

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: November 26, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

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In re AMVAC Chemical Corporation

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Serial No. 97631691

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Farah P. Bhatti of Buchalter, A Professional Corporation,
for AMVAC Chemical Corporation.

Christopher Buongiorno, Trademark Examining Attorney, Law Office 102,
Mitchell Front, Managing Attorney.

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Before Lykos, Pologeorgis, and Lavache,
Administrative Trademark Judges.

Opinion by Lavache, Administrative Trademark Judge:

AMVAC Chemical Corporation (“Applicant”) seeks registration on the Principal Register of the composite mark displayed below for “Chemical analysis; Chemical research; Chemical research and analysis; Chemical research services,” in International Class 42, and “Agricultural advice; Agricultural advice in the field of

fertilization; Agricultural advice, namely, providing recommendations for plant and soil nutrition supplements,” in International Class 44.¹



The Trademark Examining Attorney refused registration of Applicant’s mark as to both classes of services under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground of likelihood of confusion, citing the mark **SMARTSOIL**, registered in “typed” form on the Principal Register, for “Printed reports, namely, computer generated reports of field soil profiles,” in International Class 16, and “Consulting services in the field of soil and crop management by providing printed reports of soil profiles,” in International Class 44.²

After the Examining Attorney issued a final refusal, Applicant appealed and requested reconsideration. The Examining Attorney denied the request for reconsideration and the appeal resumed. Both Applicant and the Examining Attorney

¹ Application Serial No. 97631691, filed on October 13, 2022, under Trademark Act Section 1(b), 15 U.S.C. § 1051(b), based on an allegation of a bona fide intention to use the mark in commerce. Applicant has disclaimed the exclusive right to use the word “SOIL” apart from the mark as shown. The application includes the following amended description of the mark: “The mark consists of a design an inverted raindrop that includes a plant with stems and no leaves inside the raindrop; to the right of the design appears the shaded, stylized words ‘Smart Soil’; below the wording ‘Smart Soil’ is the shaded, stylized wording ‘by AMVAC’; an inverted, shaded triangle with leaves appears after the term ‘by’ and before the wording ‘AMVAC.’” Color is not claimed as a feature of the mark.

² Registration No. 2967719 issued on July 12, 2005, and was last renewed on June 2, 2015. “Prior to November 2, 2003, ‘standard character’ drawings were known as ‘typed’ drawings. The mark on a typed drawing page had to be typed entirely in capital letters. A typed drawing is the legal equivalent of a standard character drawing.” See TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) § 807.03(i) (May 2024).

filed briefs. We affirm the refusal to register as to both Classes 42 and 44 for the reasons explained below.

I. Likelihood of Confusion

Trademark Act Section 2(d), in relevant part, prohibits registration of a mark that “so resembles a mark registered in the Patent and Trademark Office . . . as to be likely, when used on or in connection with the goods [or services] of the applicant, to cause confusion.” 15 U.S.C. § 1052(d). To determine whether confusion is likely, we analyze all probative evidence relevant to the factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”). See *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003).³

In every Section 2(d) case, two key *DuPont* factors are the similarity or dissimilarity of the marks and the relatedness of the respective 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 [or services] and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976). Here, we have considered each *DuPont* factor that is relevant and for

³ As part of an internal Board pilot program to broaden acceptable forms of legal citation in Board cases, case citations in this opinion are in the form recommended in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (2024). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the pages on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board and the Director of the USPTO, this opinion cites to the Lexis legal database and, in the initial full citation of a case, also identifies the number of the Board proceeding. Practitioners should also adhere to the practice set forth in TBMP § 101.03.

which there is evidence and argument of record. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 1356 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 1205 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”). Ultimately, however, “each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 1199 (CCPA 1973).

As noted above, the involved application includes two separate classes of services. “Because each class in Applicant’s multi-class application is, in effect, a separate application, we consider each class separately [where appropriate], and determine whether . . . a likelihood of confusion [has been shown] with respect to each.” *N. Face Apparel Corp. v. Sanyang Indus. Co.*, Opp. No. 91187593, 2015 TTAB LEXIS 327, at *32 (TTAB 2015); *see also In re OSF Healthcare Sys.*, Ser. No. 88706809, 2023 TTAB LEXIS 353, at *10 (TTAB 2023) (“On the appeal of a refusal to register directed to all classes in a multi-class application such as this one, examining attorneys and applicants should facilitate the Board’s review by discussing the evidence of relatedness on a class-by-class basis.”).

