

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: April 19, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re American Health Formulations, Inc.
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Serial No. 88911633
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JungJin Lee and Erin C. Bray of Trademark Lawyer Law Firm, PLLC,
for American Health Formulations, Inc.

April A. Hesik, Trademark Examining Attorney, Law Office 124
Lydia Belzer, Managing Attorney.

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Before Taylor, Adlin, and Allard,
Administrative Trademark Judges.

Opinion by Allard, Administrative Trademark Judge:

American Health Formulations, Inc. (“Applicant”) seeks registration on the
Principal Register of the mark shown below:



(HEALTH disclaimed) for goods ultimately identified as “dietary supplements for humans” in International Class 5.¹ The mark is described as “consist[ing] of the stylized words ‘NxGEN Health’ with ‘N’ in blue, ‘x’ in yellow, ‘G’ in red, ‘E’ in green with a design of a green leaf as part of the ‘E’, and ‘N’ in blue.” The colors blue, yellow, red, green, and blue are claimed as features of the mark.

Registration is refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, when used for the identified goods indicated above, so resembles the mark NEXGEN ADVANCED registered on the Principal Register (in standard character format) for “Dietary supplements; Dietary supplements for human consumption; Dietary and nutritional supplements; Dietary and nutritional supplements for endurance sports; Dietary and nutritional supplements used for weight loss; Natural dietary supplements,” in International Class 5,² that it is likely to cause confusion, to cause mistake, or to deceive.

¹ Application Serial No. 88911633 was filed on May 12, 2020, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce.

² Registration No. 5752781 was issued on May 14, 2019.

The Examining Attorney also made final the refusal to register the mark under Section 2(d) based on a likelihood of confusion with two additional registrations: Registration Nos. 4990324 and 5779979. However, upon consideration of Applicant’s Request for Reconsideration, the Examining Attorney withdrew the refusal as to these two registrations. August 5, 2022 Denial of Request for Reconsideration at TSDR 1.

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”).

When the refusal was made final, Applicant appealed and requested reconsideration, which was denied.³ The appeal resumed and briefs were filed.⁴ After the Examining Attorney's brief was filed, Applicant requested remand for consideration of the following proposed amendment to its identification of goods (proposed amendment shown in bold): "**custom manufacturing of** dietary supplements **for humans.**"⁵ The appeal was suspended and, good cause having been shown, the application was remanded to the Examining Attorney for consideration of the proposed amendment.⁶

In the subsequent non-final Office Action, the Examining Attorney refused to enter the proposed amendment because it exceeded the scope of the original identification of goods in the application.⁷ In response, Applicant proposed another amendment (proposed amendment shown in bold): "dietary supplements **for**

³ August 5, 2022 Denial of Request for Reconsideration.

Citations in this opinion to the briefs refer to TTABVUE, the Board's online docketing system. See *New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *2 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any number(s) following TTABVUE refer to the page(s) of the docket entry where the cited material appears.

⁴ 6, 8 TTABVUE. Applicant's appeal brief (6 TTABVUE) is not double-spaced in contravention of Trademark Rules 2.126(a)(1) and 2.142(b)(2), 37 C.F.R. §§ 2.126(a)(1) and 2.142(b)(2). We have exercised our discretion to consider it because it appears that it would fall within the applicable page limits had it been double-spaced. Nonetheless, compliance with the Trademark Rules of Practice is expected. *In re University of Miami*, 123 USPQ2d 1075, 1077 n.2 (TTAB 2017) (Board exercised its discretion to consider applicant's appeal brief and reply that were not double-spaced because it appeared that they would fall within the applicable page limits had they been double-spaced).

⁵ 9 TTABVUE.

⁶ 10 TTABVUE.

⁷ 11 TTABVUE 1 (citing February 17, 2023 Office Action at TSDR 2).

humans.⁸ This amendment was entered but it was deemed insufficient to obviate the refusal, so the refusal was maintained, a subsequent final Office Action was issued,⁹ and the appeal resumed with no further briefing.¹⁰

For the reasons explained below, we affirm the refusal to register.

