

This Opinion is Not a
Precedent of the TTAB

Mailed: December 8, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re The Toasted Yolk Cafe, LLC

Serial No. 97579560

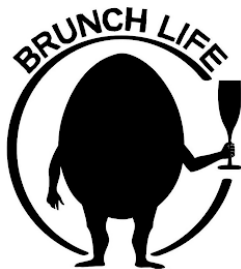
Hamutal G. Lieberman, of Helbraun & Levey LLP,
for The Toasted Yolk Cafe, LLC

Philip Liu, Trademark Examining Attorney, Law Office 109,
Michael Kazazian, Managing Attorney

Before Heasley, Casagrande, and Bradley, Administrative Trademark Judges.

Opinion by Casagrande, Administrative Trademark Judge:

The Toasted Yolk Cafe, LLC (Applicant) seeks registration on the Principal



Register of the mark for “Restaurant and café services,” in
International Class 43.¹

¹ Application Ser. No. 97579560 was filed on September 6, 2022, under Section 1(a) of the Lanham Trademark Act, 15 U.S.C. § 1051(a), claiming a date of first use anywhere and in commerce of March 1, 2021. The application describes the mark as follows: “The mark

The USPTO Examining Attorney refused registration under Section 2(d), 15 U.S.C. § 1052(d), due to likelihood of confusion with two standard-character marks owned by the same registrant, both registered for “Café services; Restaurant services” in International Class 43: TOAST A BRUNCH LIFE² and A CALI LIFE IS A BRUNCH LIFE.³

After the Examining Attorney issued a final refusal,⁴ Applicant simultaneously requested reconsideration and appealed.⁵ We suspended the appeal and remanded to the Examining Attorney to consider the request for reconsideration.⁶ The Examining Attorney denied the request,⁷ upon which we resumed the appeal.⁸ Both Applicant and the Examining Attorney filed appeal briefs.⁹ The appeal is now ready for decision. For the reasons explained below, we affirm the refusal.

consists of the wording ‘BRUNCH LIFE’ in stylized font, above an egg with arms and legs holding a champagne glass inside a circle.” Color is not claimed as a feature of the mark, and Applicant disclaims any exclusive right in the word BRUNCH apart from the mark as depicted.

² Reg. No. 6790989 (the ’989 Registration) issued on July 12, 2022.

³ Reg. No. 6816225 (the ’225 Registration) issued on August 9, 2022.

⁴ See March 23, 2024, Final Office Action. Any citations to specific pages of prosecution filings will be to .pdf-format versions of the documents as downloaded from the USPTO’s Trademark Status & Document Retrieval (TSDR) electronic trademark docketing system.

⁵ See September 23, 2024, Request for Reconsideration; Notice of Appeal, 1 TTABVUE. References to the briefs and appeal record cite to the Board’s TTABVUE electronic docket system. The number preceding “TTABVUE” represents the docket number assigned to the cited filing in TTABVUE and any number immediately following “TTABVUE” identifies the specifically-cited page(s), if any.

⁶ See 2 TTABVUE.

⁷ See April 19, 2025, Denial of Reconsideration.

⁸ See 5 TTABVUE.

⁹ See 6 TTABVUE (Applicant’s brief); 8 TTABVUE (Examining Attorney’s brief).

ANALYSIS

Section 2(d) of the Trademark Act prohibits registration of a mark that “so resembles a mark registered in the Patent and Trademark Office ... as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1052(d). We determine whether confusion is likely by analyzing all probative facts in evidence relevant to the likelihood-of-confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973). *See, e.g., In re Charger Ventures LLC*, 64 F.4th 1375, 1379 (Fed. Cir. 2023). Though *du Pont* lists thirteen numbered factors (some with subparts), we generally address only those that are relevant and material to the case before us, *see, e.g., Shen Mfg. Co. v. Ritz Hotel, Ltd.*, 393 F.3d 1238, 1241 (Fed. Cir. 2004); *Octocom Sys., Inc. v. Houston Computer Servs., Inc.*, 918 F.2d 937, 943 (Fed. Cir. 1990)—typically the factors that the parties address and on which there is relevant evidence in the record. *See, e.g., Dollar Fin. Grp., Inc. v. Brittex Fin., Inc.*, 132 F.4th 1363, 1371-72 (Fed. Cir. 2025); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 946-47 (Fed. Cir. 2000). We then weigh together our findings on these factors to determine if, on balance, they indicate that confusion is likely. *See, e.g., Charger Ventures*, 64 F.4th at 1381; *In re Majestic Distilling Co.*, 315 F.3d 1311, 1319 (Fed. Cir. 2003).

