

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: November 12, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Agrinova Science S.A.
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Serial No. 97636947
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Adam J. Bruno of Bay State IP, LLC,
for Agrinova Science, S.A.

Hunter Morrissey, Trademark Examining Attorney, Law Office 110,
Chris Pedersen, Managing Attorney.

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Before Wellington, Heasley, and Elgin,
Administrative Trademark Judges.

Opinion by Elgin, Administrative Trademark Judge:

Agrinova Science, S.A. (“Applicant”) seeks registration on the Principal Register



of the composite mark **AGRI nova SCIENCE** (“science” disclaimed) for the following goods
and services:

Compost; Fertilizers; Manure; Adjuvant for use with
agricultural chemicals; Biostimulants being plant growth
stimulants; Chemical fertilizers; Chemical preparations to
prevent diseases affecting cereal plants; Chemicals for use

in agriculture, horticulture and forestry except fungicides, herbicides, insecticides and parasiticides; Fertilising preparations; Growing media for plants; Humic acid sold as an ingredient of fertilizer and soil conditioning preparations; Mineral fertilising preparations; Organic acid salts; Plant growth regulating preparations; Plant growth regulators for agricultural use; Seaweed extract for use as a growth stimulant on plants, in International Class 1; and

Advertising services; Business administration; Business management; Demonstration of goods; Developing promotional campaigns for business; Direct mail advertising services; Dissemination of advertising matter; Franchising, namely, offering business management assistance in the establishment and/or operation of business relating to chemicals for use in agriculture, horticulture and forestry; Import-export agency services; Marketing services; On-line advertising on a computer network; On-line retail store services featuring chemicals of all kinds for use in agriculture, horticulture and forestry; Organization of events, exhibitions, fairs and shows for commercial, promotional and advertising purposes; Wholesale and retail store services featuring chemicals used in agriculture, aquaculture, horticulture and forestry, in International Class 35.¹

¹ Application Ser. No. 97636947 was filed on October 18, 2022 under Section 44(e) of the Trademark Act, 15 U.S.C. § 1126(e), based upon European Union Reg. No. 018193407, registered June 27, 2020. The colors white, green, black and orange are claimed as a feature of the mark. The mark is described in the application as consisting of:

[T]he literal elements “AGRINOVA” in a stylized black font, where “AGRI” is large and “NOVA” appears smaller and directly above the literal elements “SCIENCE”, which is in a stylized green font. Above all the literal elements are two slanted green rectangles with rounded edges, which are angled, with the bottom right edge of the left rectangle positioned above the “G” in “AGRINOVA” and the bottom left edge of the right rectangle positioned above the “R” in “AGRINOVA”. Directly above the space between the two rectangles is a circle with a thin green border outside of a white thicker border. Inside the circle are three half circles: an orange half circle with a white border is at the top of the circle, and two green half circles with a white border are at the bottom of the circle.

The Examining Attorney refused registration of the subject mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground that, as applied to the goods and services identified in the application, it so resembles the standard character mark AGRINOVA for “Fresh agricultural products, namely, vegetables, fruits, herbs, living grass, natural turf, and seeds, none of the foregoing including potatoes,” in International Class 31² as to be likely to cause confusion, to cause mistake, or to deceive.

When the refusal was made final, Applicant appealed the decision to the Board. Applicant and the Examining Attorney filed briefs.³

For the reasons set forth below, we **affirm** the refusal to register.

I. Likelihood of Confusion Test

Section 2(d) of the Trademark Act prohibits the registration of a mark that

[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office . . . as to be likely, when used on or in connection with the [services] of the applicant, to cause confusion, or to cause mistake, or to deceive.

² Registration No. 5427392 issued March 20, 2018 on the Principal Register; Declaration of Continuing Use under Trademark Act Section 8, 15 U.S.C. § 1058, accepted.

³ Applicant’s Brief is at 4 TTABVUE. The Examining Attorney’s Brief is at 6 TTABVUE. Applicant did not file a Reply Brief.

Citations in this opinion to the briefs on appeal are to the Board’s TTABVUE docket system. *See In re Integra Biosciences Corp.*, Ser. No. 87484450, 2022 TTAB LEXIS 17, *6. Page references to the application record refer to the downloaded .pdf version of USPTO’s Trademark Status & Document Retrieval (TSDR) system. The citation form in this opinion is in a form provided in the 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 only by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this opinion employs citation to the LEXIS database.

