

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: July 24, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re The Gallen Group

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Serial No. 98335808

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Brendan M. Palfreyman of Harris Beach PLLC,
for The Gallen Group.

Thomas Key, Trademark Examining Attorney, Law Office 130,
John Lincoski, Managing Attorney.

—
Before Zervas, Lebow, and Allard,
Administrative Trademark Judges.

Opinion by Allard, Administrative Trademark Judge:

The Gallen Group (“Applicant”) seeks registration on the Principal Register of the mark THE BATHING BEAUTIES (in standard characters) for “Headwear, namely, headscarfs, headwraps, headbands, pareos,” in International Class 25.¹

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 on the goods

¹ Application Serial No. 98335808 was filed on December 29, 2023, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use anywhere since October 1, 2023 and in commerce since November 1, 2023.

identified above, so resembles the mark BATHING BEAUTY (in standard characters) registered on the Principal Register for “Beachwear; Bikinis; Bras; Coverups; Housecoats; Loungewear; Swimsuits; Athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms; Business wear, namely, suits, jackets, trousers, blazers, blouses, shirts, skirts, dresses and footwear; Dressing gowns and bath robes; Pajamas for babies, adults, children, women, and men; Women’s clothing, namely, shirts, dresses, skirts, blouses; Women’s underwear; Yoga pants; Yoga shirts,” in International Class 25,² that it is likely to cause confusion, to cause mistake, or to deceive.

After the refusal was made final, Applicant appealed and requested reconsideration. After the request was denied, the appeal resumed. Applicant and the Examining Attorney filed briefs.³ We affirm the refusal.

I. Likelihood of Confusion

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 goods of the applicant, to cause confusion, or to cause mistake, or to deceive” 15 U.S.C. § 1052(d). Our determination under Section 2(d) is based on an analysis of

² Registration No. 6771961 was issued on June 28, 2022.

References to the briefs on appeal refer to TTABVUE, the Board’s online docketing system. The number preceding “TTABVUE” corresponds to the docket entry number; the number(s) following “TTABVUE” refer to the page number(s) of that particular docket entry.

³ Applicant’s brief appears at 6 TTABVUE and the Examining Attorney’s brief appears at 8 TTABVUE.

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, 1361 (CCPA 1973) (“*DuPont*”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 1314 (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, 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, 1206 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”).

In every Section 2(d) case, two key factors are the similarity or dissimilarity of the marks (the first factor) and the goods or services (the second factor). *See 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, 1164-65 (Fed. Cir. 2002)); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976). These two factors, together with the third (channels of trade), the fourth (conditions under which and buyers to whom sales are made), and the sixth (number and nature of similar marks in use on similar goods), are addressed herein.

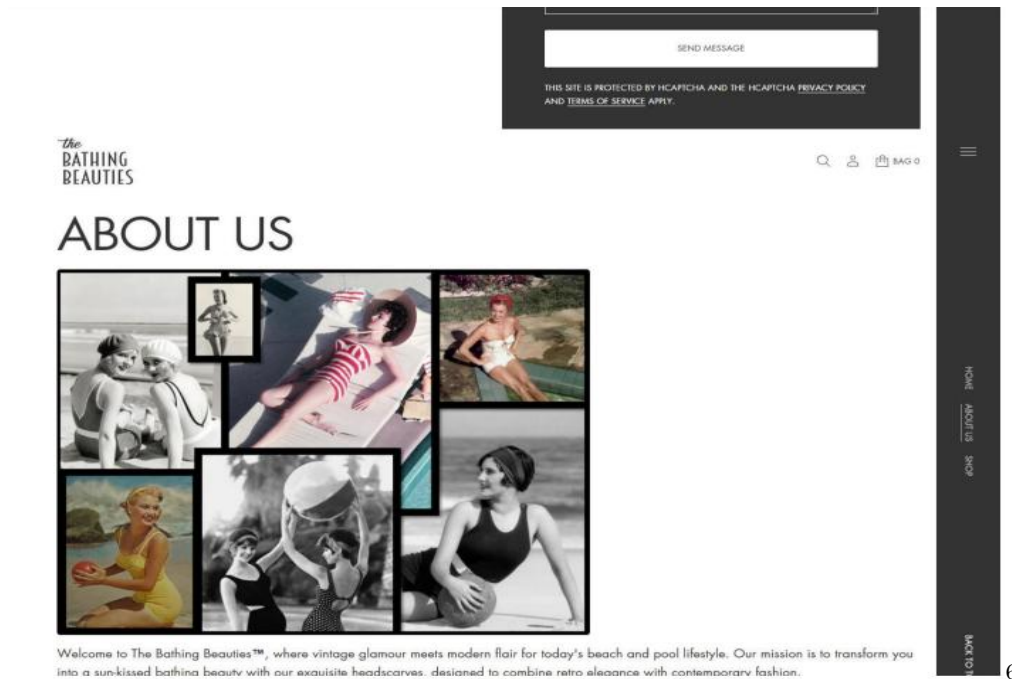
A. Similarity of the Goods, Channels of Trade, and Classes of Consumers

