

This Opinion is Not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Yafa Hummus Inc.

Serial Nos. 88157691 and 88157695

Amir Vicente Adibi of Adibi IP Group PC,
for Yafa Hummus Inc.

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Laurie Kaufman, Managing Attorney.

Before Kuhlke, Heasley and Dunn,
Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Yafa Hummus Inc. (“Applicant”) seeks registration on the Principal Register for



the marks

(with HUMMUS, MEDITERRANEAN and SINCE

1951 disclaimed), and YAFA HUMMUS SIMPLY MEDITERRANEAN in standard

characters (with HUMMUS and MEDITERRANEAN disclaimed), both for

“Restaurant services; Restaurant services featuring Mediterranean cuisine, Greek

cuisine, and a fusion of Mediterranean and Greek cuisine; Restaurant and café services; Restaurant and catering services,” in International Class 43.¹

The Trademark Examining Attorney has refused registration of Applicant’s marks under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s marks, when used in connection with the identified services, so



resemble the registered mark (with YAFA GRILLE SHAWARMA, FALAFEL and PITA disclaimed) for “Restaurant and catering services,” in International Class 43, as to be likely to cause confusion, mistake or deception. The registration includes a color claim for the colors “orange, red, and black,” and a translation statement that the “English translation of ‘YAFA’ in the mark is ‘JAFFA’.”²

¹ Application Serial Nos. 88157691 and 88157695 were filed on October 16, 2018 based on allegations of first use on August 15, 2017 and first use in commerce on August 18, 2017 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a). Application Serial No. 88157691 includes the following description of the mark:

The mark consists of the word “YAFA” in stylized text extending along a center of a circle, the word “HUMMUS” in smaller curved text that extends along a bottom portion of the circle and disposed within the circle, the words “SIMPLY MEDITERRANEAN” in smaller text disposed outside of and below the circle, the words “SINCE 1951” in even smaller stylized text disposed above the word “HUMMUS”, and a plurality of garbanzo beans disposed between two olive leaf branches along an upper portion of the circle and disposed within the circle.

² Registration No. 4885191, issued on January 12, 2016. The registration also includes the following description of the mark:

The mark consists of an inverted frustoconical shape design in orange depicting spiced meat on the left side of the mark, the word “YAFA” in lower case stylized red text with an orange horizontal bar above the letter “A”, the word “GRILLE” in upper case orange text is nestled below the letters “A” “F” “A” in “YAFA” and above the words “SHAWARMA”, “FALAFEL” and “PITA” in black text, separated

When the Section 2(d) refusals were made final, Applicant appealed and requested reconsideration in each application. On March 24, 2020, the Examining Attorney denied the requests, the appeals resumed and briefs have been filed. These appeals present common questions of law and fact and the records are substantially similar. Therefore, in the interest of judicial economy, we consolidate the cases and decide them in this single opinion. *See In re Tapco Int'l Corp.*, 122 USPQ2d 1369, 1369 n.1 (TTAB 2017); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1214 (June 2020). We have considered all arguments and evidence filed in each case.³ We affirm the refusal to register in each application.

I. Likelihood of Confusion

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 (Fed. Cir. 2003). We consider each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *see also M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d

by black-color hyphens, which are located below and span the entire length of the word "YAFA".

³ Citations to TTABVUE throughout the decision are to the Board's public online database that contains the appeal file, available on the USPTO website, www.USPTO.gov. The first number represents the docket number in the TTABVUE electronic case file and the second represents the page number(s).

Citations to the examination record refer to the Trademark Office's online Trademark Status and Document Retrieval system (TSDR).

Citations are to the appeal file and record in Application Serial No. 88157691.

1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006) (even within the *DuPont* list of factors, only factors that are “relevant and of record” need be considered).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. *See In re Chatam Int’l Inc.*, 380 F.3d 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.”); *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. Relatedness of the Services, Trade Channels, Classes of Consumers

When considering the services, trade channels, and classes of consumers, we must make our determinations based on the services as they are identified in the application and cited registration. *See In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). *See also Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Houston Computer Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Applicant's and Registrant's "Restaurant and catering services" are identical. It is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed by the identification of services within a particular class in an application. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986 (CCPA 1981); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014). However, we further find that Applicant's "Restaurant services; Restaurant services featuring Mediterranean cuisine, Greek cuisine, and a fusion of Mediterranean and Greek cuisine; Restaurant and café services" are encompassed by Registrant's "Restaurant and catering services."

