

This Opinion is Not a
Precedent of the TTAB

Hearing: April 17, 2018

Mailed: April 18, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Brickhouse Tavern, LLC
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Serial No. 87046141
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Michael Neustel and Jason L. Gilbert of Neustel Law Offices, Ltd.,
for Brickhouse Tavern, LLC.

Sally Shih, Trademark Examining Attorney, Law Office 106,
Mary I. Sparrow, Managing Attorney.

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Before Bergsman, Lykos and Heasley,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Brickhouse Tavern, LLC (“Applicant”) seeks registration on the Principal Register of the mark BREWTUS’ BRICKHOUSE (in standard characters) for “restaurant and bar services,” in Class 43.¹

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

¹ Application Serial No. 87046141 was filed on May 22, 2016, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce.

Applicant's mark so resembles the marks registered on the Principal Register listed below, owned by one entity, as to be likely to cause confusion.

- Registration No. 3349634 for the mark BRICK HOUSE SUBS (standard characters) for “restaurant services,” in Class 43.² Registrant disclaimed the exclusive right to use the word “Subs”;
- Registration No. 3815051 for the mark BRICK HOUSE TAVERN + TAP (standard characters) for “bar services,” in Class 43. Registrant disclaimed the exclusive right to use the words “Tavern” and “Tap”;³
- Registration No. 3815053 for the mark BRICK HOUSE TAVERN + TAP and design, shown below for “bar services,” in Class 43.⁴



Registrant disclaimed the exclusive right to use the words “Tavern” and Tap”;

² Registered December 4, 2007; renewed.

³ Registered July 6, 2010; Sections 8 and 15 declarations accepted and acknowledged.

⁴ Registered July 6, 2010; Sections 8 and 15 declarations accepted and acknowledged.

- Registration No. 3943731 for the mark BRICK HOUSE TAVERN + TAP (standard characters) for “restaurant services,” in Class 43.⁵ Registrant disclaimed the exclusive right to use the words “Tavern” and “Tap”; and
- Registration No. 4797136 for the mark BRICKHOUSEBREWERY (standard characters) for “beer, ales, lager, stout and porter,” in Class 32, and “bar and restaurant services,” in Class 43;⁶

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

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 Indus., 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 or 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

⁵ Registered April 12, 2011; Sections 8 and 15 declarations accepted and acknowledged.

⁶ Registered August 25, 2015.

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*, 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)).

For the sake of economy, we confine our analysis to Registration No. 3815051 for the mark BRICK HOUSE TAVERN + TAP (standard characters) for “bar services” and Registration No. 3943731 for the mark BRICK HOUSE TAVERN + TAP (standard characters) for “restaurant services” because these are the marks most likely to support a finding of likelihood of confusion. If the refusal cannot be affirmed on the basis of these registered marks, it could not be affirmed on the basis of the other cited marks. *See, e.g., In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

- I. The similarity or dissimilarity of the services and established, likely-to-continue channels of trade, and buyers to whom sales are made.

The services are identical. Applicant, in its brief, does not argue otherwise.⁷

⁷ At the oral hearing, Applicant conceded that the services are identical.

Because the services described in the application and Registrant's registrations are identical, we must 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) (legally identical goods are presumed to travel in same channels of trade to same class of purchasers); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *United Glob. Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011).

II. The strength of Registrant's marks.

Applicant contends, without any evidence, that the term "Brick House" "is a common term across a range of industries."⁸ It has been used to reference a type of masonry used in building homes and has a wide variety of connotations. The term has been associated with everything from restaurants and bars to clothing stores and coffee shops."⁹ However, Applicant submitted no third-party websites to show that the term "Brick House" is commonly used as a name or part of a name for restaurants or bars, nor did Applicant submit copies of third-party registrations to show the meaning of the term "Brick House" as used in ordinary parlance.¹⁰ *See Juice*

⁸ At the oral hearing, Applicant confirmed that there is no evidence regarding third-party use of the term "Brick House."

⁹ Applicant's March 6, 2017 Response to an Office Action (TSDR 8). Citations to the record in the TSDR database are to the downloadable .pdf format.

¹⁰ "If an applicant has relevant information, it is incumbent on applicant to make this information of record. A mere reference to a website does not make the information of record."

Generation, Inc. v. GS Enters. LLC, 794 F.3d 1334, 115 USPQ2d 1671 (Fed. Cir. 2015) (quoting 2 McCarthy on Trademarks and Unfair Competition § 11:90 (4th ed. 2015) (“[a] real evidentiary value of third party *registrations* per se is to show the sense in which ... a mark is used in ordinary parlance.”)).

Assuming we define “Brickhouse” or “Brick House” using its component parts, a “Brickhouse” is a brick building.¹¹ We find that “Brickhouse” or “Brick House” are arbitrary terms when used in connection with restaurant or bar services engendering the commercial impression that that Registrant’s establishment is made of bricks.

