

**THIS OPINION IS NOT A
PRECEDENT OF
THE T.T.A.B.**

Mailed: September 13, 2010

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Dr Pepper/Seven Up, Inc.
v.
Krush Global Limited

Opposition No. 91180742; and
Cancellation No. 92048446¹

Laura Popp-Rosenberg of Fross Zelnick Lehrman & Zissu, PC
for Dr Pepper/Seven Up, Inc.

William C. Wright of Epstein Drangle Bazerman & James, LLP
for Krush Global Ltd.

Before Holtzman, Cataldo and Bergsman,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Opposition No. 91180742

Defendant seeks to register the following mark
for "restaurant, catering, snack bar and café services;
provision of prepared food; food and drink preparation and
presentation services; bar services; catering services for
the provision of food and drink; preparation of food stuffs

¹ These proceedings were consolidated by a Board order issued on
January 22, 2008.

or meals for consumption off the premises; sandwich and salad bar services; wine bar services" in Class 43.²



As grounds for opposition, plaintiff has alleged that defendant's mark, when used in connection with the recited services, so resembles plaintiff's previously used and registered marks as to be likely to cause confusion, mistake or to deceive. Plaintiff pleaded ownership of the following marks:³ CRUSH, in typed or standard characters, for "non-alcoholic, maltless beverages and concentrates and compounds for making same";⁴ for "shorts, visors, jackets, caps";⁵ for

² Application Serial No. 79033050, filed on October 10, 2006 as a request for extension of protection pursuant to Trademark Act §66(a). After commencement of these proceedings, defendant deleted goods previously recited in Classes 29 and 32 without the consent of plaintiff. As a result, the Board entered judgment against defendant as to those goods.

³ In addition, opposer pleaded ownership of Registration No. 0683361 for the mark ORANGE CRUSH, issued on August 11, 1959, for "non-alcoholic, maltless orange-flavored beverages and concentrates and compounds for making same." This registration was subsequently canceled under Section 8/expired under Section 9 on March 14, 2010.

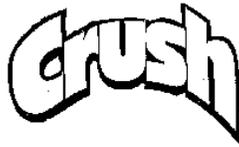
⁴ Registration No. 0187791, issued on August 12, 1924, claiming a date of first use anywhere and a date of first use in commerce of 1915. Fourth renewal.

⁵ Registration No. 1424931, issued on January 13, 1987, claiming a date of first use anywhere and a date of first use in commerce of January 1, 1985. First renewal.

"soft candies";⁶ and for "confectionery, namely candy";⁷ the mark shown below for "cosmetic products, namely lip balm and lip gloss;"⁸



and the mark shown below for "soft drinks and concentrates for making the same."⁹



For each pleaded registration, plaintiff attached to its notice of opposition a printout of information from the electronic database records of the USPTO showing the current status and title of the registration. Accordingly, such registrations are received into evidence and are made part of the record for all purposes of this proceeding.

Trademark Rule 2.122(d)(1).

⁶ Registration No. 2536979, issued on February 5, 2002, claiming a date of first use anywhere and a date of first use in commerce of September 1999. Trademark Act §8 affidavit accepted, §15 affidavit acknowledged.

⁷ Registration No. 2895772, issued on October 19, 2004, claiming a date of first use anywhere and a date of first use in commerce of October 31, 1999.

⁸ Registration No. 3209282, issued on February 13, 2007, claiming a date of first use anywhere and a date of first use in commerce of August 10, 1981.

⁹ Registration No. 2418265, issued on January 2, 2001, claiming a date of first use anywhere and a date of first use in commerce of June 1, 1999. Trademark Act §8 affidavit accepted, §15 affidavit acknowledged.

Opposition No. 91180742 and Cancellation No. 92048446

In its answer, defendant denied the salient allegations of the notice of opposition.

