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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Coors Brewing Company

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Serial No. 75/599,304

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Sabrina C. Stavish of Sheridan Ross P.C. for Coors Brewing Company.

Yvonne Jones, Trademark Examining Attorney, Law Office 101  
(Jerry Price, Managing Attorney).

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Before Hanak, Hairston and Drost, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On December 3, 1998, Coors Brewing Company (applicant) applied to register the following mark on the Principal Register for "beer" in International Class 32<sup>1</sup>:

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<sup>1</sup> Serial No. 75/599,304. The application claims a date of first use and date of first use in commerce of February 1997. The drawing, which does not reproduce well, contains in larger letters the words BLUE MOON and in smaller letters at the bottom of the drawing the words BLUE MOON BREWING CO. The application contains a disclaimer of the words "Brewing Co."



The examining attorney<sup>2</sup> ultimately refused to register the mark because the examining attorney held that there is a likelihood of confusion between applicant's mark for beer and the following three registrations. The first registration, shown below, is for "restaurant services" in International Class 42.<sup>3</sup>



The examining attorney also cited two other registrations for the mark BLUE MOON, typed<sup>4</sup> and with a design shown below, owned by the same entity, for "wine" in International Class 33.

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<sup>2</sup> The present examining attorney was not the original examining attorney in this case.

<sup>3</sup> Registration No. 1,770,568 issued May 11, 1993. Affidavits under Section 8 and 15 have been accepted and acknowledged respectively. The lines in the drawing are design features and not an indication of color.

<sup>4</sup> Registration No. 2,224,435 issued February 16, 1999.



Blue Moon

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After the Examining Attorney made the refusals final, this appeal followed. Both applicant and the examining attorney filed briefs. An oral hearing was held on May 21, 2002.

Both the applicant and the examining attorney have filed a significant amount of evidence. A summary of their respective positions and the evidence that supports those positions follows.

The examining attorney held that the cited registrations and applicant's mark were confusingly similar. Regarding Registration No. 1,770,568, the examining attorney argues that the dominant portion of both the registration and application is the BLUE MOON word portion. Further, the examining attorney noted the design in both marks includes an image of a moon. As to the goods and services, the examining attorney provided the following evidence to support a determination that beer and

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<sup>5</sup> Registration No. 2,068,550 issued June 10, 1997.

restaurant services are related. First, the evidence shows that restaurants often have their own private label beer.

[S]ome microbreweries have become suppliers of private label beers to restaurants and supermarkets.  
*The Business Press/California*, October 23, 1995, p. 1.

His original restaurant was packing them in. He expanded the menu, added fireplaces, and even brewed a private label beer.  
*Success*, July 1995, p. 33.

Red River Barbeque & Grille's private label beer, Red Amber, now is sold by local distributors, too.  
*Pittsburgh Post-Gazette*, June 18, 1995, p. H12.

But he lost track of time sampling private-label beer at the Berghoff Restaurant.  
*Chicago Sun-Times*, September 10, 1994, p. 6.

Brandevor produces Wild Boar Special Amber Beer, private-label beers for TGI Friday's Restaurants and a Florida restaurant chain, and imports Simpatico beer from Mexico.  
*Seattle Times*, November 6, 1992, p. C8.

Huber, on the other hand has 90,000 barrels of beer on hand and says he has had inquiries from about 20 restaurants and hotels to supply private label beer.  
*Chicago Tribune*, March 23, 1989, p. 15A.

Second, there are restaurants called "brewpubs," which are defined as "a small brewery that serves most of its beer on the premises, often through an associated restaurant or taproom." *The Encyclopedia of Beer*, p. 114. See also *The Capital*, October 13, 1996, p. B1 ("Restaurants can be tricky, and brewpubs more so"); *St. Louis Post-Dispatch*, October 6, 1996, p. 6T ("Tourist officials point out that you can visit the state's major ski resorts ... and

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find a brewpub (a restaurant that produces less than 15,000 barrels of beer annually)"; *Baltimore Sun*, October 2, 1996, p. 1F ("The Brewer's Art, a new brewpub and restaurant on North Charles Street"); and *The Pittsburgh Post-Gazette*, September 30, 1996, p. B-3 ("Christopher Passodelis ... is working with several partners to turn a nondescript Strip District warehouse into a new brewpub and restaurant").