A. Relatedness of the Services

We begin our analysis with the second *DuPont* factor, which concerns the similarity or dissimilarity and nature of the respective services. *DuPont*, 476 F.2d at 1361. In determining the relatedness of the services, we must look to the services as

identified in the application and the cited registration. *See Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990)).

It is sufficient that the services are related in some manner, or that the conditions and activities surrounding their marketing are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1396 (Fed. Cir. 2012); *7-Eleven, Inc. v. Wechsler*, Opp. No. 91117739, 2007 TTAB LEXIS 58, at *18 (TTAB 2007). The issue is not whether consumers would confuse Applicant's services with Registrant's services, but rather whether there is a likelihood of confusion as to the source of these services. *L'Oreal S.A. v. Marcon*, Opp. No. 91184456, 2012 TTAB LEXIS 77, at *16 (TTAB 2012); *In re Rexel Inc.*, Ser. No. 73241423, 1984 TTAB LEXIS 57, at *2 (TTAB 1984).

Registration may be refused as to a particular class of services if Applicant's mark for any of its identified services in that class is likely to cause confusion with Registrant's mark for any of the goods or services listed in the cited registration. *See SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 1041 (Fed. Cir. 1983) (holding that a single good from among several may sustain a finding of likelihood of confusion); *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 1336 (CCPA 1981) (indicating that likelihood of confusion must be found if there is likely to be confusion with

respect to any item that comes within the identification of goods or services in the application).

Accordingly, for our analysis, it is not necessary to address Registrant's "Printed reports, namely, computer generated reports of field soil profiles," in International Class 16. Instead, we confine our discussion to a comparison of Applicant's services and Registrant's Class 44 services.

To reiterate, Applicant's services are "Chemical analysis; Chemical research; Chemical research and analysis; Chemical research services," in International Class 42, and "Agricultural advice; Agricultural advice in the field of fertilization; Agricultural advice, namely, providing recommendations for plant and soil nutrition supplements," in International Class 44. Registrant's Class 44 services are "Consulting services in the field of soil and crop management by providing printed reports of soil profiles."

1. Applicant's Class 44 Services

The Examining Attorney contends that Registrant's soil and crop management consulting services "are encompassed by applicant's broadly stated 'agriculture advice' services" in International Class 44.⁴ We agree. The term "agriculture" refers to "the science, art, or practice of **cultivating the soil, producing crops**, and raising livestock and in varying degrees the preparation and marketing of the

⁴ Examining Attorney's Brief, 8 TTABVUE 9.

The TTABVUE and Trademark Status and Document Retrieval ("TSDR") citations in this opinion refer to the docket and electronic file database for the involved application.

resulting products.”⁵ Thus, we consider the wording “agricultural advice,” which is included in Applicant’s identification of services without any limitations, to encompass consulting related to the agricultural subjects of soil and crop management. *See, e.g., In re Solid State Design, Inc.*, Ser. No. 87269041, 2018 TTAB LEXIS 1, at *15-16 (TTAB 2018) (“[W]here the goods [or services] in an application or registration are broadly described, they are deemed to encompass ‘all the goods [or services] of the nature and type described therein.’” (quoting *In re Jump Designs, LLC*, Ser. No. 76393986, 2006 TTAB LEXIS 209, at *13 (TTAB 2006)), *overruled on other grounds by In re Driven Innovations, Inc.*, Ser. No. 77073701, 2015 TTAB LEXIS 179, at *13 (TTAB 2015))). We therefore deem Applicant’s services in International Class 44 to be legally identical, in part, to Registrant’s Class 44 services.

2. Applicant’s Class 42 Services and Remaining Class 44 Services

As to Applicant’s Class 42 services and the remaining Class 44 services, the Examining Attorney also asserts that the evidence of record “illustrates the overlapping and interwoven nature of chemical analysis, agricultural advice including recommendations for plant and soil nutrition and fertilization, consulting services in the field of soil and crop management and reports of soil profiles.”⁶ To that

⁵ *See* MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/agriculture> (accessed on November 19, 2024) (emphasis added). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed form or regular fixed editions. *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, Opp. No. 91061847, 1982 TTAB LEXIS 146, at *7 (TTAB 1982), *aff’d*, 703 F.2d 1372 (Fed. Cir. 1983); *In re Red Bull GmbH*, Ser. No. 75788830, 2006 TTAB LEXIS 136, at *7 (TTAB 2006); TBMP § 1208.04.