Cancellation No. 92048446

Defendant also is the owner of the mark CRUSSH, registered in standard characters on the Principal Register for the same Class 43 services as listed above in the opposed extension application.¹⁰

As grounds for the petition to cancel, plaintiff alleged priority of use and likelihood of confusion. Plaintiff alleged ownership of the same registered marks pleaded in its notice of opposition, *supra*, and listed above. Plaintiff attached to its petition to cancel a printout of information from the USPTO's electronic database records showing the current status and title of each registration. Each registration is valid and subsisting and is owned by plaintiff. The registrations are received into evidence and are part of the record for all purposes of this proceeding. Trademark Rule 2.122(d)(1).

In its answer, defendant admitted that it has not used the mark in the United States. Defendant otherwise denied the salient allegations of the petition to cancel.

¹⁰ Registration No. 3275548, issued on August 7, 2007 pursuant to Trademark Act §66(a).

Standing and Priority

In an order issued on February 12, 2009, the Board granted plaintiff's motion for summary judgment in part as to its standing and priority in both of these consolidated proceedings. Accordingly, the only issue remaining for decision herein is plaintiff's pleaded ground of likelihood of confusion.

Stipulations of the Parties

The parties herein stipulated that documents produced in discovery shall be deemed authentic. The parties further stipulated to submission of testimony by declaration, subject to the opposing party's right to conduct oral cross-examination; and that certain cross-examination also would be submitted by declaration.

Evidentiary Objections

Plaintiff filed a motion to strike Exhibits 1, 2, 9 and 10 of defendant's First and Supplemental Trial Declarations of Mr. William C. Wright (by which declarations defendant seeks to introduce identical exhibits) for failure to properly authenticate the exhibits; Exhibits DX003 - DX013 of defendant's notice of reliance (which also are identical to Exhibits 1-10 of the First and Supplemental Trial Declarations of William C. Wright) for failure to authenticate and indicate the relevance thereof; and Exhibits 3, 4, 6, 7 and 8 of defendant's Trial Declaration

of Mr. James Learmond for failure to authenticate. In addition, plaintiff moves to strike that portion of defendant's notice of reliance that asserts defendant's reliance upon "All documents produced by Opposer/Petitioner [plaintiff] in this proceeding number DPSU 000001 through DPSU 002324"¹¹ because defendant failed to introduce these documents into the record herein.

First, we agree with plaintiff that any documents produced in discovery by plaintiff and "relied upon" by defendant but not introduced during testimony have no probative value for the obvious reason that the Board is thus deprived of an opportunity to examine them. It was incumbent upon defendant to timely introduce any documents sought to be relied upon in order for the Board to consider them in our determination herein. Accordingly, we will only consider documents of record herein, and defendant's offer in its response to plaintiff's motion to strike to make additional documents of record after the close of its testimony period is denied.

Turning to defendant's notice of reliance, in *Safer, Inc. v. OMS Investments, Inc.*, 94 USPQ2d 1031 (TTAB 2010), the Board changed its practice regarding Internet evidence, holding that a document obtained from the Internet may be admitted into evidence pursuant to a notice of reliance in

¹¹ Defendant's Notice of Reliance, para. 12.

the same manner as a printed publication in general circulation in accordance with Trademark Rule 2.122(e), provided as follows: that the document obtained from the Internet is publicly available, that is, the propounding party identifies the document's date of publication or the date it was accessed and printed, and its source (URL); and that the propounding party indicates in the notice of reliance "generally the relevance of the material being offered." In this case, defendant indicates the URL and date the documents in question were accessed and printed. However, defendant fails to indicate the relevance thereof. We find, therefore, that the documents comprising these exhibits have not properly been made of record by defendant's notice of reliance.

With regard to the exhibits sought to be stricken from the first and supplemental Wright Declarations and the Learmond Declaration, we note that none of the documents in question were authenticated by the declarants. We find, therefore, that the documents comprising these exhibits have not properly been made of record by testimonial declaration.

We note nonetheless that none of the documents sought to be excluded from defendant's trial declarations and notice of reliance are outcome determinative of this case. As such, regardless of whether we strike or consider them in our determination herein, the result would be the same. In

view thereof, we will exercise our discretion to consider the documents comprising these exhibits for such probative value as they may have.