I. Evidentiary Matter

Applicant attaches to its brief 14 exhibits.¹¹ It appears that these documents were made of record during examination.¹² To the extent this evidence was made of record during examination, we consider it. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d) (“The record should be complete prior to the filing of the appeal. Evidence should not be filed with the Board after the filing of a notice of appeal.”).

We discourage attaching material in the record to briefs for the reasons discussed in *In re Michalko*, 110 USPQ2d 1949, 1950 (TTAB 2014) (“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.”).

⁸ 11 TTABVUE 1 (citing March 13, 2023 Response to Office Action).

⁹ 11 TTABVUE 1 (citing May 7, 2023 Subsequent Final Office Action).

¹⁰ 12 TTABVUE.

¹¹ 6 TTABVUE 13-59.

¹² Moreover, some documents appear to have been made of record by Applicant twice: once by attaching it to a response to an office action and then again in support of its request for reconsideration. We discourage these duplicate filings as well.

II. Likelihood of Confusion

“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 [or] mistake, or to deceive.’” *In re Charger Ventures LLC*, 64 F.4th 1375, 2023 USPQ2d 451, at *2 (Fed. Cir. 2023) (quoting 15 U.S.C. § 1052(d)). Our determination under Section 2(d) of the Trademark Act involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). 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); *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)).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See e.g., In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945 (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.”).

Applicant and the Examining Attorney address the following *DuPont* factors: (1) the similarity or dissimilarity of the marks, (2) the similarity or dissimilarity of the identified goods, (3) the similarity or dissimilarity of established, likely-to-continue channels of trade, and (4) the number and nature of similar marks in use on similar goods. We address each in turn.

A. Similarity or Dissimilarity of the Goods, Channels of Trade and Classes of Consumers

“The second *DuPont* factor considers “[t]he similarity or dissimilarity and nature of the goods ... as described in an application or registration” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567)).

The chart below shows the goods identified in the involved application and the cited registration:

Applicant’s Identification of Goods	Cited Registration’s Identification of Goods
dietary supplements for humans	Dietary supplements; Dietary supplements for human consumption; Dietary and nutritional supplements; Dietary and nutritional supplements for endurance sports; Dietary and nutritional supplements used for weight loss; Natural dietary supplements

Here, the goods identified in the application and cited registration are legally identical because the broadly worded “dietary supplements” in the cited registration

encompasses the “dietary supplements for humans” identified in the involved application. *See In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”).

Moreover, given the legal identity of the goods, and the lack of restrictions or limitations in the application or registration as to their nature, channels of trade, or classes of customers, we must presume that the channels of trade and classes of purchasers for the legally identical goods are the same. *See 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 argues that “[it] has done a comprehensive search of the internet in an effort to find information regarding Registrant’s goods beyond what the Registrant has published to the United States Patent and Trademark Office with no success[,]” and that “[it] believes that Registrant is not offering goods in commerce.”¹³ This argument is irrelevant to the issues before us as it constitutes a collateral attack on the cited registration, which is not permissible in an ex parte appeal. *In re Phillips-Van Heusen Corp.*, 228 USPQ 949, 950 (TTAB 1986) (in an ex parte proceeding, claim that mark in cited registration is not in use is an impermissible collateral attack on the validity of the registration).

¹³ 6 TTABVUE 8; *see also* 6 TTABVUE 9.

Applicant also argues that the channels of trade do not overlap because Applicant intends to sell its supplements “wholesale to distributors with no individual consumer contact[,]”¹⁴ and that Registrant, even assuming it is selling its goods and that it actually “does have consumers, they are individuals seeking a daily multivitamin who live in the West Newton, Pennsylvania area.”¹⁵ These arguments are unavailing. We focus, as we must, on the identifications of goods set forth in the application and cited registration, rather than on alleged “real world” differences as alleged by Applicant. *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (“It was proper, however, for the Board to focus on the application and registrations rather than on real-world conditions”); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.”).

