

This Opinion is Not a
Precedent of the TTAB

Hearing: March 17, 2021

Mailed: March 18, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Monrovia Nursery Company
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Serial No. 88559348
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Steven Andrew Wilson of Lewis Roca Rothgerber Christie LLP,
for Monrovia Nursery Company.

Claudia Garcia, Trademark Examining Attorney, Law Office 111,
Chris Doninger, Managing Attorney.

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Before Kuhlke, Shaw, and Dunn,
Administrative Trademark Judges.

Opinion by Dunn, Administrative Trademark Judge:

Monrovia Nursery Company (Applicant) seeks registration on the Principal Register of the mark COLORIFIC (in standard characters) for “live plants, namely, echinacea and excluding fresh vegetables, for sale online and in garden centers and mass merchants,” in International Class 31.¹

¹Application Serial No. 88559348 filed on August 1, 2019 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce.

References to the application are to the downloadable .pdf version of documents available from the TSDR (Trademark Status and Document Retrieval) database. The TTABVUE

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as applied to the goods identified in the application, so resembles the mark COLORIFIC (in standard characters) for "fresh vegetables," in International Class 31,² on the Principal Register as to be likely to cause confusion, to cause mistake, or to deceive.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

I. LIKELIHOOD OF CONFUSION

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). We must 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). In any likelihood of confusion analysis, two key considerations are the similarities between services and the similarities between the marks. *See 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 [or services] and differences in the marks.").

citations refer to the Board's electronic docket, with the first number referring to the docket entry and the second number, if applicable, referring to the page within the entry.

² Registration No. 4696686 issued March 3, 2015, Section 8 accepted.

A. Similarity or Dissimilarity of the Marks

The first *DuPont* factor requires consideration of “[t]he similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *DuPont*, 177 USPQ at 567. Applicant seeks to register the term COLORIFIC in standard characters, which is identical to the registered mark. As a result, the marks look and sound the same. As to connotation, we find that the term COLORIFIC does not appear in the dictionary, but is a coined, or fanciful, term. *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173, 1181 (Fed. Cir. 2004) (defining a fanciful mark as “a non-dictionary word concocted by the trademark holder for its product” and observing that such marks are typically strong). Neither Applicant nor the Examining Attorney contend or present any evidence that the coined term COLORIFIC has a particular connotation, so we find that the connotation and overall commercial impression is identical when applied to the respective goods. *Cf. Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (“Opposer’s COACH mark, when applied to fashion accessories is clearly either arbitrary or suggestive of carriage or travel accommodations [e.g., stagecoach, train, motor coach, etc.] thereby engendering the commercial impression of a traveling bag [e.g., a coach or carriage bag]. On the other hand, applicant’s COACH marks call to mind a tutor who prepares a student for an examination.”).

Because the marks COLORIFIC are identical in appearance, pronunciation, connotation and commercial impression, this *DuPont* factor strongly favors finding a likelihood of confusion.

B. Similarity or Dissimilarity of the Goods and Channels of Trade

We turn to the similarity or dissimilarity of the respective goods and their channels of trade. The issue is not whether the goods will be confused with each other, but rather whether the public will be confused as to their source. *See Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods.”). It is sufficient that the goods of the applicant and the registrant are related in some manner or that the conditions surrounding their marketing are such that they are likely to be encountered by the same persons under circumstances that, because of the marks used in connection therewith, would lead to the mistaken belief that they originate from the same source. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 14711, 1476 (Fed. Cir. 2000). The application and registrations themselves may provide evidence of the relationship between the goods. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002).

Here, because they both are plant products, we find an inherent relationship between Applicant’s goods “live plants, namely, echinacea and excluding fresh vegetables, for sale online and in garden centers and mass merchants” and the registered goods “fresh vegetables.” *See Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1310 (Fed. Cir. 2002) (“On the face of the registrations themselves, QSC’s [amplifiers and power amplifiers] and the ACOUSTIC WAVE [loudspeaker systems and music systems consisting of a loudspeaker system and

amplifier and at least one of a radio tuner, compact disc player and audio tape cassette player and loudspeaker systems] are related.”); *In re Anderson*, 101 USPQ2d 1912, 1920 (TTAB 2012) (“[W]e find an inherent relationship between the ‘tires’ and the ‘vehicle wheel cap and hub caps’ in the cited registrations on the one hand and the ‘custom manufacture of automobile services’ in the application on the other hand, since tires and either hub caps or wheel caps may be an essential element in the manufacture of many automobiles”).