We base our determination under Section 2(d) on all the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”); *see also Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1319 (Fed. Cir. 2018) (“Whether a likelihood of confusion exists between an applicant’s mark and a previously registered mark is determined on a case-by-case basis, aided by application of the thirteen *DuPont* factors.”) (citations omitted). “In discharging this duty, the thirteen *DuPont* factors ‘must be considered’ ‘when [they] are of record.’” *In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019) (quoting *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1406 (Fed. Cir. 1997) and *DuPont*, 476 F.2d at 1361).

“Two key *DuPont* factors in every Section 2(d) case are the first two factors regarding the similarity or dissimilarity of the marks and the . . . [goods and] 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.’” *In re Embiid*, Ser. No. 88202890, 2021 TTAB LEXIS 168, *10 (quoting *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976)); *see also In re i.am.symbolic, llc*, 866 F.3d 1315, 1322 (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 [and services].’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65 (Fed. Cir. 2002)).

Applicant and the Examining Attorney discuss these two factors, as well as the third and fourth *DuPont* factors relating to channels of trade and consumer sophistication.

II. DuPont Factors


A. Similarity or Dissimilarity of the Marks

Under the first *DuPont* factor, we consider “the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.” *In re Inn at St. John’s, LLC*, Ser. No. 87075988, 2018 TTAB LEXIS 170, *12 (citing *DuPont*, 476 F.2d at 1361). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Id.* (quoting *In re Davia*, Ser. No. 85497617, 2014 TTAB LEXIS 214, *4).

The proper test regarding similarity “is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1373 (Fed. Cir. 2018) (internal citation omitted). Although the marks must be viewed in their entirety, “in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985); *see also Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1321 (Fed. Cir. 2014).

“The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than specific impression of marks.” *In re i.am.symbolic, llc*, Ser. No. 85916778, 2018 TTAB LEXIS 281, *11. Further, the similarity or dissimilarity of marks “is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d 747, 752 (Fed. Cir. 2014) (internal quotation omitted)).



Applicant’s composite mark is . The cited mark is AGRINOVA in standard characters. The Examining Attorney argues that the dominant term of Applicant’s mark is AGRINOVA, which is identical to the cited mark.⁴ Further, he contends that the addition of the disclaimed term SCIENCE “fails to significantly distinguish the marks in overall commercial impression because it is merely descriptive of or generic for the Applicant’s goods and services and it is equally apt in connection with the Applicant’s goods and services as it is with the Registrant’s goods.”⁵ As to the design elements of Applicant’s composite mark, the Examining Attorney argues the cited mark is in standard characters and thus is not limited to any particular display or rendition.⁶ Applicant contends the additional term

⁴ 6 TTABVUE 4-5.

⁵ *Id.* at 5.

⁶ *Id.*

SCIENCE and large colorful design of a plant in its mark distinguishes it from the cited mark.⁷

We note that the literal elements of Applicant's mark incorporate the cited mark in its entirety. Merely adding a term to a registered mark generally does not obviate the similarity between the compared marks. *See, e.g., Stone Lion*, 746 F.3d at 1322 (affirming the Board's finding that applicant's mark STONE LION CAPITAL incorporated the entirety of the registered marks LION CAPITAL and LION, and that the noun LION was the dominant part of both parties' marks); *Coca-Cola Bottling Co. v. Jos. E. Seagram & Sons, Inc.*, 526 F.2d 556, 557-58 (CCPA 1975) (finding BENGAL and BENGAL LANCER and design to be confusingly similar). Visually, the term AGRINOVA in Applicant's mark is larger and more prominent than the term SCIENCE, giving it more weight.

The marks also are highly similar when pronounced. We must remember the tendency of consumers to shorten marks, making it reasonable to assume that at least some consumers will "drop the highly descriptive/generic term[s] [SCIENCE] when calling for" Applicant's goods and services. *In re Bay State Brewing Co.*, Ser. No. 85826258, 2016 TTAB LEXIS 46, *9 (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 815 (CCPA 1978) (Rich, J., concurring) ("the users of language have a universal habit of shortening full names – from haste or laziness or just economy of words.")).