In addition, plaintiff filed a statement of objections to defendant's evidence, in which plaintiff asserts numerous substantive objections to defendant's trial declarations and evidence submitted therewith, along with its notices of reliance, on the grounds of relevance, hearsay, lack of foundation, lack of personal knowledge, and best evidence rule. Again, however, we note that none of the testimony and/or exhibits sought to be excluded is outcome determinative. Given this fact, coupled with the number of objections (50), we see no compelling reason to discuss the objections in a detailed fashion. Suffice it to say, we have kept in mind the various objections, and we have accorded whatever probative value the subject testimony and exhibits merit.

The Record

By operation of Trademark Rule 2.122, 37 C.F.R. §2.122, the record in this case includes the pleadings and the files of the involved application and registration. In addition, during its assigned testimony period, plaintiff submitted the testimony and rebuttal declarations, with exhibits, of Andrew D. Springate, its Senior Vice-President of Brand Marketing of Dr Pepper Snapple Group (plaintiff's parent);

and Mario Ortiz, a paralegal from the law firm of defendant's counsel of record. In addition, plaintiff submitted notices of reliance upon official records, defendant's discovery responses, and printed publications.

During its assigned testimony period, defendant submitted the testimony depositions, with exhibits, of James Learmond, founder, Chairman and Director of defendant; and William C. Wright, an attorney from the law firm of defendant's counsel. In addition, defendant submitted notices of reliance upon printed publications, Internet materials, official records and plaintiff's discovery responses.

Plaintiff and defendant filed main briefs on the case, and plaintiff filed a reply brief. We are mindful that both parties submitted testimony and evidence as well as briefs marked as containing confidential information. We will therefore endeavor to refer to such information only in general terms.

Likelihood of Confusion

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *See In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée*

En 1772, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

As noted above, plaintiff has pleaded and made of record copies of numerous registrations for the mark CRUSH displayed in typed or standard characters as well as stylized presentations. In our analysis, we will concentrate our discussion of the issue of likelihood of confusion on the registration of plaintiff which identifies goods most similar to the services of defendant, namely, Registration No. 0187791 for the mark CRUSH, in typed or standard characters, for "non-alcoholic, maltless beverages and concentrates and compounds for making same."

Defendant's Marks and Plaintiff's CRUSH Mark

We turn then to the first *du Pont* factor, i.e., whether defendant's marks and plaintiff's CRUSH mark are similar or dissimilar when viewed in their entirety in terms of appearance, sound, connotation and overall commercial impression. See *Palm Bay Imports, Inc. v. Veuve Clicquot, supra*. The test, under the first *du Pont* factor, 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.

Strength of Plaintiff's CRUSH Mark

We begin our determination by evaluating the strength of plaintiff's CRUSH mark in its Registration No. 0187791. This mark registered on August 12, 1924 on the Principal Register, carries with it a presumption of inherent distinctiveness, and has since become incontestable under Trademark Act §15. In addition, plaintiff has introduced confidential testimony and evidence indicating substantial sales, extensive advertisements, and indicia of both consumer awareness and plaintiff's market share of soft drinks under the CRUSH mark. In short, the record supports a finding that plaintiff's CRUSH mark has achieved a degree of recognition and strength in the market and that the mark is therefore entitled to a broader scope of protection than might be accorded a less distinctive mark. Further, while we recognize that defendant has introduced evidence that "crush" may have a number of meanings in different contexts, and that certain third parties may use the term "crush" as applied to a number of different good and services, such evidence does not serve to diminish the scope of protection to be accorded plaintiff's CRUSH mark.

Defendant's Mark in Registration No. 327548

We turn then to defendant's CRUSSH mark in its Registration No. 3275548. CRUSSH, in standard characters, is nearly identical in appearance and sound to plaintiff's CRUSH mark, in typed or standard characters. Visually, the marks differ by a single letter, namely, the repeated "S" in defendant's CRUSSH mark which, due to its placement, does little to distinguish it from plaintiff's CRUSH mark. Furthermore, because the addition of the letter "S" to defendant's mark merely repeats the first "S" there is little, if any, discernable difference in sound between CRUSSH and CRUSH. It is settled that there is no correct pronunciation of a trademark. *In re Teradata Corporation*, 223 USPQ 361, 362 (TTAB 1984). Moreover, there is no credible evidence of record to suggest that CRUSSH will be pronounced differently from CRUSH.