In view thereof, the marks in Registrant’s registrations are entitled to the full sweep of presumptions accorded under Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b) (*i.e.*, the validity of the registered marks and the registrations of the marks, the Registrant’s ownership of the marks, and Registrant’s exclusive right to use the marks in commerce).

III. The similarity or dissimilarity of the marks.

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *du Pont*, 177 USPQ at 567. “Similarity in any one of

In order to review the facts in this case, there should be evidence in the record.” *In re Planalytics Inc.*, 70 USPQ2d 1453, 1457 (TTAB 2004) (footnote omitted).

¹¹ The word “house” is defined, *inter alia*, as “a building for any purpose.” *Dictionary.com* based on the Random House Dictionary (2018). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

these elements may be sufficient to find the marks confusingly similar.” *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014).

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. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). “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*, 101 USPQ2d at 721; *see also San Fernando Elec. Mfg. Co. v. JFD Elec. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d mem.*, 972 F.2d 1353 (Fed. Cir. 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Because the services are restaurant and bar services without any restrictions or limitations, the average customer is an ordinary consumer.

The marks BREWTUS' BRICKHOUSE and BRICK HOUSE TAVERN + TAP are similar because they share the term BRICKHOUSE or BRICK HOUSE. Although the term "Brickhouse" in Applicant's mark is presented without a space, consumers will view and verbalize it as "Brick House," based on normal English pronunciation. The presence or absence of a space between two words is an inconsequential difference that, even if noticed or remembered by consumers, would not serve to distinguish the marks. *See, e.g., Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1025 (TTAB 2009) (finding that DESIGNED TO SELL does not create a distinct commercial impression from DESIGNED2SELL); *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 applicant has not argued otherwise.").

With respect to the registered mark, BRICK HOUSE is the dominant element that consumers will remember and use to refer to Registrant's services because the words "Tavern" and "Tap" are merely descriptive and Registrant's exclusive right to use "Tavern" and "Tap" has been disclaimed.¹² It is well-settled that disclaimed, descriptive matter may have less significance in likelihood of confusion determinations. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842,

¹² Applicant concedes that BRICK HOUSE is the dominant element of the registered marks. Applicant's Brief, p. 8 (4 TTABVUE 9) ("Each of Registrant's Marks includes the dominant term 'BRICK HOUSE.'").

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.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985)); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression”). 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. *In re Nat’l Data Corp.*, 224 USPQ at 751.

The significance of the term “Brick House” as the dominant element of the mark BRICK HOUSE TAVERN + TAP is reinforced by its location as the first part of the mark. See *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Fondée En 1772*, 396 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.*, 23 USPQ2d at 1700 (upon encountering the marks, consumers will first notice the identical lead word); *Presto Prod. Inc. v. Nice-Pak Prod., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”).

Although the record does not indicate that Registrant's business is referred to as BRICK HOUSE, we cannot ignore the propensity of consumers to shorten trademarks and, in this case, this would be accomplished by dropping "Tavern + Tap" in referring to Registrant's restaurant and bar services as BRICK HOUSE. *Big M Inc. v. The United States Shoe Co.*, 228 USPQ 614, 616 (TTAB 1985) (finding that T.H. MANDY would be shortened to MANDY); *see also In re Abcor Dev. Corp.*, 588 F.2d 511, 200 USPQ 215, 219 (CCPA 1978) (J. Rich, concurring) ("users of language have a universal habit of shortening full names – from haste or laziness or just economy of words"); *Marshall Field & Co. v. Mrs. Fields Cookies*, 25 USPQ2d 1321, 1333 (TTAB 1992) ("companies are frequently called by shortened names").

Applicant argues that the addition of the term BREWTUS' to its mark, which is not present in the registered mark, distinguishes the marks.¹³ According to Applicant, the "focus" of its mark is the term BREWTUS,' which conveys ownership, as opposed to BRICKHOUSE, which is the subject of ownership.¹⁴ "Thus, a consumer would not view the Applicant's Mark as being a 'brickhouse', but instead would view the Applicant's Mark as being '*Brewtus' brickhouse*.'"¹⁵

However, even though BREWTUS' appears first, its significance is tempered by its juxtaposition with BRICKHOUSE. When we consider Applicant's mark in its entirety, the name "Brewtus" in its possessive form points to the term "Brickhouse,"

¹³ Applicant's Brief, p. 6 (4 TTABVUE 7).

¹⁴ *Id.* at 9 (4 TTABVUE 10).