The second *DuPont* factor considers the “similarity or dissimilarity and nature of the goods or services as described in an application or registration ...,” while the third *DuPont* factor considers 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 as identified in the application and the cited registration. *In re Charger Ventures LLC*, 64 F.4th 1375, 1383 (Fed. Cir. 2023).

It is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp., Inc.*, 648 F.2d 1335, 1336 (CCPA 1981); *Inter IKEA Sys. B.V. v. Akea, LLC*, Opp. No. 91196527, 2014 TTAB LEXIS 166, at *37 (TTAB 2014).

The Examining Attorney argues that Applicant's identified "headscarves" are intended to be worn as beachwear; thus, the compared goods overlap.⁴ To support his position, he made of record a screenshot from Applicant's website:⁵



⁴ 8 TTABVUE 5-6; January 21, 2025 Denial of Request for Reconsideration at TSDR 2.

⁵ January 21, 2025 Denial of Request for Reconsideration at TSDR 2, 4-9.

⁶ January 21, 2025 Denial of Request for Reconsideration at TSDR 4.

Because it is somewhat difficult to read, we note that the caption under the image reads: “Welcome to The Bathing Beauties™, where vintage glamour meets modern flair for today’s beach and pool lifestyle. Our mission is to transform you into a sun-kissed bathing beauty with our exquisite headscarves, designed to combine retro elegance with contemporary fashion.”⁷ Based on this evidence, we find that Applicant’s identified “headscarves” are encompassed by “beachwear” of the cited registration, rendering the goods legally identical in part. *See, e.g., Look Cycle Int’l v. Kunshan Qiyue Outdoor Sports Goods Co.*, Can. No. 92079409, 2024 TTAB LEXIS 289, at *11 (TTAB 2024) (“The ‘cycles’ identified in Petitioner’s Registration ... encompass Respondent’s ‘bicycles,’ and ... [t]hus, the goods are legally identical in part.”); *Hughes Furniture Indus., Inc.*, Ser. No. 85627379, 2015 TTAB LEXIS 65, at *10 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”).

Other goods in Applicant’s identification of goods are also legally identical to those identified in the cited registration. We take judicial notice that the term “pareo” is defined as “[a] garment consisting of a rectangular piece of printed cloth worn especially in Polynesia as a wraparound skirt or dress.”⁸ An image of a person wearing such a skirt over a bathing suit is included with the definition:

⁷ *Id.*

⁸ THE AMERICAN HERITAGE DICTIONARY, accessed July 17, 2025, <https://ahdictionary.com/word/search.html?id=P5077700>. *See In re Cordua Rests. LP*, Ser. No. 85214191, 2014 TTAB LEXIS 94, at *6 n.4 (TTAB 2014) (“The Board may take judicial notice of dictionary definitions.”), *aff’d*, 823 F.3d 594 (Fed. Cir. 2016).



Third-party websites of record similarly show pareos used as a type of beachwear or coverup for a bathing suit:



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Based on this evidence, we find that a “pareo,” as identified by Applicant, is a type of “beachwear,” as identified by the cited registration, and therefore is encompassed by it, rendering the goods legally identical in part. The cited registration also identifies “coverups.” We find that Applicant’s identified “pareos” are also encompassed by “coverups,” rendering the goods legally identical in part for this additional reason. *See, e.g., Look Cycle*, 2024 TTAB LEXIS 289, at *11; *Hughes Furniture*, 2015 TTAB LEXIS 65, at *10.

⁹ October 19, 2024 Final Office Action at TSDR 101, 106-08. The Examining Attorney also provides evidence that Applicant’s and the cited registration’s goods are related based on third-party website evidence that he summarizes in his brief. 8 TTABVUE 7-8 (citing October 19, 2024 Final Office Action at TSDR 7-140).

