

This Opinion Is Not a
Precedent of the TTAB

Mailed: June 26, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Justin Vineyards & Winery LLC
v.
Crooked Stave, LLC
—

Opposition No. 91229132
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J. P. Pecht, Michael M. Vasseghi, and Danielle M. Criona of Roll Law Group P.C.,
for Justin Vineyards & Winery LLC.

H. Michael Drumm, Trent Rinebarger, and Derek E. Long of Drumm Law, LLC,
for Crooked Stave, LLC.

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Before Cataldo, Hightower, and Pologeorgis,
Administrative Trademark Judges.

Opinion by Hightower, Administrative Trademark Judge:

Applicant Crooked Stave, LLC seeks registration on the Principal Register of the mark HOP SAVANT, in standard characters and with “HOP” disclaimed, for “beer” in International Class 32.¹ Opposer Justin Vineyards & Winery LLC opposes registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), asserting priority and a likelihood of confusion with its mark SAVANT, registered on the Principal

¹ Application Serial No. 86794630, filed October 21, 2015, alleging May 13, 2013 as the date of first use and use in commerce.

Register in standard characters for “wine” in International Class 33.² We dismiss the opposition.

I. Evidentiary Stipulations

The parties entered into, and the Board approved, two stipulations concerning the introduction of evidence at trial and evidentiary objections. 5-6, 8, and 13 TTABVue.

The stipulation for the introduction of evidence comprised two major provisions:

- Documents produced in response to requests for production or interrogatories are deemed authentic business records. Objections to such documents on the grounds of authenticity and genuineness are waived. All other objections are preserved.
- Testimony may be introduced by sworn declaration, with exhibits, following a procedure in which the non-offering party submits a list of written questions to the declarant by way of cross-examination. The parties retain the right to lodge written objections to all or part of a testimony declaration.

Effective January 14, 2017, the Trademark Rules affecting Board practice were amended to enhance the efficiency of inter partes proceedings, including by permitting parties to submit testimony in the form of an affidavit or declaration, subject to the right of any adverse party to elect to take and bear the expense of cross-examination by oral testimony. Trademark Rule 2.123, 37 C.F.R. § 2.123. In this case, the parties opted instead for cross-examination of affiants on written questions. As discussed after the 2017 rules amendments in *TPI Holdings, Inc. v. TrailerTrader.com, LLC*, 126 USPQ2d 1409, 1412 (TTAB 2018):

the Board recognizes that there certainly remains room for parties to agree to go beyond the rules, and to craft an ACR [Accelerated Case Resolution] stipulation that suits their interests. (citation omitted). Indeed, while the circumstances of each inter partes proceeding are unique,

² Registration No. 3231562, issued April 17, 2007; renewed.

parties are encouraged to continue to explore whether ACR is appropriate given those circumstances and, if so, attempt to stipulate to provisions that suit the parties' particular interests and accelerates the timing for a Board final decision in the matter.³

II. Record and Evidentiary Objections

The record comprises the pleadings and, without any action by the parties, the file of the involved application. Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1).

Opposer submitted the following evidence:

- Affidavit Testimony of Clarence Chia, Opposer's vice president of marketing, with exhibits A through N (15 TTABVUE);⁴ and
- A Notice of Reliance submitting a status and title copy of Opposer's pleaded Registration No. 3231562 (9 TTABVUE). *See* Trademark Rule 2.122(d)(2), 37 C.F.R. § 2.122(d)(2).

Applicant submitted the testimonial Affidavit of Chad Yakobson, its owner and brewmaster, with Exhibits A through D (16 TTABVUE).

In an appendix to its reply brief, Opposer asserted objections to portions of the Yakobson Affidavit. Objections raised for the first time in a reply brief are untimely because they effectively foreclose the adverse party from responding. *Productos Lacteos Tocumbo S.A. de C.V. v. Paleteria La Michoacana Inc.*, 98 USPQ2d 1921, 1928 (TTAB 2011). There is no indication that Opposer's objections were raised within five days after the affidavit was filed, as required by the parties' stipulation regarding evidentiary objections. 8 TTABVUE 2 at ¶ 3. Even if they were, objections raised at

³ The Board commends the parties for employing this ACR-type efficiency in this case. *See* Trademark Board Manual of Procedure (TBMP) § 705 (June 2017) and authority cited therein.

⁴ The parties stipulated to submission of this substitute affidavit testimony, which the Board accepted into evidence. 15 and 17 TTABVUE.

trial also are waived if a party does not maintain them until its reply brief. *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1104 (TTAB 2007). We deem Opposer's objections waived.