Third, there are registrations for the same mark for both beer and restaurant services. See, e.g., Registration No. 2,047,236 (beer and restaurant services); Registration No. 2,020,560 (beer and bar and restaurant services); Registration No. 2,181,182 (beer and restaurant services); Registration No. 2,232,672 (beer, ale and stout and restaurant and bar services); Registration No. 2,130,659 (malt beverages, namely, beer, ale, stout, porter, malt liquor and restaurant services); Registration No. 2,139,104 (beer and restaurant services); Registration No. 2,261,244 (beer, ale and porter and restaurant services, take out restaurant services; brew pub restaurant services); and Registration No. 2,086,698 (beer and ale and restaurant services). Based on this evidence, the examining attorney concluded that there is a likelihood of confusion when applicant's and registrant's BLUE MOON marks are used on beer and restaurant services.

Regarding the registrations for BLUE MOON in typed form and with a design for wine (Registration Nos. 2,068,550 and 2,224,435), the examining attorney points to applicant's concession that "Applicant's beer could be sold in the same stores to the same class of customers as the wine products of the Registrant." Applicant's Br. at 5. The examining attorney then refers to several registrations for the same marks for beer and wine. Registration No. 2,162,683 (beer, wine and liquors); Registration No. 1,996,820 (champagne, cognac, distilled spirits, liquors, whiskey, wine, ale, beer, and stout); and Registration No. 1,861,111 (ale, beer, fruit juices, cider (sweet) and (hard), wine, cooking wine, aperitif wines)<sup>6</sup>.

Applicant, on the other hand, argues that there is no confusion between these two marks. Initially, applicant points out that "the word portion of the Applicant's mark is more common as it is based on the phrase 'once in a blue moon.'" Applicant's Br. at 5. Applicant provided various evidence to support its argument that "Blue Moon" was

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<sup>6</sup> Several other registrations are also in the record but these registrations were either house marks or for such a wide variety of goods that their probative value is minimal. See, e.g. Registration No. 1,890,019 (ice cream, fruit juices, beer, wine, and gourmet fruits and cheeses); Registration No. 1,736,992 (movie theater services, resort hotel services, T-shirts, beer, ale, and wine); and Registration No. 1,553,878 (management services rendered to public facilities, French fries, pickles, and milk).

either a weak mark or that the services and goods were not related. First, there are copies of registrations in which the same marks are registered to different parties for beer and restaurant services. See Registration No. 1,763,162 (TAJ MAHAL for beer) and 1,158,610 (TAJ MAHAL for restaurant services); No. 1,968,311 (PULLMAN for beer) and No. 1,480,112 (PULLMAN for restaurant services); and No. 1,788,369 (TROPICAL for beer) and No. 1,666,109 (TROPICALE for providing lodging services, restaurant services, catering services and party facilities rental services on board ships). Second, applicant provided listings in telephone directories and a Dun & Bradstreet report showing the mark BLUE MOON associated with other restaurants. The Dun & Bradstreet report identifies more than 60 listings for restaurant-type businesses with the term "Blue Moon" in the name of the establishment or the owner. Telephone book listings also identify numerous "Blue Moon" restaurants such as BLUE MOON CAFE (Greater San Antonio), BLUE MOON CAFE (Muskogee, OK); BLUE MOON RESTAURANT, INC. (Ponca City, OK), BLUE MOON CAFE (Baton Rouge, LA), BLUE MOON SALOON (Wichita, KS), and BLUE MOON GOURMET PIZZA (Nevada).<sup>7</sup> Third, applicant submitted registrations and applications

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<sup>7</sup> The Dun & Bradstreet listings frequently overlap with the other listings applicant has made of record.

