

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

Mailed: September 4, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

—————  
Trademark Trial and Appeal Board  
—————

*In re Doofood*  
—————

Serial No. 87370003  
—————

Gene Bolmarcich of the Law Offices of Gene Bolmarcich,  
for Doofood.<sup>1</sup>

Melissa Vallillo, Trademark Examining Attorney, Law Office 105,  
Jennifer Williston, Managing Attorney.

—————

Before Bergsman, Greenbaum and Goodman,  
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Doofood (“Applicant”) seeks registration on the Principal Register of the mark



DOOFOOD and design, displayed as \_\_\_\_\_, for

---

<sup>1</sup> The record has been updated to reflect the change in correspondence address for Applicant’s attorney, filed June 12, 2018.

Food preparation services featuring fresh, properly proportioned, healthy meal kits and made to order for delivery, in International Class 43.<sup>2</sup>

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when used in connection with Applicant's services, so resembles the previously registered mark DO FOOD (stylized, FOOD disclaimed), displayed as



, for "Prepared food kits composed of meat, poultry, fish, seafood, and/or vegetables and also including sauces or seasonings, ready for cooking and assembly as a meal" in International Class 29,<sup>3</sup> as to be likely to cause confusion, mistake or deception.

---

<sup>2</sup> Application Serial No. 87370003 was filed on March 14, 2017 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant's claim of first use anywhere and use in commerce since at least as early as February 1, 2017. The application claims the colors orange and black as a feature of the mark, and describes the mark as follows:

The mark consists of the word "doofood" in lower case font, where "doo" is orange and "food" is black, to the right of a design comprising the outline of a cooking pot comprised of the combined letters "FD" with a handle, where the handle and part of the pot is black and the remainder of the pot is orange. Black steam rises from the pot and an orange flame is below it. The complete design is enclosed in an orange outline of a circle. The color white is not a feature of the mark, and the white areas in the drawing represent the transparent areas in the mark.

<sup>3</sup> Registration No. 5211710 issued on May 30, 2017. The registration claims the colors white and green as a feature of the mark, and describes the mark as "consist[ing] of the stylized wording 'DO FOOD' in white superimposed over two irregular ovals in shades of green." The registration also identifies "noodles" and "sauces" in International Class 30, but they are not involved in this appeal.

After the Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

### I. Applicable Law

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *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 Co.*, 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 In re Chatam Int'l Inc.*, 380 F.2d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *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.”). We discuss below these and other relevant factors. *See M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006) (even within *du Pont* list, only factors that are “relevant and of record” need be considered). *See also In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

A. The similarity or dissimilarity of the marks

Under this factor, we compare Applicant's and Registrant's marks "in their entireties as to appearance, sound, connotation and commercial impression." *In re Viterra*, 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). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014); accord *Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion."). In comparing the marks, "[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. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (quotation omitted). Further, marks "must be considered ... in light of the fallibility of memory ...." *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)). The proper focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *St. Helena Hosp.*, 113 USPQ2d at 1085; *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d

1005, 169 USPQ 39, 40 (CCPA 1971). Here, the average customer includes members of the general public who cook meals at home with ingredients prepared by others.

Applicant argues that the differences in the marks in appearance are sufficient to distinguish them, and that the marks create different commercial impressions, with Registrant's mark conveying the idea of "doing" food ("such as 'Oh, I see, they **do** [as in make or prepare] food for me"), while Applicant's mark is intended to reference Applicant's name, DooJin Kim.<sup>4</sup> The Examining Attorney points out that there is no evidence concerning the purported meaning of Registrant's mark, and that Applicant has conceded that consumers likely are unaware of the intended reference to Applicant's name.<sup>5</sup> The Examining Attorney focuses on the visual and aural similarities between the literal elements in the marks, DO FOOD and DOO FOOD, which she contends is the most distinctive portion, and therefore the strongest source identifying element, of each mark.

Our analysis cannot be predicated on dissection of the involved marks. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014). Rather, we are obliged to consider the marks in their entireties. *Id.* See also *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) ("It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion."). Nonetheless, there is nothing improper in stating that, for rational

---

<sup>4</sup> Applicant's Brief, 5 TTABVUE 4.

