

**This Opinion is Not a
Precedent of the TTAB**

Mailed: April 27, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Fricker's Progressive Concepts, Inc.

v.

Samar Haddad

—
Opposition No. 91207770
—

B. Joseph Schaeff of Dinsmore & Shohl LLP,
for Fricker's Progressive Concepts, Inc.

Samar Haddad, pro se.

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Before Seeherman, Greenbaum and Pologeorgis,
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Samar Haddad ("Applicant") seeks registration on the Principal Register of the mark FLIP'N CHICKEN (in standard characters, CHICKEN disclaimed) for "restaurant services, restaurants featuring home delivery, and take-out restaurant services" in International Class 43.¹

¹ Application Serial No. 85453782 was filed on October 22, 2011, based upon Applicant's claim of first use anywhere and use in commerce since at least as early as July 15, 2011.

Fricker's Progressive Concepts, Inc. ("Opposer") has opposed registration of Applicant's mark on the ground that as used in connection with Applicant's services, the mark so resembles Opposer's twelve previously used and registered marks, for FRICKIN' for "restaurant services" and "chicken wings; prepared food for consumption on and off the premises, namely, restaurant menu items in the nature of entrees, side dishes and appetizers consisting primarily of poultry and meat ... [and] chicken sandwiches," FRICKIN' CHICKEN for "chicken sandwiches for consumption on or off the premises," FRICKER'S for "restaurant services," and variations of these marks, as to be likely to cause confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). By her answer, Applicant admitted Opposer's ownership of Opposer's pleaded registrations, and Opposer's priority of use based on those registrations,² and denied the remaining salient allegations.

I. Record

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of application Serial No. 85453782. Opposer attached to its notice of opposition printouts from the USPTO TSDR electronic database consisting of copies of its twelve pleaded registrations showing their current status and title. In addition, pursuant to the parties' stipulation to accept testimony by declaration,³ Opposer submitted the Testimonial Affidavit of Louis J. Schirack, Opposer's Chief Financial Officer, with, *inter alia*, copies of Opposer's and Applicant's

² 6 TTABVUE 3, ¶ 3.

³ 16 TTABVUE 2; approved by the Board on April 20, 2015 (17 TTABVUE).

menus,⁴ and printouts from THE ONLINE SLANG DICTIONARY and URBAN DICTIONARY displaying entries for the words “frick,” “fricking,” “flip,” and “flipping.”⁵ Opposer also filed a Notice of Reliance on printouts of menus from Applicant’s web site.⁶

On October 18, 2015, the Board granted Opposer’s motion to strike Applicant’s testimonial affidavit and supporting evidence because it was untimely, having been submitted two weeks after Applicant’s testimony period closed.⁷ Applicant therefore has no testimony or evidence of record. Nonetheless, as plaintiff in this proceeding, Opposer must prove its standing and its claim by a preponderance of the evidence. *Cerveceria Centroamericana S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989).

II. The Parties

Opposer owns, operates, and franchises the FRICKER’S restaurant chain, which Opposer established in 1985.⁸ Opposer uses the marks FRICKIN’, FRICKIN’ CHICKEN, and FRICKER’S, and variations thereof, in connection with restaurant services and a variety of restaurant menu items and prepared foods available for in-restaurant dining and carryout.⁹ Opposer’s menu is varied, but Opposer’s signature dishes feature chicken, particularly chicken wings.¹⁰ Opposer derived its various

⁴ 15 TTABVUE 8, 11, 45.

⁵ 15 TTABVUE 31, 38.

⁶ 15 TTABVUE 52.

⁷ 26 TTABVUE.

⁸ 15 TTABVUE 2, ¶¶ 3-4.

⁹ 15 TTABVUE 3, ¶ 5.

¹⁰ 15 TTABVUE 2, ¶ 3.

FRICKER'S, FRICKIN', and FRICKIN' CHICKEN marks from the surnames of its founders, Raymond and Robert Frick.¹¹

The parties do not dispute that Applicant has a restaurant that features chicken.¹²

III. Standing/Priority

Because Opposer's twelve pleaded registrations are of record, are valid and subsisting, and owned by Opposer, Opposer's standing to oppose registration of Applicant's mark is established. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). Further, its priority is not in issue as to the goods and services listed in the registrations. *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). As noted above, in her answer Applicant admitted Opposer's standing and priority.

We turn now to the issue of likelihood of confusion under Section 2(d).

IV. Likelihood of Confusion

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). Opposer must establish that there is a likelihood of confusion by a

¹¹ 15 TTABVUE 4-5, ¶ 8.

