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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Franciscan Vineyards, Inc.  
v.  
BeauxKat Enterprises LLC

Opposition No. 91181755  
to application Serial No. 77223446  
filed on July 6, 2007

Linda Kurth and Jack Rannells of Baker and Rannells for  
Franciscan Vineyards, Inc.

Justin D. Park of Romero Park & Wiggins for BeauxKat  
Enterprises LLC.

Before Quinn, Holtzman and Walsh, Administrative Trademark  
Judges.

Opinion by Quinn, Administrative Trademark Judge:

BeauxKat Enterprises LLC filed an intent-to-use  
application to register the mark BLACK RAVEN BREWING COMPANY  
("BREWING COMPANY" disclaimed) in standard characters for  
"beer" in International Class 32.

Franciscan Vineyards, Inc. opposed registration under  
Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on  
the ground that applicant's mark, when used in connection  
with applicant's goods, so resembles opposer's previously

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used and registered marks RAVENSWOOD, RAVENS WOOD, RAVENS, RAGIN' RAVEN, and a stylized raven bird design for wine, clothing and sauces, as to be likely to cause confusion.

Applicant, in its answer, denied the salient allegations of likelihood of confusion.

Before turning to the substantive merits of the likelihood of confusion claim, we are required to rule on the several evidentiary objections raised by the parties in their respective briefs.

Opposer objects to applicant's fourth notice of reliance on certain excerpts from printed publications. Opposer's objection is based on relevancy. Suffice it to say that we have kept in mind the objection when determining the probative value of this evidence.

Opposer also raises ten pages of objections directed to various portions of applicant's testimony, and related exhibits. Applicant has filed a response thereto. We see no useful purpose in going through the objections in excruciating detail. We have considered the testimony and exhibits in light of the objections, and accorded it whatever probative value it merits. We will specifically address, however, opposer's most substantive objection to the testimony of Douglas Engler, namely opposer's objection to applicant's offer of it as expert testimony.

We do not view Mr. Engler as an "expert" in the alcoholic beverage field. Although Mr. Engler owns and has operated a retail store (Malt & Vine) selling beer and wine for three years, we find that his overall experience and qualifications fall short of establishing him as an expert under Fed. R. Evid. 702 for the reasons set forth by opposer. (Opposer's Brief, Appendix "A," p. 32; Reply Brief, pp. 9-10). Accordingly, although we have considered Mr. Engler's testimony in his capacity as a fact witness, we do not regard him as an expert in the field.<sup>1</sup> In any event, the Board is responsible for the factual findings under the relevant *du Pont* factors and the ultimate determination of likelihood of confusion, and we will not substitute the opinion of a witness, even an expert witness, for our evaluation of the facts. *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1402 (TTAB 2010).

Applicant, for its part, moves to strike opposer's sixth notice of reliance. Attached to the notice is a summary printout generated by a search of the TESS database showing 267 third-party registrations wherein both "wine" and "beer" are listed in the identification of goods (Exhibit 1). Opposer also submitted copies of 50

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<sup>1</sup> In view thereof, there is no need to address the procedural wrangling over whether or not applicant timely and appropriately identified Mr. Engler as an expert.

"representative" registrations listed in the summary.  
(Exhibit 3).

The TESS summary is insufficient to properly make of record the third-party registrations. *Black & Decker Corp. v. Emerson Electric Co.*, 84 USPQ2d 1482, 1494 (TTAB 2007). However, the copies of the 50 third-party registrations have been properly introduced. Accordingly, applicant's motion to strike is granted in part, and denied in part. To the extent that applicant argues that the probative value of such evidence is minimal, we will address this point in our consideration of this specific evidence, *infra*.

Applicant also moved to strike opposer's ninth notice of reliance on a dictionary listing of the word "raven." Dictionary evidence is proper subject matter for a notice of reliance. The objection is overruled, and this evidence has been accorded appropriate probative weight.

