

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: May 6, 2026

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Skylark Nails Supply

Serial No. 97612916
—

Clement Cheng of Newhope Law, PC,
for Skylark Nails Supply.

Ellen Perkins, Examining Attorney, Law Office 110,
Loksye Lee Riso, Managing Attorney.

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Before Thurmon, Cohen and Stanley,
Administrative Trademark Judges.

Opinion by Cohen, Administrative Trademark Judge:

Applicant Skylark Nails Supply seeks registration on the Principal Register of the standard character mark CRE8TION for:

Acrylic nail powder and liquid preparations for shaping or sculpting nails; Adhesives for affixing false eyelashes; Artificial eyelashes; Nail hardeners; Nail tips, in International Class 3; and

Manicure implements, namely, nail files, nail clippers, cuticle pushers, tweezers, nail and cuticle scissors; Pedicure implements, namely, namely, nail files, nail clippers, cuticle pushers, tweezers, nail and cuticle scissors; Eyelash curlers and eyelash separators, in International Class 8.¹

¹ Application Serial No. 97612916 (the “Application”) was filed on September 29, 2022, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on an allegation of use anywhere of April 8, 2008 and in commerce of June 15, 2008 for International Class 3 and

The Trademark Examining Attorney finally refused registration of the mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that the mark in the Application, when used on or in connection with the identified goods, so resembles the mark CREATION (in standard characters), registered on the Principal Register, for:

Perfumery products, namely, perfumes, toilet water; beauty products, namely, rouge, eye shadow, foundation base make-up, facial and beauty masks, lipsticks, nail polish and nail polish removers; make-up remover preparations; toilet products, namely, hair shampoo, non-medicated bath salts, bath and shower gels, bubble baths, toilet soaps, essential oils for personal use; hair lotions; shaving soaps, creams and foams; after-shave lotions and balms; toothpastes; non-medicated sun tanning products, namely, oils, milks, lotions and creams; self-tanning creams; non-medicated skin and face preparations, namely, skin toners, lotions and creams; moisturizing skin creams and skin lotions; body scrubs; facial scrubs; deodorants for personal use, in International Class 3;²

as to be likely to cause confusion, mistake or deception.

When the refusal was made final, Applicant requested reconsideration and filed an appeal. The Application was remanded to the Examining Attorney “for further examination of the request for reconsideration and evidence submitted therewith.”³

for International Class 8, an allegation of use anywhere and in commerce of September 29, 2022.

² Registration No. 3287973 (the “Cited Registration”) issued on September 4, 2007; renewed. The Cited Registration is owned by Ted Lapidus (“Registrant”).

³ 8 TTABVUE 3. The Application was remanded because the Examining Attorney “ha[d] not issued an Office action which indicates if the request [for reconsideration] overcomes or resolves all outstanding refusals and requirements; issued a new final refusal; or issued an Office action which withdraws the Examining Attorneys basis for refusal.” 8 TTABVUE 3.

The Examining Attorney denied the request for reconsideration⁴ and the appeal was resumed.⁵ We affirm the refusal to register.

I. Likelihood of Confusion

“The Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion [or] mistake, or to deceive.” *In re Charger Ventures LLC*, 64 F.4th 1375, 1379 (Fed. Cir. 2023) (cleaned up). Our determination of the likelihood of confusion under Section 2(d) of the Trademark Act is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”); *Charger Ventures*, 64 F.4th at 1379. 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).

In any likelihood of confusion analysis, different *DuPont* factors may play a dominant role and some factors may not be relevant. *Naterra Int’l, Inc. v. Bensalem*, 92 F.4th 1113, 1116 (Fed. Cir. 2024) (citing *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 1362 (Fed. Cir. 2022)). In addition, varying weight may be assigned to each factor depending on the evidence presented, and “any one of the factors may control a particular case.” *Id.*; *see also Charger Ventures*, 64 F.4th at 1381. Two key considerations in every likelihood of confusion analysis are the similarities

⁴ 9 TTABVUE.