¹⁵ *Id.* at 10 (4 TTABVUE 11).

highlighting that term so that the name “Brewtus” will be viewed as an identification of the previously anonymous source of the services rendered under the registered mark BRICK HOUSE TAP & TAVERN. *See In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (“the presence of an additional term in the mark does not necessarily eliminate the likelihood of confusion if some terms are identical.”).

We must consider both similarities and dissimilarities when analyzing the marks. As noted above, there is no evidence that BRICKHOUSE or BRICK HOUSE has been used by others in connection with restaurant or bar services or that those terms have any meaning in connection with restaurant and bar services. Because the shared term BRICKHOUSE/BRICK HOUSE is an arbitrary term, consumers are likely to mistakenly believe that there is an association between the source of the services. *See Procter & Gamble Co. v. Johnson & Johnson*, 485 F.Supp. 1185, 205 USPQ 697, 708 (SDNY 1979) (“When arbitrary or fanciful marks are involved, the distinctiveness of the marks will make the public more conscious of similarities than differences. ... In contrast when common words are involved ... the degree of difference rather than the degree of similarity is likely to be more noticeable.”), *aff’d without opinion*, 636 F.2d 1203 (2d Cir. 1980). In other words, where the shared term is suggestive, descriptive, or commonly used, the addition of a house mark, trade name, or other material may be sufficient to distinguish the marks. *See In re Cosvetic Labs., Inc.*, 202 USPQ 842, 845 (TTAB 1979); *In re C.F. Hathaway Co.*, 190 USPQ 343, 344 (TTAB 1976).

But here, consumers already familiar with Registrant's BRICK HOUSE TAP & TAVERN upon encountering Applicant's BREWTUS' BRICKHOUSE may mistakenly believe that they come from the same source because BREWTUS' BRICKHOUSE is a version of BRICK HOUSE TAP & TAVERN. *See In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (VANTAGE TITAN is likely to be considered another product from the source of the TITAN products); *see also In re Fiesta Palms LLC*, 83 USPQ2d 1360, 1366 (TTAB 2007) (CLUB PALMS MVP is similar to MVP);¹⁶ *In re Christian Dior, S.A.*, 225 USPQ 533, 535 (TTAB 1985) (LE CACHET DE DIOR is similar to CACHET because consumers familiar with registrant's CACHET products encountering applicant's LE CACHET DE DIOR products would assume that applicant is the source of the CACHET products);¹⁷ *Key West Fragrance & Cosmetic Factory, Inc. v. Mennen Co.*, 216 USPQ 168, 170 (TTAB 1982) (MENNEN SKIN SAVERS is similar to SKIN SAVERS); *In re Cosvetic Labs., Inc.*, 202 USPQ at 845 (HEAD START COSVETIC is similar to HEAD START);¹⁸ *compare with Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ2d 1313 (TTAB

¹⁶ The Board noted that the applicant in that case did not submit evidence that the term MVP is so highly suggestive that the inclusion of CLUB PALMS creates significant differences in the marks and, therefore, the addition of CLUB PALMS to applicant's mark is not sufficient to distinguish the marks. *Id.* at 1366.

¹⁷ The Board noted that, without evidence, it could not find that CACHET is highly suggestive or descriptive of the goods or that CACHET is commonly used or registered and is of such nature that it is entitled only to a narrow scope of protection or exclusivity of use. *Id.* at 534-35.

¹⁸ The Board noted that applicant's contention that HEAD START is commonly used by others was not supported by any evidence and, therefore, "the record herein is insufficient to show that purchasers have become conditioned to the use by several concerns of marks containing the words 'HEAD START' for similar products or related to registrant's after-shave lotion." *Id.* at 844-45.

2005) (No likelihood of confusion between NORTON McNAUGHTON ESSENTIALS and ESSENTIALS where the evidence demonstrated that “Essentials” was a highly suggestive term); *In re Shawnee Milling Co.*, 225 USPQ 747, 749 (TTAB 1985) (GOLDEN CRUST is not similar to ADOLPH’S GOLD’N CRUST because “Golden Crust” and its phonetic equivalent “Gold’n Crust” are highly suggestive).

Because the marks share the arbitrary term BRICKHOUSE or BRICK HOUSE, they are similar in appearance, sound, connotation and commercial impression. The presence of the additional words in each mark is insufficient to distinguish the marks. Accordingly, we find that BREWTUS’ BRICKHOUSE is similar to BRICK HOUSE TAP & TAVERN.

IV. Analyzing the factors.

Because the marks are similar, the services are identical and we presume that the services are offered in the same channels of trade to the same classes of consumers, we find that Applicant’s mark BREWTUS’ BRICKHOUSE for “restaurant and bar services” is likely to cause confusion with the registered marks BRICK HOUSE TAVERN + TAP for “restaurant services” and “bar services.”

Decision: The refusal to register Applicant’s mark BREWTUS’ BRICKHOUSE for the services identified therein is affirmed.