The record includes the pleadings; the file of the involved application; a declaration, filed pursuant to stipulation, of an officer of opposer; trial testimony, with related exhibits, taken by applicant; status and title copies of opposer's pleaded registrations, excerpts from printed publications, applicant's responses to certain discovery requests, and copies of official records, more specifically, portions of federal and state regulations and third-party registrations, all introduced by way of

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opposer's notices of reliance; and opposer's responses to applicant's interrogatories, and excerpts of printed publications, made of record through applicant's notices of reliance. The parties filed briefs.

Opposer has established its standing to oppose registration of the involved application. In particular, opposer has properly made its pleaded registrations of record and, further, has shown that it is not a mere intermeddler. Opposer's use and registrations of its marks establish that opposer has standing. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

As indicated in the Board's denial of opposer's motion for summary judgment on April 3, 2009, priority is not in issue in view of opposer's ownership of valid and subsisting registrations. *King Candy, Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Opposer's following registrations, all valid and subsisting, are of record:

	RN 2118153	Clothing, namely, aprons, bandanas, caps, gym shorts, hats, jeans jackets, polo shirts, tank tops, T-shirts, and sweatshirts
	RN 2130653	Wine
RAVENSWOOD	RN 2132719	Wine
RAVENS	RN 2888963	Wine
RAVENS	RN 3134833	Aprons, shirts, T-shirts, caps, jackets; wines
RAGIN' RAVEN	RN 3153731	Barbeque sauce; picante sauce; ready-made sauces; sauces; sauces for barbecued meat
RAGIN RAVEN	RN 3336587	Wine
RAVENS WOOD	RN 3457923	Barbeque sauce; picante sauce; ready-made sauces; sauces; sauces for barbecued meat

Although opposer, in its brief (p. 8), reproduced two other design marks depicting silhouettes of black ravens, there is insufficient evidence of record to establish that opposer has used these designs as trademarks for opposer's wine or

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any other products; rather, the designs were used as background in advertisements. (opposer's third notice of reliance). Accordingly, in making our decision we have not considered these designs to be trademarks upon which to base a likelihood of confusion finding.

Our 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. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Opposer must establish that there is a likelihood of confusion by a preponderance of the evidence. The relevant *du Pont* factors in the proceeding now before us are discussed below.

Insofar as the goods are concerned, it is well established that the goods 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 of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods 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

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USPQ2d 1423 (TTAB 1993); and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978). The issue, of course, is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of the goods. *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

It is beyond dispute that of opposer's goods (wine, clothing and cooking sauces), "wine" is the closest to applicant's "beer." Thus, we will focus on this comparison, as have the parties, in our analysis of the issue of likelihood of confusion. We make our determinations regarding the similarities between the parties' goods, channels of trade and classes of purchasers based on the goods as they are identified in the application and registration, respectively. *Octocom Systems Inc. v. Houston Computers Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Applicant's goods are identified as "beer," and registrant's goods are identified as "wine(s)."<sup>2</sup>

Applicant's and registrant's goods are related to the extent that wine and beer are alcoholic beverages. We acknowledge that wine and beer are specifically different products which would not be confused for each other, but

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<sup>2</sup> Thus, real world distinctions, as for example, that opposer's wine is relatively inexpensive (around \$10 a bottle at retail), while applicant's beer, sold only as draft beer, is fairly expensive (\$5-\$6 per pint), are irrelevant in considering this *du Pont* factor.

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that is not the test, as noted above. The fact that federal and state regulations show, according to applicant, that regulators differentiate between beer and wine is of minimal probative value.

Opposer submitted a printout of a search summary using the USPTO's TESS database. The summary lists 267 third-party registrations of marks that list both "wine" and "beer" in the identification of goods. As noted above, a TESS printout is insufficient to properly make the registrations of record. However, opposer additionally submitted copies of these 50 third-party registrations that include in their identification of goods both wine and beer.