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for BLUE MOON owned by others for food items. See Registration No. 2,141,022 (BLUE MOON SORBET for sorbet and fruit ice); No. 1,019,524 (BLUE MOON and design for cheese); No. 2,343,774 (BLUE MOON BERRY for soft drinks) and Serial No. 75/510,616 (BLUE LUNA Café for dips, pretzels, and fruit juices). Fourth, applicant included printouts from the NEXIS automated database that refer to BLUE MOON eating establishments and bars. See, e.g., *Chicago Daily Herald*, January 11, 2000, p. 5 ("during a press conference at the Blue Moon restaurant in North Chicago"); *Madison State Journal*, December 23, 1999, p. 8 ("State Bar & Grill's sister restaurant, the Blue Moon"); *Commercial Appeal*, September 16, 1999, p. NT1 ("Laura Moon and her daughter, Denise Moon, hope their new Blue Moon Café takes the place of the pharmacy"). Fifth, the evidence shows that by the mid 1990's there were 815,000 restaurants in the United States, *New York Times*, September 6, 2000, p. F1, compared with "about 1,450 brewpubs, microbreweries and regional specialty breweries." *Richmond Times Dispatch*, June 8, 2000, p. D-26.

Based on this evidence, applicant concludes that "while it can be argued that the beer for which registration is sought is related in that brewpubs make beer and contain restaurants, given the great number of

restaurants and the small number of brewpubs, it is unlikely that consumers will assume that beer sold under Applicant's BLUE MOON AND DESIGN mark originates from the same source as the restaurant services." Applicant's Br. at 2. Regarding the refusal based on the '435 and '550 registrations for BLUE MOON, typed and with a design, for wine, applicant argues that "consumers are aware that wine is made from grapes and beer from grains. The processes and the fact that wineries and breweries make different products are well known to consumers." Applicant's Br. at 5-6.

Determining whether there is a likelihood of confusion requires consideration of the factors set forth in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000).

In considering the evidence of record on these factors, we must keep in mind that "[t]he 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." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Refusal based on Registration No. 1,770,568

We begin by addressing the refusal of applicant's mark because of the mark shown below for restaurant services:



The first factor we consider is whether the applicant's goods, beer, are related to registrant's restaurant services. We start by noting that there is no per se rule that requires a determination of likelihood of confusion when similar marks are used on restaurant services and food items. Jacobs v. International Multifoods Corp., 668 USPQ F.2d 1234, 212 USPQ 641, 642 (CCPA 1982) (BOSTON TEA PARTY for tea not confusingly similar to BOSTON SEA PARTY for restaurant services). We must consider the case under its own facts after examining the particular marks and the particular goods and services. Compare In re Central Soya Co., 220 USPQ 914, 917-18 (USPQ 1984) (No likelihood of confusion between POSADA (stylized) for Mexican style prepared frozen enchiladas and LA POSADA for lodging and restaurant services; weak terms entitled to narrower scope of protection) with In re Azteca Restaurant Enterprises Inc., 50 USPQ2d 1209, 1212 (TTAB 1999) (AZTECA

MEXICAN RESTAURANT confusingly similar to AZTECA for Mexican food items; AZTECA not "so highly suggestive").

We must compare the goods and services as set out in the respective identifications in the application and registration. See Paula Payne Products v. Johnson Publishing Co., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods"). See also Octocom Systems, Inc. v. Houston Computers Services 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 goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed"); In re Dixie Restaurants, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997)(quotation marks omitted) ("Indeed, the second DuPont factor expressly mandates consideration of the similarity or dissimilarity of the services as described in an application or registration").

Here, we find that restaurant services and beer are related goods and services. We find it significant that

beer is not simply an item sold in restaurants. That alone would amount to almost a per se rule that restaurants and food items sold in restaurants are related. Rather, in this case, the examining attorney has shown that restaurants do not only serve beer but restaurants themselves are the source of beer either as a brewpub or as a distributor of their own private label beer. We find that this evidence meets the requirement that there be "something more than that similar or even identical marks are used for food products and for restaurant services." Jacobs, 212 USPQ at 642. It is significant that restaurants can be brewpubs that produce their own beer or they can also be the source of their own private label beer.

Applicant makes several arguments in response to the evidence concerning restaurants/brewpubs. First, it argues that there is no evidence that the cited registration is for brewpub services. Applicant's Br. at 2. However, it is clear that "brewpubs" are a type of restaurant. *St. Louis Post-Dispatch*, October 6, 1996, p. 6T ("brewpub (a restaurant that produces less than 15,000 barrels of beer annually)"); *The Encyclopedia of Beer*, p. 114 (brewpub - "a small brewery that serves most of its beer on the premises, often through an associated restaurant or taproom").