Because the services are identical and otherwise legally identical, and there are no limitations as to channels of trade or classes of purchasers, we presume that Applicant's and Registrant's services will be offered via the same channels of trade to the same classes of consumers. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion).

Applicant presents no argument regarding the services, trade channels and classes of consumers, other than to observe that "Applicant's Mark and the Cited Mark occupy the same International Class (IC 043), [and] have related services..." App. Brief, 7 TTABVUE 7.

We find Applicant's and Registrant's services to be identical in part and otherwise legally identical, and the trade channels and classes of consumers are presumed to overlap. This strongly favors a finding of likelihood of confusion.

B. Similarity/Dissimilarity of the Marks

We compare the marks in their entireties 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.” *In re Inn at St. John's*, 126 USPQ2d 1742, 1746 (TTAB 2018) *aff'd* 777 Fed. Appx. 516 (Fed. Cir. 2019) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014). “The 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). In evaluating the similarities between marks, the emphasis must be on the recollection of the average purchaser, who normally retains a general, rather than specific, impression of trademarks. *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016) (citing *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd per curiam*, 972 F.2d 1353 (Fed. Cir. 1992)).

Our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on a comparison of the entire marks,

not just part of the marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). *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.”). However, “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 entirety.” *Nat'l Data*, 224 USPQ at 751.

Finally, when the services are identical or legally identical, the degree of similarity between the marks necessary to support a determination that confusion is likely declines. *See Bridgestone Americas Tire Operations, LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012); *Viterra Inc.*, 101 USPQ2d at 1908.

The Registrant’s mark is shown below:



We begin with a comparison of Applicant’s mark in Application Serial No. 88157691:



Applicant observes that “[t]he Cited Mark’s disclaimer of the literal portion of the mark in its entirety means that the Cited Mark is **not** claiming exclusive rights over such terms [and] [m]ore importantly, the Registrant has disclaimed the entire literal portion of its mark, namely ‘YAFA.’” App. Brief, 7 TTABVUE 4 (emphasis in original). Thus, Applicant argues that although the disclaimed terms should be considered in the comparison of the marks, they are less significant and of less dominance than other components of the marks. Applicant points to the design elements in both marks and the other different disclaimed wording and concludes these differences are sufficient to distinguish the marks.

The Examining Attorney argues the marks share an “overall similar commercial impression” because both marks “begin with the word YAFA,” which is prominently featured. Ex. Att. Brief, 9 TTABVUE 6, 9. Further, because the additional wording in Registrant’s mark, GRILLE, PITA, SHAWARMA and FALAFEL, and Applicant’s mark, HUMMUS, MEDITERRANEAN, and SINCE 1951, is highly descriptive or generic and the word SIMPLY in Applicant’s mark “does not significantly alter the overall meaning of the mark,” it does not serve to diminish the similarity based on the shared term YAFA. *Id.* at 8. The Examining Attorney acknowledges that Registrant disclaimed the word YAFA in its mark, but points to the several meanings of YAFA⁴ and argues that YAFA is not, in fact, descriptive of the services. Finally, the Examining Attorney asserts that the design portions of the marks also do not

⁴ See August 30, 2019 Office Action pp. 41-42 (evidence showing YAFA as a Hebrew word, a female given name, a misspelling of a city in Israel and a tribe in Yemen).

diminish the overall primary significance of the shared wording because the wording is more likely to be remembered and the design elements are suggestive of a significant feature of the services consisting respectively of a shawarma spit, and garbanzo beans and “wheat.”⁵ *Id.* at 8.

Applicant’s and Registrant’s marks are similar in appearance, sound, connotation and commercial impression because they both include the word YAFA. The word YAFA is visually the most prominent literal element of the marks and the additional wording (other than the word Simply) in both marks is highly descriptive or generic of the services. In addition, the design elements suggest the type of food offered in the restaurants which in both cases could include “Mediterranean,” a word appearing in Applicant’s mark. The registration, through the translation statement, makes clear YAFA is Jaffa, a city in Israel.⁶

Applicant acknowledges this meaning, noting the translation in the registration and observing that Jaffa “is the correct spelling of a city in Israel, a Mediterranean country [and] [a]rguably the term ‘Yafa’ as used by Registrant is highly suggestive of Registrant’s restaurant services that provide Mediterranean cuisine.” App. Reply Brief, 10 TTABVUE 5. Applicant’s identification specifies a Mediterranean cuisine

⁵ Applicant corrects the Examining Attorney’s description of the design as including wheat. The design includes olive branches as stated in the description of the mark.