We will first compare the application to TOAST A BRUNCH LIFE. If we find confusion likely, the application will stand refused, and there will be no need to assess whether confusion is likely in light of A CALI LIFE IS A BRUNCH LIFE. We will

assess the latter registered mark only if we find confusion unlikely between Applicant's mark and TOAST A BRUNCH LIFE.

A. Comparison of the marks

The first likelihood-of-confusion factor assesses “[t]he similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *du Pont*, 476 F.2d at 1361. This is always an important inquiry. *See, e.g., Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165 (Fed. Cir. 2002); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976). “Similarity is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d 747, 752 (Fed. Cir. 2014) (citation omitted). “The proper test is ... 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.” *In re i.am.symbolic, llc*, 866 F.3d 1315, 1323 (Fed. Cir. 2017) (citation omitted); *see also Phillips Petroleum Co. v. Knox Indus. Corp.*, 277 F.2d 945, 947 (CCPA 1960) (“This issue is whether the marks are confusingly similar, not whether they are identical.”) (citation omitted).

In assessing the marks, we compare their “appearance, sound, connotation and commercial impression.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1340 (Fed. Cir. 2015) (citation omitted); *accord i.am.symbolic*, 866 F.3d at 1324. Similarity of all four aspects is not required; in an appropriate case, similarity in even one aspect may be sufficient to show that confusion is likely. *See, e.g., Krim-Ko Corp.*

v. Coca-Cola Bottling Co., 390 F.2d 728, 732 (CCPA 1968); *Cecile Gagnon Co. v. Bourjois, Inc.*, 223 F.2d 731, 733 (CCPA 1955).

We do not compare the marks side-by-side, as though in a laboratory. *See, e.g., St. Helena Hosp.*, 774 F.3d at 751; *Grandpa Pidgeon's of Mo., Inc. v. Borgsmiller*, 477 F.2d 586, 587 (CCPA 1973). The issue is not “whether one can distinguish the marks at a given moment.” *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 1007 (CCPA 1971). Rather, we keep in mind that consumers depend on their recollection of marks to which they’ve previously been exposed and that their memories are fallible. *See, e.g., Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 1007 (CCPA 1981). Sometimes their recall of marks they’ve seen or heard before is “dim,” *see Neutrogena Corp. v. Bristol-Myers Co.*, 410 F.2d 1391, 1393 (CCPA 1969), or “vague,” *see In re J.F. Marr Co.*, 311 F.2d 814, 815 (CCPA 1963).

We compare marks in their entirety. *See, e.g., Oakville Hills Cellar, Inc. v. Georgallis Holdings, LLC*, 826 F.3d 1376, 1380 (Fed. Cir. 2016). Sometimes, however, “one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012) (citations omitted).

Turning to the marks at issue, the entire literal component of Applicant’s composite mark is the term “BRUNCH LIFE,” which term also appears in TOAST A BRUNCH LIFE. Applicant does not argue that those identical words mean something

different in the compared marks, so there's that similarity in addition to the fact that these terms look and sound the same.

Applicant argues that the two marks as a whole look and sound different because of the presence of the words "TOAST A" before "BRUNCH LIFE" in the cited mark.¹⁰ True enough. That does result in a dissimilarity between the marks as wholes. Applicant goes on to urge that the phrase "'TOAST A' introduces a different leading word,"¹¹ one referring either to "a particular food item" or "a celebratory act," which requires "additional cognitive processing."¹² Again, true enough. But, as the Examining Attorney points out, "BRUNCH LIFE" is the concluding noun phrase in the sentence "TOAST A BRUNCH LIFE," and, as the object of that short sentence, it creates a "strong focal point."¹³ The Examining Attorney acknowledges the general rule that leading words tend to contribute significantly to a mark's overall commercial impression¹⁴—a general rule which we, too, acknowledge¹⁵—but argues

¹⁰ See 6 TTABVUE 13-14.

¹¹ See *id.* at 13.

¹² See *id.* at 18. Although Applicant seems to refer a piece of toasted bread as a possible meaning for the word "TOAST" in the mark, the rest of its argument differentiating the marks is based on the verb meaning of "making a toast" as a celebratory act, and we agree that is the much more natural reading of "TOAST A" in the cited mark.

¹³ See 8 TTABVUE 6-7.

¹⁴ See *id.* at 7-8.