Inasmuch as restaurants can include brewpubs, there is no basis to exclude brewpubs from the type of services included within registrant's identification of services. We will not read a limitation into registrant's identification of services that it is not a brewpub. See Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) ("There is no specific limitation here, and nothing in the inherent nature of Squirtco's mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The board, thus, improperly read limitations into the registration").

Second, applicant argues that there are "a total of 1,450 brewpubs, microbreweries and regional specialty breweries." Applicant's Br. at 2. Applicant then points out that there are approximately 815,000 restaurants, and "given the great number of restaurants and the small number of brewpubs, it is unlikely that consumers will assume that beer sold under Applicant's BLUE MOON AND DESIGN mark originates from the same source as restaurant services sold under Registrant's BLUE MOON AND DESIGN mark where the designs are very different." Id. Applicant's argument is not persuasive. While brewpubs may constitute a small part of the restaurant industry, it is hardly insignificant. "Even if the overlap between consumers of registrant's

RIGHT-A-WAY services [distributorship services in the field of automobile-related parts] and Shell's RIGHT-A-WAY services [service station oil and lubrication change services] were small in relation to the total number of Shell customers, it is not *de minimis* in relation to the registrant's customers. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). Here, there is a non-*de minimis* overlap between prospective customers of registrant's services and applicant's goods.

In addition, 1,450 restaurants/brewpubs is hardly an insignificant number of restaurants. Again, there is no reason to believe that patrons of these brewpubs would not be virtually identical to purchasers of applicant's beer.

Finally, the number of brewpubs does not take into consideration the fact that there are restaurants that simply market a house brand of beer without brewing the beer themselves. See, e.g., *The Business Press/California*, October 23, 1995, p. 1 ("[S]ome microbreweries have become suppliers of private label beers to restaurants and supermarkets") and *Chicago Sun-Times*, September 10, 1994, p. 6 ("But he lost track of time sampling private-label beer at the Berghoff Restaurant"). Thus, beside the more than one thousand brewpubs, there are numerous restaurants that also sell their own private label brand of beer brewed

by others. This beer can also be sold outside the restaurant establishment itself. *Pittsburgh Post-Gazette*, June 18, 1995, p. H12 ("Red River Barbeque & Grille's private label beer, Red Amber, now is sold by local distributors, too"). Because of the evidence of restaurant brewpubs and private label beer sold by restaurants, we find that there is significant evidence to support the examining attorney's conclusion that beer and restaurant services are related. This evidence provides the "something more" the CCPA referred to in the Jacobs case as necessary to hold that food products and restaurant services are related.

Next, we consider whether the marks are similar in sound, appearance, meaning or commercial impression. du Pont, 177 USPQ at 567. It is well settled that it is improper to dissect a mark. Shell Oil, 26 USPQ2d at 1688. However, more or less weight may be given to a particular feature of a mark for rational reasons. In re National Data Corporation, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). Also, when we compare marks, "[s]ide-by-side comparison is not the test. The focus must be on the 'general recollection' reasonably produced by appellant's mark and a comparison of appellee's mark therewith." Johann Maria Farina Gegenuber Dem Julichs-Platz v.

Chesebrough-Pond, Inc., 470 F.2d 1385, 176 USPQ 199, 200 (CCPA 1972) (citation omitted).

Both marks contain the identical words "Blue Moon." The only additional wording in applicant's mark consists of the disclaimed words "Brewing Co." Disclaimed matter is often "less significant in creating the mark's commercial impression." In re Code Consultants Inc., 60 USPQ2d 1699, 1702 (TTAB 2001). It would be particular unlikely that the disclaimed matter here would significantly distinguish the marks because it is printed in much smaller, harder-to-read print. See Azteca Restaurant, 50 USPQ2d at 1211 ("On applicant's menus, which are the specimens of record, the [disclaimed] words appear on a line below the term AZTECA and are in smaller type than the term AZTECA. Certainly, when applicant's mark is viewed as a whole, it is the term AZTECA which is the dominating and distinguishing element thereof").