⁶ Jaffa is defined as: “a former seaport in W Israel, part of Tel-Aviv since 1950: ancient Biblical town.” Dictionary.com (based on RANDOM HOUSE UNABRIDGED DICTIONARY (2020)). The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

and would also evoke the city on the Mediterranean. Applicant's statement that the term YAF A is suggestive as used with the registered restaurant services makes less convincing its argument that the disclaimer requires treating YAF A as a lesser contributor to the commercial impression of the registered mark. *Compare In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707 (Fed. Cir. 2017) ("marks that are merely descriptive cannot be registered unless they acquire secondary meaning under § 2(f) of the Lanham Act, 15 U.S.C. § 1052(f), but marks that are suggestive are 'inherently distinctive' and can be registered.").

Whether or not consumers are familiar with the city, they would ascribe the same meaning to the identical word YAF A used in connection with identical restaurant services. The commercial impression of the marks is similar in structure and format with the word YAF A featured prominently surrounded by words and design that specifies or evokes the type of food offered by the restaurant services.

Applicant relies heavily on the disclaimer of the word YAF A in the registered mark to argue that YAF A should not be considered the dominant part of the mark. However, "disclaimers are not helpful in preventing likelihood of confusion in the mind of the consumer, because he is unaware of their existence" and "disclaimed material still forms a part of the mark and cannot be ignored in determining likelihood of confusion." *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 395 (Fed. Cir. 1983). Moreover, likely confusion may be found where the shared term has been disclaimed. *Id.* (finding GIANT dominant part of mark GIANT HAMBURGERS and design even where GIANT disclaimed).

The Federal Circuit has “previously . . . found that the dominant portion of a composite word and design mark is the literal portion, even where the literal portion has been disclaimed.” *Viterra Inc.*, 101 USPQ2d at 1911 (citing *Giant Food v. Nation’s Foodservice*, 218 USPQ2d at 395. As in *Viterra* and *Giant Food*, the Board may accord greater weight to the literal portion of the mark, and we do so in this appeal with the word YAFA, which is a visually important and prominent part of each mark.

In addition, in a composite mark, the words are generally given greater weight because they would be used by consumers to refer to the services. *In re Dakin’s Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); *see also Anthony’s Pizza & Pasta International, Inc. v. Anthony’s Pizza Holding Co., Inc.*, 95 USPQ2d 1271, 1279 (TTAB 2009) *aff’d Anthony’s Pizza Holding Co., Inc. v. Anthony’s Pizza & Pasta*, 415 Fed. Appx. 222 (Fed. Cir. 2010). It is clear consumers would use the word YAFA to refer to the respective restaurant services.

Applicant highlights three unpublished decisions (*In re Wall Street Alliance, Inc.*, Serial No. 87496920 (TTAB 2019) (WALL ST ALLIANCE and design not confusingly similar to WALL STREET ALLIANCE GROUP and design), *In re Murray*, Serial No. 77029078 (TTAB 2009) (MY HASSLE FREE LISTINGS and design not confusingly similar to HASSLE FREE LISTINGS and HASSLE-FREE HOME SELLING)) and (*Outdoor Kids v. Parris Mfg. Co., Inc.*, 385 F. App’x 992 (Fed. Cir. 2010) (affirming Board’s finding OUTDOOR KIDS and KIDS OUTDOORS and design not confusingly similar) in which the Board found no similarity where the literal elements were disclaimed in their entirety or in part. App. Brief, 7 TTABVUE 5.