⁶ Examining Attorney’s Brief, 8 TTABVUE 9.

end, the Examining Attorney points to online excerpts explaining the nature and purpose of soil sampling, testing and analysis, and how those processes relate to soil profiles and recommendations for crop fertilization and soil nutrition. For instance, one of these excerpts indicates that a soil profile is used to make fertilizer recommendations based on what the soil sample taken shows in terms of plant nutrients.⁷ Another excerpt explains that “[s]oil analysis is a set of various chemical processes that determine the amount of available plant nutrients in the soil, but also the chemical, physical and biological soil properties important for plant nutrition.”⁸ A third excerpt notes that the chemical analysis phase of soil testing “is a highly technical area where precision laboratory instruments and chemical procedures are used for soil analysis.”⁹

The Examining Attorney has also introduced Internet evidence showing that third parties in the marketplace offer, under a single mark, services concerning soil and crop management, as well as services involving chemical analysis and research, and agricultural advice relating to fertilization and plant/soil nutrition.

For example:

- ACS Agricultural Consulting Services (ascrops.com) offers soil sampling, soil analysis, and crop plans, as well as fertilization advice;¹⁰

⁷ September 18, 2023 Final Office Action at TSDR 126.

⁸ *Id.* at 133.

⁹ *Id.* at 136.

¹⁰ *Id.* at 8-16.

- Crop Quest (cropquest.com) offers crop consulting services that include soil sampling, “fertilizer recommendations based on certified laboratory analysis,” and ag-chemical recommendations;¹¹
- Cropwise Consulting (cropwiseconsulting.com) offers soil sampling, crop consulting, plant tissue sampling, nutrient deficiency determinations, application of chemicals to crops, herbicide recommendations, fertilizer need determinations, fertilizer recommendations, fungicide and insecticide advice, ag-chemical recommendations, and stalk nitrate testing;¹²
- Duraroot Environmental Consulting (duraroot.com) offers agricultural consulting that applies the scientific disciplines of “biology, chemistry, and geology” and includes soil consulting, plant consulting, soil fertility assessments, soil nutrient assessments, and pesticide use planning;¹³
- Kinsey Agricultural Services (kinseyag.com) offers soil fertility consulting, soil testing, laboratory analysis of soil (involving chemical analysis), soil nutrient correction advice, plant tissue analysis, and fertilizer recommendations;¹⁴
- Servitech (servitech.com) offers crop consulting services, including soil sampling, soil testing (involving chemical analysis of soil), plant disease management, soil fertility planning, nutrient management plan consulting, and fertilizer recommendations;¹⁵ and
- Thrive Agronomics (thriveagronmics.com) offers “agricultural consulting and crop consulting for crop fertility,” involving soil

¹¹ *Id.* at 22-28.

¹² *Id.* at 30-44.

¹³ *Id.* at 46-56.

¹⁴ *Id.* at 60-70.

¹⁵ *Id.* at 72-90

sampling, soil testing, soil analysis, fertility determinations, and nutrient recommendations.¹⁶

This evidence is relevant and probative to the extent that it suggests that consumers will view Applicant's Class 42 and remaining Class 44 services as related to Registrant's Class 44 services. *See, e.g., Naterra Int'l, Inc. v. Bensalem*, 92 F.4th 1113, 1117 (Fed. Cir. 2024) (“[T]estimony that third-party companies sell both types of goods is pertinent to the relatedness of the goods.”); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1328-29 (Fed. Cir. 2000) (finding the Board “erred when it refused to consider the lay evidence that several large companies produce and sell both pet and human food in deciding whether a consumer would reasonably believe that . . . dog treats originated from the same source as . . . human snacks”).

Lastly, the Examining Attorney has also provided copies of the following active, used-based, third-party registrations showing instances of a single mark being registered for services identified in both Applicant's application and the cited registration:¹⁷

- Registration No. 6749671 lists, inter alia, agricultural testing for determining soil, manure, compost, and plant nutrients for fertilizer recommendations; soil, manure, compost, and plant sampling, namely, scientific research of soil, manure, compost and plants for analysis and consulting purposes; agricultural services, namely, soil sampling and crop observing for analysis and consulting purposes;

¹⁶ *Id.* at 92-98.