The only significant difference between the marks consists of their designs. Even here, the designs are not entirely different. Both applicant's and registrant's design consist of a moon design. Beyond that similarity, applicant's mark is of a moon design over a forest scene while applicant's design is of a moon wearing sunglasses. The designs do not lead to a conclusion that the marks are

dissimilar. The Federal Circuit in a case involving different arrow designs agreed with the Board's conclusion that despite the different arrow designs the marks were similar:

Without doubt the word portions of the two marks are identical, have the same connotation, and give the same commercial impression. The identity of words, connotation, and commercial impression weighs heavily against the applicant. We agree with the Board that the words dominate these marks, and that their differences in script and arrow design do not diminish their substantial identify when viewed as a whole.

Shell Oil, 26 USPQ2d at 1688 (citation omitted). See also In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 464-65, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988) (BIGG'S and design for grocery and general merchandise store services found likely to be confused with BIGGS and different design for furniture).

In the present case, the identical nature of the non-disclaimed words and the fact that both marks contain a moon design lead us to conclude that the commercial impressions of the marks are similar and that prospective customers would not rely on the differences in the designs in the marks to distinguish applicant's goods from registrant's services. These words would be pronounced the same, and they would have a similar appearance because of the use of the identical wording, "Blue Moon." The moon

designs reinforce the "Blue Moon" wording. We also take into consideration the fallibility of human memory. See Clorox Company v. State Chemical Mfg. Co., 197 USPQ 840, 844 (TTAB 1977) ("[T]aking into account, as we must, the fallibility of the human memory over a period of time, we conclude that applicant's mark "FORMULA 999" so resembles opposer's mark "FORMULA 409" as to be likely" to cause confusion); Richardson-Vicks Inc. v. Franklin Mint Corp., 216 USPQ 989, 992 (TTAB 1982) (The Board found that "the fallibility of the human memory over a period of time" supported the conclusion that confusion was likely). Also, there is no significant difference in meaning between the marks as both marks contain the wording "Blue Moon" and the accompanying designs illustrate a moon. Therefore, we conclude that applicant's and registrant's marks are similar.

Applicant argues that it has presented evidence in the form of registrations that shows that "substantially the same mark[s] for beer and restaurant services [are] owned by different parties." Applicant's Br. at 2-3. The examining attorney has offered her own registrations as evidence that the same marks are used by the same parties on both restaurant services and beer. Although third-party registrations "may have some probative value to the extent

that they may serve to suggest that such goods or services are the type which may emanate from a single source," (In re Mucky Duck Mustard Co., 6 USPQ2d 1467, 1470 n.6 (TTAB 1988)), in this case the registration evidence is offsetting. Also, the fact that applicant has included three registrations for other food items does not mean that there is no likelihood of confusion between the marks and goods and services in this case. The food items in the third-party registrations include soft drinks, sorbet, and cheese, and they are significantly different than beer.<sup>8</sup> In addition, we do not have the files of those registrations, but in this case we have substantial evidence that beer and restaurant services are related.

Applicant's more significant evidence consists of telephone entries showing listings for restaurant-type establishments that use the "Blue Moon" in their names. Applicant relies on the In re Broadway Chicken, Inc. case. 38 USPQ2d 1559 (TTAB 1996). In that case, the Board referred to the fact that there were "575 entities whose names contain the term BROADWAY and which offer restaurant and/or related services or goods. Of these, we count well over 300 entities which are designated in the American

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<sup>8</sup> The applications that applicant refers to are even less relevant.

Business Directory search report as restaurants and/or eating places." Id. at 1562 (footnote omitted). The Board went on to find that BROADWAY CHICKEN was not confusingly similar to BROADWAY PIZZA and BROADWAY BAR & PIZZA, all for restaurant services. The Board relied on the fact that many of the third-party restaurants referred to were located on "a street, road, avenue, etc., named BROADWAY." Id. at 1566.

In an inter partes case involving third party use, the Board noted that "applicant has not furnished any evidence regarding the extent of use of the marks by these third parties" and "the pictures of these restaurants tend to indicate that the operations are small and local in nature." Carl Karcher Enterprises Inc. v. Stars Restaurants Corp., 35 USPQ2d 1125, 1131 (TTAB 1995).