⁵ 10 TTABVUE.

between the marks and the similarities between the goods. *In re i.am.symbolic, llc*, 866 F.3d 1315, 1322 (Fed. Cir. 2017). We discuss the relevant factors below.⁶

A. Comparing the Marks

“Under the first *DuPont* factor, we consider ‘the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.’” *Sabhnani v. Mirage Brands, LLC*, No. 92068086, 2021 WL 6072822, at *13 (TTAB 2021) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1371 (Fed. Cir. 2005)). “Similarity in any one of these

⁶ Applicant raised arguments during prosecution related to use of the house mark, TED LAPIDUS, in connection with the Cited Registration and actual confusion, but not in its appeal brief. *See, e.g.*, March 25, 2025 Request for Reconsideration at TSDR 12, 14-15, 33. Applicant did not raise these arguments in its appeal brief and thus, they are considered waived. *See In re Princeton Equity Grp. LLC*, No. 97397212, 2025 WL 1638891, at *3 (TTAB 2025) (“Section 1203.02(g) of the TBMP warns applicants who institute ex parte appeal proceedings at the Board as follows: ‘If an applicant, in its appeal brief, does not assert an argument made during prosecution, it may be deemed waived by the Board.’”).

Moreover, Applicant’s argument regarding use of a house mark misses the point because it goes beyond the mark as shown in the Cited Registration. In an ex parte appeal, our analysis is based on the marks as depicted in the application and cited registration without regard to whether the marks will appear with house marks (whether previously registered or not) or other elements when in actual use. *See In re Shell Oil Co.*, 992 F.2d 1204, 1207 n.4 (applicant’s arguments that the applied-for mark would appear with applicant’s house mark were not considered in the likelihood-of-confusion determination); *In re Aquitaine Wine USA, LLC*, No. 86928469, 2018 WL 1620989, at *4 (TTAB 2018) (“[W]e do not consider how Applicant and Registrant actually use their marks in the marketplace, but rather how they appear in the registration and the application. We must compare the marks as they appear in the drawings, and not on any labels that may have additional wording or information.”).

As to Applicant’s arguments related to the lack of actual confusion, an absence of evidence of actual confusion does not necessarily point toward a finding of no likelihood of confusion, particularly in the context of an ex parte appeal. *In re Opus One, Inc.*, No. 75722593, 2001 WL 1182924, at *7 (TTAB 2001) (“The fact that an applicant in an ex parte case is unaware of any instances of actual confusion is generally entitled to little probative weight in the likelihood of confusion analysis, inasmuch as the Board in such cases generally has no way to know whether the registrant likewise is unaware of any instances of actual confusion, nor is it usually possible to determine that there has been any significant opportunity for actual confusion to have occurred.”).

elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s*, No. 87075988, 2018 WL 2734893, at *5 (TTAB 2018) (citing *In re Davia*, No. 85497617, 2014 WL 2531200, at *2 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019).

The issue is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012). We keep in mind that consumers must depend on their recollection of marks to which they have previously been exposed and that their memories are fallible. *See, e.g., In re St. Helena Hosp.*, 774 F.3d 747, 751 (Fed. Cir. 2014); *Sage Therapeutics, Inc. v. Sageforth Psych. Servs., LLC*, No. 91270181, 2024 WL 1638376, at *5 (TTAB 2024).

Applicant argues that the marks “differ substantially due to unique creative spelling and phonetic distinctions.”⁷ In response, the Examining Attorney asserts that the marks are “nearly identical” as “Applicant has merely substituted the number ‘8’ for the letter ‘A’ in the registered mark”;⁸ that there is “no correct pronunciation of a mark”;⁹ and that the “compared marks are essentially phonetic equivalents and thus could be pronounced the same.”¹⁰

⁷ 4 TTABVUE 9.

⁸ 6 TTABVUE 4.