Moreover, to the extent Applicant suggests that Registrant offers its dietary supplements only near its place of business in West Newton, Pennsylvania, we agree with the Examining Attorney¹⁶ that this argument is not relevant to the likelihood of

¹⁴ 6 TTABVUE 9.

¹⁵ *Id.*

¹⁶ 8 TTABVUE 5.

confusion determination because the cited registration is not limited to a particular geographic area. That is, the owner of a registration without specified geographic limitations enjoys a presumption of exclusive right to nationwide use of the registered mark under Trademark Act Section 7(b) regardless of its actual extent of use. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 393 (Fed. Cir. 1983).

The second and third *DuPont* factors weigh heavily in favor of a likelihood of confusion.

B. Strength of the Cited Mark

Since it affects the scope of protection of the cited mark, we consider the strength of the cited mark and the extent to which that strength may be attenuated by “[t]he number and nature of similar marks in use on similar goods.” *DuPont*, 177 USPQ at 567. “A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength” *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010). Strength “varies along a spectrum from very strong to very weak.” *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003)).

Applicant argues that “[t]here are multiple marks in international class 005, beyond those that were already stated and withdrawn in the previous Office Actions, whose marks contain some form of the words ‘nex’ or ‘gen’ and offer goods related to

dietary supplements.”¹⁷ Applicant points to nine third-party registrations to support its arguments,¹⁸ each of which we address in turn.

First, we turn to the registration for NEXCARE (Reg. No. 4415539) for “Hydrocolloid dressings for acne and skin blemishes.” It identifies goods completely unrelated to those identified in the cited registration, i.e., “dietary supplements”. Thus, it has little or no probative value in showing the conceptual weakness of the term NEX in the cited mark. *See In re i.am.symbolic*, 123 USPQ2d at 1744 (disregarding third-party registrations for other types of goods where the proffering party had neither proven nor explained that they were related to the goods in the cited registration).

Two marks are registered not based on use in commerce, but rather under Trademark Act Sections 44(e) or 66(a), 15 U.S.C. §§ 1126(e) or 1141f(a), and have been registered for less than five years. This includes (1) NEXULTRA (Reg. No. 5337802), registered pursuant to Section 44(e); and (2) GEN and Design (Reg. No. 6177077), registered pursuant to Section 66(a). Accordingly, they lack probative value, and we have not considered them. *In re 1st USA Realty Pros., Inc.*, 84 USPQ2d 1581, 1583 (TTAB 2007) (“To the extent that the registrations are based on Section 44 or Section 66 of the Trademark Act, applicant’s objection is well-taken.”).

Stripped of the third-party registrations that have no or low probative value, we are left with the following 6 marks in the name of 5 third-parties. Notably, none of

¹⁷ 6 TTABVUE 9.

¹⁸ 6 TTABVUE 9-11.

them contain the element NEX or a variation thereof, and instead all only contain the element GEN:

- MYGEN (Reg. No. 6185907) for “Dietary supplements” in the name of Nucorplabs, Inc.¹⁹
- GEN BOOST (Reg. No. 5722333) for “Dietary and nutritional supplements” in the name of GENBOOST, LLC.²⁰
- T-GEN (Reg. No. 4175553) for, inter alia, “Dietary and nutritional supplements” in the name of Unimed International Inc.²¹
- LIQUIGEN (Reg. No. 4505952) for, inter alia, “Dietary supplements for humans” in the name of SHS International Ltd.²²
- REI-GEN (Reg. No. 1944332) for “dietary supplement, principally made from mushrooms in capsule or powdered form” in the name of Gourmet Mushrooms, Inc.²³
- SHI-GEN (Reg. No. 1944331) for “dietary supplement, principally made from mushrooms in capsule or powdered form” in the name of Gourmet Mushrooms, Inc.²⁴

Because none of these third-party marks contain both elements NEX and GEN, these registered marks are less similar to the cited mark than Applicant’s mark. *See e.g., Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *25 (TTAB 2021) (“[W]hile the registered marks all contain the word ‘MIRAGE,’ they contain additional elements that cause many of them to be less similar to Petitioner’s mark

¹⁹ July 8, 2022 Request for Reconsideration at TSDR 82.