¹⁷ February 17, 2023 Nonfinal Office Action at TSDR 16-38.

plant sampling and testing being scientific research for analysis and consulting purposes”;

- Registration No. 5118311 (owned by Registrant) lists, inter alia, “agricultural services to agricultural growers and producers, namely, performing chemical analysis of soil and inspection and testing of the physical characteristics of soil, to determine soil nutrients, fertility, moisture-holding capacity, and texture, to assist in growing, managing and improving crop production; . . . providing agricultural advice; agricultural advisory services to assist agricultural growers and producers in managing and improving their crops; advisory services in the field of agricultural irrigation, namely, providing analysis of soil moisture levels and water delivery to crops for improvement of crop yields”;
- Registration No. 5112342 lists, inter alia, “providing agricultural information, advice and reports regarding crop selection, crop nutrition, crop yield production management and crop recommendations by means of a proprietary non-downloadable software tool; agricultural consulting services, namely, providing soil analysis, crop selection, crop nutrition, crop yield forecasting and crop recommendation services”;
- Registration No. 5085270 lists, inter alia, “agricultural advice and consulting in the fields of crop production management, soil management, crop, land, water and soil mapping, selection of agricultural seeds, agricultural chemicals, agricultural fertilizers, and irrigation methods, and use and application of agricultural seeds, agricultural chemicals, fertilizers and irrigation methods; application of fertilizer and agricultural chemicals for others”;
- Registration No. 4916638 lists, inter alia, “agricultural advice and consulting in the fields of crop production management, soil management, crop, land, water and soil mapping, selection of

agricultural seeds, agricultural chemicals, agricultural fertilizers, and irrigation methods, and use and application of agricultural seeds, agricultural chemicals, fertilizers and irrigation methods”;

- Registration No. 4732109 lists, inter alia, “consulting services in the field of soil and crop analysis; agricultural services, namely, soil collection, soil sampling and crop observing for analysis purposes”;
- Registration No. 4750654 lists, inter alia, “agricultural services, namely, soil sampling and crop observing for analysis purposes; agronomic consulting services; agricultural advice”;
- Registration No. 4411582 (owned by Registrant) lists, inter alia, “agricultural services to agricultural growers and producers, namely, performing chemical analysis of soil and inspection and testing of the physical characteristics of soil, to determine soil nutrients, fertility, moisture-holding capacity, and texture, to assist in growing, managing and improving crop production; agricultural services to agricultural growers and producers, namely, mapping of topography and acreage of agricultural fields using global positioning systems, geographic information systems, airborne and ground-based visible cameras, and imaging spectrometers, to measure physical properties relevant to agricultural analyses, for the purpose of analyzing soil characteristics, including nutrients, fertility, moisture-holding capacity, and texture, topography, and acreage, to assist agricultural growers and producers in growing, managing and improving crop production; providing agricultural advice; agricultural advisory services to assist agricultural growers and producers in managing and improving their crops”;
- Registration No. 3980001 lists, inter alia, “contract analytical services, namely, chemical analysis; . . . agricultural and industrial process monitoring, namely, . . . chemical and spectroscopic analysis

of agricultural crops, land, fertilizers and agricultural chemicals for the purpose of improving crop production”;

- Registration No. 3727074 lists, inter alia, “agricultural research services; . . . soil analysis services; professional consulting services and advice about soil analysis; soil analysis; agricultural advice; farm consultation; soil fertility services; professional consulting services and advice about crop nutrients, and field fertility”; and
- Registration No. 3171947 lists, inter alia, “crop management consulting services, namely, . . . soil sampling and site specific fertility recommendations, and analysis of crop yield results.”

These third-party registrations are relevant and probative to our relatedness determination to the extent that they suggest the listed services are of a type that may emanate from a single source. *In re Albert Trostel & Sons Co.*, Ser. No. 74186695, 1993 TTAB LEXIS 36, at *7 (TTAB 1993); TMEP § 1207.01(d)(iii). Indeed, as the Examining Attorney notes, two of the registrations listed above, Registration Nos. 5118311 and 4411582, are owned by Registrant, and show that Registrant itself offers some of the same services that Applicant offers (e.g., chemical analysis, agricultural advice).

Nonetheless, Applicant claims that its services are different from Registrant’s, because Registrant’s services are limited to providing soil profiles, whereas Applicant’s services are limited to chemical analysis, chemical research, and agricultural advice.¹⁸ Again, however, the question of registrability of an applicant’s

¹⁸ Appeal Brief, 6 TTABVUE 17-18. Applicant asserts that “Registrant is not providing soil management or soil analysis services – it is providing ‘printed reports of soil profiles’” and

mark must be decided on the basis of the identification of services set forth in the application and the cited registration. *Stone Lion*, 746 F.3d at 1323. Here, as already noted, “agricultural advice” is broad enough to encompass “consulting services in the field of soil and crop management by providing printed reports of soil profiles.” And the evidence provided by the Examining Attorney establishes that agricultural advice commonly includes advice regarding soil and crop management based on soil profiles determined through soil analysis. The evidence also suggests that a consumer who requires soil and crop management consulting services may also require services such as chemical analysis, fertilization advice, and recommendations regarding plant and soil nutrition. Thus, we conclude not only that the respective services here are complementary, but that consumers are accustomed to them being offered either separately or together by the same source under the same mark. In other words, the respective services could be encountered by the same consumers under circumstances that could give rise to the mistaken belief that the services originate from the same source if they are offered under similar marks. *See Coach Servs.*, 668 F.3d at 1396.

