

This Opinion is Not a
Precedent of the TTAB

Mailed: May 10, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Angel Asset Management LLC
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Serial No. 90188208
—————

Kevin Grierson of Culhane Meadows PLLC
for Angel Asset Management LLC.

Jeffrey Look, Trademark Examining Attorney, Law Office 130,
John Lincoski, Managing Attorney.

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Before Cataldo, Wolfson, and Lebow,
Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Angel Asset Management LLC (“Applicant”) seeks to register on the Principal Register the standard character mark KOSA for “restaurant and bar services” in International Class 43.¹

Registration was refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s applied-for mark so resembles the standard

¹ Application Serial No. 90188208, filed September 17, 2020 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging Applicant’s bona fide intent to use the mark in commerce.

character mark KOSA, registered on the Principal Register for “entertainment in the nature of music festivals and live musical performances; entertainment, namely, production of music festivals and live performances featuring music; entertainment, namely, live music concerts” in International Class 41² that, when used on the respective services, Applicant’s mark is likely to cause confusion, mistake or deceive prospective consumers.

When the refusal was made final, Applicant filed a notice of appeal and request for reconsideration, which was denied. Applicant’s appeal of the final refusal is fully briefed.³ For the reasons explained below, we affirm the refusal to register.

I. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We consider each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019); *In re Country Oven, Inc.*, 2019 USPQ2d 443903, at *2 (TTAB 2019).

“Not all *DuPont* factors are relevant in each case[.]” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, at *3 (Fed. Cir.

² Registration No. 3412487, registered April 15, 2008; renewed.

³ Applicant’s motion to accept its amended brief, filed at 8 TTABVUE 4-25, is granted. Applicant’s amended brief, which has been correctly formatted, is the operative brief in this proceeding.

2020). Two key considerations are the similarities between the marks and the similarities between the services. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004) (cited in *Ricardo Media Inc. v. Inventive Software, LLC*, 2019 USPQ2d 311355, at *5 (TTAB 2019)); *see also In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1628 (TTAB 2018) (citing *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.”)).

A. The Marks

The first factor that we consider concerns the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). In this case, the marks are identical in every aspect and there is no evidence of record to support a finding that KOSA is suggestive or descriptive of Applicant’s respective services. “When word marks are identical but neither suggestive nor descriptive of the [services] associated with them, the first *DuPont* factor weighs heavily against the applicant.” *In re Majestic Distilling*, 65 USPQ2d at 1204; *see also In re i.am.symbolic*, 123 USPQ2d at 1748.

In addition, both marks are displayed in typed or standard character form so we must assume that both marks can be displayed in the same font style, color, or size. 37 C.F.R. § 2.52; *see Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 637 F.3d 1344, 98

USPQ2d 1253, 1256 (Fed. Cir. 2011) (standard character registrations “are federal mark registrations that make no claim to any particular font style, color, or size of display and, thus, are not limited to any particular presentation”); *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1187 (TTAB 2018).

Thus, the first *DuPont* factor, the similarity of the marks, weighs heavily in favor of finding a likelihood of confusion.

B. The Services

Next, we consider whether Registrant’s entertainment services are related to Applicant’s restaurant and bar services. We make our determination based on the services as they are identified in the application and cited registration. *See In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *see also Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). The issue is not whether the services will be confused with each other, but rather whether the public will be confused as to their source. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel, Inc.*, 223 USPQ 830 (TTAB 1984); *see also J. C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965) (“The confusion involved, of course, is not a confusion of [services] but a confusion of business”).