Where, as here, the goods are in part legally identical and there are no limitations as to channels of trade or classes of purchasers in either Applicant's or the cited registration's identifications of goods, we must presume that the in part legally identical goods will be sold in the same channels of trade and bought by the same classes of purchasers. *See In re Viterro Inc.*, 671 F.3d 1358, 1362 (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). Here, the consumers of the goods are members of the general public.

Applicant argues that confusion is not likely because its goods are "sufficiently distinct" from those of the cited registration "because they are, in essence, headwraps—as shown in the specimen filed in connection with this application[.]"¹⁰ Applicant adds that "[t]he goods associated with the cited registration, ... while covering a variety of apparel, do not cover any type of headwrap."¹¹ This argument is unavailing because the goods are legally identical. Registrant's broadly worded "beachwear" and "coverups" must be deemed to encompass all the goods of the nature and type described therein, which the record shows could include "headscarves" and "pareos" as identified by Applicant. *See, e.g., In re Solid State Design Inc.*, Ser. No. 87269041, 2018 TTAB LEXIS 1, at *15-16 (TTAB 2018) (where the goods in an

¹⁰ 6 TTABVue 4.

¹¹ *Id.* at 5.

application or registration are broadly described, they are deemed to encompass “all the goods of the nature and type described therein . . .”).

B. Strength of the Cited Mark

We next consider the strength of the cited mark, as the strength of Registrant’s mark affects the scope of protection to which it is entitled. *DuPont*, 476 F.2d at 1361. Because the record does not include any evidence of third-party use, which could impact the commercial strength of the cited mark, we focus on the evidence that potentially impacts the cited mark’s conceptual strength.

Conceptual or inherent strength is a measure of a mark’s distinctiveness. *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353-54 (Fed. Cir. 2010). “Marks are often classified in categories of generally increasing distinctiveness[:] (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful.” *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992). “Marks that are descriptive or highly suggestive are entitled to a narrower scope of protection, i.e., are less likely to generate confusion over source identification, than their more fanciful counterparts.” *Spireon, Inc. v. Flex LTD*, 71 F.4th 1355, 1362-63 (Fed. Cir. 2023) (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1339 (Fed. Cir. 2015)); *see also Jack Wolfskin Ausrüstung Fur Draussen GmbH v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1373 (Fed. Cir. 2015) (“The weaker an opposer’s mark, the closer an applicant’s mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection.”).

Active third-party registrations may be relevant to show that a mark or a portion of a mark is descriptive, suggestive, or so commonly used in a particular industry that the public will look to other elements to distinguish the source of the goods. *See Juice Generation*, 794 F.3d at 1338-39; *see also Jack Wolfskin*, 797 F.3d at 1373-74 (“[E]vidence of third-party registrations is relevant to ‘show the sense in which . . . a mark is used in ordinary parlance[.]’”); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 917 (CCPA 1976) (Third-party registrations “may be given some weight to show the meaning of a mark in the same way that dictionaries are used.”).

Applicant argues that because of the “substantial third-party [registrations]” that incorporate either the term “BEAUTY/BEAUTIES and BATHING used in connection with goods in Class 25, such as apparel[,] consumers will be more likely to distinguish between the marks with even small variations”¹² To support its position, Applicant submitted both (1) lists of search results from its various searches on the USPTO website; and (2) copies of some third-party registrations from these search results.¹³

Turning to the first category of evidence, i.e., the lists of various search results, to the extent Applicant intended to introduce the actual registrations, this evidence was not properly submitted. It is well-settled that the mere listing of registrations is not sufficient to make the registrations of record. *In re White*, Ser. No. 78146926, 2006 TTAB LEXIS 263, at *16-17 (TTAB 2006). Moreover, because these listings were submitted at a point where the Applicant could not correct the format of the

¹² 6 TTABVUE 4.

¹³ January 2, 2025 Request for Reconsideration at TSDR 5-54.

submission, i.e., on request for reconsideration, and the Examining Attorney did not discuss them, we need not consider such evidence.¹⁴ *In re 1st USA Realty Pros. Inc.*, Ser. No. 78553715, 2007 TTAB LEXIS 73, at *3-4 (TTAB 2007) (listing of third-party registration information submitted with request for reconsideration not considered because when applicant filed the list, applicant no longer had an opportunity to add to the record of the application and correct the evidentiary insufficiency of the submission). *See also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1208.02 & n.11 and authorities cited therein.