⁹ *Id.*

¹⁰ *Id.*

The marks CREATION and CRE8TION are visually similar because they both consist of one-word, three-syllable terms that are similar in cadence and structure, beginning with the letters “CRE,” and ending with “TION.” Applicant’s substitution of the letter “A” for the number “8” as the fourth character in its mark is a minor difference that, if even noticed, does little to distinguish the marks’ appearances. The difference in appearance between CREATION and CRE8TION resulting from the difference in a single character may be noticed if the marks are viewed together, but they “must be considered . . . in light of the fallibility of human memory” and “not on the basis of side-by-side comparison.” *St. Helena Hosp.*, 774 F.3d at 751 (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 685 (CCPA 1977)). A consumer with a general recollection of CREATION for the goods identified in the Cited Registration who separately sees Applicant’s CRE8TION mark in connection with the goods identified in the Application could readily view Applicant’s mark simply as the mark in the Cited Registration. *See, e.g., Neutrogena Corp. v. Bristol-Myers Co.*, 410 F.2d 1391, 1393 (CCPA 1969) (“[T]he refined analyses of which lawyers are capable in taking these marks apart and putting them together are not likely to occur to the great bulk of the people walking into self-service stores or asking salesclerks for products of which they may have but dim recollections from having previously seen or heard one or the other of the involved marks.”).

Regarding the sound of the marks, it has long been held that “there is no correct pronunciation of a trademark that is not a recognized word.” *In re Jimenez*, 2025 WL 3126703, at *5 (TTAB 2025) (quoting *StonCor Grp., Inc. v. Specialty Coatings, Inc.*,

759 F.3d 1327, 1331-32 (Fed. Cir. 2014). Consumers therefore could pronounce a mark differently than the mark owner intends. *See In re Viterra*, 671 F.3d 1358, 1367 (Fed. Cir. 2012) (“[T]here is no correct pronunciation of a trademark, and consumers may pronounce a mark differently than intended by the brand owner.”). We agree with the Examining Attorney that “the compared marks ... could clearly be pronounced the same.”¹¹ The letter “A,” when pronounced as a long A (/ā/) as in “creation” is similar sounding to the pronunciation of the number “8” and thus, CREATION v. CRESTION would likely be pronounced similarly, if not identically, by consumers. “Similarity in sound alone may be sufficient for a finding of likelihood of confusion.” *In re 1st USA Realty Prof’ls, Inc.*, No. 78553715, 2007 WL 2315610, at *6 (TTAB 2007) (citing *Krim-Ko Corp. v. The Coca-Cola Co.*, 390 F.2d 728, 907 (CCPA 1968)).

As to connotation or commercial impression, Applicant relies on various Board cases¹² wherein the marks were found to convey different connotations or commercial impressions when applied to the parties’ respective goods to support its contention that “even phonetically identical marks can coexist if visual appearance and meaning diverge significantly in the eyes of the consumer.”¹³ Applicant, however, does not provide any argument or evidence regarding what meaning, if any, CRESTION has in connection with its goods, or how that meaning would differ from the meaning of

¹¹ 6 TTABVUE 4. In the “Miscellaneous Information” section of the March 26, 2025 Snap Shot Amendment, the pseudo mark for Applicant’s mark is “Cre Eight Tion.”

¹² Applicant relies on several Board cases but provides only case names, not case citations. 4 TTABVUE 5-8.

¹³ 4 TTABVUE 6.

CREATION if used with the same context. Indeed, there is no evidence of record to suggest that CREATION, or the variant CRESTION, have any significance in connection with the involved goods. *See In re Joel Embiid*, No. 88202890, 2021 WL 2285576, at *9 (TTAB 2021) (“[T]here is no evidence here, or other reason to find, that the mark TRUST THE PROCESS has one meaning when used with shoes, and a second and different meaning when used with shirts and sweatshirts, based on the nature of the respective goods.”). CREATION denotes “the act of making, inventing, or producing”;¹⁴ there is no entry for CRESTION. The term CREATION or the variant CRESTION are arbitrary in relation to the relevant goods and there is nothing of record that persuades us that they project different connotations or commercial impressions. This, and the other similarities discussed above, give the marks a similar overall, if not the same, connotation and commercial impression.