In order to support a finding of a likelihood of confusion, it is sufficient that the types of services of an applicant and registrant are related in some manner or that

the conditions surrounding the marketing of these types of services are such that they are likely to be encountered by the same persons under circumstances that, because of the marks used in connection therewith, would lead to the mistaken belief that they originate from the same source. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1476 (Fed. Cir. 2000). Where identical marks are involved, as is the case here, the degree of similarity between the services that is required to support a finding of likelihood of confusion declines and all that is required is a “viable relationship” between the services. *L’Oreal S.A. v. Marcon*, 102 USPQ2d at 1439; *In re Opus One*, 60 USPQ2d 1812, 1815 (TTAB 2001) (“Where the applicant’s mark is identical to the registrant’s mark, as it is in this case, there need only be a viable relationship between the respective goods or services in order to find that a likelihood of confusion exists”); *see also, e.g., In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993) (“even when goods or services are not competitive or intrinsically related, the use of identical marks can lead to an assumption that there is a common source”); *In re i.am.symbolic, llc*, 116 USPQ2d at 1411.

The Trademark Examining Attorney need not prove relatedness as to each and every type of entertainment service provided by Registrant. It is sufficient for a refusal based on likelihood of confusion that relatedness is established between any type of services recited in the registration and Applicant’s services. *i.am.symbolic*, 116 USPQ2d at 1409; *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014); *see also Tuxedo Monopoly, Inc. v. General Mills Fun Grp.*, 648 F.2d

1335, 209 USPQ 986, 988 (CCPA 1981) (“[L]ikelihood of confusion must be found if the public, being familiar with appellee’s use of MONOPOLY for board games and seeing the mark on *any item* that comes within the description of goods set forth by appellant in its application, is likely to believe that appellee has expanded its use of the mark, directly or under a license, for such item.”). Applicant’s application is for “restaurant and bar services.” The cited mark is registered for entertainment services, specifically music festivals, live musical performances and live music concerts.

To show the services are related, the Examining Attorney submitted evidence of third-party use of a single mark for both restaurant and bar services and entertainment services in the nature of live musical performances and live music concerts.

For example:

- Bobby McKey’s Dueling Piano Bar offers live music and a menu of cocktails and “quick bites” February 5, 2021 Office Action at TSDR 5-11;
- CopperBlues Rock Pub & Kitchen offers appetizers, burgers, sandwiches, salads and a dessert in a location that features cover bands, dueling pianos, and other musical performances. “Beer, music, and food is what we’re all about!” February 5, 2021 Office Action at TSDR 12-27; and
- Harry’s Ocean Bar & Grill advertises itself as “one of the most well-known restaurants in Cape May NJ” and invites patrons to enjoy “the best ocean views in Cape May with live music (in season), and tasty food & refreshing drinks.” December 8, 2021 Office Action at TSDR 2-3.

The Examining Attorney also submitted over 100 use-based, third-party registrations showing the same mark has been registered for both restaurant or bar

services and live musical concerts or performances. August 11, 2022 Denial of the Request for Reconsideration.⁴ For example:

- THE BROADMOOR is registered under Reg. No. 1700883 for “live entertainment featuring music” and “restaurant services” (TSDR 2);
- PROHIBITION is registered under Reg. No. 2213710 for “restaurant, cocktail lounge and bar services featuring live music” (TSDR 3);
- LOVE SHACK is registered under Reg. No. 2150748 for “restaurant services” and “nightclub services featuring live music” (TSDR 7);
- BOTTLENECK BLUES BAR is registered under Reg. No. 2922349 for “providing and presenting stage shows, band, vocal, instrumental, music, dance and comic performances” and “restaurant services located in casino facilities; bar services located in casino facilities” (TSDR 10);
- AMNESIA is registered under Reg. No. 4019687 for “live shows” and “restaurant, bar and lounge services” (TSDR 11);
- LAMBERTS is registered under Reg. No. 5034112 for “live music concerts” and “restaurant services featuring barbecue” (TSDR 31);
- OCEAN MIST is registered under Reg. No. 4755667 for “live music concerts” and “restaurant and bar services” (TSDR 33);
- THE CRAZY SOFA is registered under Reg. No. 5096232 for “live music concerts” and “restaurant services” (TSDR 37); and
- KOWLOON (stylized) is registered under Reg. No. 5002226 for “live music concerts” and “restaurant, bar and catering services (TSDR 43).

