

This Opinion is Not a
Precedent of the TTAB

Mailed: March 24, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Lit Hookah LLC
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Serial No. 87904592
—

Sevag Demirjian of Demirjian Law Offices,
for Lit Hookah LLC.

Leslee A. Friedman, Trademark Examining Attorney, Law Office 120,
David Miller, Managing Attorney.

—
Before Ritchie, Larkin, and Coggins,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Lit Hookah LLC (“Applicant”) seeks registration on the Principal Register of the
mark shown below



lit

for “glass hookahs, including whole hookahs and hookah parts such as the bowl, down-stem and hoses to be utilized to smoke tobacco and other herbal products without electronic components,”¹ in International Class 34.²

The Examining Attorney refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that it so resembles the registered standard character mark LIT HOOKAH LOUNGE & BAR for “hookah lounge services,” in International Class 41,³ as to be likely, when used in connection with the goods identified in the application, to cause confusion, to cause mistake, or to deceive.

Applicant appealed when the Examining Attorney made the refusal final. Applicant and the Examining Attorney have filed briefs.⁴ We affirm the refusal to register.

¹ A “hookah” is “a pipe for smoking tobacco or drugs that has a long tube and pulls the smoke through a small container of water.” MACMILLAN DICTIONARY (macmillandictionary.com, last accessed on March 24, 2020). The Board may take judicial notice of dictionary definitions, including definitions from online dictionaries, to clarify the meaning of words in the identifications of goods or services. *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1636 (TTAB 2009).

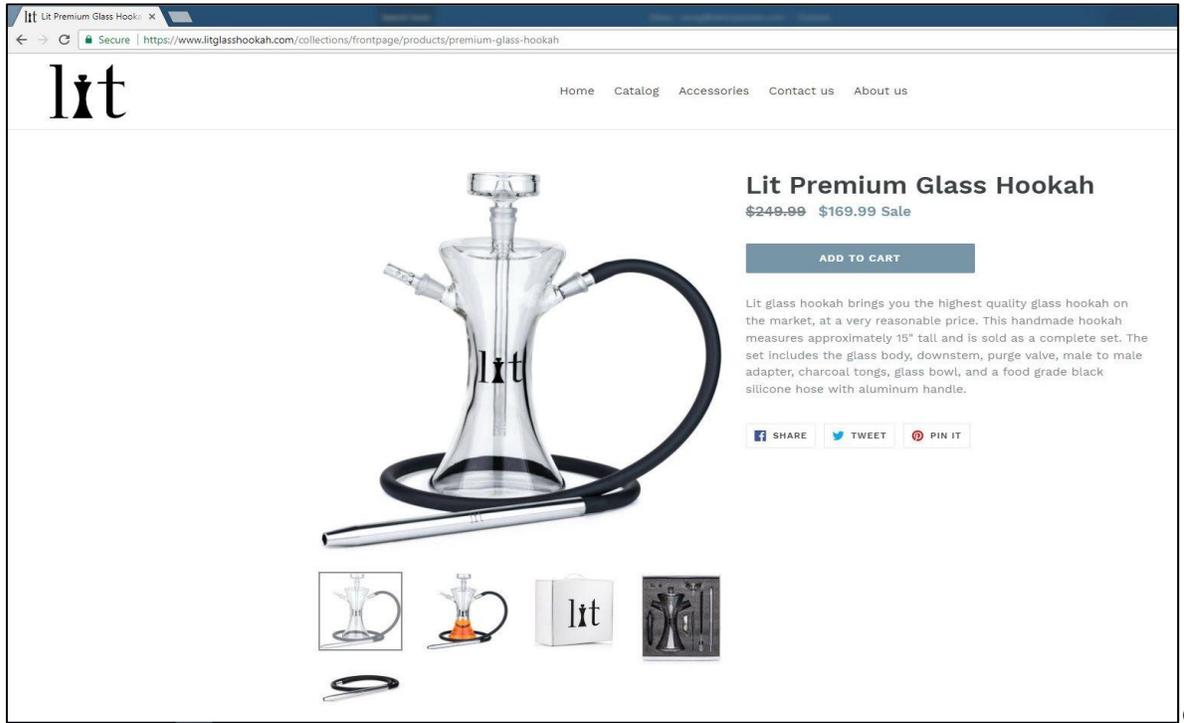
² Application Serial No. 87904592 was filed on May 2, 2018 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claimed first use of the mark and first use of the mark in commerce at least as early as July 2017. Applicant describes its mark as “a stylized version of the word ‘lit’ with the ‘l’ being in the shape of applicant’s glass hookah product.”

³ The cited Registration No. 5425731 issued on March 20, 2018. The registrant has disclaimed the exclusive right to use HOOKAH LOUNGE & BAR apart from the mark as shown.

⁴ Citations in this opinion to the briefs refer to TTABVUE, the Board’s online docketing system. *Turdin v. Tribolite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page number(s) of the docket entry where the cited materials appear.

I. Record on Appeal⁵

The record includes Applicant's specimen of use, which we reproduce below



and the following materials:

- Pages regarding the cited registration, made of record by the Examining Attorney;⁷
- Webpages of third-party hookah lounges, made of record by the Examining Attorney to show that hookah lounges also sell hookah equipment;⁸

⁵ Citations in this opinion to the application record are to pages in the Trademark Status & Document Retrieval ("TSDR") database of the United States Patent and Trademark Office ("USPTO"). We summarize only those portions of the record that are germane to the appeal.

⁶ May 2, 2018 Specimen of Use.

⁷ August 23, 2018 Office Action at TSDR 4-5.

⁸ *Id.* at TSDR 8-18; February 4, 2019 Final Office Action at TSDR 2-26.

