 4595404, registered September 2, 2014. The cited registration contains a disclaimer of BAR and the following description: “[t]he mark consists of the uppercase letter ‘M’ in a large font with the word ‘BAR’ in uppercase directly underneath.”

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). “Not all of the [*du Pont*] factors are relevant to every case, and only factors of significance to the particular mark need be considered.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1719 (Fed. Cir. 2012) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir 2010)).

A. The Similarity of the Services, Trade Channels and Classes of Purchasers

Applicant’s recitation of services “restaurant and bar services,” encompasses registrant’s recitation of services “restaurant and bar services, excluding Italian cuisine and macrobiotic cuisine.” The services hence are legally identical. When the respective recitations of services are legally identical and Applicant’s lacks restrictions as to nature, type, channels of trade, or classes of purchasers, as is the case here, Applicant’s trade channels encompass registrant’s trade channels and classes of purchasers. *In re Viterra, Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002) (citing *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198 (Fed. Cir. 1983) (“[A]bsent restrictions in the application and registration, goods and services are presumed to travel in the same channels of trade to the same class of purchasers.”)). Thus, we presume the trade channels and classes of purchasers (which we find are members of the general public) for Applicant’s and registrant’s services overlap. Applicant has not disputed these presumptions.

The *du Pont* factors regarding the similarity of services, purchasers and trade channels all favor a finding of likelihood of confusion.

B. The Similarity of the Marks

We next consider whether Applicant's and registrant's marks are similar when viewed in their entirety in terms of appearance, sound, connotation and commercial impression. See *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1689). The test under the first *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 that confusion as to the source of the services offered under the respective marks is likely to result. See *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1748 (Fed. Cir. 2017); *Coach Servs. Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1721. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Applicant's mark is MBAR, and the mark in the cited registration is . The marks are identical in sound because they have the identical elements; the letter "M" followed by the word "bar." In a particular case, "two marks may be found to be

confusingly similar if there are sufficient similarities in terms of sound or visual appearance or connotation.” *Kabushiki Kaisha Hattori Seiko v. Satellite Int’l, Ltd.*, 29 USPQ2d 1317, 1318 (TTAB 1991), *aff’d mem.*, 979 F.2d 216 (Fed. Cir. 1992) (citation omitted). *See also Eveready Battery Co. v. Green Planet Inc.*, 91 USPQ2d 1511, 1519 (TTAB 2009) (citing *Krim-Ko Corp. v. The Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”)).

In addition, we consider the marks substantially similar in appearance; the cited mark is a standard character mark and hence may be displayed in the same lettering style as Applicant’s mark, and with a letter “M” that is much larger in size than the word BAR, although without a space between the “M” and BAR. Rights in standard character marks reside in the wording or other literal element and not in any particular display or rendition. *See In re Viterra Inc.*, 101 USPQ2d at 1909; *In re Mighty Leaf Tea*, 94 USPQ2d at 1260. Applicant’s argument regarding the manner in which Applicant actually uses its mark is not persuasive.<sup>3</sup>

As for the meaning of the marks, of course they are the same. The elimination of a space between the letter “M” and the word “bar” does not create a term with a different meaning. The commercial impression of the marks is also the same in view of the identical component terms in the marks. Applicant emphasizes that the term BAR has been disclaimed in the cited registration and that “[i]t is inconsistent to have the Citation achieve registration as dominant M logo with the term bar disclaimed

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<sup>3</sup> Applicant’s brief at 6-7, 7 TTABVUE 7-8.

and then stand as an obstacle to the registration of the unitary word mark MBAR.”<sup>4</sup> The consuming public perceiving registrant’s mark, however, would not know that there is a disclaimer of that term. “The technicality of a disclaimer in [an] application to register its mark has no legal effect on the issue of likelihood of confusion. The public is unaware of what words have been disclaimed during prosecution of the trademark application at the PTO.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). Moreover, the Federal Circuit has instructed that “the ultimate conclusion” must rest “on consideration of the marks in their entireties.” *Id.*

Applicant also argues that its mark is a unitary term and there is no explanation why Applicant would break up its mark and use the stylization of registrant’s mark. A unitary mark is one which would be perceived by the relevant purchaser as having “a distinct meaning of its own independent of the meaning of its constituent elements.” *Dena Corp. v. Belvedere Int’l Inc.*, 950 F.2d 1555, 21 USPQ2d 1047, 1052 (Fed. Cir. 1991). There is nothing about the letter M and the term BAR in Applicant’s mark which links them inextricably. There is no contention that the meaning or commercial impression of the letter “M” or the word BAR in Applicant’s mark would be different if either were removed from the mark, or that the meaning of one term depends on its being used with any other term.