When we consider the marks in their entirety, we find not only similarity in sound and appearance, but also that they convey the same or similar connotation and commercial impression.

This *DuPont* factor strongly supports a conclusion that confusion is likely.

¹⁴ MERRIAM-WEBSTER DICTIONARY, MERRIAM-WEBSTER.COM/Dictionary/CREATION (accessed May 4, 2026). The Board may take judicial notice of dictionary definitions retrieved from online sources when the definitions themselves are derived from dictionaries that exist in printed form. *See B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d 727, 728 (Fed. Cir. 1988); *In re Cordua Rests. LP*, No. 85214191, 2014 WL 1390504, at *2 n.4 (TTAB 2014) *aff'd*, 823 F.3d 594 (Fed. Cir. 2016). We take judicial notice of the definition for “creation.”

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

1. The Goods

“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 Embiid*, No. 88202890, 2021 WL 2285576, at *10 (TTAB 2021) (quoting *In re Detroit Athletic Co.*, 903 F.3d 1297, 1306 (Fed. Cir. 2018)). “In analyzing the [goods], the Board considers [t]he similarity or dissimilarity and nature of the [goods] as described in an application or registration.” *In re OSF Healthcare Sys.*, No. 88706809, 2023 WL 6140427, at *4 (TTAB 2023) (quoting *Embiid*, 2021 WL 2285576, at *10). The “Examining Attorney need not prove, and we need not find, similarity as to each product listed in the description of goods” to affirm the refusal. *In re St. Julian Wine Co.*, No. 87834973, 2020 WL 2788005, at *5 (TTAB 2020). “[I]t is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application.” *In re Aquamar, Inc.*, No. 85861533, 2015 WL 4269973, at *4 n.5 (TTAB 2015). It is “not necessary that the goods be similar or even competitive to support a finding of a likelihood of confusion.” *Coach Servs.*, 668 F.3d at 1369 (quoting *7-Eleven, Inc. v. Wechsler*, No. 91117739, 2007 WL 1431084, at *10 (TTAB 2007)). “[L]ikelihood of confusion can be found ‘if the respective goods are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.’” *Id.*

One way to show that consumers perceive goods as related (in the trademark sense) is to show that third parties offer both the goods identified in an application and those identified in a cited registration under the same mark. *See, e.g., Naterra Int'l*, 92 F.4th at 1117; *Detroit Athletic*, 903 F.3d at 1306; *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002) (evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”). To support the argument that the goods are related, the Examining Attorney submitted evidence of third-party websites offering the goods identified in both classes of the Application and the Cited Registration under the same marks, including

- RED ASPEN mark for a glue application bundle (includes items used in prepping nails for fake or acrylic nails including nail files, liquid nail dehydrator, and nail prep pads), press-on nails, nail clippers, eyeshadow and hand cream;¹⁵
- TARTE mark for false eyelashes, lash scissors, lash tweezers, eyelash curlers, concealer, foundation and blush;¹⁶
- REVLON mark for cuticle nippers, cuticle scissors, nail files, foundation, blush, multicare base top coat for nails, nail polish;¹⁷
- LONDONTOWN mark for nail polish, liquid nail ridge filler, liquid nail hardener, nail files, nail clippers and lip gloss;¹⁸
- ULTA mark for a manicure kit (includes a nail file, nail clippers and scissors) and foundation;¹⁹

¹⁵ August 8, 2024 Office Action at TSDR 8-30.

¹⁶ *Id.* at 32-52; December 31, 2024 Final Office Action at TSDR 6-29.

¹⁷ August 8, 2024 Office Action at TSDR 53-79.

¹⁸ *Id.* at 80-92.

¹⁹ December 31, 2024 Final Office Action at TSDR 30-31, 35-37.