With regard to the connotation or meaning of the marks, we note that defendant has introduced several definitions of "crush" in a number of contexts. These include "to extract or obtain by pressing or squeezing: *crush juice from a grape*,"¹² and "a substance prepared by or as if by crushing, especially a fruit drink: *orange crush*."¹³ However, there is little, if any, evidence of record to suggest that "crush" has a different connotation as applied to

¹² Trial Declaration of James Learmond, Exhibit 3, citing to Dictionary.com, based upon The American Heritage Dictionary of the English Language, (4th ed., 2006).

plaintiff's beverages and compounds and concentrates for making them, on one hand, and defendant's various restaurant, bar, and food and drink preparation services on the other. In other words, to the extent that plaintiff's CRUSH mark may connote beverages having a flavor of crushed fruit, such connotation is not dissimilar from defendant's CRUSSH mark which will likely be taken as connoting restaurant, bar and drink preparation services including drinks flavored with crushed fruit. Thus, the connotations of the marks are also similar.

As a result, we find that plaintiff's CRUSH mark is highly similar to defendant's CRUSSH mark in appearance, sound and connotation, and that overall the marks convey highly similar commercial impressions.

Defendant's Mark in Application No. 79033050

Now we turn to our comparison of plaintiff's CRUSH mark with defendant's mark, displayed below,



which consists of the word CRUSSH and an irregularly shaped background design. As discussed above in connection with defendant's CRUSSH mark in standard characters, the word

¹³ Id.

portion of defendant's CRUSSH and design mark is highly similar in appearance, sound and connotation to plaintiff's CRUSH mark.

Nor do we find that the addition of the amorphous background design in defendant's mark is sufficient to distinguish it from plaintiff's CRUSH mark. The word portion of defendant's CRUSSH and design mark clearly is the dominant portion thereof. It is a well-established principle that, in articulating reasons for reaching a conclusion on the issue of likelihood 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 a consideration of the marks in their entireties. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). In this case, the amorphous background does not significantly add to the overall commercial impression of defendant's mark. In addition, when a mark contains both a word and a design, then the word is normally accorded greater weight inasmuch it would be used by purchasers to request the goods or services. *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). For these reasons, we consider CRUSSH to be the dominant feature of defendant's mark.

Thus, as discussed above the dominant portion of defendant's mark, i.e., CRUSSH, is highly similar to plaintiff's CRUSH mark and that, taken as a whole, the parties' marks are far more similar than dissimilar in appearance, sound, and connotation, and convey highly similar overall commercial impressions.

In view thereof, this *du Pont* factor favors plaintiff as to both of defendant's marks.

The Goods and Services

With respect to the goods and services, it is well established that the goods or services of the parties need not be similar or competitive, or even offered through the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective goods or services of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods or services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. See *Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993); and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

In this case, the goods in plaintiff's Registration No. 0187791 are "non-alcoholic, maltless beverages and concentrates and compounds for making same." Both defendant's involved application and registration recite "restaurant, catering, snack bar and café services; provision of prepared food; food and drink preparation and presentation services; bar services; catering services for the provision of food and drink; preparation of food stuffs or meals for consumption off the premises; sandwich and salad bar services; wine bar services."

It is further settled that we must consider the goods as they are identified in plaintiff's Registration No. 0187791 and the services as they are identified in defendant's involved application and registration. *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("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 [or services] set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods [or services], the particular channels of trade or the class of purchasers to which the sales of goods [or services] are directed"). As a result, defendant's arguments, testimony and evidence regarding its intended limitation of its services to the

provision of fresh food and drinks, made without preservatives, to health-conscious consumers must fail because such limitations are not present in its recitations of services. Rather, in the absence of any such limitations we must presume that defendant would serve any sort of beverage at its restaurants, bars or cafes, including non-alcoholic, maltless beverages of the kind identified in plaintiff's Registration No. 0187791.

