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Mailed:
July 26, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Flowerhorn

Serial No. 77847440

Kelly J. Kubasta of Klemchuk Kubasta LLP for Flowerhorn.

David S. Miller, Trademark Examining Attorney, Law Office
105 (Thomas G. Howell, Managing Attorney).

Before Taylor, Bergsman and Ritchie,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Flowerhorn ("applicant") filed a use-based application
to register the mark HOT N JUICY CRAWFISH and design, shown
below,



for "bar services; restaurant services featuring seafood,
namely, Cajun style crawfish, shrimp, crab, and oysters,"

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in Class 43. Applicant disclaimed the exclusive right to use the word "Crawfish."

The Trademark Examining Attorney refused to register 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 is likely to cause confusion with the mark HOT N JUICY and design, shown below,



for "restaurant and carry out restaurant services," in Class 42.¹ The registration issued under the provisions of Section 2(f) of the Trademark Act.

Our determination of likelihood of confusion 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). 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

¹ Registration No. 1186182, issued January 12, 1982; renewed.

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between the marks and the similarities between the 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 the marks").

A. The similarity or dissimilarity and nature of the services described in the application and registration.

Applicant is seeking to register its mark for "bar services; restaurant services featuring seafood, namely, Cajun style crawfish, shrimp, crab, and oysters." The description of services for the mark in the cited registration are "restaurant and carry out restaurant services." Registrant's restaurant services encompass applicant's restaurant services featuring seafood because the registrant's description of services is not restricted. The issue of likelihood of confusion between the applied for and registered marks must be determined on the basis of the services as they are identified in the involved application and registration. *Paula Payne Products Company v. Johnson Publishing Company, Inc.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Thus, where the services in a cited registration

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are broadly described and there are no limitations in the description of services as to their nature, type, channels of trade or classes of purchasers, it is presumed that the scope of the registration encompasses all services of the nature and type described, that the identified services move in all channels of trade that would be normal for such services, and that the services would be purchased by all potential customers. *In re Elbaum*, 211 USPQ at 640.

Accordingly, the services are in part identical.

With respect to applicant's bar services, the examining attorney submitted numerous use-based third-party registrations incorporating both bar and restaurant services. Third-party registrations which individually cover a number of different services that are based on use in commerce may have some probative value to the extent that they serve to suggest that the listed services are of a type which may emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d at 1785-1786; *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). Thus, bar and restaurant services are related for purposes of our likelihood of confusion analysis.

B. The similarity or dissimilarity of likely-to-continue trade channels and classes of consumers.

As indicated above, because there are no limitations as to channels of trade or classes of purchasers in registrant's description of services, it is presumed that registrant's restaurant services encompass applicant's restaurant services featuring seafood, move in all channels of trade normal for those services, and that they are available to all classes of purchasers for those services. *See In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992).

Moreover, since we consider the restaurant services identical for purposes of the likelihood of confusion analysis, we must presume that the services move in the same channels of trade and are sold to the same classes of consumers. *See Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade"); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the

same channels of trade, and be sold to the same class of purchasers").

- C. The conditions under which and buyers to whom sales are made, i.e. "impulse" vs. careful, sophisticated purchasing.

Applicant's and registrant's descriptions of services do not contain any limitations pertaining to the conditions of sales. Therefore, their respective services must be presumed to encompass inexpensive or moderately-priced restaurant services. *In re Opus One*, 60 USPQ2d 1812, 1817 (TTAB 2001). Moreover, there is no evidence in the record from which we might conclude that ordinary restaurant patrons are necessarily sophisticated and careful in making their purchasing decisions such that we consider them to be exercising a high degree of consumer care. Accordingly, this *du Pont* likelihood of confusion factor does not weigh in applicant's favor in this case.

- D. The similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. In a particular case,

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any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1988). In comparing the marks, we are mindful, where as here the services are in part identical and otherwise related, 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. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007).

Moreover, in comparing the marks, 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 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

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recollection of the average customer, who retains a general rather than a 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). In this case, the average consumer of applicant's and registrant's restaurant services are ordinary consumers.

