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Subject: U.S. Trademark Application Serial No. 90667527 - CHICK-A-BOOM - Examiner Brief
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Attachments

United States Patent and Trademark Office (USPTO)

U.S. Application Serial No. 90667527

Mark: CHICK-A-BOOM

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Reference/Docket No. N/A

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EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant, Chick-A-Boom LLC, appeals the trademark examining attorney's refusal to register the mark **CHICK-A-BOOM** in standard characters for "Restaurant services", on the Principal Register. Registration is refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), based on a likelihood of confusion with the mark **CHK-A BOOM** in U.S. Registration No. 6469790 in standard characters for "Providing of food and drink via online ordering, takeout services, and delivery services" in Class 43, and with the mark **CHICKABOOM** in U.S. Registration No. 3024366 in standard characters for "Processed meat, namely, chicken" in Class 29.

ISSUE

Whether Applicant's proposed mark is likely to be confused with the registered marks so as to preclude registration under Section 2(d) of the Trademark Act.

STATEMENTS OF FACTS

On April 23, 2021, applicant Chick-A-Boom LLC applied for registration on the Principal Register for the mark **CHICK-A-BOOM** in standard characters for, "Restaurant services" in Class 043. In an Office Action dated December 30, 2021, the Office refused registration under Section 2(d) of the Trademark Act, on the grounds that the applied-for mark is likely to cause confusion with the mark **CHK-A BOOM** in U.S. Registration No. 6469790 in standard characters for "Providing of food and drink via online ordering, takeout services, and delivery services" in Class 43, and the with the mark **CHICKABOOM** in U.S. Registration No. 3024366 in standard characters for "Processed meat, namely, chicken" in Class 29.

Following Applicant's response on February 18, 2022, the Office Action issued a Final action on March 31, 2022, wherein the Section 2(d) refusals were maintained and made final. On September 30, 2022, Applicant requested reconsideration of the refusals. The Office denied applicant's request for reconsideration on December 29, 2022. On January 4, 2023, Applicant filed for appeal and submitted its brief on March 5, 2023, arguing applicant's mark is not likely to cause confusion with the Registration No. 3024366 because similar marks are in use in the class on similar goods without confusion, Applicant's mark differs in appearance, sound and creates a distinct commercial impression, and confusion is unlikely due to the applied-for and registered goods and services varying greatly.

DISCUSSION

THE MARK "CHICK-A-BOOM" IS SO SIMILAR IN SOUND AND MEANING SO AS TO CREATE A LIKELIHOOD OF CONFUSION WITH THE REGISTERED MARKS "CHK-A BOOM" AND "CHICKABOOM" FOR RELATED GOODS AND SERVICES, AND, ACCORDINGLY, THE REFUSAL OF REGISTRATION UNDER SECTION 2(d) OF THE TRADEMARK ACT SHOULD BE AFFIRMED.

Trademark Act Section 2(d) bars registration of an applied-for mark that is so similar to a registered mark that it is likely consumers would be confused, mistaken, or deceived as to the commercial source of the goods and/or services of the parties. *See* 15 U.S.C. §1052(d). Likelihood of confusion is determined on a case-by-case basis by applying the factors set forth in *In re E. I. du Pont de Nemours*

& Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973) (called the “*du Pont* factors”). *In re i.am.symbolic, llc*, 866 F.3d 1315, 1322, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017). Any evidence of record related to those factors need be considered; however, “not all of the *DuPont* factors are relevant or of similar weight in every case.” *In re Guild Mortg. Co.*, 912 F.3d 1376, 1379, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019) (quoting *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1406, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997)).

Although not all *du Pont* factors may be relevant, there are generally two key considerations in any likelihood of confusion analysis: (1) the similarities between the compared marks and (2) the relatedness of the compared goods and/or services. *See In re i.am.symbolic, llc*, 866 F.3d at 1322, 123 USPQ2d at 1747 (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 USPQ 24, 29 (C.C.P.A. 1976) (“The fundamental inquiry mandated by [Section] 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.”); TMEP §1207.01.

Similarity of the Marks

Marks are compared in their entirety for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)); TMEP §1207.01(b)-(b)(v). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d per curiam*, 777 F. App’x 516, 2019 BL 343921 (Fed. Cir. 2019); TMEP §1207.01(b).

Here, applicant’s mark, **CHICK-A-BOOM**, is confusingly similar to the registered marks, **CHK-A BOOM** and **CHICKABOOM**, all in standard characters. As discussed below, the term **CHICK-A-BOOM** is at least highly similar in sound and identical to the terms **CHK-A BOOM** and **CHICKABOOM** in the registered marks. Moreover, this similar wording conveys the same meaning, that is, goods and services in connection with chicken with an explosive flavor.