- Dictionary definitions of the word “lit,” made of record by Applicant;⁹
- Lists of registrations of, and applications to register, marks containing the word “lit” from the USPTO’s Trademark Electronic Search System (“TESS”) database, made of record by Applicant;¹⁰
- Pages from the TESS database regarding specific registrations of, and applications to register, LIT-formative marks, made of record by Applicant;¹¹
- Pages from the website of the cited registrant, and various related social media pages, made of record by Applicant;¹²
- Reviews of the registrant’s hookah lounge, made of record by Applicant;¹³
- Search results from the Google search engine regarding Johnson City, Tennessee, where the cited registrant’s hookah lounge is located, made of record by Applicant;¹⁴
- A page from amazon.com displaying a hookah set sold under Applicant’s mark, made of record by Applicant;¹⁵ and

⁹ January 15, 2019 Response to Office Action at TSDR 17-22. Applicant attached these definitions and other materials to its appeal brief. 4 TTABVUE 18-72. “Parties to Board cases occasionally seem to be under the impression that attaching previously-filed evidence to a brief and citing to the attachments, rather than to the original submission is a courtesy or a convenience to the Board. It is neither.” *In re Michalko*, 110 USPQ2d 1949, 1950 (TTAB 2014). Citation to the record is sufficient, as it obviates the need to determine whether materials attached to briefs are properly of record. *Id.* at 1950-51.

¹⁰ January 15, 2019 Response to Office Action at TSDR 23-31.

¹¹ *Id.* at TSDR 32-44.

¹² *Id.* at TSDR 45-58.

¹³ *Id.* at TSDR 59-62.

¹⁴ *Id.* at TSDR 63-65.

¹⁵ *Id.* at TSDR 66-67.

- Depictions of merchandise and signage bearing the cited mark, made of record by Applicant.¹⁶

II. Analysis of Refusal

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, mistake, or deception. 15 U.S.C. § 1052(d). Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

Two key factors in every Section 2(d) case are the first two *DuPont* factors, the similarity or dissimilarity of the marks, and the similarity or dissimilarity of the goods or services, because 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, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). Applicant discusses those two key factors, 4 TTABVUE 8-12, 14-15, 17, as well as the sixth *DuPont* factor, the number and nature of similar marks in use for similar services, *DuPont*, 177 USPQ at 567, 4 TTABVUE 3-8, 15-16, and the eight *DuPont* factor, the length of time during and conditions

¹⁶ *Id.* at TSDR 68-71.

under which there has been concurrent use of the marks without evidence of actual confusion. *DuPont*, 177 USPQ at 567. 4 TTABVUE 13.¹⁷

A. The Strength of the Cited Mark

We turn first to the sixth *DuPont* factor, the number and nature of similar marks in use for similar services, because Applicant ask us to consider the strength of the cited mark, arguing that the “term ‘lit’ is highly suggestive or descriptive in relation to the referenced goods and services, and should be afforded only narrow protection.” *Id.* at 3.

“In determining the strength or weakness of a mark, we consider both its inherent strength based on the nature of the term itself and its commercial strength based on use in the marketplace.” *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017). “The Federal Circuit has held that evidence of the extensive registration and use of a term by others can be powerful evidence of the term’s weakness.” *Id.* (citing *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. v. Millennium Sports, S.L.U.*, 797 F.3d 1361, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) and *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015)). “Use evidence may reflect commercial weakness, while third-party registration evidence that does not equate to proof of third-party use may bear on conceptual weakness if a term is commonly registered for similar goods or services.” *Tao Licensing*, 125 USPQ2d at 1057.

¹⁷ Applicant makes additional arguments that do not involve a specific *DuPont* factor. 4 TTABVUE 12-16. We address those arguments below following our *DuPont* analysis.

Applicant does not offer use evidence to show commercial weakness of the cited mark, but instead relies on dictionary definitions of “lit,” 4 TTABVUE 3, and third-party registrations of, and applications to register, LIT-formative marks, *id.* at 4-8, to show the term’s conceptual weakness. Both dictionary definitions and third-party registrations are relevant to prove that some segment of the subject marks “has a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Juice Generation*, 115 USPQ2d at 1675 (quoting 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:90 (4th ed. 2015)); *see also In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1745-46 (TTAB 2018).

The dictionary definitions formally define “lit” in its verb form as the “past tense and past participle of LIGHT” and in its adjective form as “affected by alcohol: DRUNK,”¹⁸ and colloquially define “lit” as “[a] term used to describe something that is cool and exciting, or just generally something you would want to experience.”¹⁹ Applicant claims that in view of these various meanings, the word LIT as it appears in the subject marks “is suggestive or descriptive of a feature or characteristic of the relevant goods and services, smoking related goods and services that must be ‘lit’ to

¹⁸ January 15, 2019 Response to Office Action at TSDR 18 (MERRIAM-WEBSTER DICTIONARY).

¹⁹ *Id.* at 22 (URBAN DICTIONARY). The “Urban Dictionary (urbandictionary.com) is a slang dictionary with definitions submitted by visitors to the website.” *In re Star Belly Stitcher, Inc.*, 107 USPQ2d 2059, 2061 n.3 (TTAB 2013). We will consider the definition of “lit” from the Urban Dictionary, taking into account “the limitations inherent in this dictionary, given that anyone can submit or edit the definitions.” *Id.*

enjoy, namely the hookahs which are used to smoke tobacco by lighting the tobacco with a flame.” 4 TTABVUE 3.

The Examining Attorney responds that the “proliferation of these definitions by itself makes the term [LIT] less likely to be understood as merely descriptive, as it allows for a number of commercial impressions,” 6 TTABVUE 6, and notes that “[n]either applicant nor registrant has disclaimed or been required to disclaim LIT,” *id.*, such that the “term is, at the very least, suggestive.” *Id.*

We agree with the Examining Attorney that the meaning of the word LIT is nebulous in the context of the goods identified in the application and the services identified in the cited registration. The Examining Attorney correctly points out that neither Applicant nor the owner of the cited registration was required to disclaim the word LIT, or to prove that LIT had acquired distinctiveness, during the examination of their applications as a condition to registration of their respective marks, indicating that the USPTO concluded that the word was, at worst, suggestive of the subject goods and services. *See Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006) (a mark registered on the Principal Register is entitled to all presumptions under Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), including the presumption that the mark is distinctive). Applicant’s dictionary evidence does not establish that the word LIT is conceptually weak when it is used in marks for the subject goods or services.

With respect to the third-party LIT-formative marks, Applicant argues that “there are 136 filed applications for trademarks that include the popular word ‘LIT’ in

relevant classes 34, 35 and 41,” and that of “those 136 filed applications, 45 are live registered marks and 35 are pending trademark applications.” 4 TTABVUE 4.²⁰ Applicant specifically discusses three registrations and four applications. *Id.* at 5-7.