Similarly, we do not have evidence here of the extent of these third parties' use and it appears that these examples are small and local in nature. In addition, we note that applicant has referred to a *New York Times* article indicating that by the mid 1990's there were more than 815,000 restaurants in the United States. Applicant's Br. at 2. Considering that there are more than 800,000 restaurants in the United States, it is hardly surprising that there would be some use of the same term by other

restaurants throughout the entire United States. To rely on this evidence of scattered third party use by itself as convincing evidence of no likelihood of confusion, when the marks are very similar, would condemn most restaurant marks to the category of weak marks. The limited evidence of local and scattered third party use is not sufficient to reach that conclusion. In addition, unlike in Broadway Chicken, there is no evidence that "Blue Moon" is used because it refers to the road or street on which the restaurants are located. Obviously, there is much less likelihood of confusion if the record establishes that a term is used in hundreds of cases for restaurants located on a street named "Broadway" as opposed to scattered instances where other restaurants appear to have similar names.

Finally, even if we had doubts about the issue of likelihood of confusion, we must resolve them against applicant.

If there be doubt on the issue of likelihood of confusion, the familiar rule in trademark cases, which this court has consistently applied since its creation in 1929, is that it must be resolved against the newcomer or in favor of the prior user or registrant. The rule is usually applied in inter partes cases but it applies equally to ex parte rejections.

In re Pneumatiques, Caoutchouc Manufacture et Platitudes Kleber-Colombes, 487 F.2d 918, 179 USPQ 729, 729 (CCPA

1973). See also Dixie Restaurants, 41 USPQ at 1535 ("Dixie argues alternatively that the PTO should pass the mark to publication and allow the registrant to oppose the applicant's mark, if it chooses. But it is the duty of the PTO and this court to determine whether there is a likelihood of confusion between two marks"). Here, even if the evidence of third party use raised doubts about whether there was a likelihood of confusion in this case, we must resolve them in the registrant's favor.

Refusal based on Registration  
Nos. 2,068,550 and 2,224,435

We now address the refusal based on the marks BLUE MOON and BLUE MOON and design for wine. With regard to these registrations, we reach the opposite conclusion. As with food items and restaurant services, there is no per se rule that all food and beverages are related. Interstate Brands Corp. v. Celestial Seasonings, Inc., 576 F.2d 926, 198 USPQ 151, 152 (CCPA 1973). See also In re Mars, Inc., 741 F.2d 395, 222 USPQ 938 (Fed. Cir. 1984) (Federal Circuit held that there was no likelihood of confusion between the same mark CANYON for candy bars and fresh citrus fruit). Likewise there is no per se rule that holds that all alcoholic beverages are related. See G.H. Mumm & Cie v. Desnoes & Geddes Ltd., 917 F.2d 1292, 16 USPQ2d

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1635, 1638-39 (Fed. Cir. 1990) (RED STRIPE and design for beer was not confusingly similar to a design of a red stripe for wines and sparkling wines); National Distillers and Chemical Corp. v. William Grant & Sons, Inc., 505 F.2d 719, 184 USPQ 34 (CCPA 1974) (DUET on prepared alcoholic cocktails, some of which contained brandy, and DUVET for French brandy and liqueurs not confusingly similar).

The examining attorney has introduced some evidence that beer and wine are sold by the same party under the same mark. However, as discussed earlier, many of these registrations are for a house mark or registrations containing a wide variety of goods and services such as meats, fish, and vegetables (Registration No. 1,423,066); resort hotel services and movie theater services (Registration No. 1,736,692); and French fries and management services rendered to owners of public facilities (Registration No. 1,553,878). The few remaining registrations are not sufficient to convince us that beer and wine are sufficiently related that the contemporaneous use of the involved marks thereon is likely to cause confusion.

Decision: The Examining Attorney's refusal to register applicant's mark on the ground that it is likely to cause confusion with Registration Nos. 2,068,550 and

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2,224,435 under Section 2(d) of the Trademark Act is reversed. The Examining Attorney's refusal to register applicant's mark on the ground that it is likely to cause confusion with Registration No. 1,770,568 under Section 2(d) of the Trademark Act is affirmed.