Differences in appearance and structure between Applicant's mark and the registered marks do not

obviate the similarities between the marks. The marks are essentially phonetic equivalents and thus sound similar. Similarity in sound alone may be sufficient to support a finding that the compared marks are confusingly similar. *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007) (citing *Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 732, 156 USPQ 523, 526 (C.C.P.A. 1968)); TMEP §1207.01(b)(iv). In the present case, each mark consists of the term **CHICK** (or the phonetic equivalent of **CHK**), followed by the letter **A**, and **BOOM**.

Additionally, punctuation is generally not sufficient to alter the connotation and overall commercial impression of otherwise confusingly similar marks and, as such, is not sufficient to distinguish marks. *See, e.g., In re St. Helena Hosp.*, 774 F.3d 747, 750-51, 113 USPQ2d 1082, 1084-85 (Fed. Cir. 2014) (finding punctuation in registrant's mark, TAKE 10!, did not alter the pronunciation or distinguish it in any significant way from applicant's mark, TAKETEN); *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016) (finding "the hyphen in [a]pplicant's mark MINI-MELTS [did] not distinguish it from [o]pposer's mark [MINI MELTS]"); *Mag Instrument Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1712 (TTAB 2010) (citing *Goodyear Tire & Rubber Co. v. Dayco Corp.*, 201 USPQ 485, 488 n.1 (TTAB 1978)) (finding hyphen did not distinguish opposer's mark, MAG-NUM STAR, from applicant's mark, MAGNUM MAXFIRE).

Thus, Applicant's mark and the registered marks is highly similar is sound, appearance, and overall commercial impression.

Applicant has submitted 15 third-party registrations for marks including the component **CHICK** (or the phonetic equivalent **CHK**) to show that this portion of the mark in the cited registration is inherently or conceptually weak and should not be afforded a broad scope of protection. *See Jack Wolfskin Ausrüstung Fur Draussen GmbH v. New Millennium Sports, SLU*, 797 F.3d 1363, 1374, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1339, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015); *Sabhani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *22 (TTAB 2021) (quoting *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017)); TMEP §1207.01(d)(iii).

A large number of active use-based third-party registrations including the same or similar term or mark segment for the same or similar goods and/or services may be relevant to prove, in the same way dictionaries are used, that a term or mark segment has "a normally understood and well-recognized

descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak” and entitled to only a narrow scope of protection. *Jack Wolfskin Ausrüstung Fur Draussen GmbH v. New Millennium Sports, SLU*, 797 F.3d at 1374, 116 USPQ2d at 1136 (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d at 1339, 115 USPQ2d at 1675); *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *22 (citing *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d at 1057). Registrations that are not based on use in commerce, such as those registered under Trademark Act Section 66(a) or solely under Trademark Act Section 44, and for which no Section 8 or 71 affidavits or declarations of continuing use have been filed, have “very little, if any, persuasive value.” TMEP §1207.01(d)(iii) (citing *In re Info. Builders Inc.*, 2020 USPQ2d 10444, at *6 n.19 (TTAB 2020)).

Of the third-party registrations applicant submitted, only 14 appear to be active and based on use in commerce. Evidence comprising only a small number of active use-based third-party registrations including the same or similar component is generally entitled to little weight in determining the strength of a mark. See *In re i.am.symbolic, llc*, 866 F.3d 1315, 1328-29, 123 USPQ2d 1744, 1751-52 (Fed. Cir. 2017); *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269 (C.C.P.A. 1973). That is especially so where, as here, the marks in those registrations are not as similar in format or commercial impression as the registrants’ and applicant’s marks are to each other. See *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 675, 223 USPQ 1281, 1284-85 (Fed. Cir. 1984) (noting none of the five registrations of marks shown to be in use had the same format or conveyed a commercial impression similar to the applicant’s and cited registered mark). These few registrations are “not evidence of what happens in the market place or that customers are familiar with them.” *Sock It To Me, Inc. v. Aiping Fan*, 2020 USPQ2d 10611, at *9 (TTAB 2020) (quoting *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d at 1406, 177 USPQ at 269). Thus, the few use-based third-party registrations submitted by applicant are insufficient to establish that the mark or portion of the mark is inherently or conceptually weak. As such, Applicant's assertion that **CHICK** is merely diluted is unpersuasive, as here the marks are compared in their entirety. See *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014).

