

This Opinion is not a
Precedent of the TTAB

Mailed: January 22, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re ADCO Global, Inc.

Serial No. 97452377

Sven W. Hanson for ADCO Global, Inc.

Betty Chang, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.

Before Heasley, Lynch, and Myles
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Applicant, ADCO Global, Inc., seeks registration on the Principal Register of the mark SOIL SWITCH (in standard characters, with “SOIL” disclaimed) for “plant growth nutrients” in International Class 1.¹

¹ Application Serial No. 97452377 was filed on June 10, 2022, based on a declared intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Citations to the prosecution file refer to the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system and identify the documents by title, date, and page in the downloadable .pdf version. Citations to the briefs and other materials in the appeal record refer to the Board’s TTABVUE online docket system.

The Examining Attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as used in connection with these goods, so resembles the registered mark GREENSWITCH (in standard characters) for "chemicals for use in agriculture, except fungicides, herbicides, insecticides and parasiticides; compost, fertilizers, liquid fertilizers; phosphates; biostimulants being plant growth stimulants for use on plants or in soils for the regulation of physiological processes in plants, including growth, for crop improvement and for improving plant resistance to abiotic stress; bacterial preparations, other than for medical or veterinary use; plant growth regulating preparations; soil improvement preparations; biological preparations other than for medical or veterinary use," in International Class 1, as to be likely to cause confusion, to cause mistake, or to deceive.²

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

I. Likelihood of Confusion

"[A] mark tells the public who is responsible for a product. In serving that function, trademarks benefit consumers and producers alike." *Jack Daniel's Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 146 (2023).³ Trademarks enable consumers to

² Registration No. 6303298, issued on the Principal Register on March 30, 2021.

³ As part of an internal Board pilot citation program, the citation form in this opinion follows 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 by the page(s) on which they appear in the

select the goods they wish to purchase, and “ensure that the producer itself—and not some ‘imitating competitor’—will reap the financial rewards associated with the product’s good reputation.” *Id.* “The cardinal sin under the law...is to undermine that function. ... It is to confuse consumers about source—to make (some of) them think that one producer’s products are another’s.” *Id.* at 157.

Consistent with that purpose, “the Lanham Act bars the registration of ‘a mark which so resembles [another’s] mark ... as to be likely ... to cause confusion, or to cause mistake, or to deceive.’ § 1052(d).” *Vidal v. Elster*, 602 U.S. 286, 299 (2024). To determine whether there is a likelihood of confusion between marks under Section 2(d), we analyze the evidence and arguments under the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (the “*DuPont* factors”) cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 144 (2015). “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.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1319 (Fed. Cir. 2018). “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.’” *In re i.am.symbolic, LLC*, 866 F.3d 1315, 1322 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164 (Fed. Cir. 2002)).

Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this opinion cites the Westlaw legal database.

Those factors prove to be the core determinants in this case.

A. Relatedness of the Goods, Channels of Trade, and Classes of Customers

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration...,” and the third *DuPont* factor concerns the “similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 476 F.2d at 1361.

“The relevant inquiry in an ex parte proceeding focuses on the goods ... described in the application and registration.” *In re Charger Ventures LLC*, 64 F.4th 1375, 1383 (Fed. Cir. 2023). And “[w]e find that the close relationship between the goods is self evident from the respective identifications of goods and there is no requirement for the submission of extrinsic evidence to establish that the goods are related in this case.” *Kellogg Co. v. Gen. Mills Inc.*, 2007 WL 499921, *6 (TTAB 2007).

Again, Applicant identifies “plant growth nutrients” and Registrant identifies:

chemicals for use in agriculture, except fungicides, herbicides, insecticides and parasiticides; compost, fertilizers, liquid fertilizers; phosphates; biostimulants being plant growth stimulants for use on plants or in soils for the regulation of physiological processes in plants, including growth, for crop improvement and for improving plant resistance to abiotic stress; bacterial preparations, other than for medical or veterinary use; plant growth regulating preparations; soil improvement preparations; biological preparations other than for medical or veterinary use.