“As a general proposition, although use-based, third-party registrations alone are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless may have some probative value to the extent they may serve to suggest that the goods are of a kind that emanate from a single source.”

⁴ One of these, Reg. No. 4137584 for THE REFINERY has been partially cancelled and is not probative (TSDR 18).

In re I-Coat Co., LLC, 126 USPQ2d 1730, 1738 (TTAB 2018); *see also Hewlett-Packard*, 62 USPQ2d at 1004 (evidence that “a single company sells the goods and services of both parties, if presented, is relevant to the relatedness analysis”).

Several of the marks shown in the third-party registrations attached to the Reconsideration Denial have matching Internet evidence; that is, the Examining Attorney attached Internet evidence showing that these marks are not only registered, but are in use. For example:

- Hard Rock Café International (USA), Inc. owns Reg. No. 2478328 for the mark HARD ROCK for “live music concerts” and “restaurant, bar and take-out food services,” and advertises these services online under the mark HARD ROCK (TSDR 121-22).



This is our standard brand menu. Items may vary. To view prices and availability, [find your local cafe page](#).

- LEGENDARY® STEAK BURGERS**
- STARTERS & SHAREABLES
- SANDWICHES
- SALADS & BOWLS
- SPECIALTY ENTRÉES
- DESSERTS
- KIDS
- BEVERAGES

HARD ROCK CAFE BILOXI EVENTS

There is always something exciting happening at Hard Rock Cafe Biloxi! From local live music to special offers, our Event Calendar is a great way to get the insider scoop and first look at upcoming happenings.



KRONITE ROCK



JASON SHERECK

- Cipriani Group, Inc. owns Reg. No. 6707646 for the mark CASA CIPRIANI for “ongoing concerts series, providing live music concerts, live performances by musical bands,” and “hotel services; restaurant, catering, bar and cocktail lounge services” (TSDR 81) and advertises these services online under the mark CASA CIPRIANI (TSDR 128).

The screenshot displays the Casa Cipriani website. At the top left is the Casa Cipriani logo. The main navigation menu includes: ROOMS & SUITES, THE CLUB (underlined), SPA & WELLNESS, PRIVATE EVENTS, EXCLUSIVE OFFERS, and LOCATION. On the right side, there are buttons for MEMBERS and RESERVE Y. Below the main navigation, a secondary menu includes DINING AND ENTERTAINMENT (underlined), RULES & POLICIES, and DRESS CODE. The page title is "Dining and Entertainment". A dark banner below the title contains the text: "At Casa Cipriani you can expect the same simple, quality food that has become synonymous with Cipriani around the world, allowing you the freedom of choosing your preferred experience".