Nonetheless, because the goods and services here involve restaurant, bar, and food and drink preparation services on the one hand and beverage items on the other, we must also consider that there is no per se rule that confusion is likely simply because "similar or even identical marks are used for food products and for restaurant services." *Jacobs v. International Multifoods Corporation*, 668 F.2d 1234, 212 USPQ 641, 642 (CCPA 1982). See also *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1064 (Fed. Cir. 2003) ("But the registered mark in this case is simply for restaurant services in general, and the Board's conclusion that restaurant services and beer are related is based on the fact that a tiny percentage of all restaurants also serve as a source of beer, which is a very weak evidentiary basis for a finding of relatedness"). The Federal Circuit further explained, however, that the outcome would have been different "if the registrant's mark had been

for a brewpub or for restaurant services and beer. In that case, the goods and services associated with the two marks would clearly be related." *Id.*

In this case, plaintiff has submitted evidence pointing to a relationship between its beverages and defendant's restaurant, bar and food and drink preparation services. Specifically, plaintiff has introduced evidence that it is not uncommon for parties to utilize the same marks for restaurant services and food and beverage products. The following examples are illustrative of companies that provide restaurant and food and beverage store services on the one hand and also produce food and beverage items for sale by third-party retailers, such as supermarkets:¹⁴ BEN & JERRY'S; BOB EVANS; BOSTON MARKET; CARVEL; CALIFORNIA PIZZA KITCHEN; DUNKIN'DONUTS; GODIVA; HAAGEN-DAZS; and STARBUCKS. Plaintiff submitted further evidence that it owns the marks STEWART'S and A&W, and that it uses these marks both for beverages and restaurant services.¹⁵ In addition, plaintiff submitted evidence that defendant's plans for expansion of its business includes "Crussh bars in other big cities, airports and railway stations as well as a possible venture into bottled smoothies."¹⁶

¹⁴ Ortiz Testimony Declaration, paras. 2-15, Exhibits PX105-147.

¹⁵ Springate Testimony Declaration, paras. 52-4; Notice of Reliance, Exhibits PX100-104.

¹⁶ Learmond Testimony, Exhibit DP6.

Finally, plaintiff submitted numerous use-based registrations to show that the same entity has registered a common mark for restaurant services and various beverage products.¹⁷ The following examples are illustrative:

No. 3100296 - "restaurant services" and "fruit and ice beverage; fruit juice"

No. 3433399 - "restaurant services" and "frozen fruit beverages, fruit drinks"

No. 3327216 - "restaurant services" and "soft drinks, smoothies, lemonade and fruit flavored beverages"

No. 3428843 - "restaurant services, namely, provision of beverages for dining in and drive-in services" and "blended drinks, namely, smoothies"

No. 3243072 - "restaurant services" and "smoothies, fruit drinks and fruit juices, sparkling water, spring water, flavored waters and pop"

These registrations suggest, in general, that beverages, including non-alcoholic beverages, and restaurant services are related. See *In re Infinity Broadcasting Corp. of Dallas*, 60 USPQ2d 1214, 1217-18 (TTAB 2001) ("The registrations show that entities have registered their marks for both television and radio broadcasting services. Although these registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nevertheless have probative value to the extent that they serve to suggest that the goods and services

¹⁷ Plaintiff's Notice of Reliance, Exhibits PX1-PX104.

Opposition No. 91180742 and Cancellation No. 92048446

listed therein are of a kind which may emanate from a single source." See, e.g., *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 at n. 6 (TTAB 1988)).

Our case law has recognized that the "something more" requirement of *Jacobs* includes situations where the specific food or beverage items of one entity are likely to be sold in the other's restaurant. See *In re Azteca Restaurant Enterprises Inc.*, 50 USPQ2d 1209, 1211 (TTAB 1999) ("The average consumer, therefore, would be likely to view Mexican food items and Mexican restaurant services as emanating from or sponsored by the same source if such goods and services are sold under the same or substantially similar marks"); *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001) ("The fact that applicant's restaurant serves the type of goods (indeed the actual goods) identified in the cited registration is certainly probative evidence which supports a finding under the second *du Pont* factor that applicant's services and [registrant's] goods are related"). In light of the evidence of record and the above authorities, we find that defendant's restaurant, bar and food and drink preparation services and plaintiff's non-alcoholic, maltless beverages are related. Furthermore, patrons of restaurants, bars and cafes serving food and beverages are likely to

overlap with purchasers of non-alcoholic beverages in retail stores.