We are compelled to comment, at the outset of our consideration of this evidence, that opposer should have been more careful in its selection of the registrations. Indeed, opposer submitted numerous registrations that are of no probative value. Several of the registrations are cancelled; by our count, 7 of them. Further, several of the registrations are based on foreign filings; by our count, numbering no less than 12. One other registration specifically indicates that the goods do not include wine (Reg. No. 2431892). Accordingly, it would appear that of

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the registrations submitted, 30 are subsisting, use-based registrations that list both "wine" and "beer."<sup>3</sup>

Although such registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have probative value to the extent that they serve to suggest that wine and beer are of a kind of product that may emanate from a single source under a single mark. *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff'd*, 864 F.2d 149 (Fed. Cir. 1988). See also *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993). By way of example, see Reg. No. 3099373 for the mark SCHILLINBRIDGE for beer and wine only; Reg. No. 3115035 for the mark PRIMER for beer and wine and other alcoholic beverages; and Reg. No. 3396347 for beer and wine and other alcoholic beverages.

Having said this, we also note that a few of the registered marks appear to be house marks, with the identifications of goods listing goods as diverse as stationery, cooking sets and candelabras, as well as wine and beer (e.g., Reg. No. 3005606 owned by Laurent-Perrier for the stylized mark LP). The probative value of these registrations is diminished.

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<sup>3</sup> In the future counsel would be well advised to submit only those registrations that carry probative weight, and not saddle the Board with the task of sifting through a multitude of registrations (in this case accounting for more than 200 pages).

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We find that the use-based third-party registrations (discounting those for house marks) are probative under the second *du Pont* factor in showing relatedness between wine and beer. This finding is buttressed by Mr. Engler's testimony that he is aware "of a couple boutique wineries in California who have installed a very small scale brewing system so that they could brew some beer for their local - the people who come into their tasting room or their local restaurants." (Engler dep., p. 14).

Given the lack of restrictions in the identifications of goods, we must presume that the goods travel through all ordinary trade channels, which would include for both beer and wine, liquor stores, grocery stores, bars and restaurants. Indeed, Mr. Engler states that at his Malt & Vine store he sells both beer and wine. And, although Mr. Engler opined that there is no "direct competition between beer and wine," and that there are differences in how he markets beer and wine, he acknowledged that the same distributors handle both. (Engler dep., pp. 11 and 13). Applicant itself, at its brewpub, offers one red and one white wine selection (both produced by a third party under a different mark) as alternatives for non-beer drinkers. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002).

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Further, these goods would be offered to the same customers. See *Schieffelin & Co. v. Molson Companies Ltd.*, 9 USPQ2d 2069, 2073 (TTAB 1989) (“[a] typical consumer of alcoholic beverages may drink more than one type of beverage and may shop for different alcoholic beverages in the same liquor store. Moreover, a person may serve more than one kind of alcoholic beverage before or during a meal or at a party.”). We have considered Mr. Engler’s testimony that consumers routinely define themselves as either a “beer person” or a “wine person.” (Engler dep., pp. 9-10). Notwithstanding his characterization, Mr. Engler readily conceded that the same consumers, himself included, buy and drink both beer and wine. (Engler dep., pp. 35-36). Further, the relevant purchasing public would include ordinary consumers who would be likely to use nothing more than ordinary care in making their purchasing decisions. The goods are identified broadly enough as to include relatively inexpensive beer and wine; thus, such goods may be subject to an impulse purchase, even during the same shopping trip. (Engler dep., p. 12).

The record also includes excerpts from 14 printed publications, such as *Food & Wine*, *Bon Appetit*, *Wine Spectator* and *Gourmet* showing that beer and wine are advertised or discussed in the same magazines. (opposer’s second notice of reliance).

In making our findings above on the *du Pont* factors relating to the goods, we note that when similar evidence has been made of record, numerous cases have found that different alcoholic beverages are related products which are sold in the same trade channels to the same classes of purchasers, including to ordinary consumers, and that confusion is likely to result if the goods were to be sold under similar marks. See, e.g., *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) (beer and tequila); and *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003) (malt liquor and tequila). Indeed, when the proper evidence has been made of record, the Board's precedential authority specifically holds beer and wine are related products. See *In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719 (TTAB 1992).

In sum, the factors relating to the goods, namely the similarities between wine and beer, the identity in trade channels and prospective purchasers, and the conditions of sale weigh in favor of a finding of likelihood of confusion.