The Examining Attorney responds that the “mere listing of registrations does not make such registrations part of the record.” 6 TTABVUE 7 (citing *In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1405 n.17 (TTAB 2018)). She claims that “Applicant properly made of record three live registrations, two live applications, and one abandoned application.” *Id.*

We must determine whether the TESS list is of record and, if so, what weight (if any) it deserves. In *Peace Love World Live*, the Board explained that the “Board does not take judicial notice of registrations and a list of registrations does not make these registrations of record,” *Peace Love World Live*, 127 USPQ2d at 1405 n.17, but noted that where “the Examining Attorney does not object to the list of registrations, the Board may consider the objection waived.” *Id.* The Board cited *In re Houston*, 101 USPQ2d 1534 (TTAB 2012), for the proposition that “the examining attorney’s failure to advise applicant of the insufficiency of the list of registrations when it was proffered during examination constituted a waiver of any objection to consideration of that list.” *Peace Love World Live*, 127 USPQ2d at 1405 n.17 (citing *In re Houston*, 101 USPQ2d at 1536).

²⁰ As noted above, Applicant made the referenced TESS list of registrations and applications of record during prosecution. January 15, 2019 Response to Office Action at TSDR 24-31.

After Applicant made the TESS list of record during prosecution, the Examining Attorney did not advise Applicant that the submission of the list was insufficient.²¹ Accordingly, we find that to the extent that the Examining Attorney objects on appeal to consideration of the list, that objection has been waived. *Houston*, 101 USPQ2d at 1536. “Nevertheless, the list does not include enough information to be probative.” *Peace Love World Live*, 127 USPQ2d at 1405 n.17. As in *Peace Love World Live*, the list here “includes only the serial number, registration number, mark, and status (live or dead) of the applications or registrations,” *id.*, and “[b]ecause the goods [and services] are not listed, we do not know whether the listed registrations are relevant.” *Id.* (citing *Nat’l Fidelity Life Ins. v. Nat’l Ins. Trust*, 199 USPQ 691, 694 n.5 (TTAB 1978)). We find that the TESS list does not show the weakness of the LIT element of the cited mark.

Turning to the specific third-party marks discussed by Applicant, we agree with the Examining Attorney that the “third-party applications are evidence only that the applications were filed; they are not evidence of use of the mark[s].” 6 TTABVUE 7. *See Peace Love World Live*, 127 USPQ2d at 1405 n.17; *Inn at St. John’s*, 126 USPQ2d at 1745. Accordingly, the referenced applications (Serial Nos. 86973303, 86342833, 87838560, and 87551303) do not show the conceptual weakness of the LIT element of the cited mark.

²¹ February 4, 2019 Final Office Action at TSDR 1 (discussing third-party registrations and applications submitted by Applicant).

The record contains evidence of three live registrations of LIT-formative marks. They are Registration No. 5214858 of the mark shown below



for “smoking pipes,”²² Registration No. 5421091 of the standard character mark LIT for “night clubs,”²³ and Registration No. 4226939 of the standard character mark LIT for “electronic cigarettes and components and parts, namely, cartomisers, atomisers, and refill cartridges.”²⁴

The Examining Attorney concedes that the registrations of LIT for “night clubs,” and of KIL KEEP IT LIT and design for “smoking pipes” “appear to be for goods and services in similar fields to those identified in applicant’s application,” 6 TTABVUE 7, as night clubs and hookah lounges are both recreational venues and, as noted above, a hookah is a form of pipe for smoking, and hookah lounge services necessarily involve the use of such pipes by customers. The registration of LIT for e-cigarette components and parts, however, has “limited probative value,” *Inn at St. John’s*, 126

²² January 15, 2019 Response to Office Action at TSDR 33.

²³ *Id.* at TSDR 38.

²⁴ Applicant misidentifies this registration in its brief as Registration No. 5198902. 4 TTABVUE 5. The registration was made of record by the Examining Attorney as a bar to registration of Applicant’s mark under Section 2(d). August 23, 2018 Office Action at TSDR 2-3. The Examining Attorney subsequently withdrew the § 2(d) refusal based on this registration. February 4, 2019 Final Office Action at TSDR 1. She does not address this registration in her brief, focusing solely on the two other registrations. 6 TTABVUE 7 n.1.

USPQ2d at 1745 (citing *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017)), because the relationship of those goods to hookah lounge services is neither apparent nor proven. But even if we considered all of the registrations, “unlike cases in which extensive evidence of third-party registration and use of similar marks was found to be ‘powerful on its face’ inasmuch as ‘a considerable number of third parties[?] use [of] similar marks was shown,” *id.* (quoting *Juice Generation*, 115 USPQ2d at 1674), Applicant “has presented no evidence of third-party use, and at most, [three] third party registrations of varying probative value,” *id.*, with no registrations for services identical to those identified in the cited registration. “This is a far cry from the large quantum of evidence of third-party use and third-party registrations that was held to be significant in both” *Jack Wolfskin* and *Juice Generation. Id.*

The record does not support Applicant’s argument that the word LIT that is common to the marks is conceptually weak, and we find that both the commercial and conceptual strength of the cited mark under the sixth *DuPont* factor are thus neutral in our analysis of likelihood of confusion.

B. Similarity or Dissimilarity of the Marks

Under the first *DuPont* factor, we consider “the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the

marks confusingly similar.” *Inn at St. John’s*, 126 USPQ2d at 1746 (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

The proper test regarding similarity “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.” *Cai v. Diamond Hong, Inc.*, 901 F.3d, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation marks and citation omitted)). “The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than specific impression of marks.” *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018) (citations omitted).