Applicant's mark HOT N JUICY and design is similar to registrant's mark HOT N JUICY CRAWFISH and design to the extent that both marks share the term "Hot N Juicy." In analyzing the similarity or dissimilarity of the marks, it is a well-established principle 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 the ultimate conclusion rests on a consideration of the marks in their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

While the design elements in both marks are aesthetically pleasing, they are not sufficient to distinguish the marks because consumers will use the word portions of the marks to request or refer to the respective restaurant services. *In re Dakin's Miniatures, Inc.*, 59

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USPQ2d 1593, 1596 (TTAB 1999) ("In the case of marks which consist of words and a design, the words are normally accorded greater weight because they would be used by purchasers to request the goods"); *In re Appetito Provisions Co.*, 2 USPQ2d 1553, 1554 (TTAB 1987). Thus, the words HOT N JUICY and HOT N JUICY CRAWFISH are the dominant elements of the marks.

We find that the term HOT N JUICY is the dominant element of applicant's mark HOT N JUICY CRAWFISH because the word "Crawfish" is descriptive when it is used in connection with restaurant services featuring seafood, namely, Cajun style crawfish. When used in connection with seafood restaurant services, "crawfish" identifies the specialty of the house. See the discussion below. In this regard, we note that applicant disclaimed the exclusive right to use the word "Crawfish." Therefore, the term "Hot N Juicy" is accorded more weight than the word "Crawfish" in our comparison of the marks. *In re National Data Corp.*, 224 USPQ at 751.

The significance of the term "Hot N Juicy" as the dominant element of applicant's mark is further reinforced by its location as the first part of the mark. See *Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark

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which is most likely to be impressed upon the mind of a purchaser and remembered"); see also *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin*, 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 America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers must first notice the identical lead word).

Furthermore, consumers may abbreviate applicant's mark HOT N JUICY CRAWFISH to simply HOT N JUICY. This is supported by the excerpts from the articles attached as exhibits to the Laina Vo affidavit attached to applicant's October 7, 2010 Response:

1. Nightline's Daily Line: Where We Fit (June 30, 2010) (abcnews.com)

Cynthia McFadden: Why I'm Looking for America's Best Unheralded Chefs

A few weeks ago I discovered a place where they cook up some of the best shrimp and king crab legs I've ever had - it's a little joint in a strip mall called "Hot N Juicy Crawfish" ... in the desert outside of Vegas!

* * *

I find myself daydreaming. What I want is one of those steaming plates of

crawfish with the Hot N Juicy special sauce that I had that afternoon at the Spring Mountain Plaza strip mall.

2. The 944 Magazine (date illegible) (944.com)

Utensils Not Included

For those looking to escape truffles and foie gras, Hot N Juicy Crawfish located on Spring Mountain Road, offers diners a thoroughly counterculture experience. ...

* * *

Customize the spiciness. The Hot N Juicy Special features the house's signature seasonings, which offers a heat level similar to a three-alarm fire. ...

* * *

Hot N Juicy, while off the beaten path, is a known celebrity hangout, so you never know who you will be cracking crab alongside.

3. Las Vegas City Life (July 6, 2007) (lasvegascitylife.com)

Suck and pinch

Crawfish and other rare delicacies served up Hot N Juicy

I'd been driving past a new restaurant called Hot N Juicy Crawfish on Spring Mountain Road for the past several weeks and hadn't had the chance to check it out. ...

* * *

As the name suggests, the specialty at Hot N Juicy Crawfish is, in fact, crawfish. ...

* * *

But Hot N Juicy is a straight up Louisiana style seafood restaurant. ...

* * *

... and Hot N Juicy offers large rolls of paper towels at every table to help clean up.

* * *

We also had a pound of blue crabs, which translated into three medium-sized females. Having grown up pulling blues out of the waters of the Jersey shore, I absolutely loved them (Hot N Juicy imports theirs from Texas). ...

* * *

Between blue crabs and crawfish, Hot N Juicy is offering a pair of delicacies incredibly difficult to find locally.

4. Las Vegas Weekly (July 10, 2008)
(lasvegasweekly.com)

Succulent Carnage

You'll get messy, but you'll never forget a meal at Hot n' Juicy Crawfish

Hot n' Juicy Crawfish. Just the name of the joint made me want to go in the first time I saw it. ...

* * *

We opted for a pound with the Hot 'n Juicy special seasoning ...

* * *

The Hot 'n Juicy special seasoning has bodacious, bright flavor where you can actually taste the elements of all the seasonings come in together.

5. Las Vegas Review Journal (February 29, 2008) (lvrj.com)

Restaurant Review: Hot n Juicy
Crawfish

Down and Dirty: Hot n Juicy Crawfish offers delicious seafood if you don't mind the mess.