Echinacea is sold not only as a live plant but as an herbal remedy. More specifically, we take judicial notice that echinacea is defined as “the dried rhizome, roots, or other parts of any of three purple coneflowers that are used primarily in dietary supplements and herbal remedies for the stimulating effect they are held to have on the immune system.”³ Vegetables are the edible part of plants. We take judicial notice that vegetables are “a usually herbaceous plant (such as the cabbage, bean, or potato) grown for an edible part that is usually eaten as part of a meal.”⁴ Based on these definitions, it is clear not only that Applicant’s goods and the registered goods are inherently related as plant products, but they are functionally related as plant products beneficial to humans, either as herbal remedies or food. *Compare In re Davia*, 110 USPQ2d 1810, 1815 (TTAB 2014) (“Both agave sweeteners

³ *Merriam-Webster.com Dictionary*, <https://www.merriam-webster.com/dictionary/echinacea>. Accessed 18 Mar. 2021. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016).

⁴ *Merriam-Webster.com Dictionary*, <https://www.merriam-webster.com/dictionary/vegetable>. Accessed 18 Mar. 2021.

and pepper sauce are used as condiments, defined in Webster's dictionary as "something (such as salt, mustard, or ketchup) that is added to food to give it more flavor." Thus, they are functionally related.").

In addition to the inherent and functional relationship between the goods, the record shows that live plants and fresh vegetables are goods which may emanate from a single source. The Examining Attorney submitted three use-based third party registrations (Nos. 5023050, 5223685, and 5372998) for goods including fresh vegetables and live plants.⁵ "Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source." *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff'd*, 864 F.2d 149 (Fed. Cir. 1988) (unpublished table decision). *Accord In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1737 (TTAB 2018) (third party registrations support finding "optical lenses, namely, corrective lenses sold through eye care professionals" related to "spectacles, spectacle cases, spectacle lenses, spectacle settings, spectacle frames, glasses for sport, protective helmets for sports, binoculars, parts of these goods included in this class" and "ski glasses, ski

⁵ September 11, 2019 Office Action TSDR 10-17. A fourth registration (No. 4498981) was cancelled after submission and will be given no consideration.

goggles, goggles for sports, protective sport helmets; sunglasses, bags specifically adapted for protective helmets”).

Turning to the channels of trade, the record includes examples of fourteen different entities (Greentree Naturals, Kohler Farms, Seedpod Farm, Mustard Seed Farm, Newaukum Valley Harvest, Haven Homestead, Buckleberry Farm, Olde Achers Farm, Johnson Creek Farm, Best Family Farms, Coffee Creek Community & Gardens, Vienna Gardens, Centralia Farmer’s Market, and Winlock Saturday Market) offering both live plants and fresh vegetables for sale.⁶ While limited, the record also includes webpages showing that both Applicant’s live echinacea plants and the registered fresh vegetables may emanate from the same source (Candellas, New Castle Fruit & Produce, and Sunbeam Farm).⁷

Applicant argues that the evidence of live plants and vegetables being sold by the same entity does not establish “whether any of these farms sell both echinacea and fresh vegetables,” and that the different channels of trade preclude a likelihood of confusion.⁸ In support, Applicant points to the trade channels identified in its

⁶ February 21, 2020 Office Action TSDR 19-21, 23, 25-28, 30-31,34, 39-42, 48-50. Because fruit and vegetables are not synonymous, we do not consider evidence of entities that sell fruit and live plants to be probative here. Similarly, because flowers are part of a plant which may be cut for sale, leaving the plant, we do not treat flowers as synonymous with live plants. We accept Applicant’s assertion (8 TTABVUE 10) that the webpage for My Green Organic Farm is no longer available, and have not considered that evidence.