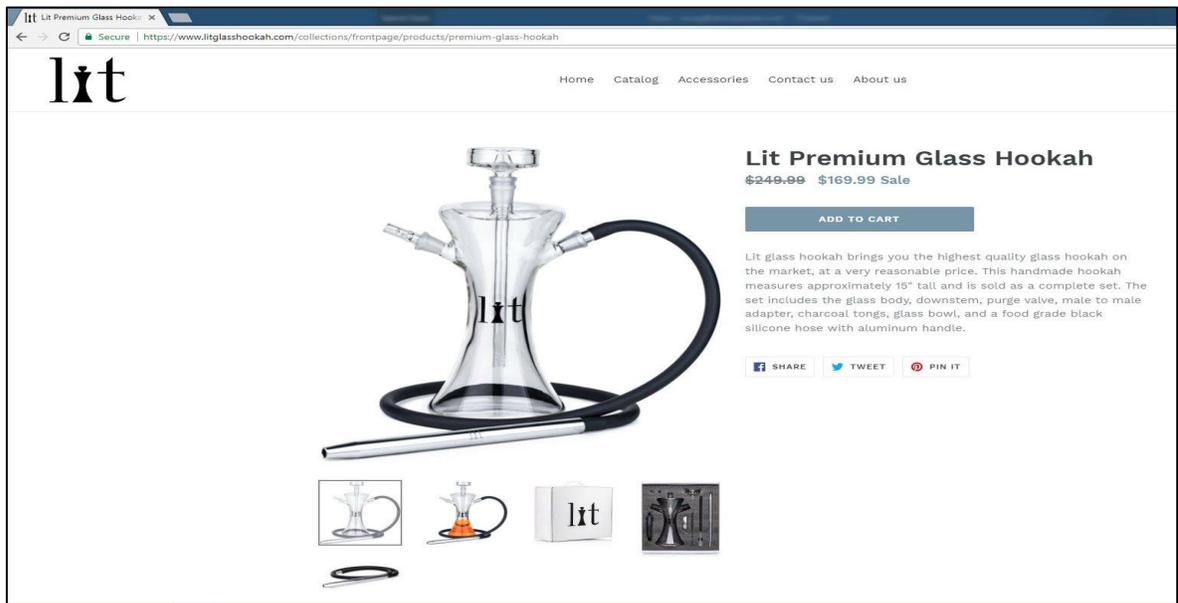
Applicant argues that the refusal to register is based on “an improper dissection of Registrant’s marks [sic].” 4 TTABVUE 10. Applicant notes that the registrant “did not register ‘LIT’ on its own but included the disclaimed phrase ‘HOOKAH LOUNGE & BAR’ in its mark, and as such, the phrase needs to be taken into consideration when evaluating the overall commercial impression of the mark.” *Id.* at 10-11. The Examining Attorney responds that the word LIT is the dominant element of both marks, and should be given greater weight in the comparison of the marks than the design element in Applicant’s mark and the words HOOKAH LOUNGE & BAR in the cited mark. 6 TTABVUE 4-5. We will begin our analysis of the first *DuPont* factor by determining the dominant portions of the marks.

The marks must be considered in their entireties, but “in articulating reasons for reaching a conclusion on the issue 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 consideration of the marks in their entireties.” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)). The word LIT is the first part of the cited mark, and that “is particularly significant because consumers typically notice those words first.” *Id.* at 1049 (citing *Palm Bay Imps.*, 73 USPQ2d at 1692). *See also Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). The words HOOKAH LOUNGE & BAR that follow LIT in the cited mark have been disclaimed and have no source-identifying capacity because they merely identify the services provided under the mark. *See, e.g., In re Dixie Rests.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (holding that Board properly found that DELTA, not CAFE, was the dominant portion of the mark THE DELTA CAFE for restaurant services). We agree with the Examining Attorney that LIT is the dominant portion of the cited mark.

Applicant’s mark forms the word LIT in lower-case letters, and contains a design element in the form of what Applicant describes as the letter “I” being in the shape of applicant’s glass hookah product:”

The image shows the lowercase letters 'lit' in a serif font. The letter 'i' is replaced by a silhouette of a hookah, with the bowl of the hookah forming the dot of the 'i' and the stem forming the vertical part of the 'i'. The letters 'l' and 't' are in a standard serif font.

In cases involving marks “consisting of words and a design, the words are normally accorded greater weight because they are likely to make a greater impression upon purchasers, to be remembered by them, and to be used to request the goods.” *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (citing *In re Viterra, Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012)). This general principle applies to Applicant’s stylized mark, as shown by Applicant’s specimen, which uses the word “Lit” alone, without stylization, to identify Applicant and its goods:



See CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 200 n.5 (Fed. Cir. 1983) (finding that the verbal portion of the applicant’s composite mark was its dominant portion based in part on the use of the words alone in the applicant’s catalog). We can infer from Applicant’s use of Lit that consumers will follow suit in using the word when verbalizing the mark, referring to Applicant, and calling for its goods. *Aquitaine Wine USA*, 126 USPQ2d at 1184. We find that the word LIT is also the dominant portion of Applicant’s mark.

We turn now to the required comparison of the marks “in their entireties as to appearance, sound, connotation and commercial impression,” *Palm Bay Imps.* 73 USPQ2d at 1691, giving greater weight in that comparison to the word LIT than to the other elements of the marks.

With respect to appearance and sound, Applicant argues that the “singular term ‘LIT’ has a very different look, especially when used as the logo version applied-for by Applicants [sic], when compared side-by-side with Registrant’s ‘LIT HOOKAH LOUNGE & BAR,’” and that its “mark is one short word, whereas Registrant’s contains five distinct words,” 4 TTABVUE 11, such that the “aural and visual impression of the marks are markedly different.” *Id.* As to meaning, Applicant claims that the marks are different in commercial impression, *id.*, but focuses primarily on the difference in the goods and services in arguing that “[a]lthough Applicant and Registrant both feature the word ‘hookah’ in their description, the goods and services are markedly different.” *Id.*

The Examining Attorney responds that

[e]ven if potential purchasers realize the apparent visual and aural differences between applicant’s and registrant’s marks, they could still reasonably assume, given the overall similarities in sound, appearance, connotation, and commercial impression in the respective marks, that applicant’s goods provided under the LIT mark constitute a new or additional goods line from the same source as the services sold under the LIT HOOKAH LOUNGE & BAR mark with which they are acquainted or familiar, and that applicant’s mark is merely a variation of the registrant’s mark.