- OPI mark for a liquid nail strengthener, a liquid bond building nail serum and nail polish;²⁰
- NYX mark for eyelash curlers, lip gloss, false eyelashes, lash glue, and foundation;²¹ and
- MAC for eyelash curlers, foundation, blush, lipstick and false eyelashes.²²

Applicant does not address this factor, apparently conceding the relatedness of the relevant goods. *In re Morinaga Nyugyo K.K.*, No. 86338392, 2016 WL 5219811, at *2 (TTAB 2016) (Board considered Applicant to have conceded the issues of similarity of the goods and channels of trade by not addressing the issues). Indeed, the evidence shows that the goods identified in the Application and Cited Registration share a similar purpose for consumers as personal skin care products. Again, “likelihood of confusion can be found ‘if the respective goods are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.’” *Coach Servs.*, 668 F.3d at 1369 (quoting *7-Eleven*, 2007 WL 1431084, at *10).

We find the marketplace evidence detailed above persuasive to show that consumers encounter the products identified in both classes of the Application coming from the same sources as the various products identified in the Cited Registration and reasonably expect those goods to emanate from the same source. *See, e.g., Detroit Athletic*, 903 F.3d at 1306 (crediting relatedness evidence that third parties use the

²⁰ *Id.* at 32-33.

²¹ *Id.* at 45-62.

²² *Id.* at 63-91.

same mark for the goods and services at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both”); *Hydra Mac, Inc. v. Mack Trucks, Inc.*, 507 F.2d 1399, 1400 (CCPA 1975) (“[T]he confusion found to be likely is not as to the products but as to their source. Here the goods of the parties are such as might reasonably be expected to emanate from the same source.”) (citation omitted); *Mishawaka Rubber & W. Mfg. Co. v. Bata Narodni Podnik*, 222 F.2d 279, 287 (CCPA 1955) (“In determining whether there is likelihood of confusion, one is not concerned merely with confusion in goods; the question is whether goods are of a nature which purchasers might reasonably assume to come from same source.”).

Moreover, as to International Class 3, the goods identified in the Application originally also included “nail polish base coat; nail polish top coat.”²³ Applicant’s inclusion of “nail polish base coat; nail polish top coat” in the original identification of goods is consistent with the third-party website evidence that Applicant’s Class 3 goods and Registrant’s goods can come from a single source. *See Octocom Sys., Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 941 (Fed. Cir. 1990) (on the issue of the relatedness of the applicant’s “modems” and the opposer’s “computer programs,” the fact “that such goods might come from a single source is shown by [applicant’s] original application, which indicates [applicant] itself used the mark OCTOCOM for both modems and computer programs.”); *In re HerbalScience Grp., LLC*, No.

²³ September 29, 2022 Application at TSDR 1-2; *see* November 15, 2023 Petition to Revive at TSDR 1-2.

77519313, 2010 WL 5651672, at *3 (TTAB 2010) (the applicant's concession that its identified goods and those of the registrant can emanate from a single source under a single mark was supported by the fact that "applicant originally included nutritional supplements and dietary supplements in its identification of goods.").

Based on the evidence of record, we find Applicant's Class 3 and 8 goods are related to Registrant's goods and thus, this factor weighs in favor of a finding of likelihood of confusion.

2. Trade Channels, Consumers and Purchase Conditions

The third *DuPont* factor considers "[t]he similarity or dissimilarity of established, likely-to-continue trade channels" and the fourth factor addresses "[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. We base our comparison of the trade channels and purchasing conditions/customers on the identification of goods in the Application and Cited Registration. *See, e.g., i.am.symbolic*, 866 F.3d at 1325.

Applicant argues that the trade channels and consumers are different because its goods are "exclusively distributed wholesale to nail salons through professional distributors";²⁴ and that "CREATION-branded products are sold at retail to end consumers online and at department stores."²⁵ These arguments are unavailing because neither the Cited Registration nor the Application contain such restrictions.

²⁴ 4 TTABVUE 9.