²⁰ *Id.* at TSDR 83-84.

²¹ *Id.* at TSDR 85-86.

²² *Id.* at TSDR 87-88.

²³ *Id.* at TSDR 89-90.

²⁴ *Id.* at TSDR 91-92.

than Respondent's marks are."). Consequently, these third party registrations have little, if any, persuasive value in our analysis.

C. Similarity or Dissimilarity of the Marks

We compare the marks "in their entireties as to appearance, sound, connotation and commercial impression." *In re Detroit Athletic*, 128 USPQ2d at 1048 (quoting *DuPont*, 177 USPQ at 567); *see also Palm Bay*, 73 USPQ2d at 1691. "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff'd mem.*, 777 F. App'x. 516 (Fed. Cir. 2019).

"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." *In re i.am.symbolic*, 123 USPQ2d at 1748 (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)). Further, 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) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 1 (CCPA 1977)). We focus on the recollection of the average consumer, who normally retains a general rather than a specific impression of trademarks. *Id.* at 1085. Since the relevant goods are dietary supplements, without any restrictions or limitations, the average purchaser is an ordinary consumer of such goods.

Similarity is not a binary factor, rather it is a matter of degree. *In re St. Helena Hosp.*, 113 USPQ2d at 1085. We also bear in mind that because the identified goods are legally identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (“When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.”).

Considering first the appearance of the marks, Applicant argues that its mark is a “design-plus mark with distinguishing features, which differs greatly in appearance when compared to Registrant’s mark.”²⁵ Applicant maintains that its “unique design,” consisting of various letters in various colors, which colors are claimed as a feature of the mark, distinguish it from the cited mark, which “is merely the words ‘NEXGEN ADVANCED’ with no distinctive characteristics whatsoever.”²⁶


Applicant also points to the different spellings of the first term, i.e., “NX” compared to “NEX,” and the fact that Applicant’s mark incorporates the word HEALTH while the cited mark incorporates the word ADVANCED as further proof of the differences in appearance of the marks.²⁷

²⁵ 6 TTABVUE 7.

²⁶ *Id.*


²⁷ *Id.* at 7-8.




Considering Applicant's composite mark  in its entirety, the prominence of the NXGEN literal element provides a rational reason to find that the term NXGEN is the dominant portion of the mark. The fact that the term NXGEN is larger in size than the term HEALTH and appears first further supports our finding that NXGEN is the dominant element, as does the fact that the term HEALTH is descriptive and has been disclaimed. *See e.g., Century 21 Real Estate*, 23 USPQ2d at 1701 (finding similarity between CENTURY 21 and CENTURY LIFE OF AMERICA in part because "consumers must first notice th[e] identical lead word"); *Palm Bay*, 73 USPQ2d at 1692 (finding similarity between VEUVE ROYALE and two VEUVE CLICQUOT marks in part because "VEUVE . . . remains a 'prominent feature' as the first word in the mark and the first word to appear on the label"); *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184-85 (TTAB 2018) (finding the term LAROQUE appearing in "large, bold typeface" to be the dominant term); *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (affirming finding that "DELTA," not the descriptive and disclaimed word "CAFE," was the dominant portion of the mark THE DELTA CAFE).