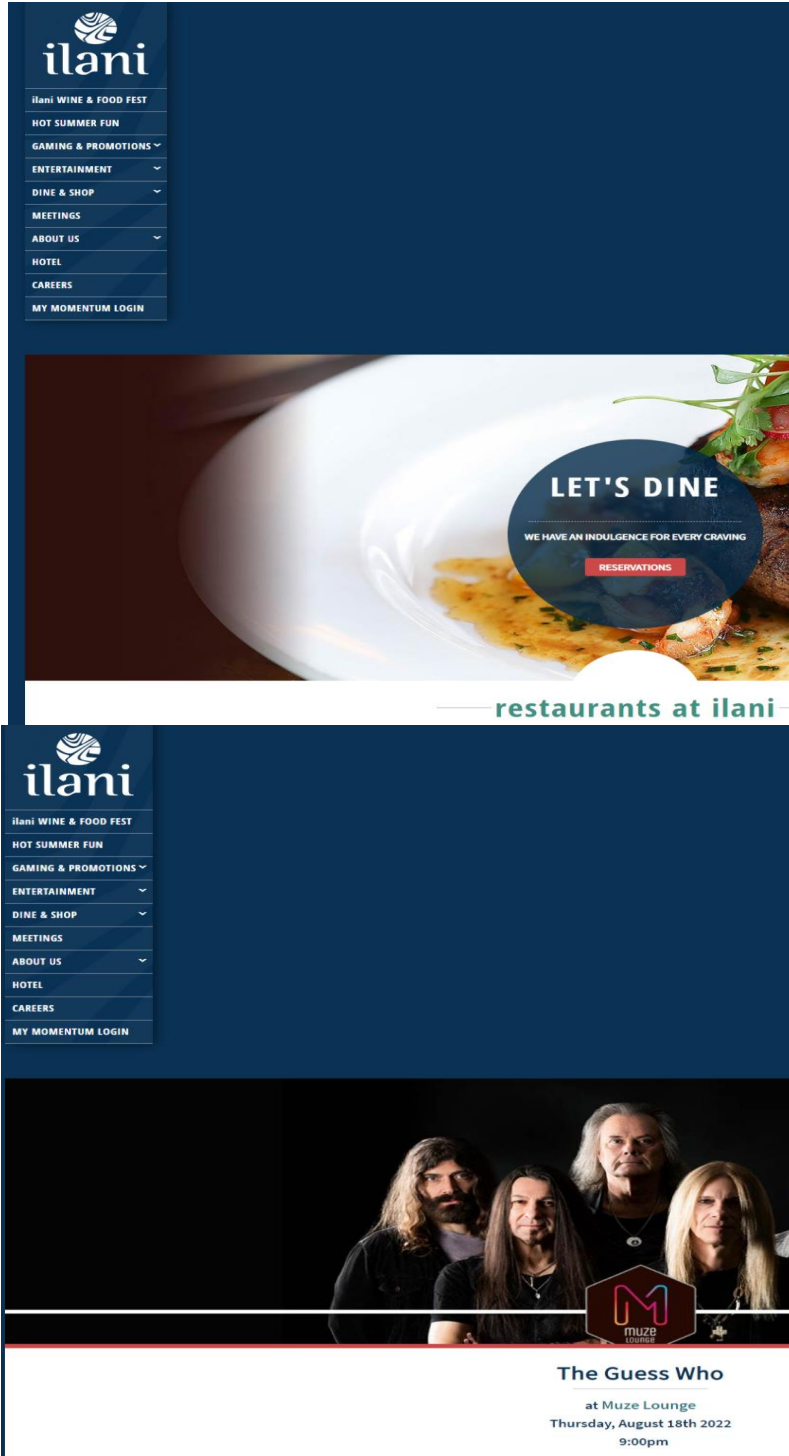
CLUB RESTAURANT

Casa Cipriani's formal Restaurant is open for breakfast, lunch, and dinner every day. The elegant interior, with up glass murals, art deco flower imagery and torchier lamps is inspired by the glamorous dining room of a French c... The dining terrace overlooking the Brooklyn Bridge and East River allows you to get lost in spectacular views whi... favorites. The menu includes Harry's Bar classics like the original Carpaccio, Baked tagliolini with ham, Calf's live piccantine al limone, Baby artichokes from the island of Torcello and the famous vanilla meringue cake to name a... Reservations for dinner are recommended and our books open thirty days in advance. Reservations can be made portal, email, or phone.