6 TTABVUE 6.

There are differences between the marks in appearance and sound when the marks are “compared side-by-side,” as Applicant urges, 4 TTABVUE 11, but the “marks ‘must be considered . . . in light of the fallibility of memory’ and ‘not on the basis of side-by-side comparison.’” *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, 3 (CCPA 1977)). In comparing the marks in this manner, we must also take into account the “general rather than specific impression” of the cited mark, *i.am.symbolic, llc*, 127 USPQ2d at 1630, that a consumer would likely hold when exposed to Applicant’s mark separately.

The cited mark is a standard character mark and “we must consider that the literal elements of the mark (the words and the letters) may be presented in any font style, size, or color, including the same font, size and color of the literal portions of Applicant’s mark,” *Aquitaine Wine USA*, 126 USPQ2d at 1186, such as the lower case lettering of Applicant’s mark. “[I]llustrations of the mark as actually used may assist the [Board] in visualizing other forms in which the mark may appear.” *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011). An example of the possible display of the cited standard character mark is its display on the registrant’s website and signage with the letter “I” in LIT formed by a hookah, in a manner reminiscent of Applicant’s display of the letter “I” in its mark:



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Given the nature of the cited mark LIT HOOKAH LOUNGE & BAR, a consumer with a “general rather than specific impression” of its appearance would be more

²⁵ January 15, 2019 Response to Office Action at TSDR 46.

²⁶ *Id.* at TSDR 71.

likely to recall the source-identifying lead word LIT than all five of the words in the mark, which includes the generic term HOOKAH LOUNGE & BAR. A consumer with that general impression of the appearance of the cited mark who then encounters Applicant's stylized LIT mark would view Applicant's mark as similar in appearance to the recalled cited mark because of the near-identity of the dominant portions of the marks, the word LIT. We find that the marks are similar in appearance.

With respect to sound, Applicant is correct that its "mark is one short word, whereas Registrant's contains five distinct words," 4 TTABVUE 11, but Applicant's argument that the marks sound different for that reason assumes that the cited mark will regularly be verbalized as "five distinct words." That appears quite unlikely given "the penchant of consumers to shorten marks." *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1961 (TTAB 2016) (finding that when the applicant's mark TIME TRAVELER BLONDE for beer was verbalized, the penchant to shorten marks "would lead many consumers to drop the highly descriptive/generic term 'Blonde' when calling for Applicant's goods.") (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 219 (CCPA 1978) (Rich, J., concurring) ("the users of language have a universal habit of shortening full names--from haste or laziness or just economy of words")); *see also Aquitaine Wine USA*, 126 USPQ2d at 1188 ("consumers often have a propensity to shorten marks" when ordering goods or services orally). We find that it is far more likely that consumers will recall and verbalize the cited mark simply as LIT or LIT HOOKAH, which are, respectively, identical, or very similar, in sound to Applicant's mark when it is verbalized. Even if the entire cited mark LIT HOOKAH LOUNGE &

BAR is spoken, however, the source-identifying LIT portion of the mark is identical in sound to Applicant's entire mark when it is spoken. We find that the marks are similar in sound.

Finally, with respect to connotation and commercial impression, the dominant word LIT common to the marks gives them a similar connotation even if the precise meaning of LIT is uncertain or indeterminable. As discussed below in our analysis of the second *DuPont* factor, the goods and services offered under the marks are not "markedly different," as Applicant claims, 4 TTABVUE 11, but instead are complementary because both the goods and the services enable consumers to smoke tobacco using hookahs. Applicant argues at one place in its brief that "Lit' for a lounge may mean the common laudatory term of being drunk, whereas the meaning in consumers [sic] minds with hookah goods is to light the hookah with a flame," *id.* at 17, but argues in another place in its brief that LIT has essentially the same meaning when used with both the goods and the services because it "is suggestive or descriptive of a feature or characteristic of the relevant goods and services, smoking related goods and services that must be 'lit' to enjoy, namely the hookahs which are used to smoke tobacco by lighting the tobacco with a flame." *Id.* at 3. Applicant cites no evidence supporting its claim that LIT means one thing when it is used for hookahs and something different when it is used as part of the mark LIT HOOKAH LOUNGE & BAR for hookah lounge services involving the use of hookahs. Even if the precise meaning of LIT is unclear, we find that it is likely to mean essentially the same thing

in both marks, and that Applicant's stylized mark LIT and the cited mark LIT HOOKAH LOUNGE & BAR are thus similar in meaning.

The marks are similar in appearance, sound, and connotation and commercial impression, and the first *DuPont* factor thus supports a finding of a likelihood of confusion.

C. Similarity or Dissimilarity of the Goods and Services, and Channels of Trade

The second *DuPont* factor “considers ‘[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,’” while the third *DuPont* factor considers “the similarity or dissimilarity of established, likely-to-continue trade channels.” *Detroit Athletic Co.*, 128 USPQ2d at 1051 (quoting *DuPont*, 177 USPQ at 567). Our analysis under these factors is based on the identifications of goods in the application and the identification of services in the cited registration. *Id.*; *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-63 (Fed. Cir. 2014).

It is “not necessary that the goods [and services] be identical or even competitive to support a finding of a likelihood of confusion.” *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven, Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). “[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.’” *Id.* (quoting *7-Eleven*, 83 USPQ2d at 1724).

Applicant argues “[a]s a general matter” that its “listed goods are classified in International Class 34, which is markedly different than the [cited] mark which is in class 41 for services” and that because “Applicant’s mark is associated with a different class than the Registrant[’s], there is no likelihood of confusion.” 4 TTABVUE 9.

Applicant also argues specifically that

[j]ust because Registrant has a singular brick and mortar lounge location that offers hookah services, this in no way implies that registrant sells, or will ever sell, hookahs under this mark. Most hookah lounges do not sell hookahs under the same brand name, but only allow users to smoke hookahs provided by the store, at an hourly fee. Even those lounges who do sell hookahs do not sell hookahs of their own branding. They sell other company’s [sic] branded hookahs. This is similar to a market that may contain many different brand names in their store, but their trademark registration would be limited to the retail store, and not each individual product themselves sold in the stores. This is further evidenced with registrant’s failure to register their mark in any class or with any description that suggests they sell, or will ever sell, hookah related products. Their registration is clearly for “Hookah lounge services” and their scope of protection should be restricted accordingly.

Id. at 11-12.