As for the cited mark, NEXGEN ADVANCED, we find that the term NEXGEN is the dominant portion as it appears first and has the most source-identifying significance. *See e.g., Century 21 Real Estate*, 23 USPQ2d at 1701; *Palm Bay*, 73 USPQ2d at 1692; *In re Aquitaine Wine*, 126 USPQ2d at 1184. While the term ADVANCED has not been disclaimed, it is a laudatory term and has less trademark significance when compared to the term NEXGEN. *Cf., In re Nett Designs, Inc.*, 236

F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001) (finding THE ULTIMATE BIKE RACK to be merely descriptive and, therefore, subject to disclaimer); *In re Boston Beer Co. L.P.*, 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999) (finding THE BEST BEER IN AMERICA so highly laudatory and descriptive as applied to beer and ale that it is incapable of acquiring distinctiveness).

Comparing Applicant's  mark to the cited NEXGEN ADVANCED mark, we acknowledge that the marks have some dissimilarities in appearance due to (1) the different spellings of the initial elements (NX and NEX), (2) Applicant's incorporation of the term HEALTH compared to the cited mark's incorporation of the term ADVANCED, and (3) the presence of the leaf design in Applicant's mark. However, the cited mark is registered in standard character format, meaning that it can be depicted in any font style, size or color. Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a). With this in mind, the cited mark could be displayed in a manner that would cause it to look more similar to Applicant's mark than as argued by Applicant:

Applicant's Mark	Mark of Cited Registration
	

Thus, we find that the marks are similar in appearance.

With respect to sound, Applicant argues that, according to the International Phonetic Alphabet that it made of record, the marks will sound different when pronounced:

The Applicant's mark contains the words "nxgen" and "health". The Registrant's mark contains the words "nexgen" and "advanced". Using the International Phonetic Alphabet, the Applicant's mark is represented as /w'nɛks,dʒɛn hɛlθɔrn/. The Registrant's mark is represented as /'nɛks,dʒɛn əd'vænst/. Looking at the phonetic representation of the sound of each mark, it is clear that the words sound differently to the ear and are not likely to be confused by the average consumer.²⁸

The Examining Attorney counters that (1) Applicant does not explain the methodology used to generate its purported phonetic transcriptions, and (2) they are of limited dispositive value.²⁹ The Examining Attorney adds that:

In any event, even if applicant's proposed phonetic transcription were taken at face value, it appears that the only difference between the phonetic transcription of the terms "NXGEN" and "NEXGEN" is a sound represented by a "w" at the beginning of "NXGEN." The applicant's evidence indicates this symbol is pronounced as a "w" as in "wet" or "window." November 24, 2020 Response to Office Action, TSDR p. 23. This "w" pronunciation does not comport with the typical pronunciation of the "n" sound in English, and applicant does not explain how this transcription was determined; it [is] thus entitled to little weight in the likelihood of confusion analysis. Furthermore, applicant's own phonetic transcriptions shows [sic] that the same symbol (a notation approximating a backwards "3") is used to represent the vowel sound in both "NX" and "NEX." Appeal Brief, p. 7. Although applicant's evidence does not indicate which vowel sound this symbol represents, it is the same in both terms. Thus, by applicant's own analysis, the terms "NXGEN" and "NEXGEN" use the same vowel sound

²⁸ *Id.* at 8 (citing Exhibit 1 attached to the brief, which is The Sounds of English and the International Phonetic Alphabet available at November 24, 2020 Response to Office Action at TSDR 22-26 and the Introduction to Phonetic Transcription available at *id.* at TSDR 27-30).

²⁹ 8 TTABVUE 7-8.

between “N” and “X” and are thus phonetic equivalents, except for the unexplained “w” sound in applicant’s mark.³⁰

We agree with the Examining Attorney that it is not obvious how Applicant arrives at its proposed pronunciation of the marks based on the evidence of record. We also agree with the Examining Attorney that the difference in the pronunciations of NXGEN and NEXGEN as described by Applicant, wherein the difference is represented by a “w” at the beginning of “NXGEN” as in “wet” or “window,” is not persuasive as it is not a sound conventionally associated with the letter “n.” Additionally, we acknowledge Applicant’s own admission that the marks will sound the same to the extent that they use the same vowel sound between the “N” and “X”.