⁷ August 19, 2020 TSDR 22-33. Bedford Fields, Pacific Botanicals, and Proven Winners offer echinacea but not fresh vegetables. Pacific Botanicals offers “kelp fronds,” which it classifies as “sea vegetables.” Kelp, a type of seaweed, does not fit the definition of “vegetable” (listed earlier in this decision) as a “usually herbaceous plant.” Bedford Fields and Proven Winners offers vegetable plants, not fresh vegetables. We do not consider evidence about these entities probative of overlapping channels of trade for the relevant goods. TSDR 6-21.

⁸ 8 TTABVUE 11.

identification of goods, “live plants, namely, echinacea and excluding fresh vegetables, for sale online and in garden centers and mass merchants.” In addition, Applicant submits the declaration of Jonathan Pedersen, Vice President of Sales & Business Development, who avers that Applicant’s live echinacea plants are a hybrid “purely ornamental in nature” and not meant for consumption; that its live echinacea plants are sold from Applicant’s website; that Applicant does not sell fresh vegetables on its website; and that the garden centers and mass merchants that buy Applicant’s live echinacea plants typically do not sell fresh vegetables.⁹

On the first point, we find the evidence that consumers are accustomed to encountering live plants and fresh vegetables from the same source to be relevant to our determination of likelihood of confusion. While the live plants identified in the relevant evidence do not specifically include echinacea, they do not exclude it, and so the evidence establishes a channel of trade for plant products both live (as Applicant’s goods) and harvested (as the registered goods). This evidence is corroborated by the evidence of the three entities which specifically carry both Applicant’s live echinacea plants and fresh vegetables.

As to the evidence that Applicant’s goods are restricted to ornamental use, the dictionary definitions make clear that echinacea has applications as an herbal remedy as well as an ornamental plant, and so we will not treat the identification of “live plants, namely, echinacea” as including a restriction to ornamental use which is not reflected in the identification of goods. *Stone Lion Capital Partners, LP v. Lion*

⁹ July 29, 2020 Request for Reconsideration TSDR 8-9.

Capital LLP, 746 F.3d 1317, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014) (“Parties that choose to recite services in their trademark application that exceed their actual services will be held to the broader scope of the application.”). *See also In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018) (“The third *DuPont* factor—like the second factor—must be evaluated with an eye toward the channels specified in the application and registration, not those as they exist in the real world.”).

In our world of pervasive e-commerce, that Applicant’s live echinacea plants are “for sale online” is not much of a restriction, a fact which Applicant acknowledged at the hearing. Where, as in the cited registration, there are no restrictions on trade channels in the identification of goods, we must presume that the goods travel in all channels of trade appropriate for such goods. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 110 USPQ2d at 1161; *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, *6 (TTAB 2020). There are no restrictions on the channels of trade for the registered fresh vegetables, so they are assumed to travel in all channels of trade, including online sales and mass merchants.

We are not convinced by Applicant’s argument that the record does not show that online sales are a channel of trade for fresh vegetables. The evidence that live plants and fresh vegetables are sold by farms and gardens which do not sell online is not determinative. While we would prefer a deeper record on this point (as on other points), the record includes website excerpts from two different entities (Candella’s and Newcastle) that offer online ordering or an online store on their homepages, as

well as offering both fresh vegetables and live echinacea plants for sale.¹⁰ We disagree with Applicant's argument that the references to online ordering and online store are insufficient, and the Examining Attorney was required to supply each webpage associated with an online sale of the fresh vegetables to demonstrate that the online ordering applied to the fresh vegetables.¹¹ Similarly, we do not find the exhortation "Shop Online Fresh Fruit & Veggies, Specialty Foods, and More. Same Day Pick Up." on the Newcastle homepage serves as proof that echinacea is not available for sale online. Rather we find that echinacea, and other products not listed in the exhortation, is implicitly included to the reference "and More."