We next turn to consider the marks.

Inasmuch as opposer introduced evidence bearing on the *du Pont* factor of fame, we first direct our attention to this factor. Fame of the prior mark plays a dominant role in likelihood of confusion cases featuring a famous mark. *Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63

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USPQ2d 1303 (Fed. Cir. 2002); *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894 (Fed. Cir. 2000); and *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992). "Famous marks enjoy wide latitude of legal protection since they are more likely to be remembered and associated in the public mind than weaker marks, and are thus more attractive as targets for would-be copyists. Indeed, '[a] strong mark...casts a long shadow which competitors must avoid.'" (citations omitted) *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005).

Opposer claims that "[its] products are well-known and have achieved great recognition" and that it "enjoys enviable sales." (Brief, p. 26). Further, opposer contends that "its mark and name are well-known and famous throughout the United States." (Brief, p. 27). Pursuant to the parties' stipulation, opposer's sales and advertising figures were introduced by way of the declaration of Joel Peterson, opposer's co-founder and senior vice president of opposer's parent company. Opposer's annual wholesale sales under its marks over the last seven years average around \$65 million, and Mr. Peterson states that the retail value is approximately double that. Opposer's annual advertising and promotional expenses for its marks have exceeded \$400,000.

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Opposer sales of a variety of gift items bearing opposer's marks during the period 1999-2003 amounted to approximately \$666,000, and in 2008 the sales amounted to \$453,000.

Fame may be measured indirectly by sales volume and advertising expenditures of the goods identified by the marks at issue, "by the length of time those indicia of commercial awareness have been evident," widespread critical assessments and through notice by independent sources of the goods identified by the marks, as well as the general reputation of the goods. *Bose Corp. v. QSC Audio Products Inc.*, 63 USPQ2d 1305-1306 and 1309. Although raw numbers of product sales and advertising expenditures may have sufficed in the past to prove fame of a mark, raw numbers alone may be misleading. Some context in which to place raw numbers may be necessary (e.g., the substantiality of the sales or advertising figures for comparable types of goods). *Id.* at 1309. Finally, because of the extreme deference accorded to a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, it is the duty of the party asserting fame to clearly prove it. *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007).

Although the numbers provided by opposer are not insignificant, there is no testimony or evidence regarding

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whether opposer's sales and advertising numbers are large or small vis-à-vis other comparable wines. Moreover, in the present case, opposer did not break down the sales and advertising figures for each mark; rather, the numbers pertain to the marks collectively. This failure adds to the uncertainty of which mark, if any, is famous as contemplated by this *du Pont* factor.

Opposer also submitted approximately 200 articles published from 1990-2009. In each of the articles, reference is made to opposer's RAVENSWOOD wines and/or winery. Most of the articles only briefly mention opposer and/or its wines; these articles carry references to many other wines/wineries as well. In any event, although opposer's winery and wines have been mentioned in many publications, the articles have limited probative value because they do not establish recognition of any of opposer's marks by the relevant purchasing public.

We also have considered Mr. Engler's testimony that opposer is a "significant winery," and that RAVENSWOOD wine enjoys a "substantial reputation" and is "well known." Further, as opposer points out, the record is devoid of evidence of any third-party uses or registrations of similar marks in the alcoholic beverage field.

Based on the record, we find that while opposer's RAVENSWOOD mark may enjoy some renown, the record falls

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short of establishing that the mark is famous as contemplated by case law. We should add that the record also falls far short in showing that any of opposer's other marks, including RAVENS, is famous.

With respect to a comparison of the marks, we must compare opposer's marks to applicant's mark in their entirety as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 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. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Although the evidence indicates that opposer's principal mark is RAVENSWOOD, we will focus our likelihood of confusion comparison between applicant's mark BLACK RAVEN BREWING COMPANY and the mark of opposer that is closest to this mark, namely RAVENS.

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It is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ("There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable.").