argues that “[b]ecause the [Examining Attorney’s] evidence does not show any use in connection with Registrant’s goods and services, specifically[,] soil profiles or printed reports of soil profiles, the evidence cannot and does not show that Applicant’s and Registrant’s services are related.” *Id.* at 18. However, this argument mischaracterizes the nature of Registrant’s listing of services by focusing on the wording “by providing printed reports of soil profiles,” to the exclusion of the preceding wording “consulting services in the field of soil and crop management.” Thus, Registrant is not merely providing printed soil profile reports. Rather it is providing soil and crop management consulting services and the medium through which those services are provided is printed soil profile reports.

Because we find that the parties' respective services are, in part, legally identical, and otherwise closely related, the second *DuPont* factor weighs strongly in favor of a finding of likelihood of confusion.

B. Similarity of Trade Channels

Next, we consider established, likely-to-continue channels of trade, the third *DuPont* factor. *DuPont*, 476 F.2d at 1361. Applicant argues that its "services are marketed in a completely different channel of trade than Registrant's . . . services as Applicant's services are provided directly to Applicant's existing customer base or to those seeking to use Applicant's agricultural chemicals."¹⁹ However, Applicant's identification of services contains no such restriction, nor may we to read any restrictions or limitations into the identification. *See In re Thor Tech, Inc.*, Ser. No. 78634024, 2009 TTAB LEXIS 253, at *15 (TTAB 2009) ("We have no authority to read any restrictions or limitations into the registrant's description of goods.").

In any event, because Applicant's Class 44 "agricultural advice" services are legally identical to Registrant's services, we must presume that the respective services travel through the same channels of trade and are offered to the same or overlapping classes of purchasers. *In re Viterra Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012) (finding the Board is entitled to rely on this legal presumption in determining likelihood of confusion); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 754 (CCPA 1968) (noting that where there are legally identical goods, the channels of trade, and classes of purchasers are considered to be the same).

¹⁹ *Id.* at 19.

As to the remaining services, the Examining Attorney's third-party website evidence shows that Applicant's Class 42 services and Class 44 services (beyond the broadly described "agriculture advice"), at a minimum, travel in some of the same or overlapping channels of trade and are offered to overlapping consumers, e.g., farmers, as Registrant's Class 44 services.

Therefore, the third *DuPont* factor weighs heavily in favor of a finding of likelihood of confusion.

C. Comparison of the Marks

We now turn to the first *DuPont* factor, which focuses on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression. *See Palm Bay Imps., Inc. v. Veuve Cliquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1371 (Fed. Cir. 2005) (quoting *DuPont*, 476 F.2d at 1361). Similarity as to any one of these elements may be sufficient to support a finding that the marks are confusingly similar. *See Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 732 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion."); *In re Inn at St. John's, LLC*, Ser. No. 87075988, 2018 TTAB LEXIS 170, at *13 (TTAB 2018).

All elements of the respective marks must be considered. *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985). However, "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." *Id.*

The marks at issue here are reproduced below.



Applicant's Mark

SMARTSOIL

Registrant's Mark

While we have displayed the respective marks next to each other for purposes of our analysis, such placement does not reflect the actual conditions under which consumers are likely to encounter the marks in the marketplace. That is, “[t]he proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *In re i.am.symbolic*, 866 F.3d 1315, 1324 (Fed. Cir. 2017) (quoting *Coach Servs.*, 668 F.3d at 1368 (internal quotation marks omitted)). And, importantly, “[t]he focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks.” *In re Box Sols. Corp.*, Ser. No. 76267086, 2006 TTAB LEXIS 176, at *14 (TTAB 2006).