¹⁵ There are instances where the same leading word may be "dominant" in one mark but not necessarily dominant in another. See, e.g., *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 1372-73 (Fed. Cir. 2005) (VEUVE, while "prominent" in VEUVE CLIQUOT, was even more important, i.e., was "the dominant feature," in "VEUVE ROYALE").

that, in the mark TOAST A BRUNCH LIFE, “BRUNCH LIFE’ carries the core commercial significance.”¹⁶

While we and our primary reviewing court frequently note that, when determining a multi-component mark’s overall legal significance, one component’s contribution to the impression **may** be “dominant” in that mark as a whole, there’s no legal rule that says one component **has** to dominate. In the mark of the cited registration, we do not think it necessary to try to coax out any greater precision than that “BRUNCH LIFE,” as the object in the sentence “TOAST A BRUNCH LIFE,” contributes in a substantial way to the mark’s overall commercial impression.

Applicant argues that the design element in its mark creates a visual difference and a whimsical impression.¹⁷ That’s not an inaccurate observation. But we don’t think it moves the needle much here. The design comprises a drawing of an egg (a common brunch food¹⁸) with two human legs and two human arms, one of which is holding a champagne glass (as one would while “toasting” someone or something¹⁹). So, while whimsical, the design does little to detract, or even distract, from the similarities in the marks as wholes. If anything, the egg figure serves to reinforce the

¹⁶ *See id.* at 7.

¹⁷ *See* 6 TTABVUE 13, 19.

¹⁸ We note that eggs are featured in one of the three brunch menu items depicted on the substitute specimen Applicant submitted with its October 30, 2023, Response to the Nonfinal Office Action, at TSDR 9.

¹⁹ We take judicial notice that the definition of “toast” as a verb—which is how it is used in the ’989 Registration—is: “to hold up your glass and then drink as an expression of good wishes or respect.” <https://dictionary.cambridge.org/us/dictionary/english/toast> (checked Dec. 4, 2025); *see, e.g., B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d 727, 728 (Fed. Cir. 1988) (tribunals may take judicial notice of dictionaries and encyclopedias); *Hancock v. Am. Steel & Wire Co.*, 203 F.2d 737, 740 (CCPA 1953) (same).

focus on the common term “brunch” and create another similarity between Applicant’s mark and the mark in the ’989 Registration because the egg holding a champagne glass could be interpreted as making a toast. But even without indulging that last observation, it is clear to us, and we find, that the marks’ overall commercial impressions are more similar than dissimilar.

B. Comparison of the services

The likelihood-of-confusion inquiry also examines “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration.” *du Pont*, 476 F.2d at 1361. We compare the services as they are set forth in the applications and registration. *See, e.g., In re Detroit Athl. Co.*, 903 F.3d 1297, 1307 (Fed. Cir. 2018); *i.am.symbolic*, 866 F.3d at 1325.

Here, Applicant does not dispute that the services identified in the application and in the ’989 Registration are identical.

C. Comparison of the channels of trade and the classes of relevant customers

Another consideration in determining whether confusion is likely is “[t]he similarity or dissimilarity of established, likely-to-continue trade channels.” *du Pont*, 476 F.2d at 1371. It is also “relevant to consider the degree of overlap of consumers exposed to the respective services” *In re Shell Oil Co.*, 992 F.2d 1204, 1207 (Fed. Cir. 1993); *see also du Pont*, 476 F.2d at 1361 (listing “buyers to whom sales are made” as a consideration). We make our assessment of the trade channels and customer classes based on the services as set forth in the applications and cited registration.

See, e.g., Detroit Athl., 903 F.3d at 1308; *Glamorene Prods. Corp. v. Procter & Gamble Co.*, 538 F.2d 894, 896 (CCPA 1976).

The Examining Attorney correctly points out that where, as here, an application and registration list identical services, “absent restrictions in the application and registration, [the] services are presumed to travel in the same channels of trade to the same class of purchasers.”²⁰ *In re Viterro Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012)) (citations omitted). Applicant neither addresses these factors nor points us to any evidence that would rebut this presumption. Accordingly, we find that the channels of trade and classes of customers for these identical services likewise is identical.