To the extent that Applicant means its mark is unitary because there is no space between the letter “M” and the word BAR, we note that the Board has found the elimination of a space between terms is not significant. *See, e.g., In re 3Com Corp.*,

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<sup>4</sup> *Id.* at 9, 7 TTABVUE 10.

56 USPQ2d 1060, 1062 (TTAB 2000) (deletion of space between words does not change commercial impression); *Seaguard Corp. v. Seaward Int'l, Inc.*, 223 USPQ 48, 51 (TTAB 1984) (SEA GUARD and SEAGUARD are “essentially identical”); *In re Best Western Family Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) (“there can be little doubt that the marks [BEEFMASTER for restaurant services and BEEF MASTER for frankfurters and bologna] are practically identical and indeed Defendant has not argued otherwise.”). *cf. Minn. Mining & Mfg. Co. v. Addressograph-Multigraph Corp.*, 155 USPQ 470, 472 (TTAB 1967) (“[i]t is almost too well established to cite cases for the proposition that an otherwise merely descriptive term is not made any less so by merely omitting spaces between the words”).

Applicant additionally relies on registrant’s statement made during the prosecution of registrant’s application that consumers “only encounter the M-logo in connection with registrant’s MASTRO’S STEAKHOUSE house mark.”<sup>5</sup> The Board

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<sup>5</sup> *Id.* at 2, 7 TTABVUE 3. In arguing against a refusal based on the registered mark M CAFÉ, registrant stated:

The letter “M” in Applicant’s Mark thus serves to connect Applicant’s Mark and the services offered thereunder to Applicant and Applicant’s steakhouses operated under the MASTRO’S STEAKHOUSE, M and Design and other such house marks. Because consumers always encounter Applicant’s M BAR (Stylized) mark in the presence of Applicant’s prominent house marks, the “M” in Applicant’s Mark is understood to connote Applicant and its steakhouses. It is therefore highly unlikely that any party would purchase Applicant’s services believing them to be those of the cited registrants’.

April 25, 2018 Req. for Recon. Exh D, TSDR 50.

has stated, “[t]he doctrine of ‘file wrapper estoppel’ does not apply in trademark cases.” *Anthony’s Pizza & Pasta Int’l Inc. v. Anthony’s Pizza Holding Co.*, 95 USPQ2d 1271, 1281 (TTAB 2009), *aff’d*, 415 Fed. Appx. 222 (Fed. Cir. 2010) (citing *Giant Food, Inc. v. Standard Terry Mills, Inc.*, 229 USPQ 955, 963 (TTAB 1986)). In *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015), the Federal Circuit addressed the probity of statements made in the course of prosecuting an application:

Although estoppel based on prosecution of an application has played a more limited role for trademarks than for patents, we have recognized that such comments [made in prosecuting an application] have significance as “facts ‘illuminative of shade and tone in the total picture confronting the decision maker[.]’” Other courts have afforded even greater weight to such statements. GS’s comments therefore support Juice Generation’s argument that “PEACE & LOVE” is suggestive or descriptive. (citations omitted.)

What Applicant essentially asks us to do is to read a limitation into registrant’s unrestricted registration where none appears based on registrant’s argument; there is no indication the argument was persuasive and, given governing law and policy, almost certainly did not persuade the assigned examining attorney to allow the registration of registrant’s mark. *See In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018) (“[W]e do not consider how Applicant and Registrant actually use their marks in the marketplace, but rather how they appear in the registration and the application. We must compare the marks as they appear in the drawings, and not on any labels that may have additional wording or information.”); TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMEP”) § 1207.01(b) (Oct. 2018) (“the analysis is based on the marks as depicted in the respective application and

registration, without regard to whether the marks will appear with other marks, such as house marks, or other elements when used”). The Federal Circuit recently stated in *In re i.am.symbolic, LLC*, 123 USPQ2d at 1748, “[i]t is well established that the Board may not read limitations into an unrestricted registration or application” (citing *SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983)).<sup>6</sup>

