

**THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB**

Mailed:  
April 23, 2010

UNITED STATES PATENT AND TRADEMARK OFFICE

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**Trademark Trial and Appeal Board**

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In re Chubby's, Inc.

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Serial No. 77481121

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Scott T. Kannady of Brown & Kannady, LLC, for Chubby's, Inc.

Tracy L. Fletcher, Trademark Examining Attorney, Law Office 115  
(Tomas V. Vlcek, Managing Attorney).

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Before Hairston, Grendel, and Ritchie, Administrative Trademark  
Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Chubby's, Inc. ("applicant") filed an application to register the mark THE ORIGINAL CHUBBYS MEXICAN FOOD,<sup>1</sup> for services identified as "bar and restaurant services." The Trademark Examining Attorney refused registration of applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles the

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<sup>1</sup> Serial No. 77481121, in International Class 43, filed May 22, 2008, pursuant to Section 1(a) of the Trademark Act, 15 U.S.C. §1051(a), alleging dates of first use and first in commerce on June 1, 1990, and disclaiming the exclusive right to use "THE ORIGINAL" and "MEXICAN FOOD" apart from the mark as shown.

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registered mark EL CHUBBY'S,<sup>2</sup> for "restaurant services featuring Mexican food," that when used on or in connection with applicant's identified services, it is likely to cause confusion or mistake or to deceive.

Upon final refusal of registration, applicant filed a timely appeal. Both applicant and the examining attorney filed briefs. For the reasons discussed herein, the Board affirms the refusal to register.

We base our determination under Section 2(d) 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); see also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. See *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

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<sup>2</sup> Registration No. 3028790, in International Class 43, issued December 13, 2005, based on first use on October 4, 1990, and first use in commerce on November 1, 1990.

the marks"). We discuss each of the *du Pont* factors as to which applicant or the examining attorney submitted argument or evidence.

#### The Services

The application identifies "bar and restaurant services" while the cited registration identifies a narrower field of "restaurants services featuring Mexican food." Nonetheless, the services in the cited registration are encompassed within the broad scope of "bar and restaurant services" identified in the application. Hence, the services in the cited registration are legally identical to those in the application, and we find that this *du Pont* factor strongly favors finding a likelihood of confusion.

#### The Channels of Trade and Classes of Purchasers

Under the third *du Pont* factor, we consider evidence pertaining to the similarity or dissimilarity of the trade channels in which and the purchasers to whom applicant's services and services in the cited registration are or would be marketed. Because there are no limitations or restrictions as to trade channels or classes of purchasers in the respective identifications of services, we presume that the services are marketed in all normal trade channels and to all normal classes of purchasers for such services, regardless of what the evidence might show to be the actual trade channels and purchasers for their services. *Packard Press Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351 (Fed. Cir. 2000); *Octocom Systems Inc.*

*v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990).

Moreover, because registrant's services and applicant's services as identified in the application and the cited registration are legally identical, we presume that the respective services are or will be sold in the same trade channels and to the same classes of purchasers. *Brown Shoe Co. v. Robbins*, 90 USPQ2d 1752 (TTAB 2009); *Genesco Inc. v. Martz*, 66 USPQ2d 1260 (TTAB 2003); *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994). Accordingly, we find that this *du Pont* factor also weighs in favor of finding a likelihood of confusion.

#### Customer Sophistication

Applicant argues that its customers are sophisticated, stating in its brief: "The consumer who is interested in purchasing Mexican food is sophisticated." (Appl's Brief at 6). However, we note that restaurant patrons include ordinary consumers exercising only a normal degree of care. Accordingly, we find that this *du Pont* factors also weighs in favor of finding a likelihood of confusion.

#### The Marks

Preliminarily, we note that the more similar the services at issue, the less similar the marks need to be for the Board to find a likelihood of confusion. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992). We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin*

*Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

In comparing the marks, we are mindful that the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods and/or services offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

The mark in the cited registration consists of the words "EL CHUBBY'S." We take judicial notice of the fact not disputed by the examining attorney or the applicant that the first word "EL" is the Spanish word for "the," which has no trademark significance. We find the mark EL CHUBBY'S to be arbitrary for restaurant services, including those featuring Mexican food. Applicant has not argued to the contrary.

Applicant's mark consists of the words "THE ORIGINAL CHUBBY'S MEXICAN FOOD." Applicant has disclaimed the words "THE ORIGINAL," and "MEXICAN FOOD." While we must not improperly

dissect a mark, certain features may be considered dominant. *In re National Data Corp.*, 224 USPQ 749, 751 (Fed. Cir. 1985) (“[T]here is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties.”). In particular, descriptive or disclaimed matter is generally considered a less dominant portion of a mark. *Id.* We note that the words “THE ORIGINAL” are laudatory, and generally appear to be descriptive of applicant’s service, while “MEXICAN FOOD,” is descriptive of a feature of that service. Accordingly, the arbitrary word “CHUBBYS” is the dominant portion of applicant’s mark.

In sum, although the marks in their entireties appear and sound different, they have similar connotations and commercial impressions, and their dominant features are the same. Accordingly, we find this *du Pont* factor to also favor finding a likelihood of confusion.

#### Conclusion

In summary we have carefully considered all of the evidence and arguments of record relevant to the *du Pont* likelihood of confusion factors. We conclude that with legally identical services moving in the same channels of trade to the same purchasers, and similar marks, there is a likelihood of confusion between applicant’s THE ORIGINAL CHUBBYS MEXICAN FOOD

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mark for "bar and restaurant services" and the registered mark  
EL CHUBBYS for "restaurant services featuring Mexican food."

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