

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB JUNE 9, 99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Qreitem**

Serial No. 75/089,246

James C. Wray, Esq. for **Samir Qreitem**.

Montia O. Givens, Trademark Examining Attorney, Law Office 101
(**Chris Wells**, Acting Managing Attorney).

Before **Simms**, **Hanak** and **Hohein**, Administrative Trademark Judges.

Opinion by **Hohein**, Administrative Trademark Judge:

Samir Qreitem has filed an application to register the mark "BACKYARD STEAKHOUSE" as a service mark for "restaurant services".¹

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to his services, so resembles the mark "BACK YARD BURGERS," which is registered for "restaurant

¹ Ser. No. 75/089,246, filed on April 16, 1996, which alleges a bona fide intention to use such mark in commerce. The word "STEAKHOUSE" is disclaimed.

services,"² as to be likely to cause confusion, mistake or deception.

Applicant has appealed. Briefs have been filed,³ but an oral hearing was not held.⁴ We affirm the refusal to register.

Turning first to consideration of the respective services, we note that as identified in the application and cited registration, the services are identical in all respects. Although applicant urges that, in light of presence of the words "STEAKHOUSE" and "BURGERS" in the marks at issue, his restaurant services are "typically [rendered in] a large building [and are] associated with up-scale, waiter-services dining," while registrant's restaurant services are "typically associated with a meat patty product [which is] served in small fast-food type carry out restaurants," it is well settled that the issue of likelihood of confusion must be determined on the basis of the services as they are set forth in the involved application and

² Reg. No. 1,679,702, issued on March 17, 1992, which sets forth a date of first use anywhere of November 15, 1986 and a date of first use in commerce of March 21, 1987; combined affidavit §§8 and 15.

³ Applicant, after filing a reply brief which essentially reiterates the arguments set forth in his initial brief, submitted a supplemental reply brief which is accompanied by evidence of an asserted "plethora of marks using BACKYARD and STEAK" which applicant states "was obtained by a simple search of the Internet's World Wide Web." Such evidence, however, is manifestly untimely under Trademark Rule 2.142(d) and applicant has made no showing that the evidence, which shows only a few examples of third-party uses of marks incorporating the term "BACKYARD" in connection with restaurant services, is newly discovered or otherwise was previously unobtainable. Accordingly, no further consideration will be given thereto.

⁴ Although an oral hearing was scheduled at applicant's request, applicant subsequently submitted a communication stating that he would not attend the oral hearing.

cited registration. See, e.g., CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and Paula Payne Products Co. v. Johnson Publishing Co., Inc., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). Furthermore, the record contains evidence, in the form of several restaurant menus obtained from the Internet, showing that steak houses⁵ typically offer burgers as entrees in addition to steaks. Thus, it is plain that such restaurants would include burgers as a menu item and that, in view of this overlap, applicant's steak house restaurant services must be considered to be closely related to the type of restaurant services provided by registrant. Clearly, if offered under the same or similar marks, confusion as to the source or sponsorship of such services would be likely to occur.

Turning, therefore, to consideration of the marks at issue herein, applicant argues that, when considered in their entirety, the respective marks are not only different in sound and appearance, but the connotation and overall commercial impression each mark conveys are dissimilar. In particular, applicant contends that his mark "has an incongruous meaning--a big building--a steakhouse in a back yard," while registrant's mark is not incongruous in that it signifies burgers "just like the ones that come from your back yard." Applicant accordingly maintains that inasmuch as "BACKYARD STEAKHOUSE does not look like or sound like BACK YARD BURGERS" and has a "completely

⁵ According to the record, Webster's II New Riverside University Dictionary defines "steak house" as "[a] restaurant specializing in beefsteak dishes."

different" meaning as "a building in a backyard, rather than a patty grilled in a back yard," confusion as to origin or affiliation is not likely to occur.

We agree with the Examining Attorney, however, that such confusion is likely since the dominant and distinguishing portion of each mark is the term "BACKYARD" or "BACK YARD".⁶ While applicant is correct that the respective marks must be compared in their entireties, it is nevertheless the case that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entireties." In re National Data Corp., 753 F.3d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For instance, "that a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark" 224 USPQ at 751.

Here, as confirmed by applicant's disclaimer thereof, the word "STEAKHOUSE" in his "BACKYARD STEAKHOUSE" mark is a generic term for applicant's restaurant services. Similarly, it is obvious that the word "BURGERS" in registrant's "BACK YARD BURGERS" mark is at least highly suggestive, if not highly descriptive, of registrant's restaurant services. It is thus the

⁶ As shown by the excerpt made of record by the Examining Attorney from Webster's II New Riverside University Dictionary, the term "back yard," which is defined as "[a] yard behind a house," is also commonly spelled as "backyard".

word "BACKYARD" and its legal equivalent "BACK YARD" which, when the respective marks are considered as a whole, form the dominating and distinguishing elements thereof. See, e.g., In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) [dominant portion of mark "THE DELTA CAFE" and design ("CAFE" disclaimed) for restaurant services is the word "DELTA," *citing* In re National Data Corp., 224 USPQ at 751].

We consequently concur with the Examining Attorney that applicant's "BACKYARD STEAKHOUSE" mark, in addition to similarities in sound and appearance, projects a commercial impression which is substantially similar to that engendered by registrant's "BACK YARD BURGERS" mark. Both marks, as stated by the Examining Attorney in her denial of applicant's request for reconsideration of the final refusal, essentially convey the same overall commercial impression when used in connection with restaurant services, namely, that of a restaurant offering "a steak or burger that tastes just like one grilled in your own home's backyard".

There thus being nothing incongruous in the commercial impression of applicant's mark, we conclude that customers, familiar with registrant's "BACK YARD BURGERS" mark for restaurant services, would be likely to believe, upon encountering applicant's substantially similar "BACKYARD STEAKHOUSE" mark for restaurant services, that such services emanate from or are otherwise sponsored by or affiliated with the same source. Consumers, for example, could readily believe that

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registrant has expanded its burger restaurant services to a separate or upscale line of steakhouse restaurants.

Decision: The refusal under Section 2(d) is affirmed.

R. L. Simms

E. W. Hanak

G. D. Hohein
Administrative Trademark Judges,
Trademark Trial and Appeal Board