²⁵ *Id.*

“The description of the goods in the application for registration is critical because any registration that issues will carry that description. Moreover, although a registrant’s current business practices may be quite narrow, they may change at any time from, for example, industrial sales to individual consumer sales.” *CBS Inc. v. Morrow*, 708 F.2d 1579, 1581 (Fed. Cir. 1983) (citation omitted), *quoted in Can. Imperial Bank of Com. v. Wells Fargo Bank, Nat’l Ass’n*, 811 F.2d 1490, 1492-93 (Fed. Cir. 1987). Applicant thus may not restrict the scope of the unrestricted goods identified in its Application (let alone in the Cited Registration where Applicant has no control over the manner in which the goods are marketed and sold) by argument or by extrinsic evidence about the current means of distribution. *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014) (“It was proper, however, for the Board to focus on the application and registrations rather than on real-world conditions”); *Octocom*, 918 F.2d at 942 (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.”). When, as in this case, the involved identifications do not limit how the goods are sold or to whom, we presume that they are sold “in all normal trade channels to all the normal classes of purchasers.” *Detroit Athletic*, 903 F.3d at 1308.

The Examining Attorney’s evidence of third-party use discussed above demonstrating that the products identified in the Application and the Cited

Registration are related also demonstrates that those goods are advertised on the same third-party websites to the same consumers. *See, e.g., Hewlett-Packard*, 281 F.3d at 1267 (evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”); *Viterra*, 671 F.3d at 1362 (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)’ *Embiid*, 2021 WL 2285576, at *15 (Board found “channels of trade and classes of customers plainly overlap” where record demonstrated relevant goods sold together on third-party websites and offered and registered under a single mark by numerous businesses). This evidence shows that the trade channels and customers for the goods in the Application and Cited Registration overlap to at least some degree.

Applicant asserts that its consumers “possess specialized knowledge and higher purchasing sophistication.”²⁶ As we noted above, the Application and Cited Registration identify goods that are not restricted by target market, price, or any other manner that might suggest higher than normal consumer sophistication. While we can infer from the identifications and the nature of Applicant’s and Registrant’s goods that potential consumers may include sophisticated as well as unsophisticated consumers, “[p]recedent requires that we base our decision on the least sophisticated potential purchasers.” *Stone Lion*, 746 F.3d at 1325; *see In re I-Coat Co., LLC*, No. 86802467, 2018 WL 2753196, at *11 (TTAB 2018); *S.W. Mgmt.*, 2015 WL 4464550, at

²⁶ *Id.*

*17 (where the goods in an application or registration are broadly described, they are deemed to encompass all the goods of the nature and type described therein); *Estée Lauder Inc. v. L’Oreal, S.A.*, 129 F.3d 588, 595 (Fed. Cir. 1997) (“arguments of counsel cannot take the place of evidence lacking in the record”) (citation omitted).

Based on the foregoing, we find that the third *DuPont* factor weighs in favor of a finding of likelihood of confusion and the fourth factor is neutral.

C. Strength of the Mark

As an initial matter, to the extent that Applicant argues its mark is well-known or famous,²⁷ those arguments implicate the fifth *DuPont* factor. However, those arguments are irrelevant in this context as that factor pertains to the fame of the cited mark, not the applied-for mark. *See DuPont*, 476 F.2d at 1361 (“the fame of the prior mark”) (emphasis added). More relevant, however, are Applicant’s arguments that “third-party trademarks coexist using variations of ‘create’ or ‘creation,’ ... demonstrating a crowded market with similar branding concepts.”²⁸

Under the fifth and sixth *DuPont* factors, we consider the strength of the cited registered mark, and the extent to which that strength may be attenuated by third-party use and registrations. *DuPont*, 476 F.2d at 1361. The strength of the cited

²⁷ 4 TTABVUE 10 (“Exhibits 17–19 further emphasize CRESTION’s well-established market presence and consumer engagement on platforms like YouTube, Facebook, and Instagram, reinforcing brand distinctiveness and professional market segmentation ... Exhibits 20–29 provide additional evidence of robust market presence through influential nail artists and manicurists actively using and endorsing CRESTION products ... Exhibits 31–36 offer further evidence of CRESTION’s market distinction, showcasing user-generated content, continued professional endorsements, and the product range’s professional appeal.”).