Even if we were to consider registrant’s statement, it adds little in terms of the “shade and tone in the total picture.” The registration does not require that registrant’s services always be offered in the presence or close association with MASTRO’S STEAKHOUSE and registrant’s statement that “the ‘M’ in [the M-logo] is understood to connote [Registrant] and its steakhouses” is premised on the assumption that the registered mark would be used with the house mark, which is not necessarily the case. *See M.C.I. Foods, Inc. v. Bunte*, 96 USPQ2d 1544, 1552 (TTAB 2010) (registrant’s arguments to the Examining Attorney that the design part of a word-design mark was dominant did not prevent the Board from finding to the contrary that the word part was dominant).

Upon consideration of the foregoing and the marks in their entirety, we find

**M**  
MBAR and **BAR** to be similar in appearance, sound, meaning and commercial impression. The *du Pont* factor regarding the similarity of the marks weighs in favor of a finding that confusion is likely.

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<sup>6</sup> For this reason too, arguments such as “consumers ‘call for the services’ only in connection with the term ‘MASTRO’” are not plausible. See Applicant’s brief at 8, 7 TTABVUE 9.

### C. The Strength of the Registered Mark

Of course, marks vary along a spectrum from very strong to very weak. *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017). To determine a mark's strength, we consider both inherent strength, based on the nature of the mark itself, and commercial strength. *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 (secondary meaning).”); *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014).

With regard to inherent strength, the letter “M,” an arbitrary designation for registrant's services, is followed by the generic term BAR. Considered as a whole, the mark is an arbitrary mark for registrant's services. Generic components of a mark, however, may not be ignored. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (quoting *Nat'l Data*, 224 USPQ at 752).

Turning to commercial strength, Applicant submitted 43 third-party registrations for marks for restaurant and bar services.<sup>7</sup> Most are stylized depictions of the letter “M” with no additional wording. The stylization or background elements of these

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<sup>7</sup> We have not considered the two applications and cancelled Registration No. 3825244. Pending applications are evidence only that an application was filed on a certain date; they are not evidence of use of the marks. *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d 1187, 1193 n.8 (TTAB 2007); *Interpayment Servs. Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1468 n.6 (TTAB 2003). A cancelled registration is not evidence of anything except that it issued. *See Action Temporary 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”); *Time Warner Ent. Co. v. Jones*, 65 USPQ2d 1650, 1654 n.6 (TTAB 2002).

marks differ remarkably from one to the other. There are standard character or typed marks in Applicant's submission; one registration is for the letter "M" only and several others are for marks with unrelated wording such as MSHACK, M. WELLS or M LIFE. MS EUROPA, also a standard character form mark, has an entirely different commercial impression from registrant's mark. Applicant's and registrant's marks are the only marks containing both the letter "M" and the word BAR. In addition, we note that Applicant's evidence consists only of third-party registrations that may be relevant to show a descriptive or suggestive meaning, but no evidence of third-party use to establish commercial weakness. *See Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. v. Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015).

We find that the third-party registrations are insufficient to establish that Applicant's mark with the identical components of registrant's mark, for legally identical services, is registrable. In other words, Applicant's evidence does not establish that registrant's mark is so weak to permit the registration of Applicant's mark with identical components for legally identical services.

#### D. Conclusion

We have considered all of the evidence in the record and the arguments of the Examining Attorney and Applicant, including evidence and arguments not specifically addressed in this decision. In view of the similarity of the marks, the legal identity of the services, and the presumed overlapping purchasers and trade channels, and because Applicant has not demonstrated that registrant's mark is so

weak as to allow the registration of Applicant's mark, we conclude that confusion is likely between Applicant's mark for "restaurant and bar services" and registrant's mark for "restaurant and bar services, excluding Italian cuisine and macrobiotic cuisine."<sup>8</sup>

**Decision:** The refusal to register is affirmed.

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<sup>8</sup> Applicant also notes the Office's "Consistency Initiative." Applicant's brief at 5, 7 TTABVUE 6. The USPTO describes the Consistency Initiative as an "instrument for applicants to raise concerns about the occasional instances of inconsistent practice within the Office." The Consistency Initiative is a program developed to aid the examination by the Trademark Examining Group and decisions made under the Initiative are not binding on the Board.