<sup>5</sup> *Id.* ("Although not a fact that a consumer would necessarily know, 'Doo' is derived from Applicant's name, DooJin Kim, and has the appearance of an Asian name.").

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. *Stone Lion*, 110 USPQ2d at 1161.

Looking at the marks in their entireties, the literal terms DO FOOD and DOOFOOD stand out as the most prominent element, conveying the strongest commercial impression, in each mark. Generally, it is “the verbal portion of a word and design mark [that] will be the dominant portion.” *Viterra*, 101 USPQ2d at 1911; *see also CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983) (“[T]he verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed.”). We find that to be the case here, where the designs in the marks highlight rather than overwhelm or detract from the wording. In the case of Registrant’s mark, the design component is not remarkable and is more in the nature of a backdrop that emphasizes the wording. In Applicant’s mark, the stylized pot with flame and steam design evokes the cooking aspect of Applicant’s meal kit preparation and delivery services, thereby reinforcing the suggestion of the word “food” in Applicant’s mark. Neither design element would be articulated, separate and apart from the literal terms of the marks. *See Viterra*, 101 USPQ2d at 1908 (normally according greater weight to the word in composite word and design marks because purchasers would use the word to request or refer to the goods or services).

The terms DO FOOD and DOOFOOD are highly similar because they are phonetic equivalents. *See Kabushiki Kaisha Hattori Tokeiten v. Scutto*, 228 USPQ 461, 462 (TTAB 1985) (“the word portion of applicant’s mark ‘SEYCOS’, is virtually the

phonetic equivalent of opposer's 'SEIKO' mark and is, in fact, the phonetic equivalent of the plural of opposer's mark"). In certain circumstances, similarity in sound alone may be sufficient to find the marks confusingly similar. *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988). In this case, however, the terms DO FOOD and DOOFOOD also are nearly identical in appearance, differing only by one letter and a space. Such minor differences do not normally create dissimilar marks. *See In re Great Lakes Canning, Inc.*, 227 USPQ 483, 495 (TTAB 1985) (CAYNA is similar to CANA); *Seaguard Corp. v. Seaward Int'l, Inc.*, 223 USPQ 48, 51 (TTAB 1984) (SEAGUARD and SEA GUARD "are, in contemplation of the law, identical"); *Stock Pot, Inc. v. Stockpot Rest., Inc.*, 220 USPQ 52, 52 (TTAB 1983), *aff'd*, 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984) (STOCKPOT and STOCK POT are similar). Further, there is no evidence that the term "do food" has any meaning with respect to meal kits and meal kit preparation and delivery services. As the Federal Circuit recently reiterated, "Attorney argument is no substitute for evidence." *Zheng Cai, d/b/a Tai Chi Green Tea Inc. v. Diamond Hong, Inc.*, \_\_\_ F.3d \_\_\_, \_\_\_ USPQ2d \_\_\_ (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005)). To the extent the term "do food" could, perhaps, connote cooking and eating, that meaning would apply equally to the goods identified in the registration and the services identified in the application.

When viewed in their entireties, we find the marks to be similar in appearance, sound, connotation, and commercial impression. This *du Pont* factor supports a finding of a likelihood of confusion.

B. Similarity of the Goods and Services and Channels of Trade

We must make our determinations concerning the goods and services and channels of trade based on the goods and services as they are identified in the application and registration. *See Dixie Rests.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). *See also Stone Lion*, 110 USPQ2d at 1161; *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004-05 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Computs. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). “[L]ikelihood of confusion can be found ‘if the respective goods [and services] are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.’” *Coach Servs.*, 101 USPQ2d at 1722 (quoting 7-*Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

The goods identified in the registration are “Prepared food kits composed of meat, poultry, fish, seafood, and/or vegetables and also including sauces or seasonings, ready for cooking and assembly as a meal,” and the services identified in the application are “Food preparation services featuring fresh, properly proportioned, healthy meal kits and made to order for delivery.” It is well established that confusion may be likely to occur from the use of the same or similar marks for goods, on the one hand, and for services involving those goods, on the other. *See, e.g., In re Hyper*



*Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025, 1025 (Fed. Cir. 1988) (BIGGS for retail grocery and general merchandise store services likely to be confused with BIGGS for furniture); *In re H. J. Seiler Co.*, 289 F.2d 674, 129 USPQ 347 (CCPA 1961) (SEILER'S for catering services and SEILER'S for smoked and cured meats likely to cause confusion); *In re United Serv. Distribs., Inc.*, 229 USPQ 237 (TTAB 1986) (mark depicting silhouette of a man and woman, used in connection with distributorship services in the field of health and beauty aids, likely to cause confusion with visually similar silhouette mark used in connection with skin cream); *Steelcase Inc. v. Steelcare Inc.*, 219 USPQ 433 (TTAB 1983) (STEELCARE INC. and design for refinishing of furniture, office furniture, and machinery and STEELCASE for office furniture and accessories likely to cause confusion).

The identified goods and services are related on their face in that Applicant offers preparation and delivery of meal kits and Registrant offers “prepared food kits ... ready for cooking and assembly as a meal.” This finding is supported by printouts from the websites of Hello Fresh, Diet-to-Go, Blue Apron, and Purple Carrot, all of which offer, under the same trademark, prepared food kits of the type offered by Registrant as well as meal kit preparation and delivery services of the type offered by Applicant.<sup>6</sup> These webpages are probative of the relatedness of the identified goods and services. *See, e.g., In re C.H. Hanson Co.*, 115 USPQ2d 1351, 1355-56 (TTAB 2015); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009). The

---

<sup>6</sup> August 18, 2017 Final Office Action, TSDR pp. 24-57. Citations to the TSDR database are to the downloadable .pdf format.

Examining Attorney also made of record six third-party use-based registrations for the marks GREEN CHEF, BLUE APRON, FRESH MEAL PREP FMP, ONE POTATO, FEASTIVE, and BEGOCHICK, covering goods of the type identified in the cited registration as well as services of the type identified in the application.<sup>7</sup> The third-party registrations are also probative of the relatedness of the goods and services because they suggest that the listed goods and services are of a type that may emanate from the same source. *See, e.g., In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). We find that the goods and services commonly emanate from the same source under the same mark, and therefore they are closely related.

As to the channels of trade and conditions of purchase, because the identification of goods in the registration and the identification of services in the application contain no limitations as to channels of trade and classes of purchasers, it is presumed that the goods identified in the registration move in all channels of trade normal for those goods, such as the home delivery services identified in the application, and that they are available to all classes of purchasers for those goods and services, including members of the general public who cook at home. *See Stone Lion*, 110 USPQ2d at 1161; *see also Coach Servs.*, 101 USPQ2d at 1723 (absent limitation, “goods are presumed to travel in all normal channels ... for the relevant goods.”); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). As neither the application nor the registration contain limitations as to the channels of trade or classes of purchasers,

---

<sup>7</sup> *Id.*, TSDR pp. 6-23.

and in light of the above-discussed evidence of third party commercial websites showing that companies such as Hello Fresh, Diet-to-Go, and Blue Apron offer meal kit preparation and delivery services as well as meal kits bearing the companies' names advertised together, we find the channels of trade and classes of purchasers to be the same. *See In re Anderson*, 101 USPQ2d 1912, 1920 (TTAB 2012); *see also In re Thomas*, 79 USPQ2d 1021, 1023 (TTAB 2006) (deeming channels of trade and classes of purchasers to be the same for jewelry and jewelry stores when the application and registration contain no limitations).

The second and third *du Pont* factors also support a finding of a likelihood of confusion.

## II. Conclusion

Having considered all the evidence and arguments bearing on the relevant *du Pont* factors, we conclude that the marks are similar, and the identified goods and services are closely related and move through the same channels of trade to the same classes of purchasers. We therefore find that Applicant's mark is likely to cause confusion with the cited mark when used on or in connection with the services identified in the application.

**Decision:** The refusal to register Applicant's mark

 is affirmed.