In the case of applicant's mark, BLACK RAVEN clearly dominates the BREWING COMPANY portion. The generic words BREWING COMPANY are disclaimed, and, although we have compared the marks in their entireties, these words play a subordinate role in the mark. *See In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (THE DELTA CAFÉ and design mark is dominated by DELTA). The subordinate role of the words BREWING COMPANY is further confirmed by the evidence showing applicant's logo mark wherein these words are in small font at the bottom of the logo. There is no question that BLACK RAVEN is the portion of the mark that is most likely to be remembered and used by consumers in calling for and referring to applicant's beer. Moreover, purchasers in

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general are inclined to focus on the first word or portion in a trademark. *Presto Products, Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is likely to be impressed upon the mind of a purchaser and remembered"). See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1692. This dominant portion of applicant's mark, BLACK RAVEN, is similar to the entirety of opposer's mark RAVENS.

The marks share the word RAVEN (the plural form in opposer's mark) and, thus, look and sound similar.

As for meaning, the term "raven" is defined, in pertinent part, as "a large, black, omnivorous and occasionally predatory bird; glossy black." The New Lexicon Webster's Dictionary of the English Language (1987).

Applicant's promotional materials show that its logo depicts a black bird, as does opposer's advertising materials. We find that RAVENS and BLACK RAVEN convey substantially similar, if not virtually identical meanings. Although the addition of BREWING COMPANY in applicant's mark informs prospective consumers that the entity is a brewery, the evidence indicates, as discussed above, that beer and wine may emanate from the same entity.

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The marks engender similar overall commercial impressions, that of a raven bird; and, as shown by the dictionary definition, ravens are black in color.

Accordingly, the *du Pont* factor focusing on the similarities between the marks RAVENS and BLACK RAVEN BREWING COMPANY weighs in opposer's favor. As noted above, opposer has prior rights in a variety of registered marks, namely RAVENSWOOD, RAVENS, RAVENS WOOD and RAGIN' RAVEN. Although opposer did not plead or prove a "family" of RAVEN marks, the fact that opposer itself has used variations of marks that include RAVEN(S) increases the likelihood that BLACK RAVEN, even when coupled with the generic designation BREWING COMPANY, would be perceived as another variation. See *Humana Inc. v. Humanomics Inc.*, 3 USPQ2d 1696, 1700 (TTAB 1987) (opposer's use of HUMANA variation, e.g., HUMANA CARE and HUMANA CARE PLUS, increases likelihood that applicant's mark HUMANOMICS would be perceived as a variation); and *Varian Associates, Inc. v. Leybold-Heraeus G.m.B.H.*, 219 USPQ 829, 833 (TTAB 1983) (use of trade name VARIAN in close association with other marks incorporating the term "vac", e.g., VACION, VACSORB and EVAC, accorded considerable weight in Board's conclusion that applicant's VAROVAC used for the same goods is likely to be associated with opposer).

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The absence of evidence of actual confusion is not dispositive in this case. A showing of actual confusion would of course be highly probative, if not conclusive, of a likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight. *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965). In any event, given that sales of applicant's beer are almost exclusively at its brewpub, the exposure of applicant's mark to the general purchasing public has been relatively limited. Thus, it would appear that the opportunity for instances of actual confusion to have occurred in the marketplace has been minimal. See *Cunningham v. Laser Golf Corp.*, 55 USPQ2d at 1847; and *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). Moreover, as often stated, proof of actual confusion is not necessary to establish likelihood of confusion. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983). Accordingly, the *du Pont* factor of the length of time during and conditions under which there has been contemporaneous use without evidence of actual confusion is considered neutral.

We find that the *du Pont* factors, on balance, weigh in favor of a finding of likelihood of confusion. We conclude that consumers familiar with opposer's wine sold under the

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mark RAVENS, would be likely to believe, upon encountering applicant's mark BLACK RAVEN BREWING COMPANY for beer, that the goods originate from or are associated with or sponsored by the same entity.

Lastly, to the extent that there may be any doubt on our finding of likelihood of confusion, we resolve that doubt, as we must, in favor of opposer as the prior user and registrant. See *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 218 USPQ at 395.

**Decision:** The opposition is sustained, and registration to applicant is refused.