The Examining Attorney, for her part, argues that the terms NXGEN and NEXGEN are similar in sound.³¹ The Examining Attorney argues that, “[a]lthough there is no vowel between ‘N’ and ‘X’ in applicant’s mark, it could be pronounced with a short ‘E’ sound, as in ‘NEX’” and each could be pronounced as “next.”³²

We find that the dominant portions of the marks will be pronounced similarly, at least to the extent that they each begin with an “n” sound, share an “x” sound in the middle and end with the sound “gen.” While it is true that we do not know what vowel sound a consumer may use between the “n” and “x” of Applicant’s mark, it will likely be an “e” sound, as admitted by Applicant, due in part to the similarities between “Nx” and the known word “next.” This finding is supported, as mentioned, by

³⁰ *Id.* at 8.

³¹ *Id.* at 7.

³² *Id.* at 7-8.

Applicant's own admission and also by our finding, discussed below, that the dominant portion of Applicant's mark connotes "next generation," further substantiating that the term "Nx" will be pronounced as "next." Consumers will likely perceive these aural similarities notwithstanding that there is no "correct" way to pronounce a mark that is not a recognized English word. *See, e.g., StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 111 USPQ2d 1649, 1651 (Fed. Cir. 2014); *Viterra*, 101 USPQ2d at 1912 ("there is no correct pronunciation of a trademark").

Applicant does not address the connotation or commercial impression of its mark. The Examining Attorney, however, argues that the marks have similar connotations because "both are near-phonetic equivalents of the phrase 'next gen.'"³³ Continuing, the Examining Attorney argues that the dictionary definition of "next" is "immediately following in time, order, importance, etc."³⁴ In both marks, the similar terms "NX" and "NEX" are immediately followed by the identical term "GEN," which the record shows is the first syllable in the word "generation," which is defined as "a form, type, class, etc., of objects existing at the same time and having many similarities or developed from a common model or ancestor (often used in combination): **a new generation of anti-cancer drugs**["]³⁵ As such, both marks

³³ *Id.* at 8.

³⁴ *Id.* at 8 (citing November 24, 2020 Response to Office Action at TSDR 31).


³⁵ 8 TTABVUE 8 (citing November 24, 2020 Response to Office Action at TSDR 45 (italics in original and bold here)).

connote and, as a result, engender the commercial impression of the “next gen,” i.e., that the supplements are the next generation of products.³⁶

We agree with the Examining Attorney and find that Applicant’s mark and the cited mark both connote “next generation,” i.e., that the supplements are the next generation of products, and, consequently, the marks engender the same commercial impression.

As mentioned earlier, similarity is not a binary factor but is a matter of degree. *In re St. Helena Hosp.*, 113 USPQ2d at 1085. While there are some specific differences



between the  and NEXGEN ADVANCED marks, these differences are outweighed by their similarities, as discussed above. Considering the marks as a whole, we find them more similar than dissimilar.

The first *DuPont* factor weighs in favor of a finding of likelihood of confusion.

D. Summary of the Factors and Conclusion as to Likelihood of Confusion

We have considered all of the evidence and arguments bearing on the likelihood of confusion issue. Applicant was not able to demonstrate that the cited mark is conceptually weak. We find that the goods are legally identical, and we presume that the channels of trade and classes of purchasers are the same. The marks are more similar than dissimilar. Because the first three factors weigh in favor of likelihood of confusion, and because the conceptual strength of the cited mark was not diminished,

³⁶ 8 TTABVUE 8.

we conclude that confusion is likely between Applicant's mark and the cited mark
NEXGEN ADVANCED.

III. Decision

The refusal to register Applicant's mark is affirmed.