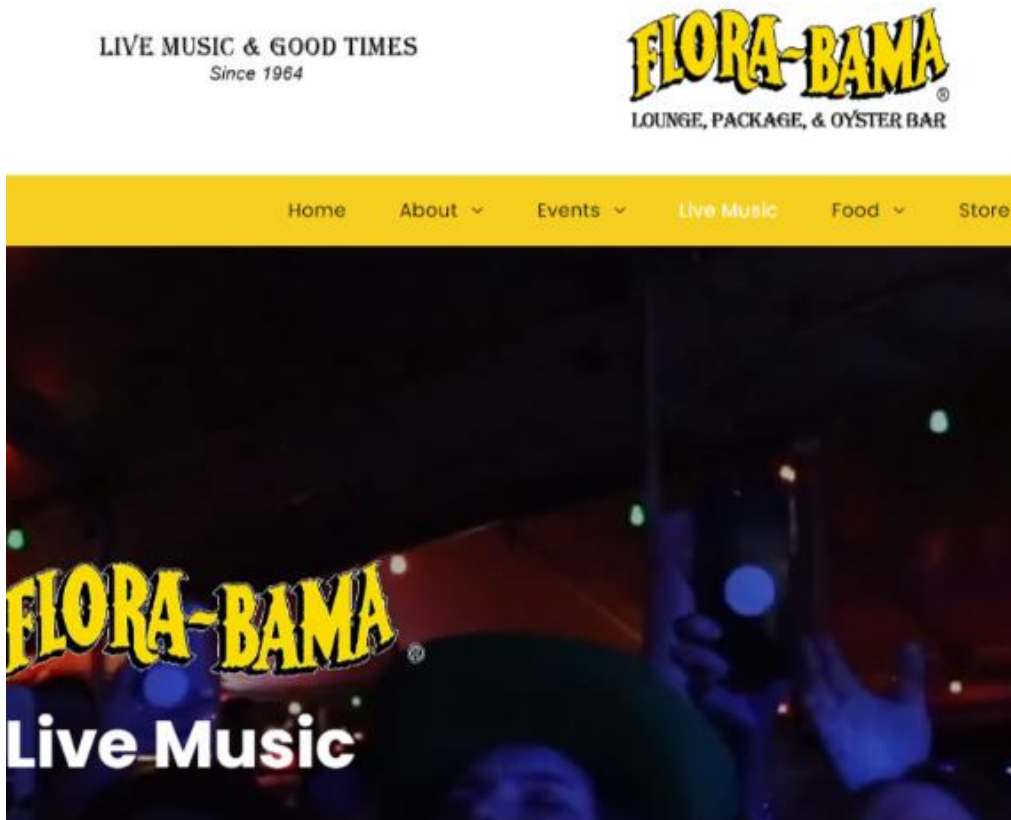
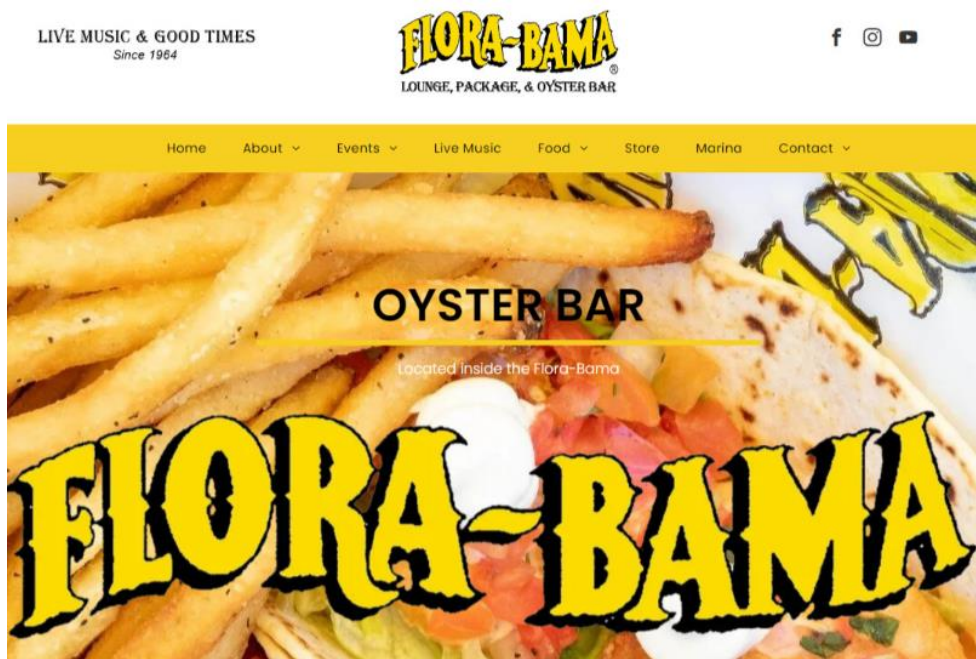
Jazz Café

The Jazz Café at Casa Cipriani is open from Tuesday to Saturday, 7pm - 1:30am, and offers dinner with live mu... different jazz bands alternate each evening with a variety of musical flavors throughout the week, reminiscent of c... and '40. The menu includes decadent items like oysters, caviar, and truffle when in season, together with Cipriani... Reservations for dinner are recommended and our books open thirty days in advance. Reservations can be made portal, email, or phone.