In view of the related nature of plaintiff's goods under its CRUSH mark and defendant's services, this *du Pont* factor also favors plaintiff.

Channels of Trade

Because we have found that the parties' goods and services are related, and because there are no recited restrictions as to their channels of trade or classes of purchasers, we must assume that the goods and services are available in all the normal channels of trade to all the usual consumers of such goods and services, and that the purchasers for plaintiff's goods as well as defendant's services would overlap. See *Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910 (TTAB 2000). See also *Octocom Systems, Inc. v. Houston Computers Services Inc.* 16 USPQ2d at 1787, and *Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods."). In view of these authorities, we are not persuaded by defendant's arguments that seek to impose trade channel limitations not recited in its services or plaintiff's goods. Simply put, we will not read into the

parties' recitations of goods and services limitations that are not stated therein.

We find that, as a result of the foregoing, this *du Pont* factor also favors plaintiff.

Conditions of Sale

The next *du Pont* factor discussed by the parties is that of the conditions of sale. Defendant asserts that its patrons are discerning, health-conscious urban professionals while consumers of plaintiff's goods are largely children.¹⁸ However, as identified, neither plaintiff's goods nor defendant's services are restricted by age, profession, taste or other factors. As such, we must presume that the parties' respective goods and services are available to all consumers. Moreover, sophisticated purchasers are not necessarily knowledgeable in the field of trademarks or immune from source confusion. See *In re Decombe*, 9 USPQ2d 1812, 1814-1815 (TTAB 1988). Furthermore, even if some degree of care were exhibited in making the purchasing decision, the marks at issue are sufficiently similar such that even careful purchasers are likely to assume that the marks identify goods and services emanating from a single source.

Thus, this *du Pont* factor also favors plaintiff.

¹⁸ Defendant's brief, p. 25.

Bad Faith

Another *du Pont* factor discussed by the parties is whether defendant acted in bad faith in seeking and obtaining registration of its involved marks. We note, however, that there is little or no evidence in the record from which we may infer that defendant acted in bad faith in adopting its marks. Mere knowledge of the existence of plaintiff's marks does not, in and of itself, constitute bad faith. See *Action Temporary Services Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307 (Fed. Cir 1989); and *Ava Enterprises, Inc. V. Audio Boss USA, Inc.*, 77 USPQ2d 1783 (TTAB 2006). Plaintiff simply has not shown that defendant intentionally sought to trade on plaintiff's good will in selecting its marks.

Thus, this *du Pont* factor is neutral.

Summary

We have carefully considered all of the evidence pertaining to the relevant *du Pont* factors, as well as all of the parties' arguments with respect thereto, including any evidence and arguments not specifically discussed in this opinion.

We conclude that consumers familiar with plaintiff's goods under its CRUSH mark in Registration No. 0187791 would be likely to believe, upon encountering defendant's involved CRUSSH and CRUSSH and design marks for its recited services,

that the parties' goods and services originate with or are associated with or sponsored by the same entity. In making our determination, we have balanced the relevant *du Pont* factors. The factors of the similarity between the marks and the relatedness of the goods and services weigh strongly in plaintiff's favor. To the extent that any of defendant's points raise a doubt about our conclusion, all doubt on the issue of likelihood of confusion must be resolved in favor of the prior user and against the newcomer. See *San Fernando Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 2 (CCPA 1977).

DECISION: The opposition to registration of defendant's application Serial No. 79033050 is sustained on the ground of priority and likelihood of confusion, and registration to defendant is refused; the petition to cancel defendant's Registration No. 3275548 is granted, and defendant's registration will be cancelled in due course.