²⁸ 4 TTABVUE 10.

registered mark “varies along a spectrum from very strong to very weak.” *Dollar Fin. Grp., Inc. v. Brittex Fin., Inc.*, 132 F.4th 1363, 1372 (Fed. Cir. 2025) (quoting *Bureau Na’l Interprofessionnel du Cognac v. Cologne & Cognac Ent.*, 110 F.4th at 1366). Although the Examining Attorney is not expected to adduce evidence of the strength or fame of the cited mark, *In re Mr. Recipe*, No. 86040643, 2016 WL 1380730, at *2 (TTAB 2016), an applicant may adduce evidence of “[t]he number and nature of similar marks in use on similar goods [or services]” under the sixth *DuPont* factor to show that the cited mark is comparatively weak, conceptually or commercially, and has a “comparatively narrower range of protection.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1338 (Fed. Cir. 2015); *see also Monster Energy Co. v. Lo*, No. 91225050, 2023 WL 417620, at *9 (TTAB 2023) (the strength or weakness of the cited registered mark bears on the scope of protection to which it is entitled). “In determining the strength of a mark, we consider both its inherent strength, based on the nature of the mark itself, and, if there is evidence in the record of marketplace recognition of the mark, its commercial or marketplace strength.” *Heil Co. v. Tripleye GmbH*, No. 91277359, 2024 WL 4925901, at *18 (TTAB 2024).

In support of its contention that the CREATION mark is weak, Applicant submitted evidence of third-party websites which it argues “coexist using variations of ‘create’ or ‘creation,’ exemplified by Exhibits 9-13 (VICTORIA’S SECRET and MARC JACOBS fragrances)”²⁹ However, upon review of this evidence, most of the pages do not display any use of the word “create” or variations thereof and for the two

²⁹ 4 TTABVUE 9.

webpages that do, the terms (created or creation) do not appear to be used as a trademark.³⁰ Rather, as displayed below, the terms are used to describe a perfume, are embedded in text and are not designated in a manner to suggest the term is a trademark (e.g., use of TM or ®, appearing in all capital letters or in bold).

The image is a screenshot of an e-commerce product page for 'Bare Eau de Parfum'. On the left, there is a large product image of a glass perfume bottle with a black cap, surrounded by botanical elements like sandalwood chips, purple flowers, and orange slices. Below this image, the text reads: 'Egyptian Violet Petals', 'Upcycled Australian Sandalwood', and 'Mandarin Madagascar'. To the right of the image, the product title 'FINE FRAGRANCE Bare Eau de Parfum' is displayed, along with a 4.8-star rating from 1205 reviews and a note that 200+ units were bought in the last day. The price is listed as \$79.95, with an option for 4 payments of \$19.98 using Klarna or Afterpay. A promotional offer states: '\$65 1.7 oz Bare Eau de Parfum + Lotion and \$85 3.4oz Bare Eau de Parfum + Lotion + Mist. Up to a \$139.95 value. Details'. Below the price, there are buttons for '3.4 oz' and '1.7 oz' sizes, and a quantity selector set to '1'. Three shipping options are shown: 'Ship To You', 'FREE In-Store Pickup', and 'Same Day Delivery'. The shipping location is '90815' and the status is 'In Stock'. A pink 'ADD TO BAG' button is prominent. Below it, a banner advertises 'Free easy returns on all U.S. orders'. The 'PRODUCT DESCRIPTION' section follows, starting with 'This fragrance becomes you...' and listing notes: 'Fragrance type: Woody Floral', 'Notes: Australian sandalwood, mandarin Madagascar, Egyptian violet', and 'Eau de Parfum is our most concentrated, pure version of the fragrance'. A red arrow points to the first sentence of the product description.