The marks also are similar in meaning. The Examining Attorney submitted evidence that the prefix AGRI- refers to "of or relating to farming and stock raising

⁷ 4 TTABVUE 8-11.

especially as an economic activity: AGRICULTURAL.”⁸ Applicant advanced during prosecution that the Latin root “NOV” means “new,” thus “giving ‘NOVA’ in the Cited Mark the connotation ‘fresh,’ or ‘new’ in relation to ‘fresh agricultural products and ‘living grass.’ In contrast, ‘NOV’ as it relates to Applicant’s mark, is used with ‘SCIENCE’ and therefore connotes innovation and scientific breakthrough.”⁹ We believe, however, that consumers will ascribe the same meaning to the same term, regardless of the addition of the descriptive/generic term SCIENCE. To the extent consumers are likely to understand SCIENCE as something technical related to farming or agriculture, that meaning may be equally applicable to the goods under the cited mark.

We do not believe that the stylization of letters in Applicant’s mark is sufficient to distinguish the marks. Because Registrant’s mark is in standard characters, it may be presented in any number of fonts and colors, including those used in Applicant’s composite mark. *See In re Viterra*, 671 F.3d 1358, 1363 (Fed. Cir. 2012) (citations omitted); *In re Mighty Leaf Tea*, 601 F.3d 1342, 1348 (Fed. Cir. 2010) (rejecting an argument that the specific style of a registered mark could serve to distinguish the applicant's mark in standard character form).

We cannot similarly assume, however, that a display of Registrant’s mark may be accompanied by the design elements in Applicant’s composite mark, because when “we are comparing a standard character mark to a word + design mark for Section

⁸ Aug. 3, 2023 Office Action at TSDR 17.

⁹ Oct. 23, 2023 Resp. to Office Action at TSDR 13. Applicant did not advance this argument in its brief.

2(d) purposes, we will consider variations of the depictions of the standard character mark only with regard to ‘font style, size, or color’ of the ‘words, letters, numbers, or any combination thereof.’” *In re Aquitaine Wine USA, LLC*, Ser. No. 86928469, 2018 TTAB LEXIS 108, at *15-16 (citing *Viterra*, 671 F.3d at 1363 and *Citigroup Inc. v. Cap. City Bank Grp.*, 637 F.3d 1344, 1349 (Fed. Cir. 2011)).

But here, the design in Applicant’s composite mark does not distinguish it from the cited mark. It is well-established that, when a mark consists of both words and a design, the literal portion of a mark generally is the dominant feature because it is the element by which consumers will refer to and call for the goods or services. *See, e.g., Viterra*, 671 F.3d at 1362 (“the verbal portion of a word and design mark likely will be the dominant portion”); *In re Appetito Provisions Co.*, Ser. No. 423405, 1987 TTAB LEXIS 47, *3-4 (“if one of the marks comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services” and “because applicant’s mark shares with registrant’s mark that element responsible for creating its overall commercial impression, the marks are confusingly similar”).

Moreover, in this case, the plant design in the applied-for mark reinforces the connotation and commercial impression of the shared term AGRINOVA as relating generally to plants or agriculture in both marks. *See, e.g., In re Wilson*, Ser. No. 75285881, 2001 TTAB LEXIS 53, *4 (PINE CONE BRAND and the design of pine cones and fruit is similar to PINE CONE in part because “the illustration of the pine cones merely reinforces the dominance of the arbitrary designation PINE CONE.”);

In re Shipp, Ser. No. 538236, 1987 TTAB LEXIS 37, *1-2 (design of a woman in a Puritan costume reinforces the impression of term PURITAN); *In re Kangaroos U.S.A.*, Ser. No. 319021, 1984 TTAB LEXIS 77, *2 (BOOMERANG is similar to BOOMERANG and a swirl-like design which reinforces meaning of word).

We find that the marks are similar in sound, appearance, connotation, and commercial impression under the first *DuPont* factor, weighing in favor of likelihood of confusion.