Having determined that the search results are not to be considered, we now turn to the third-party registrations themselves, all of which are properly of record. As an initial matter, we note that all of the third-party registrations are based on use in commerce and identify goods similar to those of the cited registration.

Applicant made of record twelve registrations for BEAUTY-formative marks: BEAUTY SHINE; RISING BEAUTY; GODLY BEAUTY; WHITE BEAUTY; BEAUTY PATOOTY; BEAUTY EARPHONES and Design; BEAUTY HEADBAND

¹⁴ Even if we were to consider the search results, they would not change our decision because they have low probative value. Although, the search query provides some information, i.e., that the marks include the “beauty” or “beauties,” for example, fall in Class 25, and are “live,” the search results do not list the identified goods. Without the identifications, we cannot discern whether the marks meeting the search criteria identify relevant goods. *Made in Nature, LLC v. Pharmavite LLC*, Opp. No. 91223352, 2022 TTAB LEXIS 251, at *32 (TTAB 2021) (Explaining that Applicant’s list of third-party registrations lacks sufficient detail to be probative because the goods are not listed, therefore, “we do not know whether the listed ... registrations are relevant.”).

and Design; CRAZY BEAUTY; SLEEPING BEAUTY; NAKED BEAUTY; BEAUTY ADMIRE; and MODERN BEAUTY.¹⁵

In addition, Applicant made of record the following eight third-party registrations for BEAUTIES-formative marks: ETCHED BEAUTIES; LOUNGE BEAUTIES; CARO BEAUTIES (stylized); BEAUTIES IN BOOTS; BEAUTIES WITH BIBLES; STRIKING BEAUTIES; BASKETBALL BEAUTIES; and BASKETBALL BEAUTIES and Design.¹⁶

The following third-party registrations for marks incorporating the term “BATHING” (or its foreign equivalent) are also of record: CA-RIO-CA SUNGA CO. and Design;¹⁷ MR. BATHING APE and Design; MALLAS MAREA;¹⁸ BABY MILO STORE BY *A BATHING APE and Design; L’AUTHENTIQUE BAINDEMER;¹⁹ PURE BATHING CULTURE; YA, BANADOR;²⁰ A BATHING APE; BAPE KIDS BY A BATHING APE and Design; *A BATHING APE and Design; and A BATHING APE.²¹ As an initial matter, neither Applicant nor the Examining Attorney argued that the ordinary purchaser would stop and translate the pertinent term into its

¹⁵ January 2, 2025 Request for Reconsideration at TSDR 17, 19-20, 22-25, 27, 32-33, and 36-37.

¹⁶ *Id.* at TSDR 18, 21, 26, 28-31, and 34-35.

¹⁷ The registration states that the “English translation of ‘SUNGA’ is ‘bathing trunks.’” *Id.* at 39.

¹⁸ The registration states that the “English translation of ‘MALLAS’ in the mark is ‘bathing suits.’” *Id.* at 42.

¹⁹ The registration states that the “English translation of ‘L’AUTHENTIQUE BAINDEMER’ in the mark is ‘The Authentic Sea Bathing.’” *Id.* at 47.

²⁰ The registration states that the “English translation of ‘BANADOR’ in the mark is ‘bathing suit.’” *Id.* at 49.

²¹ *Id.* at 39-54.

English equivalent. *In re Vetements Grp. AG*, 137 F.4th 1317, 1326 (Fed. Cir. 2025) (quoting *In re Spirits Int'l, N.V.*, 563 F.3d 1347, 1351 (Fed. Cir. 2009)). Accordingly, we do not further consider those marks.

We find that the above BATHING-formative marks and the BEAUTY/BEAUTIES-formative marks, each of which is combined with other distinctive or descriptive terms and which covers one or more pertinent items of clothing, are probative to show that marks containing the term BATHING or BEAUTY/BEAUTIES can be distinguished by additional matter. *See e.g., In re Hartz Hotel Servs., Inc.*, Ser. No. 76692673, 2012 TTAB LEXIS 75, at *11 (TTAB 2012) (“It is clear from the third-party registrations that the addition of a geographic location to the word GRAND HOTEL has been sufficient for the [USPTO] to view these marks as being sufficiently different from the cited registrant’s mark, and from each other, such as not to cause confusion.”); *Plus Prods. v. Nat. Organics, Inc.*, 1979 TTAB LEXIS 85, at *18-22 (TTAB 1979) (Numerous PLUS marks on the trademark register for vitamins reflect the Office’s belief, the trademark owners’ belief, and plaintiff’s belief that PLUS marks can be registered side by side for vitamins without confusion provided there are minimal differences between the marks.). Applicant’s mark, on the other hand, which is nearly identical to the cited mark, differs only by its inclusion of the additional term “THE” and the plural term “BEAUTIES,” which as discussed below, are not sufficient in this case to distinguish the marks.²²

²² See discussion *infra* Section I(C).