Applicant's mark contains the words SMART SOIL BY AMVAC, with SMART SOIL serving as the dominant element due to its size and prominent placement. *See, e.g., Toro Co. v. ToroHead, Inc.*, Opp. No. 114061, 2001 TTAB LEXIS 823, at *5-6 (TTAB 2001) (finding TORO to be the dominant element of applicant's mark, ToroMR (with bull design), where, *inter alia*, it was prominently featured and was the only pronounceable word in the mark). Specifically, SMART SOIL is presented the largest font size and composes the largest portion of the mark. The other wording takes a

secondary role, appearing in a smaller font below SMART SOIL. Thus, Applicant's mark contains a dominant element, SMART SOIL, that is virtually identical to the cited mark in its entirety, SMARTSOIL,

In fact, the only difference is that the cited mark is presented as a single compound word, rather than two terms. But the mere presence of a space between the words SMART and SOIL in Applicant's mark is insufficient to create a commercial impression that is separate from the word SMARTSOIL that comprises Registrant's mark. *See Stockpot, Inc. v. Stock Pot Rest., Inc.*, Canc. No. 92013157, 1983 TTAB LEXIS 83, at *5 (TTAB 1983) ("There is no question that the marks of the parties [STOCKPOT and STOCK POT] are confusingly similar. The word marks are phonetically identical and visually almost identical."), *aff'd*, 737 F.2d 1576 (Fed. Cir. 1984); *In re Best W. Fam. Steak House, Inc.*, Ser. No. 73315241, 1984 TTAB LEXIS 173, at *1 (TTAB 1984) ("There can be little doubt that the marks [BEEFMASTER and BEEF MASTER] are practically identical").

Further, where the entirety of one mark is the dominant element of another mark, the likelihood of confusion is increased. *See, e.g., Hunter Indus., Inc. v. Toro Co.*, Opp. No. 91203612, 2014 TTAB LEXIS 105, at *33 (TTAB 2014) ("Likelihood of confusion often has been found where the entirety of one mark is incorporated within another."); *see also Stone Lion*, 746 F.3d at 1320-22 (affirming Board's finding that the marks at issue were similar where the applicant's mark STONE LION CAPITAL incorporated the entirety of the registered marks LION CAPITAL and LION); *Double Coin Holdings Ltd. v. Tru Dev.*, Canc. No. 92063808, 2019 TTAB LEXIS 347, at *20-23

(TTAB 2019) (finding “the parties’ marks are similar in their entirety” after noting that respondent’s “junior mark, ROAD WARRIOR contains [petitioner’s] entire mark WARRIOR”). We find that to be the case here.

Indeed, because the cited mark is nearly identical to the dominant element in Applicant’s mark, we find that the marks look and sound similar. *See, e.g., In re i.am.symbolic, llc*, Ser. No. 85916778, 2018 TTAB LEXIS 281, at *25 (TTAB 2018) (finding marks more similar than dissimilar where the marks shared the same dominant element, which was identical in sound and meaning); *In re Aquitaine Wine, USA, LLC*, Ser. No. 86928469, 2018 TTAB LEXIS 108, at *5 (TTAB 2018) (“The marks at issue are similar in sight and sound, since they share the term LAROQUE.”).

Neither Applicant nor the Examining Attorney directly addresses the meaning or significance of the wording SMARTSOIL (or SMART SOIL), but we may reasonably presume that, when considered in the context of the respective agricultural and soil-related services, it connotes intelligent, efficient, or technology-aided use or treatment of agricultural land.²⁰ In any event, given that the services at issue are legally identical, in part, and otherwise closely related, whatever commercial

²⁰ *See* THE AMERICAN HERITAGE DICTIONARY, <https://www.ahdictionary.com/word/search.html?q=smart> (accessed on November 21, 2024) (defining “smart” as “[h]aving or showing intelligence” or “[c]apable of making adjustments that resemble those resulting from human decisions, chiefly by means of electronic sensors and computer technology”); THE AMERICAN HERITAGE DICTIONARY, <https://www.ahdictionary.com/word/search.html?q=soil> (accessed on November 21, 2024) (defining “soil” as “[t]he top layer of the earth’s surface in which plants can grow, consisting of rock and mineral particles mixed with decayed organic matter and having the capability of retaining water”).

impression this wording creates would be the same, or at least highly similar, for both marks.


Despite this, Applicant argues that “[a]ny risk of confusion stemming from use of SMARTSOIL is erased by the fact that Applicant’s Mark is highly stylized which includes Applicant’s house mark and very distinct design elements, which creates a completely different commercial impression from the Cited Mark.”²¹ Applicant describes these design elements as “an inverted raindrop that includes a plant with stems and no leaves” and “and inverted, shaded triangle with leaves appear[ing] . . . before the wording ‘AMVAC.’” Applicant asserts that these design elements, and not SMART SOIL, are, in fact, the dominant elements of the mark.