Applicant claims that the record supports Applicant’s position that the goods and services are unrelated because “[a]ll three of the cited websites are for hookah lounges and they do have sections of their website that sell Hookahs, but none of the three websites sell hookahs of their own brand.” *Id.* at 12. According to Applicant, this evidence “only strengthens Applicant’s argument that there can be no likelihood of confusion, as it is not common that any hookah lounge also sells hookahs of the same

brand name.” *Id.* Applicant also concludes that the “channels of trade are different and weigh against a finding of a likelihood of confusion.” *Id.*

The Examining Attorney responds that hookahs “are complementary to and provided through the same channels of trade as ‘hookah lounge services.’” 6 TTABVUE 9. She argues that “[a]lthough applicant identified goods while registrant provides services, consumers are likely to be confused by the use of similar marks on and in connection with goods and with services featuring those goods.” *Id.* at 10. She points to websites of multiple hookah lounges that “also sell hookah equipment of the type applicant provides,” *id.*, and argues that “[t]his evidence establishes that the same entity commonly provides the relevant goods and services through the same trade channels, that the goods and services are used by the same classes of consumers in the same fields of use, and that the goods and services are complementary in terms of purpose.” *Id.* at 11.

We begin by addressing Applicant’s argument based on the different International Classes into which its goods and the registrant’s services are classified. 4 TTABVUE 9. “Classification is solely for the ‘convenience of Patent and Trademark Office administration’ . . . and ‘is wholly irrelevant to the issue of registrability under section 1052(d), which makes no reference to classification.’” *Detroit Athletic Co.*, 128 USPQ2d at 1051 (quoting 15 U.S.C. § 1112 and *Jean Patou, Inc. v. Theon, Inc.*, 9 F.3d 971, 29 USPQ2d 1771, 1774 (Fed. Cir. 1993)). “It is therefore 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.’” *Id.* (quoting

TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMEP”) Section 1207.01(a)(i)). Thus, contrary to Applicant’s claim, the fact “that the goods and services at issue fall within different classes does not preclude a finding that they are similar.” *Id.*

With respect to the relatedness of goods and services in general, the Federal Circuit has held that “the mere fact that goods and services are ‘used together’ does not, on its own, show relatedness.” *St. Helena Hosp.*, 113 USPQ2d at 1086. In *St. Helena Hosp.*, the court found that the fact that various printed materials dealing with physical activity and physical fitness of the sort identified in the cited registration were distributed in connection with services similar to the weight and lifestyle health and implementing weight and lifestyle health improvement plans in a hospital-based residential program identified in the application was insufficient to show that those goods and services were related. *Id.* at 1086-87. The court stated that “[i]n situations like the present, in which the relatedness of the goods and services is obscure or less evident, the PTO will need to show ‘something more’ than the mere fact that the goods and services are ‘used together.’” *Id.* at 1087. The court cited *Shen Mfg. Co. v. Ritz Hotel, Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350 (Fed. Cir. 2004), in which it had held that the fact that students in the sort of cooking classes identified in the opposer’s registration would undoubtedly use the sort of kitchen textiles identified in the opposed application was insufficient to show “that the consuming public would understand those products to have originated from the same source.” *Id.* at 1356.

The respective identifications here do not make the relatedness of the involved goods and services “obscure or less evident.” *St. Helena Hosp.*, 113 USPQ2d at 1087.

To the contrary, it is self-evident that “hookah lounge services” involve providing consumers of those services with hookahs, which encompass the particular “glass hookahs” identified in the application. Indeed, enabling consumers to use hookahs is the *raison d’être* for the rendition of hookah lounge services. “Here, because the relationship between [hookahs and hookah lounge services] is the opposite of obscure, unknown, or generally unrecognized, the relevant line of case law holds 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.” *In re Country Oven, Inc.*, 2019 USPQ2d 443903, *13 (TTAB 2019) (citing, *inter alia*, *Detroit Athletic Co.* and *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988)).²⁷ Goods identified as “glass hookahs” and services identified as “hookah lounge services” are intrinsically related because the rendition of the services by definition requires, and could not occur without, the goods. *Cf. Country Oven*, 2019

²⁷ Applicant cites *In re Shipp*, 4 USPQ2d 1174 (TTAB 1987), for the proposition that “[w]here the goods (or services) of the Applicant and Registrant are different, the Examining Attorney bears the burden of showing that Applicant’s and Registrant’s different goods would commonly be provided by the same source.” 4 TTABVUE 8. In *Shipp*, the goods in the cited registrations included commercial dry cleaning machine filters and parts therefor, which were sold to companies who provided the laundry and dry-cleaning services identified in the application. The Board found that the goods and services were unrelated because the services “are offered to the general public while the pertinent goods . . . are for use by owners or operators of laundries or dry cleaning establishments,” the goods “are not ordinarily sold to the general public,” and “it is unlikely that applicant’s customers would encounter any of the goods encompassed by the cited registrations.” *Shipp*, 4 USPQ2d at 1175. Applicant argues that “[j]ust like in the *In [r]e Shipp* case where the dry cleaning services were found not to be related to the dry cleaning equipment and goods offered under the same mark, there is no evidence of record that Applicant’s respective goods are sufficiently related to Registrant’s services for purposes of the likelihood of confusion analysis” 4 TTABVUE 8-9. *Shipp* is readily distinguishable, however, because here the goods are not only encountered (and used) by the consumers of the services, but the record shows that the goods are also sold to those consumers, including by some of the providers of the services.

USPQ2d 443903, *14 (“[b]akery shops by definition sell bakery goods”); *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1064 (Fed. Cir. 2003) (noting that while the record did not show that services identified generally as “restaurant services” and beer were related, “brewpub” services and beer “would clearly be related”).