At best, Applicant's evidence succeeds only in persuading us that the terms BATHING and BEAUTY/BEAUTIES, each term standing by itself rather than together as part of an overall mark registered in connection with relevant clothing items, are respectively weak elements in connection with the identified goods. That is, Applicant's evidence falls short of showing that the cited mark BATHING BEAUTY as a whole is relatively weak and entitled only to a narrow scope of protection. *Made in Nature*, 2022 TTAB LEXIS 251, at *33-34.

Simply put, the involved marks are nearly identical (BATHING BEAUTY versus THE BATHING BEAUTIES). Because Applicant's and Registrant's marks are nearly identical, third-party registered marks incorporating other elements are of less probative value. That is especially true here where the additional wording in each of the third-party marks is significant enough to make them less similar to the cited mark. *Sabhnani v. Mirage Brands, LLC*, Canc. No. 92068086, 2021 TTAB LEXIS 171, at *32 (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 than Respondent's marks are."); *In re I-Coat Co., LLC*, Ser. No. 86802467, 2018 TTAB LEXIS 171, at *17 (TTAB 2018) ("[N]one of the marks [in third-party registrations] are as similar to the mark in the cited registration as is Applicant's mark."); *Nike, Inc. v. WNBA Enters., LLC*, Opp. No. 91160755, 2007 TTAB LEXIS 39, at *39 (TTAB 2007) ("Simply put, none of the marks in these registrations and applications is as similar to opposer's mark as applicant's mark.").

In sum, Applicant has succeeded only in establishing that each component of the mark of the cited registration is conceptually weak but has not established that the conceptual strength of the registered mark as a whole is diminished or that the shared elements are so commonly used in a particular industry that the public will look to other elements to distinguish the source of the goods – here, the addition of the word THE and the fact that in one instance the last term is singular and not in plural. *Bell's Brewery, Inc. v. Innovation Brewing*, Opp. No. 91215896, 2017 TTAB LEXIS 452, at *18-19 (TTAB 2017) (13 registrations incorporating one term and eight registrations using another term insufficient “to establish that the terms either have a descriptive significance or are in such widespread use that consumers have come to distinguish marks containing them based on minute differences”). Because the cited registration is “prima facie evidence of the validity of the registered mark,” *see* Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), we must assume that the mark is inherently distinctive as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act. *See Tea Bd. of India v. Republic of Tea Inc.*, Opp. No. 91118587, 2006 TTAB LEXIS 330, at *62 (TTAB 2006). Thus, we afford the cited mark “the normal scope of protection to which inherently distinctive marks are entitled.” *Bell's Brewery*, 2017 TTAB LEXIS 452, at *20.

C. Similarity or Dissimilarity of the Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's and Registrant's marks in their entirety, considering their appearance,

sound, meaning and commercial impression. *DuPont*, 476 F.2d at 1361. *See also In re Detroit Athletic Co.*, 903 F.3d 1297, 1303 (Fed. Cir. 2018). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, Ser. No. 87075988, 2018 TTAB LEXIS 170, at *13 (TTAB 2018), *aff’d per curiam*, 777 F. App’x 516 (Fed. Cir. 2019) (quoting *In re Davia*, Ser. No. 85497617, 2014 TTAB LEXIS 214, at *3-4 (TTAB 2014)).

Where, as here, the marks appear in connection with, at least in part, legally identical goods, the degree of similarity between the marks that is necessary to support a finding of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 877 (Fed. Cir. 1992).

As an initial matter, recall that Applicant’s mark is THE BATHING BEAUTIES while the cited mark is BATHING BEAUTY.