B. Similarity or Dissimilarity of Goods and Services

The second *DuPont* factor “considers ‘[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration.’” *In re Detroit Athletic Co.*, 903 F.3d 1297, 1306 (Fed. Cir 2018) (quoting *DuPont*, 476 F.2d at 1361). “When analyzing the similarity of the goods [and services], ‘it is not necessary that the products of the parties be similar or even competitive to support a finding of likelihood of confusion.’” *Davia*, 2014 TTAB LEXIS 214, *14 (citing *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 1369 (Fed. Cir. 2012)). The goods and services need only be sufficiently related that consumers would be likely to assume, upon encountering the goods and services under similar marks, that they originate from, are sponsored or authorized by, or are otherwise connected to the same source. *See id.*

We also keep in mind that “the greater the degree of similarity between the applicant’s mark and the registered mark, the lesser the degree of similarity between the applicant’s goods [and services] and registrant’s goods [and services] that is

required to support a finding of likelihood of confusion,” *In re Thor Tech*, Ser. No. 78634024, 2009 TTAB LEXIS 253, *4-5 (citing, inter alia, *In re Opus One, Inc.*, Ser. No. 75722593, 2001 TTAB LEXIS 707, *8). We must construe the goods in the cited registration as broadly as reasonably possible “to include all goods . . . of the nature and type described therein,” *In re OSF Healthcare Sys.*, Ser. No. 88706809, 2023 TTAB LEXIS 353, *11 (quoting *In re Solid State Design Inc.*, Ser. No. 87269041, 2018 TTAB LEXIS 1, *16), and resolve any ambiguities regarding its coverage in favor of Registrant “given the presumptions afforded the registration under Section 7(b)” of the Trademark Act. *Id.* (quoting *In re C.H. Hanson Co.*, Ser. No. 77983232, 2015 TTAB LEXIS 357, *14).

In a multiple-class application such as is presented here, each class stands on its own as it would if it were in a separate application. *See In re Bonni Keller Collections Ltd.*, Ser. No. 446902, 1987 TTAB LEXIS 12, *5 (a multiple-class application is, actually, two separate applications combined for the convenience of applicant and the Office). It is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed by the identification of goods or services within a particular class in the application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 1336 (CCPA 1981); *Inter IKEA Sys. B.V. v. Akea, LLC*, Opp. No. 91196527, 2014 TTAB LEXIS 166, *37 (citations omitted).

Evidence of relatedness of goods and services may include news articles or evidence from computer databases showing that the relevant goods and services are used together or used by the same purchasers; advertisements showing that the

relevant goods and services are advertised together or sold by the same manufacturer or dealer; or copies of prior use-based registrations of the same mark for both Applicant's and Opposer's goods and services. *See, e.g., Davia*, 2014 TTAB LEXIS 214, *23 (finding pepper sauce and agave related where evidence showed both were used for the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores). In addition, "[t]he application and registration themselves may provide evidence of the relationship between the services." *Monster Energy v. Lo*, Opp. No. 91225050, 2023 TTAB LEXIS 14, *19 (citations omitted).

The Examining Attorney argues that Applicant's goods and services (particularly fertilizers, compost, agricultural chemicals, and growing media for plants in Applicant's Class 1 goods and the online and retail store services featuring chemicals for use in agriculture, horticulture and forestry in Applicant's Class 35 services) are related in part to Registrant's goods (particularly, living grass, natural turf, and seeds). The Examining Attorney made of record examples of third parties that sell the goods of both Applicant and Registrant in their online and retail stores:

- Gardener's Supply Company online and brick and mortar stores (third-party seeds, fertilizer, plant growing media, and fertilizers);¹⁰
- Scott's online store (fertilizer, lawn food, and grass seed under the SCOTTS's brand);¹¹

¹⁰ Aug. 3, 2023 Office Action at TSDR 20-33.

¹¹ *Id.* at TSDR 35-39.

- Lawn Care Nut online store (third-party fertilizer, lawn stimulants, various chemicals for lawns, and grass seed);¹²
- Lawn Synergy online store (grass sod, fertilizer, and grass seed under the LAWN SYNERGY mark, and various third-party chemicals such as stimulants for grass and plants);¹³
- Central Sod Farms, Inc. online and brick and mortar stores (third-party plant growing media, compost, plant and grass seeds, agricultural chemicals);¹⁴
- Home Depot online and brick and mortar stores (third-party grass sod, fertilizer, grass and plant seed, garden and lawn soil);¹⁵
- Lowes online and brick and mortar stores (third-party grass sod, grass and plant seed, and fertilizer).¹⁶

In addition, the evidence includes ten third-party registrations currently based on use that demonstrate Applicant's growing media, fertilizers, compost, and various agricultural chemicals, and Registrant's agricultural seeds, are of a kind that may emanate from a single source under a single mark.¹⁷

¹² *Id.* at 43-52.