We also are not persuaded that Applicant's limitation of its goods for sale in "garden centers and mass merchants" prevents overlap with the channels of trade for fresh vegetables. Applicant does not define "garden centers and mass merchants," and submitted no evidence in support of its argument that the "mass market" channel of trade in its identification of goods designates only commercial entities like "Lowe's or Home Depot."¹² We note the definition of a "mass merchandiser" as "a retailer or retail store that seeks to sell large quantities of goods quickly through such means as discounting, customer self-service, or unadorned display and packaging, as in a

¹⁰ August 19, 2020 Office Action TSDR 22-31.

¹¹ If Applicant possessed evidence that, in fact, the fresh vegetable or echinacea was not available online from those entities which offer online sales, Applicant could have requested remand to submit such rebuttal evidence.

¹² 8 TTABVUE 6. Applicant's declaration does not state that "garden centers and mass merchants" never sell fresh vegetables, but merely that they "typically" do not. Plainly, sometimes garden centers and mass merchants sell fresh vegetables as well as echinacea. It is not necessary that the channels of trade are exactly the same, but it is significant for assessing the likelihood of confusion if there is any overlap.

warehouse.”¹³ While this definition includes Home Depot and Lowes, it also generally includes supermarkets and discount retailers which sell fresh vegetables as well as live plants. *See Promark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“The parties’ respective products have been sold through the same grocery store chains, the same mass merchants such as Wal-Mart and Target, and the same club stores such as Costco and Sam’s Club, and their products have been advertised through the same forms of mass media, even appearing in some of the same retailer promotional circulars.”).¹⁴ In the absence of evidence that “mass merchants” are restricted to home improvement big box stores like Home Depot and Lowes, we are not convinced that the “mass merchants” in Applicant’s identification of goods defines a channel of trade which excludes fresh vegetables.

Finally, it is important to note that where identical marks are involved, as is the case here, the degree of similarity between the goods that is required to support a finding of likelihood of confusion declines. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993) (“[E]ven when the goods or services are not

¹³ *Dictionary.Com Unabridged*, <https://www.dictionary.com/browse/mass-merchandise> based on the Random House Unabridged Dictionary, © Random House, Inc. 2021 (Accessed 18 Mar. 2021).

¹⁴ *See also Gen. Mills Inc. v. Fage Dairy Processing Indus. SA*, 100 USPQ2d 1584, 1603 (TTAB 2011) (“Over time, applicant expanded into more ‘mass market’ stores such as Safeway, Publix and Costco, both in terms of geographic distribution and sales.”); *Vital Pharm., Inc. v. Kronholm*, 99 USPQ2d 1708, 1709 (TTAB 2011) (“With respect to opposer’s goods, “nutritional supplements,” and applicant’s goods, “cosmetics, perfumes, and fragrances for personal use,” we have applicant’s admission that “[c]osmetics, perfumes and fragrances are sold in the same mass market stores and pharmacies, such as Wal-Mart, Walgreens, and CVS, where nutritional supplements are sold.”); *Parfums de Coeur, Ltd. v. Lazarus*, 83 USPQ2d 1012, 1020 (TTAB 2007) (“Opposer’s goods are fragrance products that are sold in mass market retailers such as Wal-Mart and Kmart and in drugstores.”).

competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source”). It is only necessary that there be a “viable relationship between the goods” to support a finding of likelihood of confusion. *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1636 (TTAB 2009); *In re Wilson*, 57 USPQ2d 1863, 1867 (TTAB 2001).

The evidence of record demonstrates that Applicant’s live echinacea plants and the registered fresh vegetables are inherently related, and may be sold by the same entity, and in some of the same channels of trade, such as online sales, farms and farmers’ markets. More is not necessary. For these reasons, we find the relationship between the goods and their channels of trade also favor a finding of likelihood of confusion.

A. Balancing the Factors

In conclusion, we have considered all of the arguments and evidence of record, and all relevant *DuPont* factors. While we recognize the differences between the goods, when used with the identical mark COLORIFIC, we find that the relationship between live echinacea plants and fresh vegetables and the overlapping channels of trade make confusion likely.

Decision: The refusal to register Applicant’s mark COLORIFIC is affirmed.