Applicant argues that “the marks differ with regard to the use of the word ‘THE’ in [Applicant’s] mark and the plural use of ‘BEAUTIES,’ which, while not particularly substantive o[n] their own, do give Applicant’s Mark a different cadence and feel.”²³ These differences, Applicant adds, when considered in connection with the differences between the goods and the third-party registrations discussed above, render confusion unlikely.²⁴

We disagree. As we explained above, we don’t consider any differences between the goods; they are legally identical in part. Furthermore, the addition of the term

²³ 6 TTABVUE 5.

²⁴ *Id.*

“THE” and the plural of BEAUTY as “BEAUTIES” is not enough to distinguish the marks. The marks share the visually and phonetically identical dominant terms BATHING, followed by the visually and phonetically nearly identical terms BEAUTIES/BEAUTY. The shared terms BATHING and BEAUTY/BEAUTIES cause the marks to have nearly identical connotations and engender nearly identical commercial impressions. *See e.g., In re Thor Tech Inc.*, Ser. No. 78634024, 2009 TTAB LEXIS 253, at *3 (TTAB 2009) (finding WAVE and THE WAVE “virtually identical,” “[t]he addition of the word ‘The’ at the beginning of the registered mark does not have any trademark significance.”); *In re Narwood Prods. Inc.*, Ser. No. 73329339, 1984 TTAB LEXIS 52, at *2 (TTAB 1984) (noting the insignificance of the word “the” in comparison of THE MUSIC MAKERS and MUSICMAKERS). *Cf. Top Brand LLC v. Cozy Comfort Co. LLC*, __ F.4th __, 2025 U.S. App. LEXIS 17670, at *23 n.11 (Fed. Cir. 2025) (suggesting in dictum that circumstances might have warranted giving a bit more weight to the term “THE,” including testimony that the mark owner’s advertising emphasized the word “THE” as an important part of its mark).

Similarly, and as is usually the case, the use by Applicant of the plural term BEAUTIES is not enough to distinguish the marks because they are essentially the same term and would be perceived as such. *See Shenzhen IVPS Tech. Co. v. Fancy Pants Prods., LLC*, Opp. No. 91263919, 2022 TTAB LEXIS 383, at *57 (TTAB 2022) (quoting *Wilson v. Delaunay*, 245 F.2d 877, 878 (CCPA 1957) (“there is no material difference, in a trademark sense, between the singular and plural forms of the word ‘Zombie’ and they will therefore be regarded here as the same mark”)); *Swiss Grill*

Ltd. v. Wolf Steel Ltd., Opp. No. 91206859, 2015 TTAB LEXIS 312, at *35 n.17 (TTAB 2015) (singular and plural of SWISS GRILL deemed “virtually identical”); *Weider Publ’ns, LLC v. D & D Beauty Care Co.*, Opp. No. 91199352, 2014 TTAB LEXIS 2, at *25 (TTAB 2014) (“It is well established that trademarks and/or service marks consisting of the singular and plural forms of the same term are essentially the same mark.”).

This finding is bolstered by the principle that “marks must be considered in light of the fallibility of memory and not on the basis of side-by-side comparison.” *In re St. Helena Hosp.*, 774 F.3d 747, 750-51 (Fed. Cir. 2014). “[T]he average customer, who retains a general rather than specific impression of the marks,” *In re Aquitaine Wine USA, LLC*, Ser. No. 86928469, 2018 TTAB LEXIS 108, at *4-5 (TTAB 2018), might not notice the minimal difference of the use of the definite article “THE” at the beginning and the plural “BEAUTIES,” and likely would recall them as the same mark.

D. Conclusion as to Likelihood of Confusion

Applicant’s goods and the goods identified in the cited registration are legally identical in part. Because these goods are in-part legally identical, we must presume that these legally identical goods will be sold in the same channels of trade and bought by the same classes of purchasers. Thus, the second and third *DuPont* factors weigh heavily in favor of a likelihood of confusion. Because the classes of consumers are the same, that portion of the fourth factor regarding the buyers to whom sales are made also weighs in favor of a likelihood of confusion.

Regarding conceptual weakness, Applicant was successful only in establishing that each element of the cited mark is conceptually weak, but was not successful in diminishing the scope of protection to which the cited mark as a whole is entitled or establishing that the elements are commonly used in a particular industry that the public will look to other elements to distinguish the source of the goods. With regard to the first factor, Applicant's THE BATHING BEAUTIES mark is nearly identical to the cited BATHING BEAUTY mark.

Because all relevant factors either weigh in favor of a likelihood of confusion or are neutral, confusion is likely.

Decision

The refusal to register Applicant's mark is affirmed.