¹³ Dec. 5, 2023 Final Office Action at TSDR 28-44.

¹⁴ *Id.* at TSDR 13-27.

¹⁵ *Id.* at 45-98.

¹⁶ *Id.* at 99-128.

¹⁷ 6 TTABVUE 9-11 (citing Reg. Nos. 6393274 (G-POD in standard characters), 4438224 (MYCOACTIVE in standard characters), 7037514 (INNVICTIS in in standard characters), 6020656 (GOOD STUFF IN GOOD STUFF OUT in standard characters), 5326186 (TARGETED SEED NUTRITION in standard characters), 5887960 (MASTERGREEN & design), 3128355 (SPLENORGRO in standard characters), 4548115 (LAWN SCAPE in

The evidence also show that such goods are used and promoted together. Indeed, several registrations (G-POD, MYCOACTIVE, GOOD STUFF IN GOOD STUFF OUT, MASTERGREEN), cover seed, growing media, and fertilizer sold as a unit, e.g., as starting or repair kits. Other evidence shows how seeds and compost, or seeds and fertilizer or bio stimulants, are used together by the same consumers.¹⁸

Applicant does not address the evidence of record, arguing only that Registrant's goods are "fresh agricultural products, namely, vegetables, fruits, herbs," and Applicant's goods and services are unrelated and unlikely to be confused with Registrant's goods.¹⁹ Applicant also cites to *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238 (Fed. Cir. 2004), where the Federal Circuit reversed the Board's holding that contemporaneous use of RITZ for cooking and wine selection classes and RITZ for kitchen textiles is likely to cause confusion because the relatedness of the respective goods and services was not supported by substantial evidence. Applicant argues that, similar to *Shen*, "it is unlikely that consumers would confuse the fresh foods covered under the Cited Mark with Applicant's commercial, specialized agricultural products and various services."²⁰

Based on the application and registration themselves, we believe that Registrant's agricultural seeds, living grass and turf, and Applicant's fertilizer, compost, and

standard characters), 6257354 (EVERYONE DESERVES AN ESTATE LAWN! in standard characters), and 4201093 (COUNTRY BOY in standard characters)). See Dec. 5, 2023 Final Office Action at TSDR 129-48.

¹⁸ Dec. 5, 2023 Final Office Action at TSDR 150-61.

¹⁹ 4 TTABVUE 11-14.

²⁰ *Id.* at 13.

agricultural chemicals are complementary in that they will be used by the same consumers for the same purpose: namely, to grow healthy grass and plants. In addition, the third party registrations and uses showing that these products are sold by the same parties under the same mark are persuasive corroborative evidence that the goods are related.²¹

Moreover, because Registrant's seeds and grass sod and Applicant's chemicals and fertilizers are complementary products, retail store services featuring Applicant's same products likewise will be considered complementary or related services to Registrant's products. *See In re Melville Corp.*, Ser. No. 736814, 1991 TTAB LEXIS 18, *4 (products purchased in a single shopping expedition in the same stores found related). The evidence discussed above confirms that a single online or brick and mortar retail store may sell both Registrant's and Applicant's products together.²²

We conclude that Applicant's goods and services in Classes 1 and 35 are closely related and complementary, and thus similar, to Registrant's goods under the second *DuPont* factor.

C. Similarity or Dissimilarity of Likely-to-Continue Trade Channels

The third *DuPont* factor considers "the similarity or dissimilarity of established, likely-to-continue trade channels." *Detroit Athletic Co.*, 903 F.3d at 1308 (quoting *DuPont*, 476 F.2d at 1361). The Examining Attorney argues that the evidence

²¹ *See supra* text accompanying notes 11, 13, and 17.

²² *See supra* text accompanying notes 11-16.

discussed above also confirms that the same consumers will purchase Applicant's and Registrant's goods and services together.²³ Applicant does not discuss this factor.

“We . . . must presume that the identified goods [and services] move in all normal and usual channels of trade and methods of distribution for those goods [and services], and that they are available for purchase by all the usual purchasers.” *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 1361 (Fed. Cir. 2000); *Embiid*, 2021 TTAB LEXIS 168, *42 (quoting *DeVivo v. Ortiz*, Opp. No. 91242863, 2020 TTAB LEXIS 15, *39-40 (internal quotation omitted)).