¹² 27 TTABVUE 12, and 28 TTABVUE 9.

preponderance of the evidence. In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). These factors, and the other relevant *du Pont* factors in the proceeding now before us, are discussed below.

We focus on Opposer's registration for the mark FRICKIN' (in typed form) for "restaurant services"¹³ because we deem the mark and the services to be the most similar to Applicant's mark FLIP'N CHICKEN for her identified services. If confusion is likely between Applicant's mark and this registration, that will be sufficient to sustain the opposition. However, if we do not find a likelihood of confusion with that mark and its associated services, then there would be no likelihood of confusion with the marks in the other pleaded registrations. *See In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

A. Comparison of the Services/Channels of Trade/Conditions of Sale

We first consider the services, channels of trade, and conditions of sale. We must make our determinations under these factors based on the services as they are identified in the registration and application. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62

¹³ Registration No. 2156001 issued on May 12, 1998; renewed. Prior to November 2, 2003, "standard character" drawings were known as "typed" drawings. A typed mark is the legal equivalent of a standard character mark. TMEP § 807.03(i) (October 2015).

USPQ2d 1001 (Fed. Cir. 2002). In this case, the “restaurant services” identified in the registration are identical to the “restaurant services” identified in the application. In addition, the broadly worded “restaurant services” identified in the registration incorporate, and therefore are legally identical to, the “restaurants featuring home delivery, and take-out restaurant services” identified in the application. Further, because the services are legally identical, and as identified are not limited to any specific channels of trade, we must presume that the trade channels and classes of purchasers are the same. *In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (Board “was entitled to rely on this legal presumption in determining likelihood of confusion.”). *See Stone Lion*, 110 USPQ2d at 1161-1162; *Hewlett-Packard*, 62 USPQ2d at 1005; *Octocom*, 16 USPQ2d at 1787.

Applicant argues that the actual services offered by Applicant and Opposer differ because Applicant “Applicant only sells a limited chicken-based menu in a Fast Casual format, while the Opposer sells a multitude of menu items that are comprised of various protein options for multiple courses in a Casual format[,]” and that consumers can “distinguish between FRICKER’S varied menu and full-service format and that of FLIP’N CHICKEN with counter service and quick transaction format.”¹⁴ However, Applicant’s attempts to distinguish her classes of purchasers and channels of trade from Opposer’s are, in light of the above presumptions, unpersuasive, i.e., we must consider the services as they are identified in the registration and application. *See Stone Lion*, 110 USPQ2d at 1161-1162. Moreover, given that Applicant is seeking

¹⁴ 28 TTABVUE 9.

a geographically unrestricted registration, and Registrant owns a nationwide registration which gives Registrant presumptive exclusive rights to nationwide use in connection with restaurant services under Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), Applicant's additional argument that the parties serve different "geographical location[s]"¹⁵ is unavailing. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 393 (Fed. Cir. 1983) ("Applicant seeks a geographically unrestricted registration under which it might expand throughout the United States. Under these facts, it is not proper, as the TTAB found, to limit our consideration to the likelihood of confusion in the areas presently occupied by the parties. Section 7(b) of the Trademark Act of 1946, 15 U.S.C. §1057(b), creates a presumption that the registrant has the exclusive right to use its mark throughout the United States. Therefore, the geographical distance between the present locations of the respective businesses of the two parties has little relevance in this case.").

With regard to the "conditions under which buyers and to whom sales are made, i.e., 'impulse' vs. careful, sophisticated purchasing", *du Pont*, 177 USPQ at 567, Applicant argues that "one would initially need to make a deliberate choice between walking through the doors of or calling into a brick and mortar restaurant bearing either the name FRICKER'S or that of FLIP'N CHICKEN[,]"¹⁶ and that

Applicant offers counter service in a Fast Casual format with a very narrow menu served as a single choice of protein. Applicant's goods and services are offered to customers who want to be sold one main thing: Chicken. Opposer offers a full service experience in a Casual format with

¹⁵ 28 TTABVUE 10.

¹⁶ 28 TTABVUE 9-10.

a wider variety of proteins and courses. This distinction would require customers to exercise a higher degree of care when making a selection.¹⁷

Applicant's argument is not persuasive. The argument conflates purported differences in menus and customer ordering experiences with purchaser sophistication. Because we are bound by the descriptions of services in the application and registration, neither of which is restricted as to price or to sophisticated consumers, we must treat the services as including inexpensive and well as high-end restaurants, and therefore presume that purchasers for these services include ordinary members of the general public who may decide to dine in, or order carryout from, an inexpensive restaurant on impulse. *See Stone Lion*, 110 USPQ2d at 1162-1163. Indeed, Applicant's description of both Opposer's and her restaurants suggests that the decision to patronize either restaurant may be made on impulse, or at least without great deliberation. Moreover, any differences in the style of the restaurants could be attributed to a business decision, rather than to a difference in source of the restaurants, e.g., consumers familiar with Opposer's restaurants might view the FLIP'N CHICKEN restaurants as one of Opposer's enterprises that focuses specifically on chicken.