The day after we had dinner at Hot n Juicy Crawfish, my friend walked up to my desk and said, with some astonishment, "My hands still smell like garlic!" Yeah, mine too ...

* * *

And that, my friends, pretty much sums up the Hot n Juicy experience. ...

* * *

You choose the seasoning style (Juicy Cajun, garlic butter, lemon pepper or the Hot n Juicy Special, which is a combo of the three).

"[U]sers of language have a universal habit of shortening full names - from haste or laziness or just economy of words. Examples are: automobile to auto; telephone to phone; necktie to tie; gasoline service station to gas station." *In re Abcor Development Corp.*,

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588 F.2d 511, 200 USPQ 215, 219 (CCPA 1978) (J. Rich, concurring).

[C]ompanies are frequently called by shortened names, such as Penney's for J.C. Penney's, Sears for Sears and Roebuck (even before it officially changed its name to Sears alone), Ward's for Montgomery Ward's, and Bloomies for Bloomingdales.

Marshall Field & Co. v. Mrs. Fields Cookies, 25 USPQ2d 1321, 1333 (TTAB 1992). Thus, HOT N JUICY CRAWFISH engenders the same commercial impression as HOT N JUICY.

We also note that applicant's mark contains the entire registered mark (*i.e.*, HOT N JUICY). Likelihood of confusion is often found where the entirety of one mark is incorporated within another. *In re Denisi*, 225 USPQ 624, 626 (TTAB 1985) ("the fact that [applicant's] mark herein [PERRY'S PIZZA] incorporates the descriptive term 'pizza' as part of the mark presented for registration does not obviate the likelihood of confusion with the mark of the cited registration [PERRY'S]"); *Johnson Publishing Co. v. International Development Ltd.*, 221 USPQ 155, 156 (TTAB 1982) (EBONY for cosmetics and EBONY DRUM for hairdressing and conditioner); *In re South Bend Toy Manufacturing Company, Inc.*, 218 USPQ 479, 480 (TTAB 1983) (LIL' LADY BUGGY for toy doll carriages is likely to cause confusion with LITTLE LADY for doll clothing because "the word

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'buggy' is clearly descriptive of applicant's doll carriage products" and "would fail to alter the perceived identity of the dominant and more arbitrary 'LITTLE LADY' and 'LIL' LADY' elements of these marks").

We are not persuaded that the addition of the word "Crawfish" to applicant's mark is sufficient to differentiate applicant's mark from the registered mark in any meaningful way. As indicated above, the word "Crawfish" is descriptive when used in connection with applicant's restaurant services specializing in crawfish thereby making the term "Hot N Juicy" that part of the mark on which consumers will focus their attention.

In view of the foregoing, we find that applicant's mark HOT N JUICY CRAWFISH and design is similar to registrant's mark HOT N JUICY and design in appearance, sound, meaning and commercial impression.

E. Instances of actual confusion.

Applicant argues that it is unaware of any reported instances of confusion with the mark in the cited registration even though applicant has been using its mark since 2007 and the registrant has been using its mark since 1977. Applicant's assertion of no actual confusion between the marks is entitled to little weight. *In re Majestic Distilling Co.*, 65 USPQ2d at 1205 ("uncorroborated

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statements of no known instances of actual confusion are of little evidentiary value"); see also *In re Bissett-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of applicant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). A showing of actual confusion would of course be highly probative, if not conclusive, of a likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight, *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965), especially in an *ex parte* context. In any event, the record is devoid of probative evidence relating to the extent of use of registrant's and applicant's marks and, thus, whether there have been meaningful opportunities for instances of actual confusion to have occurred in the marketplace. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000); *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). Accordingly, the *du Pont* factors regarding the length of time during and conditions under which there has been contemporaneous use without evidence of actual confusion are neutral.

F. Balancing the *du Pont* factors.

In view of the facts that the marks are similar, the services are in part identical and otherwise related, the services move in the same channels of trade and are available to the same classes of consumers, we find that applicant's registration of the mark HOT N JUICY CRAWFISH and design for bar services and restaurant services featuring seafood, namely, Cajun style crawfish, shrimp, crab, and oysters is likely to cause confusion with the mark HOT N JUICY and design for restaurant and carry out restaurant services.

Decision: The refusal to register is affirmed.