- Cowlitz Tribal Gaming Authority owns Reg. No. 653501 for the mark ILANI for “live music and comedy,” and “bar and restaurant services” (TSDR 99) and advertises these services online under the mark ILANI (TSDR 129-131).



- MGF Properties, Inc. owns Reg. No. 4272440 for the mark FLORA-BAMA for “live musical performances” and “bar and restaurant services” (TSDR 24) and advertises these services online under the FLORA-BAMA mark (TSDR 132-134).



- Good Time Design, LLC owns Reg. No. 6489373 for the mark CERVEZA JACK'S for "live performances by musical artists" and "bar and restaurant services" (TSDR 109) and advertises "Live Music during weekend Brunch" online under the mark CERVEZA JACK'S (TSDR 135).

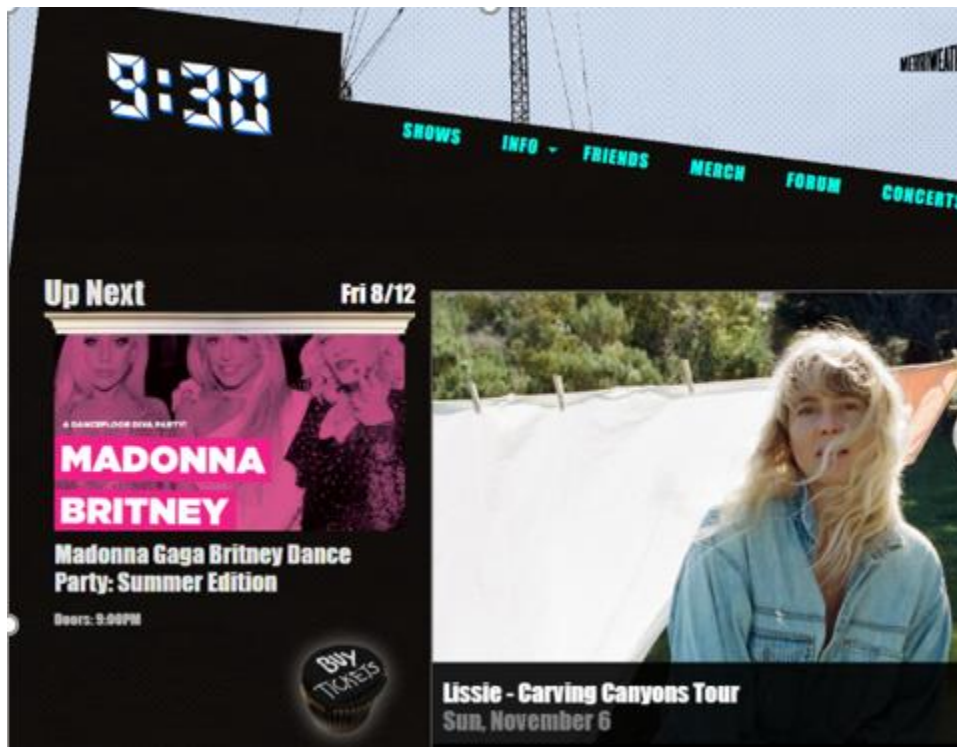


- Morongo Band of Mission owns Reg. No. 5407631 for the mark MORONGO and design for "live musical acts, stage shows, concerts and other live entertainment in the nature of live visual and audio performances featuring music, dance, variety and comedy," and "hotel, restaurant, bar services" (TSDR 66) and advertises these services online under the MORONGO and design mark (TSDR 137-38).