The record discussed above demonstrates that normal channels of trade for both Applicant's and Registrant's goods include the same online and brick and mortar retail stores, and that such goods are promoted together to the same customers. The channels of trade for Applicant's and Registrant's identified goods and services therefore overlap.²⁴ The third *DuPont* factor also favors a conclusion that confusion is likely.

D. Purchasing Conditions and Sophistication of Consumers

The fourth *DuPont* factor considers “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *Embiid*, 2021 TTAB LEXIS 168, *43 (quoting *DuPont*, 476 F.2d at 1361). Purchaser

²³ 6 TTABVUE 11-12.

²⁴ Ordinarily, “the mere fact that . . . [goods or] services may both be advertised and offered through the Internet is not a sufficient basis to find that they are sold through the same channels of trade.” *Parfums de Couer, Ltd. v. Lazarus*, Opp. No. 91161331, 2007 TTAB LEXIS 36, *31-32, cited in *Inter IKEA Sys. B.V.*, 2014 TTAB LEXIS 166, *31. Here, however, the products and services are offered together through the same online stores.

sophistication or degree of care may tend to minimize likelihood of confusion. Conversely, impulse purchases of inexpensive items may tend to have the opposite effect. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1376 (Fed. Cir. 2005) (citing *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1329 (Fed. Cir. 2000)).

Applicant argues, without any evidentiary support, that its goods are “specialized to the agricultural industry and serve a particular function, and the consumers are commercial buyers familiar with the field.”²⁵ Thus, it argues, these purchasers exercise a heightened standard of care. The Examining Attorney counters that Applicant has failed to support its assertion that the its consumers are entirely, or even primarily, comprised of “industry professionals” who are knowledgeable of the agricultural industry; and even so, consumers would include both sophisticated and unsophisticated purchasers.²⁶

The standard of care for purchasing the goods and services is that of the least sophisticated potential purchaser. *In re FCA US LLC*, Ser. No. 85650654, 2018 TTAB LEXIS 116, *29 (citing *Stone Lion*, 46 F.3d at 1325). The goods and services identified in Applicant’s application and the cited registration are not limited to professional buyers or any particular cost, and so we must presume that the purchasers consist of both sophisticated and unsophisticated purchasers. It is well known, and the evidence of record shows, that ordinary consumers and small businesses, who are less

²⁵ 4 TTABVUE 15. As we state above, attorney argument does not substitute for evidence. *See Cai*, 901 F.3d at 1361.

²⁶ 6 TTABVUE 13.

sophisticated, may purchase both Applicant's and Registrant's agricultural and horticultural products and services. Both Applicant's and Registrant's products include low-cost items, such as seed and fertilizer through ordinary online and brick and mortar stores, such as garden centers.²⁷ Nor did Applicant make any evidence of record supporting an assertion that buyers necessarily would exercise a high degree of care based on the nature of its goods or services. *Cf. G.H. Mumm & Cie v. Desnoes & Geddes, Ltd.*, 917 F.2d 1292, 1295 (Fed. Cir. 1990) (determining that when consumers enter the marketplace with a "focused need," confusion between goods or services is less likely).

We find that consumers of Applicant's and Registrant's goods and services may include individual consumers and businesses of all sizes and degrees of sophistication. Because there is no evidence in the record to show that the least sophisticated consumers of the identified goods and services would exercise anything more than ordinary care, we find the fourth *DuPont* factor to be neutral.

E. Summary of the *DuPont* Factors

Having made considered the evidence of record and made findings on all the relevant *DuPont* factors, our final step is to assess these findings together to determine if, on balance, confusion is likely. *See, e.g., In re Charger Ventures, LLC*, 64 F.4th 1375, 1384 (Fed. Cir. 2023) (Board must weigh and balance factors).

²⁷ *See, e.g.*, Aug. 3, 2023 Office Action at TSDR 23 (seeds at under five dollars), 26 (fertilizer at under ten dollars).

Because we have found that Applicant's composite mark and the cited mark are similar under the first *DuPont* factor, the goods and services are similar in part under the second *DuPont* factor, and the channels of trade under the third factor overlap, we conclude that confusion between Applicant's mark and the cited mark is likely in both classes.

Decision

The refusal to register Applicant's mark, Ser. No. 97636947, under Trademark Act Section 2(d) is **affirmed**.