In view of the foregoing, we find that the services, channels of trade and classes of purchasers, and conditions of sale favor a finding of likelihood of confusion.

¹⁷ 28 TTABVUE 6-7.

B. Comparison of the Marks

We turn to the *du Pont* factor of the similarities and dissimilarities between Opposer's mark FRICKIN' and Applicant's mark FLIP'N CHICKEN. We analyze "the marks in their entireties as to appearance, sound, connotation and commercial impression." *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *du Pont*, 177 USPQ at 567). See also *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). In comparing the marks, we are mindful that where, as here, the services are legally identical, 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. *Coach Servs.*, 101 USPQ2d at 1721; *Viterra*, 101 USPQ2d at 1912 (citing *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992)). Further, "[t]he proper test is not a side-by-side comparison of the marks, but instead 'whether the marks are sufficiently similar in terms of their commercial impression' such that persons who encounter the marks would be likely to assume a connection between the parties." *Coach Servs.*, 101 USPQ2d at 1721 (quoting *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007)). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Binion*, 93 USPQ2d 1531 (TTAB 2009); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Applicant argues that the differences in the marks in sound and appearance are sufficient to distinguish them, and that the marks create different commercial impressions because “FLIP’N” “suggest[s] food prepared by flipping[,]”¹⁸ while “FRICKIN’” has a “secondary meaning [] of the ‘F’ word and the founders’ adoption of this meaning for their ‘amusing and memorable collection of marks.’”¹⁹

In this case, we find that FLIP’N is the dominant and most significant feature of Applicant’s mark FLIP’N CHICKEN. We reach this conclusion not only because FLIP’N appears in the initial position in Applicant’s mark (*see Palm Bay*, 73 USPQ2d at 1692 (“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)), but also because it has stronger source-identifying significance than the other element of Applicant’s mark. “Chicken” is highly descriptive of Applicant’s restaurant services, as it is the type of food featured in her restaurant, and appropriately has been disclaimed. Descriptive or generic matter typically is less significant or less dominant when comparing marks. *See Cunningham*, 55 USPQ2d at 1846 (quoting *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985) (the “descriptive component of a mark may be given little weight in reaching a conclusion on likelihood of confusion”)). Thus, while we recognize that Applicant’s mark FLIP’N CHICKEN includes the term CHICKEN, and that this term affects the appearance and sound of the mark, we find that consumers are not likely to view this term as a

¹⁸ 28 TTABVUE 5.

¹⁹ 28 TTABVUE 8, citing Opposer’s brief, 27 TTABVUE 11.

source-distinguishing element, but rather as describing the type of food served in Applicant's restaurants. *See Stone Lion*, 110 USPQ2d at 1161 (nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, so long as the ultimate conclusion rests on a consideration of the marks in their entirety).

Although they are not identical, Opposer's mark FRICKIN' and the dominant portion of Applicant's mark FLIP'N CHICKEN share striking similarities: FRICKIN' and FLIP'N look similar and share the same cadence. Both words consist of two syllables starting with the letter "F" and end with the letter "N" either preceded by or followed by an apostrophe as a substitute for the suffix "ING."

As for meaning, Opposer's witness Mr. Schirack submitted printouts from THE ONLINE SLANG DICTIONARY and URBAN DICTIONARY as evidence that the words "frick," "fricking," "flip," and "flipping" are "socially acceptable euphemism[s] for the 'F' word."²⁰ Specifically, THE ONLINE SLANG DICTIONARY defines "frick" as "fuck," and under the heading "Slang terms with the same root words" "Other terms relating to 'frick'" lists "fucking" as a definition of "fricking."²¹ Likewise, URBAN DICTIONARY lists "Frick[:] euphemism for 'fuck' 'frick you, a-hole!'" as the "Top Definition," with several similar entries (e.g., "Another word for 'fuck' and such," and "an alternative to 'fuck' that is less offensive but often still satisfying. Used in casual conversation rather than genuine anger. It is less versatile than the real f-word, and is not used to refer to sex.

²⁰ 15 TTABVUE 5, ¶¶ 9-10.

²¹ 15 TTABVUE 32-33.