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³⁰ March 25, 2025 Request for Reconsideration at TSDR 39- 47.

³¹ *Id.* at 41.

FINE FRAGRANCE
Bombshell Eau de Parfum
★★★★★ (4.8) [25 Reviews](#)
In 700+ bags in the last day
\$59.95 26265787
or 4 payments of \$14.98 with [Klarna](#) or [afterpay](#)
- 1 +
Ship To You **FREE In-Store Pickup** **Same Day Delivery**
Ship to [90815](#) In Stock
Standard Delivery [Change](#)
ADD TO BAG
Free & easy returns on all U.S. orders
In-store or by mail. Now with no printer needed! [Details](#)
PRODUCT DESCRIPTION
There's a Bombshell in all of us. Confident and bold, America's No. 1 Fragrance* opens with the bright sparkle of Brazilian purple passion fruit. The heart of the fragrance blooms with Bombshell's signature floral, the peony. Here, the varietal is clean, petally Shangri-la peony from Tibet. Madagascan vanilla orchid adds a creamy sweetness. But it's Italian sunstruck pine that gives Bombshell its inimitable aromatic twist. Previously reserved for masculine fragrances, but pioneered for women with the creation of Bombshell, the note is captured at the moment the Ligurian is warmed by the afternoon sun.
• Fragrance type: Fruity Floral
• Notes: purple passion fruit, Shangri-La peony, vanilla orchid
• Eau de Parfum is our most concentrated, pure version of the fragrance
• 50 ml/1.7 fl oz.

Applicant also submitted with its Request for Reconsideration a table of trademark registrations which include variations of the term “create” with additional terms and with no status and title copies. As pointed out by the Examining Attorney,³³ merely listing third-party marks, registration numbers, and class

³² *Id.* at 43.

³³ 6 TTABVUE 7 (“The trademark examining attorney objects to list of U.S. Registrations. The mere submission of a list of registrations or a copy of a private company search report does not make such registrations part of the record.”).

numbers is insufficient to make these registrations of record. *In re Peace Love World Live, LLC*, No. 86705387, 2018 WL 3570240, at *6 n.17 (TTAB 2018) (citations omitted) (“a list of registrations does not make those registrations of record.”). Although the list that Applicant submitted includes some details, such as the classes of goods or services and the marks registered, the record does not show what goods or services are identified in the registrations or the current ownership or status of the registrations. The list of third-party registrations “does not include enough information to be probative.” *In re Peace Love World Live, LLC*, No. 86705287, 2018 WL 3570240, at *6 n.17 (TTAB 2018).

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 assume 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 New Era Cap Co., Inc. v. Pro Era, LLC*, No. 91216455, 2020 WL 2853282, at *11 (TTAB 2020). Thus, we afford the Cited Registration “the normal scope of protection to which inherently distinctive marks are entitled.” *Bell’s Brewery, Inc. v. Innovation Brewing*, No. 91215896, 2017 WL 6525233, at *9 (TTAB 2017).

We find the two strength factors (five and six) to be neutral.

II. Conclusion

Having considered all of the arguments and evidence of record, we now turn to weighing together our findings on the relevant likelihood of confusion factors. Applicant’s substitution of the numeral “8” for the letter “A” as the fourth character

in the word “creation” is a minor change, and we find the marks highly similar in sound, appearance, connotation and commercial impression. The evidence shows the respective goods are related, which Applicant does not dispute. These first two *DuPont* factors together comprise what has been called “the fundamental inquiry” in a Section 2(d) analysis, *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976), and they weigh in favor (strongly in the case of the similarity of the marks) of a conclusion that confusion is likely. We also find that the overlap, at least to some degree, in the third factor weighs in favor of a finding of likelihood of confusion and the factors regarding consumer sophistication, purchasing conditions, and strength of the cited mark are neutral.

All factors either weigh in favor of a likelihood of confusion or are neutral. There is a likelihood of confusion.

Decision: The refusal to register Applicant’s mark under Trademark Act Section 2(d) is affirmed.