As the Examining Attorney correctly observes, both goods promote plant growth.⁴ Registrant’s identified goods—particularly its “fertilizers, liquid fertilizers; phosphates; biostimulants being plant growth stimulants for use on plants or in soils

⁴ Examining Attorney’s brief, 8 TTABVUE 6.

for the regulation of physiological processes in plants, including growth, for crop improvement”—encompass Applicant’s “plant growth nutrients.” The goods are thus legally identical.⁵ See, e.g., *Look Cycle Int’l v. Kunshan Qiyue Outdoor Sports Goods Co.*, 2024 WL 3739358, *5 (TTAB 2024); *Conopco, Inc. v. Transom Symphony Opco, LLC*, 2022 WL 874335, *7 (TTAB 2022) (quoting *In re Hughes Furniture Indus., Inc.*, 2015 WL 1734918, *3 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”).

Applicant does not dispute this finding, stating “Applicant acknowledges that Applicant’s listed goods are effectively not distinct from those of the cited mark.”⁶

Because the goods in the cited registration are legally identical to Applicant’s goods, we presume that they travel through all of the same channels of trade to all of the same classes of purchasers. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1372 (Fed. Cir. 2018) (“With respect to similarity of the established trade channels through which the goods reach customers, the TTAB properly followed our case law and ‘presume[d] that the identical goods move in the same channels of trade and are available to the same classes of customers for such goods....’”); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 754 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same), cited in *Heil Co. v. Tripleye GMBH*, 2024 WL 4925901, *35 (TTAB 2024).

⁵ *Id.* at 4.

⁶ Applicant’s brief, 6 TTABVUE 3.

The second and third *DuPont* factors thus favor a finding of likelihood of confusion.

B. Similarity of the Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's and Registrant's marks in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 476 F.2d at 1361. "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Inn at St. John's, LLC*, 2018 WL 2734893, *5 (TTAB 2018), *aff'd*, 777 Fed. Appx. 516 (Fed. Cir. 2019) (quoting *In re Davia*, 2014 WL 2531200, *2 (TTAB 2014)).

As the Examining Attorney points out, both marks, SOIL SWITCH and GREENSWITCH, contain the dominant component SWITCH, prefaced by a descriptive term, "SOIL" or "GREEN." She offers as proof dictionary definitions of "SOIL" and "GREEN" to show that both terms describe "the upper layer of earth that may be dug or plowed and in which plants grow,"⁷ or fields "covered by green growth or foliage."⁸ "Matter that is descriptive of or generic for a party's goods is typically less significant or less dominant in relation to other wording in a mark," the Examining Attorney posits.⁹

Applicant argues that "While the term SOIL is arguably related to Applicant's products, its use in Applicant's mark is not 'merely' descriptive. The term SOIL is

⁷ March 24, 2023 Office Action at 22.

⁸ AHDictionary.com, July 3, 2024 Office Action (denial of request for reconsideration) at 9.

⁹ Examining Attorney's brief, 8 TTABVUE 3.

combined with the term SWITCH. This combination is not normally found in the associated industry, nor in other industries nor in common usage. Internet searches of the combination result in no references.”¹⁰

The issue, however, is not the descriptiveness, *vel non*, of Applicant’s entire mark, but the descriptiveness of the element SOIL. Applicant has disclaimed “SOIL,” effectively conceding, as it must, that the term describes the earth where its plant growth nutrients would be applied.¹¹ See *In re Information Builders Inc.*, 2020 WL 2094122, *9 (TTAB 2020) (disclaimer concedes that disclaimed terms re merely descriptive of goods). Such a disclaimed descriptive portion of Applicant’s mark is “unlikely to change the overall commercial impression engendered by the marks.” *In re Detroit Athletic Co.*, 903 F.3d 1297, 1304 (Fed. Cir. 2018). The disclaimed descriptive term “SOIL,” like its counterpart “GREEN” in the registered mark, must be considered, but does little to alleviate consumer confusion. *In re Charger Ventures LLC*, 64 F.4th at 1382. Applicant’s Internet evidence shows no use of the shared term SWITCH in this field, and if anything, demonstrates the conceptual distinctiveness of that term. See *Bell’s Brewery, Inc. v. Innovation Brewing*, 2017 WL 6525233, at *6 (TTAB 2017) (no evidence term “is used in everyday parlance or is used by other providers in conjunction with similar goods or services to impart the same kind of information.”).