As the Examining Attorney explained, however, the facts and records in those cases were very different. For example, the decisions rely on evidence of mere descriptiveness and dilution of the literal elements, rather than simply relying on the disclaimers. This demonstrates why each case must be decided on its own merits. *E.g.*, *In re Binion*, 93 USPQ2d 1531, 1536 (TTAB 2009). Previous decisions by examining attorneys in approving other marks are without evidentiary value and are not binding on the agency or the Board. *In re Davey Prods. Pty*, 92 USPQ2d 1198, 1206 (TTAB 2009); *In re Wilson*, 57 USPQ2d 1863, 1871 (TTAB 2001); *In re Sunmarks, Inc.*, 32 USPQ2d 1470, 1472 (TTAB 1994); *In re Nat'l Novice Hockey League, Inc.*, 222 USPQ 638, 641 (TTAB 1984).

Applicant asserts that the “Examining Attorney should not be able to unilaterally expand the scope of protection for Registrant’s Mark to create an exclusive right to a term that was seemingly subject to a compulsory disclaimer ...” App. Reply Brief, 10 TTABVUE 4. Applicant points out that the disclaimer was not voluntary, and the purpose of disclaimers “is to make of record, if it might otherwise be misunderstood, that a significant element of a composite mark is not being exclusively appropriated, apart from the composite.” App. Reply Brief, 10 TTABVUE 4 (quoting *In re Pencils Inc.*, 9 USPQ2d 1410, 1411 (TTAB 1988)).

It is correct that disclaimed matter may at times be less significant and less dominant than other components of a mark. *See, e.g.*, *In re Dixie Rests., Inc.*, 41 USPQ2d at 1533-34 (affirming TTAB’s finding that “DELTA,” not the disclaimed generic term “CAFE,” is the dominant portion of the mark THE DELTA CAFE); *In re*

Binion, 93 USPQ2d at 1534 (finding that “BINION’S,” not the disclaimed descriptive wording “ROADHOUSE,” is the dominant portion of the mark BINION’S ROADHOUSE). However, we also note that Applicant did not disclaim YAFA in its own mark, and asserts that the dictionary definitions of YAFA with their various connections to the Mediterranean are merely suggestive of restaurants which may offer Mediterranean cuisine.

Of course, there is no per se rule and certainly in some circumstances where the wording is suggestive or descriptive a design element may have more source-indicating significance, as was the case in the unpublished decisions.

Here, the prominent placement of YAFA at the forefront of both marks creates a strong similarity that is not diminished by the other wording or design elements, which serve to underscore the similar meaning and commercial impression of the Mediterranean style of cuisine. When calling for the restaurant services potential consumers will reach for the word YAFA, not the other wording descriptive of the food offered (shawarma, falafel, hummus) or the type of cuisine (simply Mediterranean); nor will consumers refer to the design of the food offered (the meat spit, garbanzo beans and olive branches).

We bear in mind that the “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), and that the proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016); *In re Mr. Recipe*,

LLC, 118 USPQ2d 1084, 1089 (TTAB 2016). In this case, there is a much higher probability that the word YAF A in each mark will be impressed upon the average consumer's mind and retained for purposes of later recalling the marks. Thus, in terms of appearance, sound, connotation, and commercial impression, we find the marks are similar based on the common word YAF A. In view thereof, the similarity of these marks weighs in favor of likelihood of confusion.

This reasoning applies with even greater strength to Applicant's standard character mark in Application Serial No. 88157695, YAF A HUMMUS SIMPLY MEDITERRANEAN. Again, the dominant literal element of Applicant's mark is the word YAF A. And again, even though Registrant has disclaimed YAF A, its visually prominent presence creates the same overall commercial impression as Applicant's mark—a commercial impression that is underscored by the other elements of the marks, describing the food offered by the restaurants. In addition, because the rights associated with a standard character mark reside in its wording, and not in any particular display, we must consider Applicant's mark “regardless of font style, size, or color,” including iterations that present Applicant's mark in a similar stylized form. *Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 1356, 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011); *In re RSI Sys., LLC*, 88 USPQ2d 1445 (TTAB 2008); *In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TM EP) § 1207.01(c)(iii) (Oct. 2018).

Overall, we find the marks to be similar and this weighs in favor of likely confusion.

II. Conclusion

In balancing the factors the similar marks, identical services and overlap in trade channels and classes of consumers, confusion is likely between Applicant's marks



and YAFA HUMMUS SIMPLY MEDITERRANEAN, and



Registrant's mark .

Decision: The refusals to register Applicant's marks are affirmed.