Our finding of the intrinsic relatedness of the subject goods and services is buttressed by the record evidence showing that a number of hookah lounges sell hookahs.²⁸ None of the hookahs sold by the lounges are sold under their own marks, which reduces the probative value of this evidence somewhat, but it nevertheless shows that glass hookahs and hookah lounge services may emanate from the same source, that hookah lounges are among the channels of trade in which glass hookahs are sold,²⁹ and that both hookah lounge services and glass hookahs are marketed to and purchased and used by the same classes of consumers. *Cf. Shell Oil*, 26 USPQ2d at 1689 (“[i]t is relevant to consider the degree of overlap of consumers exposed to the respective services”); *Hyper Shoppes*, 6 USPQ2d at 1026 (BIGGS for retail grocery and general merchandise store services likely to be confused with BIGGS for furniture); *In re Thomas*, 79 USPQ2d 1021, 1024 (TTAB 2006) (“It is clear that consumers would be likely to believe that jewelry on the one hand and retail stores selling jewelry on the other emanate from or are sponsored by the same source if such

²⁸ August 23, 2018 Office Action at TSDR 8-18; February 4, 2019 Final Office Action at TSDR 2-13, 18-23.

²⁹ Applicant argues that this evidence shows that “the channels of trade are different,” 4 TTABVUE 15, but the fact that some hookah lounges also sell hookahs shows that the channels of trade for the goods overlap with the channels of trade for the services.

goods and services are sold under the same or similar marks.”). Consumers familiar with hookah lounge services provided under the LIT HOOKAH LOUNGE & BAR mark who encounter glass hookahs sold under the stylized LIT mark could reasonably believe that the provider of the hookah lounge services had line extended, through licensing or otherwise, into the sale of the goods that are required for it to provide the services. *Cf. Detroit Athletic Co.*, 128 USPQ2d at 1052 (“confusion is likely where one party engages in retail services that sell goods of the type produced by the other party, as here.”). We find that the second and third *DuPont* factors support a finding of a likelihood of confusion.

D. The Absence of Evidence of Actual Confusion

Applicant argues that its “mark has been in public use since July of 2017 and there have been no instances of any actual confusion between Applicant’s mark and those of the registrant’s [sic] cited by Examiner.” 4 TTABVUE 9-10. “*DuPont* factor 8 considers the ‘length of time during and conditions under which there has been concurrent use without evidence of actual confusion.’” *Guild Mortg.*, 129 USPQ2d at 1163. The possible absence of actual confusion in this case does not weigh in favor of no likelihood of confusion for at least the three reasons discussed below.

First, Applicant’s claim here is unsupported by any declaration and is based merely on argument of counsel, which is “no substitute for evidence.” *In re OEP Enters., Inc.*, 2019 USPQ2d 309323, *14 (TTAB 2019) (quoting *Cai*, 127 USPQ2d at 1799 (internal quotation omitted)); *see also Guild Mortg.*, 129 USPQ2d at 1163 (noting that a declaration may support a finding of no actual confusion). Applicant’s

unsupported claim is, of course, also “one-sided inasmuch as it provides only [A]pplicant’s experience in the marketplace and not that of [the] registrant.” *In re Gen. Motors Corp.*, 23 USPQ2d 1465, 1470 (TTAB 1992). “The fact that an applicant in an ex parte case is unaware of any instances of actual confusion is generally entitled to little probative weight in the likelihood of confusion analysis” because “the Board in such cases generally has no way to know whether the registrant likewise is unaware of any instances of actual confusion” *In re Opus One, Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001).

Second, the “absence of any reported instances of actual confusion would be meaningful only if the record indicated appreciable and continuous use by [Applicant] of its mark for a significant period of time in the same markets as those served by [the registrant] under its mark[].” *Gillette Can. Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). As discussed below, Applicant strenuously argues that the uses of the respective marks are geographically separate and otherwise distinct because the registrant “has a very limited online presence, does not offer any goods or services online, does not market itself very well, and is clearly limited to providing services under this mark only to the visitors and residents of Johnson City, a small town in Tennessee with a population of 66,391,” while “Applicant sells its goods nationally online, mostly on Amazon . . . where Registrant has no presence.” 4 TTABVUE 13. Applicant thus admits that there has been no use of the respective marks “for a significant period of time in the same markets,” *Gillette Can.*, 23 USPQ2d at 1774, which makes the absence of instances of actual confusion essentially meaningless.

See id. (finding that there was “simply no evidence that the parties’ goods have been sold together in the same locality for a significant period of time so that, if confusion were likely to occur, circumstances have been such that it could be expected to have happened.”); *cf. Gen. Motors Corp.*, 23 USPQ2d at 1470-71 (holding that evidence of the absence of actual confusion for nearly 30 years was probative of no likelihood of confusion in view of a “confluence of facts,” including large sales of both sets of goods and expansion of the applicant’s use of its mark into the goods identified in the cited registration).

Finally, the period of simultaneous use of the marks here, less than three years, pales in comparison to the alleged 40-year period of peaceful coexistence in *Guild Mortg.* and to the 20-year period of peaceful coexistence accepted in *In re Azteca Rest. Enters. Inc.*, 50 USPQ2d 1209, 1212 (TTAB 1999). Indeed, in the latter case, the Board held that the simultaneous use of the marks without evidence of actual confusion was not probative of no likelihood of confusion because the parties’ respective restaurants were located in the different geographical locations of the Pacific Northwest and Chicago. For the reasons stated above, on this record, we find that the eighth *DuPont* factor is neutral.

E. Applicant’s Other Arguments

As noted above, Applicant advances two arguments that are not directed to any *DuPont* factor. We discuss them immediately below.

First, Applicant argues that we should apply what Applicant calls the “Dawn Donut Rule,” 4 TTABVUE 12, which Applicant derives from the Second Circuit’s

decision in *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358, 121 USPQ 430 (2d Cir. 1959), a civil infringement action in which the plaintiff, the owner of federal registrations of the marks DAWN and DAWN DONUT for baked goods, unsuccessfully sought “to enjoin the defendant from using the mark ‘Dawn’ in connection with the retail sale of doughnuts and baked goods entirely within a six county area of New York State surrounding the city of Rochester.” *Dawn Donut*, 121 USPQ at 431. The Second Circuit held in *Dawn Donut* that

because plaintiff and defendant use the mark in connection with retail sales in distinct and separate markets and because there is no present prospect that plaintiff will expand its use of the mark at the retail level into defendant’s trading area, we conclude that there is no likelihood of public confusion arising from the concurrent use of the marks and therefore the issuance of an injunction is not warranted.

Id. at 435.