Applicant is correct that we must avoid dissecting its mark and, instead, must consider the mark as a whole when determining likelihood of confusion. *See In re Chatam Int’l*, 380 F.3d 1340, 1342-44 (Fed. Cir. 2004); *In re Electrolyte Labs, Inc.*, 929 F.2d 645, 647 (Fed. Cir. 1990) (“No element of a mark is ignored simply because it is less dominant.”) However, in this case, we are not convinced that the designs in Applicant’s mark are the dominant elements of the mark or that their inclusion in the mark results in such a different commercial impression that confusion is unlikely.

First, where a mark, like Applicant’s composite mark, consists of both 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 by them to request the goods.” *Aquitaine Wine*, 2018 TTAB LEXIS 108, at *6

²¹ Appeal Brief, 6 TTABVUE 14.

(citing *Viterra*, 671 F.3d at 1362). And consumers are likely to use the SMART SOIL portion of Applicant’s mark in asking for Applicant’s services because, not only is it the most prominent element the mark, but, unlike the design elements, it is easily interpreted and pronounceable by consumers. *See Viterra*, 671 F.3d at 1366 (“[T]he verbal portion of a word and design mark likely will be the dominant portion . . . given that the literal component of brand names likely will appear alone when used in text and will be spoken when requested by consumers.”); *cf. Aquitaine Wine*, 2018 TTAB LEXIS 108, at *20 (“[C]onsumers often have a propensity to shorten marks when ordering [goods] orally.”).²²

Second, consumers could reasonably assume that Applicant’s services sold under the  mark constitute another product line from the same source as the services sold under the cited mark SMARTSOIL with which they are acquainted or familiar, and that Applicant’s mark is merely a variation of, or derivative of, the cited mark. *See, e.g., In re Comexa Ltda.*, Ser. No. 75396043, 2001 TTAB LEXIS 274 (TTAB 2001) (applicant’s use of term AMAZON and parrot design for chili sauce and pepper sauce is likely to cause confusion with registrant’s AMAZON mark for

²² Applicant’s brief cites a number of cases in support of the position that the designs in Applicant’s mark are the dominant elements in the mark and that their inclusion in the mark is sufficient to avoid a likelihood of confusion. *Id.* at 14-15. However, we do not find the cited cases to be particularly helpful because they involve different marks and different circumstances. And, as the Board has often stated, “[e]ach application for registration must be considered on its own merits.” *In re Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 828 F.2d 1567, 1569 (Fed. Cir. 1987); *see also In re Cordua Rests., Inc.*, 823 F.3d 594, 600 (Fed. Cir. 2016) (“The [USPTO] is required to examine all trademark applications for compliance with each and every eligibility requirement.”); *In re Eagle Crest, Inc.*, Ser. No. 77114518, 2010 TTAB LEXIS 346, at *5 (TTAB 2010) (“It has been said many times that each case must be decided on its own facts.”).

restaurant services); *SMS, Inc. v. Byn-Mar Inc.*, Opp. Nos. 91068062, 1985 TTAB LEXIS 32, at *4 (TTAB 1985) (applicant's marks ALSO ANDREA and ANDREA SPORT were "likely to evoke an association by consumers with opposer's preexisting mark [ANDREA SIMONE] for its established line of clothing.").

For similar reasons, we are not persuaded by Applicant's arguments that the inclusion of "by AMVAC" in Applicant's mark, which Applicant characterizes as a house mark, suffices to avoid a likelihood of confusion here. Again, consumers viewing the cited mark consisting solely of the term SMARTSOIL could reasonably presume that it is a variation of Applicant's mark that does not contain the "by AMVAC" house mark but nonetheless identifies the same source.²³ *See, e.g., In re Fiesta Palms, LLC*, Ser. No. 76595049, 2007 TTAB LEXIS 51, at *9-11 (TTAB 2007) ("It has long been held that the addition of a trade name or house mark to a registered mark does not generally avoid confusion. . . . When . . . the common part of the marks is identical, purchasers familiar with the registrant's mark are likely to assume that the house mark simply identifies, what had previously been an anonymous source."); *In re Apparel Ventures, Inc.*, Ser. No. 73438947, 1986 TTAB LEXIS 132, at *5 (TTAB 1986) ("Those already familiar with registrant's use of its mark [SPARKS] in connection with its goods, upon encountering applicant's mark [SPARKS BY SASSAFRAS] on

²³ We also reject Applicant's argument that confusion is unlikely here because Applicant's AMVAC house mark appears on almost all of Applicant's labels and promotional materials, including Applicant's website" and thus "[c]onsumers recognize this portion of the mark as uniquely identifying Applicant." *Id.* at 13. This argument implies that consumers who encounter the cited mark, which does not include the AMVAC house mark, would assume that services sold under the mark do not emanate from Applicant. However, there is no evidence of that level or kind of consumer recognition to support this counterintuitive and self-serving proposition.

applicant's goods, could easily assume that 'sassafras' is some sort of house mark that may be used with only some of the 'SPARKS' goods.”).