- Sledge, Inc. owns Reg. No. 3827535 for the mark **9:30** for “facility and operating venue for hosting and presenting live musical entertainment”

and “restaurant, bar, cocktail lounge and catering services,” and advertises these services online under the mark **9:30** (TSDR 139-40).



By submitting the third-party registrations and evidence of use of the same mark for the same services as are provided by Applicant and Registrant, the Examining Attorney is essentially asking us to draw the inference that consumers have become educated that those services may emanate from a single source. Applicant asks us instead to draw the opposite conclusion, arguing that none of the evidence shows that “live musical performances (as opposed to, for example, music from a streaming service) are closely related to restaurant and bar services, or even that the restaurants that do offer live music use the same mark for restaurant services as for live musical performances.” 6 TTABVUE 3. The above illustrative examples, however, refute Applicant’s argument.

Applicant further argues that its submission of 49 pairs of third-party registrations owned by different entities for the same or similar mark, where each entity has registered its mark for one of the services at issue, suggests that the USPTO considers restaurant/bar services unrelated to musical entertainment services. “In light of the volume of such registration pairs, the fact that some registrants have registered a mark in both classes should not be taken as an indication that the services are so closely related that consumers will be confused by two separate entities offering those respective services sharing a similar or even identical mark.” Reply Brief, 10 TTABVUE 4. For example:

- MAVERICK (Reg. No. 3012758) is registered for “restaurant services” and MAVERICK (Reg. No. 3998404) is registered for “live performances by musical bands”;

- ROCK LOBSTER (Reg. No. 3791815) is registered for “bar services” and ROCK LOBSTER (Reg. No. 4494591) is registered for “live musical performances”;
- MEZ (Reg. No. 3446017) is registered for “restaurant services” and MEZ (Reg. No. 6081221) is registered for “live musical performances”;
- PUSH (Reg. No. 3592854) is registered for “bar services” and PUSH (Reg. No. 4829693) is registered for “live musical performances”;
- NICOLETTA (Reg. No. 4466194) is registered for “bar services; restaurant and cafe services” and NICOLETTA (Reg. No. 4891670) is registered for “live musical performances”;
- REVOLVE (Reg. No. 4610622) is registered for “restaurant services” and REVOLVE (Reg. No. 6113749) is registered for “production of musical events; organizing music festivals”;
- THE D (Reg. No. 4508203) is registered for “restaurant and bar services” and THE D (Reg. No. 4333876) is registered for “live musical performances”; and
- ATR (Reg. No. 4831459) is registered for “bar and restaurant services” and ATR (Reg. No. 4735036) is registered for “live musical performances.”

The probative value of these registrations is limited to 31 pairs. The remainder are for marks where one of them includes additional wording or design features that are absent from the other and which additional features sufficiently distinguish the marks, and likely affected their registrability in the viewpoint of the USPTO at the time of application. In addition, one of the marks in another pair has been cancelled. A cancelled registration is not evidence of anything except that it issued. *Time Warner Ent. Co. v. Jones*, 65 USPQ2d 1650 (TTAB 2002).

We have carefully considered the 31 pairs of third-party registrations advanced by Applicant. Applicant urges us to treat their existence on the federal trademark register as proof “that businesses in these two industries believe that their respective [services] are distinct enough that confusion between even identical marks is unlikely.” *In re Thor Tech, Inc.*, 113 USPQ2d 1546, 1549 (TTAB 2015); *cf. Keebler Co. v. Ass’d Biscuits Ltd.*, 207 USPQ 1034 (TTAB 1980) (“pattern of” third-party registrations “tend[s] to define fields of use and, conversely, the boundaries of use and protection surrounding the marks and marks comprising the same word ... for their various products”).