[For example] What the frick was that? I'm tired of this frickin' homework.”), and lists “fuck,” “fricking,” and “fucking” among the “20 Words related to Frick.”²² THE ONLINE SLANG DICTIONARY also defines “flip” as “fuck,”²³ and URBAN DICTIONARY lists “Flipping[:] A mild curse word. Often used by the British, and West Indians. That flipping double decker cut me off!” as the “Top Definition,” and, *inter alia*, “flipping[:] A mild alternative for the word ‘fuck.’ Often used by the British. A sensored [sic] word for ‘fucking,’ [for example] flipping hell mate, why are you taking so long.”²⁴

Applicant questions the reliability of this evidence because the dictionaries are crowdsourced and therefore “of unverifiable origin.”²⁵ Although we have recognized the limitations of evidence from URBAN DICTIONARY, *see In re Star Belly Stitcher, Inc.*, 107 USPQ2d 2059, 2062 n.3 (TTAB 2013), we take judicial notice of the definitions of “fricking” and “fucking” from THE AMERICAN SLANG DICTIONARY, which defines “fricking” as “lousy; damn (A euphemism for fucking.)” and “flipping” as “damnable. (Euphemistic for fucking. Usually objectionable).”²⁶ The definitions from THE AMERICAN SLANG DICTIONARY confirm the definitions made of record by Opposer.

²² 15 TTABVUE 34-37.

²³ 15 TTBVUE 40.

²⁴ 15 TTABVUE 41-44.

²⁵ 28 TTTABVUE 8.

²⁶ AMERICAN SLANG DICTIONARY. The McGraw-Hill Companies, Inc. (2006). The Board may take judicial notice of dictionary definitions. *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

We note Applicant's argument that Opposer's mark FRICKIN' is "descriptive."²⁷ This argument would be an impermissible collateral attack absent a counterclaim, and therefore we have considered it only in the context of general conceptual weakness. *See Fort James Operating Co. v. Royal Paper Converting Inc.*, 83 USPQ2d 1624, 1626 n.1 (TTAB 2007).²⁸ There is no evidence to show that Opposer's mark has any meaning other than as a euphemism for the word "fucking," as discussed above. For example, there is no evidence of third-party use of the word FRICKIN' in connection with similar services. Indeed there is no evidence of third-party use of the word at all.

FRICKIN' is a play on the surname of Opposer's founders²⁹; it is memorable because of its euphemistic meaning. While FLIP'N might "suggest food prepared by flipping,"³⁰ FLIP'N also shares the same euphemistic meaning as FRICKIN'. Applicant's mark FLIP'N CHICKEN contains no other matter by which to distinguish it from Opposer's mark FRICKIN', other than the highly descriptive term CHICKEN. Because FRICKIN' creates such a strong commercial impression, and because FLIP'N and FRICKIN' are so similar in appearance and cadence, and both words are euphemisms for the word "fucking," when viewed in their entirety we find that

²⁷ 28 TTABVUE 5.

²⁸ We also note that because the pleaded registration is over five years old, mere descriptiveness is not available as a ground for cancellation. Section 14 of the Trademark Act, 15 U.S.C. § 1064.

²⁹ 15 TTABVUE 4, ¶ 8.

³⁰ 28 TTABVUE 5.

Opposer's mark FRICKIN' and Applicant's mark FLIP'N CHICKEN have highly similar commercial impressions.

Applicant's contention that Applicant and Opposer actually may display their marks with their "corresponding" and "distinctive" logos does not affect this analysis.³¹ Applicant has applied for a mark in standard characters, and may display the mark in any lettering style, and with or without any design. *Cf. Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1256 (Fed. Cir. 2011) (noting that standard character marks are not limited to any particular presentation); *Vornado, Inc. v. Breuer Elec. Mfg. Co.*, 390 F.2d 724, 156 USPQ 340, 342 (CCPA 1968) (noting that "the display of a mark in a particular style is of no material significance since the display may be changed at any time as may be dictated by the fancy of the applicant or the owner of the mark"); *Frances Denney v. Elizabeth Arden Sales Corp.*, 263 F.2d 347, 120 USPQ 480, 481 (CCPA 1959) ("In determining the applicant's right to registration, only the mark as set forth in the application may be considered; whether or not the mark is used with an associated house mark is not controlling.").

V. Conclusion

We conclude, after considering all evidence and arguments bearing on the relevant *du Pont* factors, including the evidence and arguments that we have not specifically discussed herein, that Applicant's mark FLIP'N CHICKEN, as used in connection with the services identified in the application, so resembles Opposer's registered

³¹ 28 TTABVUE 8.

mark FRICKIN' (Reg. No. 2156001) as used on the services identified in the registration, as to be likely to cause confusion, mistake, or deception. In view thereof, Opposer has proved its claim under Section 2(d) of the Trademark Act.

Decision: The opposition is sustained and registration to Applicant is refused.