Applicant asserts that the lack of the fame of the registered mark, **CHK-A BOOM** (Registration No. 6469790) would not indicate any inherent risk of confusion. Specifically, applicant indicates the cited mark operates an Instagram® account with 127 followers, whereas applicant's Instagram® account has

30,000 followers. However, the purported lack of fame of the cited mark, as argued by applicant, is not significant to the issue of likelihood of confusion in ex parte examination. *See In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009) (citing *In re Thomas*, 79 USPQ2d 1021, 1027 n.11 (TTAB 2006)); TMEP §1207.01(d)(ix). Because the types of evidence bearing on the fame of a registered mark include the volume of sales, advertising expenditures, and length of use of the mark, and such evidence normally is not publicly available, trademark examining attorneys are not expected to submit evidence regarding the fame of a cited registered mark in ex parte proceedings. TMEP §1207.01(d)(ix); *see In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1086 (TTAB 2016) (citing *In re Thomas*, 79 USPQ2d at 1027 n.11). When no evidence of fame, or lack thereof, has been provided, such as in the current case, this *du Pont* factor is usually treated as neutral. *See In re Mr. Recipe, LLC*, 118 USPQ2d at 1086. Thus, in this case, this factor is considered neutral for purposes of determining likelihood of confusion and applicant's arguments are not persuasive.

Applicant also argues its activities are geographically separate from those of registrant. Specifically, applicant has indicated that the cited mark in Registration No. 6469790 operates exclusively in and around Seattle, Washington, in three fast-food restaurants. Furthermore, applicant asserts that the applied-for services are only rendered Philadelphia, Pennsylvania. However, the owner of a registration without specified limitations enjoys a presumption of exclusive right to nationwide use of the registered mark under Trademark Act Section 7(b), 15 U.S.C. §1057(b), regardless of its actual extent of use. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1568, 218 USPQ 390, 393 (Fed. Cir. 1983). Further, the registered mark is without geographic limitations and applicant also seeks a registration without geographic limitations. Thus, the geographical extent of applicant's and registrant's activities, as well as the lack of actual confusion is not relevant to a likelihood of confusion determination.

Applicant also argues there has been no actual confusion between the marks reported, however ““a showing of actual confusion is not necessary to establish a likelihood of confusion.”” *In re i.am.symbolic, llc*, 866 F.3d 1315, 1322, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); TMEP §1207.01(d)(ii). “[T]he relevant test is *likelihood* of confusion, not *actual* confusion.” *In re Detroit Athletic Co.*, 903 F.3d 1297, 1309, 128 USPQ2d 1047, 1053 (Fed. Cir. 2018) (emphasis in

original). “Uncorroborated statements of no known instances of actual confusion . . . are of little evidentiary value,” especially in ex parte examination. *In re Majestic Distilling Co.*, 315 F.3d 1311, 1317, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003). As a result, applicant's statements regarding a lack of actual confusion is not relevant to a likelihood of confusion determination.

Accordingly, because the similarity in sound and commercial impression of Applicant's mark and the registered marks, consumers are likely to believe the marks identify the same source of goods. Therefore, the marks are confusingly similar.

Relatedness of the Goods and Services

The compared goods and services need not be identical or even competitive to find a likelihood of confusion. *See On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000); TMEP §1207.01(a)(i). They need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); TMEP §1207.01(a)(i); *see Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *44 (TTAB 2022) (quoting *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006)).

Here, applicant's "Restaurant services" are related to registrants' "Providing of food and drink via online ordering, takeout services, and delivery services," and "Processed meat, namely, chicken."

The trademark examining attorney has properly attached and made of record eleven different third-party websites, establishing that the same entity commonly or provides the relevant restaurant services, the provision of food and drink via online ordering, takeout services, and delivery services, as well as processed chicken.

- T.G.I. Fridays, offering restaurant services, including via online ordering, as well as takeout and delivery services, and processed chicken. (*See* Office action dated December 30, 2021, TSDR p. 6-10);
- Marie Callendar's, offering restaurant services, including via online ordering, as well as takeout and delivery services, and processed chicken. (*See* Office action dated December 30, 2021,

TSDR p. 12-19);

- Frontera, offering restaurant services, including via online ordering, as well as takeout and delivery services. (See Office action dated December 30, 2021, TSDR p. 20-27);
- Kentucky Fried Chicken, offering restaurant services, including via online ordering, as well as takeout and delivery services, and processed chicken. (See Office action dated March 31, 2022, TSDR p. 53-59);
- Nando's, offering restaurant services, including via online ordering, as well as takeout and delivery services, and processed chicken. (See Office action dated March 31, 2022, TSDR p. 60-64);
- Popeyes, offering restaurant services and processed chicken. (See Office action dated March 31, 2022, TSDR p. 65);
- Dave's Hot Chicken, offering restaurant services, including via online ordering and processed chicken. (See Office action dated March 31, 2022, TSDR p. 66);
- Cluckin' Hot The Rub Chicken and Beer, offering restaurant services, including via online ordering, takeout and delivery services, and processed chicken. (See Office action dated March 31, 2022, TSDR p. 67-73);

Thus, this evidence demonstrates that the services of the applied-for mark and the goods and services of the registered marks are likely to be offered by a single source under the same mark, frequently travels through the same channels of trade, and are marketed to the same consumers. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009). Therefore, applicant's services and registrants' goods and services are considered related for likelihood of confusion purposes.