Applicant argues that the registrant “has used its registered ‘LIT HOOKAH LOUNGE & BAR’ mark exclusively in the Tennessee area” and has “no official website, offer[s] no online sales of any goods or services, and cater[s] exclusively to walk-in consumers in their local lounge in Tennessee.” 4 TTABVue 12. Applicant claims that

the Dawn Donut Rule applies as stated herein: “Therefore, if the use of the marks by the registrant and the unauthorized user are confined to geographically separate markets, with no likelihood that the registrant will expand his use into the defendant’s market, so that no public confusion is possible, then the registrant is not entitled to enjoin the junior user’s use of the mark.”

Id. (quoting *Dawn Donut*, 121 USPQ at 434). Applicant also cites *Brennan's, Inc. v. Brennan's Rest., LLC*, 360 F.3d 125, 69 USPQ2d 1939 (2d Cir. 2004), 4 TTABVUE 12-13, in which the Second Circuit cited *Dawn Donut* in affirming the denial of an injunction to the owner of the BRENNAN'S restaurant in New Orleans against the use of BRENNAN'S SEAFOOD & CHOP HOUSE in Manhattan. *Brennan's*, 69 USPQ2d at 1946. Applicant argues that *Dawn Donut* and *Brennan's* were not "given the proper weight by" the Examining Attorney. 4 TTABVUE 12.

We are troubled by the fact that Applicant's counsel made these arguments after his similar arguments based on the self-styled "Dawn Donut Rule" were rejected by the Board in *In re Ufarms, LLC*, 2016 WL 4140916 (Serial No. 86345473) (TTAB July 14, 2016), in which he represented another applicant. In *Ufarms*, counsel argued under *Dawn Donut* and *Brennan's* that confusion was unlikely because the applicant's "stores and the registrant's stores are in separate geographic markets," 16 TTABVUE 7 (Serial No. 86345473), with the applicant operating only in "downtown urban areas" in California, *id.*,³⁰ and the owner of the cited registration using its mark exclusively in Portland, Oregon. *Id.* The Board rejected that argument as "inconsistent with the principles set forth in the cases on which it relies, and with the presumptions granted by the Trademark Act, in particular, that the registrant

³⁰ In *Ufarms*, unlike here, the geographic restriction regarding the applicant's use of its mark was reflected in its identification of services, "retail convenience store services based in California's Downtown Urban areas featuring healthy food and beverages for local consumers." 16 TTABVUE 7 n.9 (Serial No. 86345473).

has the exclusive right to use the mark commerce.” *Id.* at 7-8. The Board explained that

we are not dealing here with whether the owner of the cited registration can enjoin Applicant’s use of its mark if Applicant and the registrant are operating in distinct geographic areas. Rather, we are considering whether Applicant is entitled to a registration for the mark URBANFARM for the services identified in its application. *Dawn Donut* recognizes that the Trademark Act affords nationwide protection to registered marks, regardless of the areas in which the registrant actually uses the mark.

Id. at 8 (citing *Dawn Donut*, 121 USPQ at 433).

The same analysis and statutory presumptions apply here, where we are also “considering whether Applicant is entitled to a registration for the [stylized LIT] mark . . . for the [goods] identified in its application.” *Id.* Applicant “seeks a geographically unrestricted registration under which it might expand throughout the United States,” *Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 393 (Fed. Cir. 1983), and the cited registration is also geographically unrestricted, which presumptively gives the registrant “the exclusive right to use its mark throughout the United States.” *Id.* See also *In re Appetito Provisions, Inc.*, 3 USPQ2d 1553, 1554 n.4 (TTAB 1987). This is not a concurrent use proceeding, *cf. Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007 (TTAB 2015), and except with respect to the eighth *DuPont* factor discussed above, we cannot consider the possible geographically separate uses of the subject marks by Applicant and the registrant in deciding whether there is a likelihood of confusion. *Appetito Provisions*, 3 USPQ2d at 1554 n.4.

Applicant's second argument is that the "singular location offering the lounge and bar services" for which the cited mark is registered "is insufficient to qualify this mark for 'use in commerce' as required by the Lanham Act," and that it "is unclear how the T-shirts included in the specimen helped register an application for bar and lounge services." *Id.* These arguments constitute impermissible collateral attacks on the cited registration, which we cannot entertain on this ex parte appeal. *See, e.g., Detroit Athletic*, 128 USPQ2d at 1053; *Dixie Rests.*, 41 USPQ2d at 1534-35. Applicant's attacks are "better suited for a cancellation proceeding," *Detroit Athletic*, 128 USPQ2d at 1053, but Applicant states that it has elected to try "to register its own mark without filing a cancellation proceeding against the [cited] registration." 4 TTABVue 16.

F. Conclusion

The marks are similar in appearance, sound, connotation and commercial impression, the goods and services are intrinsically related because glass hookahs are used in the rendition of hookah lounge services and are sold by some of the providers of those services, the channels of trade for glass hookahs include the channels of trade for hookah lounge services, and both glass hookahs and hookah lounge services are sold to the same classes of purchasers. The sixth and eighth *DuPont* factors are neutral, and Applicant's other arguments are meritless. We find, on the basis of the record as a whole, that consumers familiar with the cited mark LIT HOOKAH LOUNGE & BAR for hookah lounge services who are exposed to Applicant's stylized

LIT mark for glass hookahs are likely to believe mistakenly that the goods originate with, or are authorized or sponsored by, the provider of the services.³¹

Decision: The refusal to register is affirmed.

³¹ Applicant argues that “taking all the arguments herein, [it] has raised clear doubts about whether the marks are confusingly similar” and that “[t]he law states that doubts ‘should be resolved in Applicant’s behalf.’” 4 TTABVUE 10 (quoting *In re Aid Labs. Inc.*, 221 USPQ 1215, 1216 (TTAB 1993)). The cases cited by Applicant in support of this argument all involve refusals under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), in which the Board “resolves doubts as to the mere descriptiveness of a mark in favor of the applicant.” *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1513 (TTAB 2016). In Section 2(d) cases, however, the “rule of doubt” is applied in the opposite manner and “[a]ny doubts about likelihood of confusion, etc., under § 2(d) must be resolved against applicant as the newcomer.” *Hyper Shoppes*, 6 USPQ2d at 1026. We have no doubt here that confusion is likely, but to the extent that such doubt existed, it would not aid Applicant.