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Hanak, Administrative Trademark Judge, concurring in part and dissenting in part:

I concur with the majority's decision to reverse the "refusal to register applicant's mark on the ground that it is likely to cause confusion with Registration Nos. 2,068,550 and 2,224,453 under Section 2(d) of the Trademark Act." However, I respectfully disagree with the conclusion of the majority that the contemporaneous use of applicant's mark for beer and the mark of Registration No. 1,770,568 for restaurant services is likely to cause confusion.

As the majority correctly notes, "the fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [and services] and differences in the marks." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Considering first the marks, it is critical to remember that "the basic principle in determining confusion between marks is that marks must be compared in their entirety and must be considered in connection with the particular goods or services for which they are used." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 750

(Fed. Cir. 1985). Obviously, both marks contain the common term "blue moon." This term is defined as "a very long period of time - usually used in the phrase 'once in a blue moon.'" Webster's Third New International Dictionary Unabridged (1993). The common nature of this term is reflected by the fact that applicant has made of record evidence demonstrating that there are over 100 restaurants in the United States whose names incorporate this term. Applicant's evidence consists of telephone directory listings, Nexis news stories and a Dun & Bradstreet Report.

Given the common nature of the term "blue moon," it is my belief that the design features of applicant's mark for beer and registrant's mark for restaurant services play an important role in enabling consumers to distinguish the two marks. To cut to the quick, registrant's restaurant mark has an extremely distinctive design feature which is decidedly larger than the words BLUE MOON in registrant's mark. The distinctiveness of registrant's moon results from the fact that the moon is wearing sunglasses and has a very mean expression on its "face." Not to belabor the obvious, it is highly incongruous for a moon, which is associated with the night, to be wearing sunglasses.

In stark contrast, applicant's moon is depicted in a far more natural, nocturnal setting above a grove of pine

trees and with stars to its right. The only commonality between applicant's composite mark and registrant's composite mark is that in each case the very different design elements are decidedly larger than are the words BLUE MOON.

The majority correctly notes that marks are not compared on a side-by-side basis and that one must take into account that consumers usually have only a general recollection of marks. Nevertheless, given the very significant differences in design elements of applicant's beer mark and registrant's restaurant mark, I am of the belief that if a consumer were to see one mark in July and were later to see the other mark in August, she would be able to discern that they are simply not the same marks, nor are they even "related" marks.

I turn now to a consideration of the relationship between applicant's goods (beer) and registrant's services (restaurant services). Twenty years ago, the predecessor to our primary reviewing Court set forth a rule of law that "to establish likelihood of confusion a party must show something more than that similar or even identical marks are used for food [or beverage] products and for restaurant services." Jacobs v. International Multifoods Corp., 668 F.2d 1234, 212 USPQ 641, 642 (CCPA 1982) (emphasis added).

In Jacobs, the Court indicated that one way that the "something more" requirement could be satisfied would be if it was established that the prior mark was famous. Jacobs, 212 USPQ at 642, first footnote. The rule of law set forth in Jacobs was reiterated by our primary reviewing Court in Lloyd's Food Products Inc. v. Eli's Inc., 987 F.2d 766, 25 USPQ2d 2027, 2030 (Fed. Cir. 1993) ("So the board's determination ... disregards the requirement that 'a party must show something more than that similar or even identical marks are used for food products and for restaurant services.'").

Of course, fame of the prior mark is not the only means of providing the required "something more." This Board found confusion resulting from the use of MUCKY DUCKY for mustard and THE MUCKY DUCK for restaurant services. In re Mucky Duck Mustard Co., 6 USPQ2d 1467 (TTAB 1988), aff'd as not citable precedent 88-1444 (Fed. Cir. November 14, 1988). The "something more" in Mucky Duck was the "particularly unique and strong nature" of the prior mark THE MUCKY DUCK. Mucky Duck, 6 USPQ2d at 1469. Indeed, in the Mucky Duck case applicant did not argue that there were any third-party registrations or uses of marks even remotely similar to MUCKY DUCK. Mucky Duck, 6 USPQ2d at 1469.