In its appeal brief, regarding Registration No. 3024366, Applicant asserts its mark is not likely to cause confusion because the applied-for services and registrant's goods in the cited mark vary greatly. Further, Applicant provides there is no indication of intent to expand use of the mark beyond the applied-for restaurant services. As previously set forth and reiterated above, the compared goods and services need not be identical or even competitive to find a likelihood of confusion. *See On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000); TMEP §1207.01(a)(i).

They need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); TMEP §1207.01(a)(i); see *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *44 (TTAB 2022) (quoting *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006)). The previously discussed evidence unequivocally establishes that Applicant's goods and Registrants' goods and services are likely to emanate from the same source, frequently travels the same channels of trade, and are marketed to the same consumers.

Moreover, the fact that the goods and/or services of the parties differ is not controlling in determining likelihood of confusion. The issue is not likelihood of confusion between particular goods and/or services, but likelihood of confusion as to the source or sponsorship of those goods and/or services. *In re Majestic Distilling Co.*, 315 F.3d 1311, 1316, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003); *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); TMEP §1207.01. Further, Applicant's lack of intention to expand its current services beyond restaurant services is unpersuasive, as the current identification remains highly related to that of the registrants.

Additionally, where the marks of the respective parties are identical or virtually identical, as in this case, the degree of similarity or relatedness between the goods and/or services needed to support a finding of likelihood of confusion declines. See *In re Country Oven, Inc.*, 2019 USPQ2d 443903, at *5 (TTAB 2019) (citing *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1411 (TTAB 2015), *aff'd*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017)); TMEP §1207.01(a); see also *In re Shell Oil Co.*, 992 F.2d 1204, 1207, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993). As in this case, where the marks are virtually identical, the compared goods and services are afforded a lesser degree of similarity and relatedness.

Finally, the case upon which Applicant relies on, *In re White Rock Distilleries Inc.*, to assert the goods and services are unrelated is misapplied. There, the refusal was reversed because the record lacked any evidence demonstrating the compared goods were likely to emanate from a single source or were complementary in use. See *In re White Rock Distilleries Inc.*, 92 U.S.P.Q.2d 1282, 2009 WL 3401827, at *2-3 (T.T.A.B. 2009). Here, the record is clear, there can be no doubt the compared goods and services are highly related. The examining attorney previously attached and made of record eleven

different third-party websites, each establishing that the same entity commonly provides the compared goods and services under the same mark. As such, those facts are distinguishable to the facts of the current matter.

For the reasons set forth above, the marks are confusingly similar and the goods and services are related. Thus, consumers are likely to be confused as the source or sponsorship of the goods. Thus, the Office maintains its position that registration is properly refused pursuant to Section 2(d) of the Trademark Act.

CONCLUSION

For the reasons set forth above, the trademark examining attorney respectfully submits that the applied-for mark, **CHICK-A-BOOM** in standard characters for "Restaurant services" in Class 043 is likely to cause confusion with the registered marks, **CHK-A BOOM** (Registration No. 6469790) in standard characters for "Providing of food and drink via online ordering, takeout services, and delivery services," and **CHICKABOOM** (Registration No. 3024366) in standard characters for "Processed meat, namely, chicken." Accordingly, the applied-for mark's registration is properly refused under Section 2(d) of the Trademark Act. Therefore, it is respectfully submitted that the refusal of registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), should be affirmed.

Respectfully submitted,

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United States Patent and Trademark Office (USPTO)

USPTO OFFICIAL NOTICE

Examining attorney's appeal brief has issued
on May 5, 2023 for
U.S. Trademark Application Serial No. 90667527

A USPTO examining attorney has issued an appeal brief. Follow the steps below.

- (1) **[Read the appeal brief](#)**. This email is NOT the appeal brief.
- (2) **Submit reply brief within 20 days of May 5, 2023**, if you wish to do so. If submitted, a reply brief must be submitted using the **[Electronic System for Trademark Trials and Appeals \(ESTTA\)](#)** and received by the USPTO on or before 11:59 p.m. **Eastern Time** of the last day of the reply period.
- (3) **Direct questions** about the appeal proceeding to the Trademark Trial and Appeal Board at 571-272-8500 or **TTABInfo@uspto.gov**.