¹⁰ Applicant’s brief, 6 TTABVUE 4 (citing Internet searches demonstrating the absence of use of the combination SOIL SWITCH; June 26 2024 Response to Office Action (request for reconsideration) at 4-11).

¹¹ June 26 2024 Response to Office Action at 12-13.

Because the marks are used on legally identical goods, they are, as noted, presumptively marketed through the same channels of trade to the same classes of consumers: those seeking preparations for promoting plant growth. *Heil Co.*, 2024 WL 4925901, at *35. These consumers are less likely to focus on the descriptive portions of the marks, “SOIL” and “GREEN,” and more likely to focus on the distinctive term SWITCH as dominating their commercial impression. “McCarthy on Trademarks § 23:42, at 23-248 (‘The fact that in a registration, certain descriptive or generic terms are disclaimed indicates that those terms are less significant and the other parts of the mark are the dominant parts that will impact most strongly on the ordinary buyer.’).” *In re Detroit Athl.*, 903 F.3d at 1303; *TiVo Brands LLC v. Tivoli, LLC*, 2018 WL 6921323, *17 (TTAB 2019).

As the Examining Attorney correctly notes, these consumers are likely to perceive plant-growth preparations sold under the marks SOIL SWITCH and GREENSWITCH as preparations targeting the soil and foliage, respectively, originating from the same source.¹² *Advance Magazine Publishers, Inc. v. Fashion Elecs., Inc.*, 2023 WL 4261426, *14 (TTAB 2023) (applicant’s mark likely to be perceived as a variation of opposer’s mark); *In re Dare Foods Inc.*, 2022 WL 970319, *6 (TTAB 2022) (“consumers encountering these marks could mistakenly believe the former is a variation on the registered mark used to identify a particular line ..., but nonetheless emanating from a common source.”).

Because the marks are used on legally identical goods, the degree of similarity

¹² April 26, 2024 Office Action at 4.

needed to support a finding of likely confusion declines. *See In re Mighty Leaf Tea*, 601 F.3d 1342, 1348 (Fed Cir. 2010); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877 (Fed. Cir. 1992); *Monster Energy Co. v. Lo*, 2023 WL 417620, *14 (TTAB 2023). The common element SWITCH results in marks that look and sound somewhat similar. And because each mark combines SWITCH with descriptive or generic words that share a similar meaning, the connotations and commercial impressions are very similar.

Applicant argues that the alliteration in SOIL SWITCH creates a distinctive overall impression that is distinct from Registrant's GREENSWITCH mark.¹³ But alliteration does not render the term "SOIL" in "SOIL SWITCH" any less descriptive. *See In re Lean Line, Inc.*, 1986 WL 83684, *2 (TTAB 1986) ("there is nothing in the record to suggest that the mere fact that both words which form the mark begin with the letter 'L' would cause purchasers to miss the merely descriptive significance of the term 'LEAN'...."). As noted, the variant marks are more likely to be perceived as denoting variant lines of goods, both emanating from the same source and directed to the same ultimate end, promoting plant growth.

For these reasons, the first *DuPont* factor weighs in favor of finding a likelihood of confusion.

II. Conclusion

For the reasons stated, the first through third *DuPont* factors all weigh in favor of finding a likelihood of confusion. *See In re Charger Ventures*, 64 F.4th at 1383

¹³ Applicant's brief, 6 TTABVUE 5.

(weighing *DuPont* factors).

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