D. Applicant’s “sophisticated consumers” argument is unsupported by any evidence

Applicant waxes lyrical on “the careful and deliberate nature of consumer decision-making in the restaurant and café sector,” highlighting consumers’ “thorough research” and “thoughtful approach.”²¹ According to Applicant, this “significantly mitigates the risk of confusion between the marks.”²²

We agree that, where there is evidence bearing on consumer care, “careful, sophisticated purchasing” should be taken into account. *See du Pont*, 476 F.2d at 1361 (“under Sec. 2(d), ... the following, **when of record**, must be considered: ... (4) The conditions under which ... sales are made, i. e. “impulse” vs. careful, sophisticated

²⁰ *See* 8 TTABVUE 13.

²¹ *See* 6 TTABVUE 20-21.

²² *See id.* at 21.

purchasing”) (emphasis added). But there is no evidence in the record that would support the finding Applicant urges us to make, revealing these assertions to be mere attorney argument. That is not a basis on which we can make a factual finding. *See, e.g., In re Fiesta Palms, LLC*, No. 76595049, 2007 WL 950952, at *7 (TTAB 2007) (“we must decide the case based on the evidence of record and not on what either the examining attorney or applicant argues the facts are”); *see generally Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1371 (Fed. Cir. 2018) (“Mr. Cai’s Main Brief contains numerous assertions of fact. This information is not evidence under any of the relevant rules, as the TTAB recognized.”) (citation omitted); *In re Simulations Publ’ns, Inc.*, 521 F.2d 797, 798 (CCPA 1975) (“Statements in a brief cannot take the place of evidence.”) (citation omitted); *Acomb v. Polywood Plastics Corp.*, No. 91054738, 1975 WL 21253, at *3 (TTAB 1975) (“Speculation and surmise is no substitute for evidence.”).

Further, we note that we must base our decision on the least sophisticated among the classes of customers at issue. *Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014). Here, the services are restaurant and café services. With no other restrictions in the application or the ’989 Registration, these services are considered to be available to the public generally, to both careful and impulsive consumers alike.

In the absence of any evidence supportive of Applicant’s “sophisticated purchasers” argument, we find this factor neutral. *See, e.g., In re Opus One, Inc.*, No. 75722593, 2001 WL 1182924, at *7 (TTAB 2007) (“There is no evidence in the record

from which we might conclude that wine and restaurant services, in general, are necessarily expensive, or that purchasers thereof are necessarily sophisticated and careful in making their purchasing decisions. Accordingly, this *du Pont* factor does not weigh in applicant's favor in this case."); *see also Gen. Aniline & Film Corp. v. Hukill Chem. Corp.*, 287 F.2d 926, 927-28 (CCPA 1961) (rejecting a "discriminating purchasers" argument where the goods were unrestricted as to classes of purchasers and "[t]here is no evidence other than the nature of the goods themselves from which we can determine whether purchasers of applicant's goods defined in the opposed application are discriminating purchasers").

E. Weighing the findings on the relevant factors together

Having made findings on each of the relevant likelihood-of-confusion factors at to the '989 Registration, our final step is to assess together the findings we have made on the relevant factors to determine if, on balance, they indicate that confusion is likely as to the marks before us. *See, e.g., Charger Ventures*, 64 F.4th at 1384.

"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." *Federated Foods*, 544 F.2d at 1103; *In re Max Cap. Grp. Ltd.*, No. 77186166, 2010 WL 22358, at *1 (TTAB 2010) ("In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services.") (citations omitted).

Where, as here, we have found the services identical, we must "alter" our "tolerance for substantial and confusing similarities between ... competing marks"

accordingly. *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877 (Fed. Cir. 1992). In other words, where the services are identical, the degree of mark similarity that is likely to result in confusion “declines.” *Viterra*, 671 F.3d at 1363; *In re Mighty Leaf Tea*, 601 F.3d 1342, 1348 (Fed. Cir. 2010); *Century 21 Real Estate*, 970 F.2d at 877. Here, while the marks are not identical, we found them to have more similar than different. This finding, in the circumstances presented here, weighs in favor of a conclusion that confusion is likely.

Adding further weight toward a conclusion that confusion is likely are our findings that the channels of trade and classes of customers for the services identified in the application and the '989 Registration are identical.

The factor assessing the degree of care exercised by consumers of restaurant and café services is neutral.

With all the relevant factors on which we have made findings pointing toward a conclusion that confusion is likely, and one factor being neutral, we have no difficulty in concluding that confusion is likely as between Applicant's mark and the mark of the '989 Registration.

Decision: Our conclusion that confusion is likely as between Applicant's mark and the mark of the '989 Registration means that the application must be refused under Section 2(d) of the Act. We affirm the refusal on this basis. We need not decide whether, alternatively, confusion is likely as between Applicant's mark and the mark in the '225 Registration.