Besides the fame of the prior mark or the highly distinctive character of the prior mark, the required "something more" can be established if the restaurant services and the food and beverage items involve the identical cuisine. This was the case in In re Azteca Restaurant Enterprises, Inc., 50 USPQ2d 1209 (TTAB 1999). The Board found that applicant's mark AZTECA MEXICAN RESTAURANT for restaurant services was confusingly similar to the previously registered mark AZTECA for various Mexican food items. In so doing, the Board emphasized that "applicant's mark itself makes it clear that its restaurant serves Mexican food, and a review of applicant's menu shows that applicant serves a variety of Mexican fare, including tacos, tortillas and salsa (that is, the very items listed in the cited registrations)." Azteca Restaurant, 50 USPQ2d at 1211. Moreover, in Azteca Restaurant there was a second "something more," namely the fact that "applicant [the restaurant] already is marketing for retail sale a food product under the mark AZTECA." Azteca Restaurant, 50 USPQ2d at 1211.

In stark contrast to the foregoing cases, I find nothing in the present case that satisfies the "something more" requirement. There is absolutely no evidence that registrant's mark BLUE MOON and design is famous.

Moreover, registrant's mark does not contain a phrase that is even remotely unique, but rather contains a well-known term which is incorporated into the names of over 100 other restaurants. Finally, unlike the situation in Azteca Restaurant, there is nothing in the record to suggest that registrant's restaurant is a brewpub, or that registrant's restaurant offers its own private label beer.

Indeed, there is nothing in the record to even suggest that registrant's restaurant is known for carrying a large selection of beers.

The majority is of the view that the "something more" requirement is not met simply because some restaurants serve beer, but rather because "the examining attorney has shown that ... restaurants themselves are the source of beer either as a brewpub or as a distributor of their own private label beer." I concur with the majority that the "something more" requirement is not met merely because some restaurants serve beer. Many restaurants serve an extremely wide array of food and beverage items. If the mere fact that many restaurants serve a particular food or beverage item was sufficient to meet the "something more" requirement, then the "something more" requirement would become meaningless. Virtually every food or beverage item could be found in a substantial number of restaurants, and

most food and beverage items could be found in the majority of restaurants. In finding no likelihood of confusion when the identical mark was used for restaurant services and an array of food items, another Court of Appeals summed matters up nicely when it stated that "about the only things they have in common are that they are edible." Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252, 205 USPQ 969, 977 (5<sup>th</sup> Cir. 1980), cert. denied 449 U.S. 899 (1980).

With regard to the majority's focus on brewpubs, it should be noted that applicant has established that there are about 815,000 restaurants in the United States. Applicant has also established that in the United States there are about 1,450 brewpubs, microbreweries and regional specialty breweries. There is no breakdown between the number of brewpubs (which could be considered restaurants) and microbreweries and regional breweries (which could not be considered restaurants). However, even if we were to assume that there were as many as 1,450 brewpubs in the United States, this would represent but a tiny fraction of one percent of all of the restaurants in the United States.

As for the majority's focus on restaurants which distribute their own private label beer, the Examining

Attorney made of record evidence reflecting that only a handful of restaurants (two or three) engage in this practice.

Our primary reviewing Court has made it clear that in deciding whether there exists a likelihood of confusion, "we are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal." Electronic Design & Sales v. Electronic Data Systems, 954 F.2d 713, 21 USPQ 1388, 1391 (Fed. Cir. 1992)(emphasis added).

In short, given the extremely tiny number of brewpubs and restaurants that distribute private label beers, I am of the view that the "something more" requirement set forth in Jacobs and Lloyd's Food Products is simply not met. In the words of the Court in Electronic Design & Sales, brewpubs and restaurants that distribute private label beers constitute "de minimis situations" vis-a-vis the 815,000 restaurants in the United States.

In sum, given the significant dissimilarities in the marks when considered in their entireties, and the fact that the Examining Attorney has simply failed to meet the "something more" requirement for showing a relationship

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between beer and restaurant services, I would respectfully find that there exists no likelihood of confusion between applicant's mark for beer and registrant's mark for restaurant services.