To summarize, considering the marks in their entirety, we find that they are more similar than dissimilar in sound, appearance, connotation, and overall commercial impression, because the dominant element of Applicant's mark, SMART SOIL, is virtually identical to the cited mark SMARTSOIL. *See In re Charger Ventures*, 64 F.4th 1375, 1382 (Fed. Cir. 2023) (“[A]n additional word or component may technically differentiate a mark but do little to alleviate confusion.”); *In re Coors Brewing Co.*, 343 F.3d 1340, 1344 (Fed. Circ. 2003) (noting that “similarity is not a binary factor but is a matter of degree”); *In re i.am.symbolic*, 2018 TTAB LEXIS 281, at *25 (“Although the additional wording and design element in Registrant's mark and the hash character in Applicant's mark present dissimilarities, they are not sufficient to overcome the strong similarities in connotation and overall commercial impression that the marks share due to the identity of the dominant element.”). Therefore, the first *DuPont* factor weighs strongly in favor of a finding of likelihood of confusion.

D. Purchasing Conditions and Sophistication of Purchasers

Under the fourth *DuPont* factor, we consider “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 476 F.2d at 1361. Applicant contends that, while it “believes the specific goods and services [under] the Cited Mark are different in kind from those of Applicant, Applicant believes that the level of customer sophistication, and care in

the purchasing decision, are comparable.”²⁴ Specifically, Applicant alleges that both its services and Registrant’s services are expensive and purchased with great care by sophisticated consumers consisting of large land owners or large-scale agricultural operators.²⁵

Neither Applicant’s identification of services, nor Registrant’s, includes any of these proffered restrictions, limitations, or additional specifications as to purchasing conditions or potential consumers. Nor does the record provide much insight as to the cost of the services here. The evidence does suggest, however, that the services are relatively sophisticated and would likely be purchased with care by informed consumers. *See, e.g., Edwards Lifesciences Corp. v. VigiLanz Corp.*, Opp. No. 91154210, 2010 TTAB LEXIS 84 , at *51 (TTAB 2010) (“Just based on the products involved in this proceeding [medical monitoring systems], one would expect that all of the purchasers would exercise a high degree of care when making their purchasing decision.”).

This factor weighs slightly against finding a likelihood of confusion.

II. Conclusion – Weighing the *DuPont* Factors


Having carefully considered all of the arguments and evidence of record and all relevant *DuPont* factors, we find that (1) the respective marks are highly similar, (2) Applicant’s and Registrant’s services are legally identical in part and otherwise closely related, and (3) the services in Class 44 that are legally identical are presumed

²⁴ *Id.* at 20.

²⁵ *Id.* at 19-20.

to travel in identical trade channels and be offered to identical overlapping classes of purchasers, and the evidence of record suggests that the remaining services are sold in the same trade channels to overlapping consumers. And, while we also find that the relevant services may be purchased with care by relatively sophisticated consumers, even careful, sophisticated consumers are not immune from source confusion, especially where, as here, the relevant services are legally identical in part, or otherwise closely related, and are being offered under highly similar marks. *See Shell Oil*, 992 F.2d at 1208 (citing *Weiss Assocs., Inc. v. HRL Assocs., Inc.*, 902 F.2d 1546, 1548 (Fed. Cir. 1990) (affirming the Board's reasoning that even sophisticated purchasers may be confused by similar marks)). Thus, we find that the other factors discussed above outweigh any consumer sophistication or purchasing care. *See In re Rsch. & Trading Corp.*, 793 F.2d 1276, 1279 (Fed. Cir. 1986); *HRL Assocs., Inc. v. Weiss Assocs., Inc.*, Opp. No. 91075632, 1989 TTAB LEXIS 33, at *13 (TTAB 1989) (finding likelihood of confusion in view of similarities of goods and marks, despite consumer sophistication and purchasing care), *aff'd*, 902 F.2d 1546 (Fed. Cir. 1990).

Accordingly, we find, on balance, that confusion as to source is likely.

Decision: The refusal to register Applicant's mark  **Smart Soil** by TAMVAC under Section 2(d) of the Trademark Act is affirmed as to both classes of services.