Unlike in *Thor Tech* or *Keebler*, the record here does not support a finding that consumers are aware that the involved services are offered by unrelated companies under the same or similar marks. Rather, the overwhelming evidence, not just of registration but of use, shows that consumers have become accustomed to restaurants and bars featuring live musical performances. We agree with the Examining Attorney that the number of registrations and Internet evidence submitted by the USPTO “tips the scale in favor of a finding that the services of Applicant and Registrant are closely related.” Examining Attorney’s Brief, 9 TTABVUE 9. Our finding is bolstered by the additional evidence provided by the Examining Attorney of articles from trade journals and popular magazines “showing that consumers prefer to enjoy an entertainment experience, such as live music, while eating or drinking in a bar or restaurant and that such consumers tend to linger longer, order more food and drinks

and live music draws more customers in general into the restaurant or bar.” 9
TTABVUE 6.⁵

The effect of the pairs of third-party registrations is also lessened by the fact that there is no supporting evidence of use of any of the marks that comprise the pairs (*e.g.*, a declaration from counsel or a paralegal that he/she investigated the use of the marks in the third-party registrations and found proof that any of paired registrants used a single mark on both types of services at issue). There is also an absence of proof, such as by declaration or submission of copies of the relevant file histories, that no licenses or coexistent agreements are in place between any of the paired registrants.

The evidence sufficiently demonstrates a relationship between Applicant’s services and those in the cited registration, particularly given the reduced degree of similarity between the services that is necessary for confusion to be likely, arising from the fact that they are provided under identical marks. The second *DuPont* factor supports a finding of a likelihood of confusion.

⁵ December 8, 2021 Office Action: “Where to drink in Fort Worth right now: 9 best bars with live music,” CULTUREMAP, June 11, 2021 (TSDR 4); “12 D.C. Restaurants and Bars With Live Music,” EATER WASHINGTON DC, February 26, 2018 (TSDR 12); “5 reasons why you should play music in your restaurant,” LS RETAIL, December 4, 2017 (TSDR 13) and August 11, 2022 Denial of Request for Reconsideration: “Exploring the impact of background music will on customers perception of ethnic restaurants: The moderating role of dining companions,” JOURNAL OF HOSPITALITY AND TOURISM MANAGEMENT, June 2020 (TSDR 141-43); “9 Ways Background Music Can Influence Your Restaurant’s Customers,” BACKBAR, June 3, 2019 (TSDR 143); “How Live music at restaurants draw more customers,” COOLBEANSEATERY, 2022 (TSDR 144).

C. Trade Channels, Consumer Classes, and Sales Conditions

Under the third *DuPont* factor, we consider the “similarity or dissimilarity of established, likely-to-continue trade channels,” and under the fourth *DuPont* factor, we consider “[t]he conditions under which and buyers to whom sales are made[.]” *DuPont*, 177 USPQ at 567. We base our consideration of the channels of trade and classes of consumers on the services recited in the application and cited registration. *Octocom Sys., Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of [services] set forth in the application, regardless of what the record may reveal as to the particular nature of an applicant’s [services], the particular channels of trade or the class of purchasers to which sales of the [services] are directed.”).

Because neither Applicant nor Registrant has limited its services to any particular style, genre, demographic, or price point, we must assume that both recitations include restaurant/bar services and live musical performances of all types, and that they are offered to the full range of usual consumers for such services, travelling through trade channels normal for these services. *Stone Lion*, 110 USPQ2d at 1161; *Coach Servs.*, 101 USPQ2d at 1723 (absent limitation, “[services] are presumed to travel in all normal channels ... for the relevant [services].”).

As to classes of consumers, there is no evidence to support a conclusion that the consumers are sophisticated. Accordingly, we find the third and fourth *DuPont* factors are neutral.

II. Conclusion

We have carefully considered all of the evidence made of record, as well as all of the arguments related thereto. The marks are identical and the Examining Attorney has demonstrated a viable relationship between the services. The *DuPont* factors relating to trade channels and classes of consumers are neutral, and no other factors have been argued or supported by the evidence. Accordingly, we find that when used on the services for which Applicant has applied to register the mark KOSA, confusion is likely vis-à-vis Registrant's identical mark KOSA for the services recited in the cited registration.

Decision: The refusal to register Applicant's mark under Section 2(d) of the Trademark Act is affirmed.