In an appendix to its brief, Applicant objected to ¶¶ 16, 37, 38 and 41 of the Chia Affidavit, as well as the first sentence of ¶ 17, "based on lack of personal knowledge and speculation as to the channels of distribution of Applicant's goods, and the class of consumers of Applicant's goods." Applicant's Brief at 23, 19 TTABVUE 30. Because Opposer did not respond to any of Applicant's objections, we grant the objections to ¶¶ 16 and 41 the first sentence of ¶ 17 as conceded. We overrule Applicant's objections to ¶¶ 37 and 38, in which Opposer answered written questions nine and ten from Applicant, as follows: "What are the trade channels in which Applicant sells its Hop Savant brand beer?" and "When has Applicant used each of the trade channels in which Applicant sells its Hop Savant brand beer?" Because Applicant specifically elicited this testimony concerning Applicant's own trade channels from Opposer's witness, we consider Mr. Chia's responses for any probative value they may have.⁵

Applicant also objects to Exhibits E, F, G, and H to the Chia Affidavit as "hearsay within hearsay, without an exception to F.R.E. 801 and 802." Applicant's Brief at 23, 19 TTABVUE 30. These exhibits are Internet printouts from Opposer's Facebook page and third-party wine review websites robertparker.com, winemag.com, and winespectator.com. 15 TTABVUE 35-75. Each printout displays sufficient identifying information (i.e., URL and date printed) and is admissible either as a testimony

⁵ Neither the admission nor the exclusion of any evidence challenged by the parties changes the outcome of this proceeding.

exhibit or by notice of reliance. “Although they do not prove the truth of the statements made therein, the printouts are acceptable to show that the statements were made or the information was reported in the webpages.” *Swiss Watch Int’l Inc. v. Fed. of the Swiss Watch Indus.*, 101 USPQ2d 1731, 1735 (TTAB 2012) (citing *Safer Inc. v. OMS Invests. Inc.*, 94 USPQ2d 1031 (TTAB 2010)). We therefore overrule this objection.

III. Opposer’s Standing and Priority

Standing is a threshold issue that must be proven by the plaintiff in every *inter partes* case. See *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); see also, e.g., *Bell’s Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1344 (TTAB 2017). Opposer’s standing to oppose registration of Applicant’s mark is established by its pleaded registration, which the record shows to be valid and subsisting, and owned by Opposer. See, e.g., *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Otter Prods. LLC v. BaseOneLabs LLC*, 105 USPQ2d 1252, 1254 (TTAB 2012). In addition, because Opposer’s pleaded registration is of record and Applicant did not counterclaim to cancel it, priority is not an issue with respect to wine, the goods covered by Opposer’s registration. *Penguin Books Ltd. v. Eberhard*, 48 USPQ2d 1280, 1286 (TTAB 1998) (citing *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)).

IV. Likelihood of Confusion

We assess all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d

1357, 177 USPQ 563, 567 (CCPA 1973); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). Opposer bears the burden of proving its claim by a preponderance of the evidence. *Cunningham*, 55 USPQ2d at 1848.

A. Strength of Opposer's Mark

We begin by evaluating the strength of Opposer's mark and the scope of protection to which it is entitled. The fifth *DuPont* factor is the fame of the prior mark, and the sixth factor is the number and nature of similar marks in use for similar goods or services. *DuPont*, 177 USPQ at 567. In determining strength of a mark, we consider both inherent strength, based on the nature of the mark itself, and commercial strength or recognition. *Bell's Brewery*, 125 USPQ2d at 1345; *see also In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("A mark's strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning)."). Commercial strength may be measured indirectly, by volume of sales and advertising expenditures and factors such as length of use of the mark, widespread critical assessments, notice by independent sources of the goods identified by the mark, and general reputation of the goods. *Weider Publ'ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1354 (TTAB 2014).

Concerning conceptual strength, we find that Opposer's mark SAVANT is arbitrary in connection with wine and therefore inherently distinctive. As for marketplace strength, Opposer submitted testimony that its mark has been in use since 2006 and that it has spent more than \$8 million advertising and marketing its wine portfolio since 2011, although that figure includes wine sold under other marks.

See Chia Affidavit at ¶¶ 19, 24, 42, 15 TTABVUE 7, 8, 12. In addition to its own advertising on Facebook, Opposer submitted the printouts from three third-party wine review websites to which we have referred *supra*, each of which displays Opposer's SAVANT wine. Exhibits E, F, and G to Chia Affidavit (from robertparker.com, winemag.com, and winespectator.com), 15 TTABVUE 35-59.

Mr. Chia testified that Opposer "regularly monitors the market to ensure that third parties do not utilize marks [Opposer] considers to be confusingly similar to its trademarks. I am aware of several third party marks that we are currently taking action against, in an effort to stop their use." Chia Affidavit at ¶ 28, 15 TTABVUE 9. Mr. Chia identified the third-party marks for wine and beer that Opposer was targeting as SAVANT IPA, DIVISION CHENIN BLANC SAVANT, SAVANT BEERSEL/SAVANT BLANC, and SAVANT RIESLING/SAVANT RED. *Id.* Opposer also submitted copies of cease-and-desist letters and emails it sent between 2012 and 2017 to the entities using those marks and to three additional third-party winemakers using marks comprising SAVANT or arguably similar terms in association with their goods. Chia Affidavit at ¶ 27 & Exhibit L, 15 TTABVUE 9, 98-113. The apparent result of one of these communications is reflected on a page of the Cévant Cellars website stating in part the following:

The winery was first named Savant Cellars. However, we learned early in 2012 that Justin Winery produces a red wine that is called SAVANT. The people at Justin Winery asked us to alter our name in order to avoid any confusion in the market place. Our winery adopted the same name but with a French accent which maintains our wish to honor the genius of wine and differentiates the two offerings for the market.

Chia Affidavit at Question 75, ¶ 103 & Exhibit N, 15 TTABVUE 23, 119. Mr. Chia testified on cross-examination that one of the other marks (SAVALI) has proceeded to registration (Chia Affidavit at Questions 79-80 & ¶¶ 107-08, 15 TTABVUE 24), while another mark (LADY SAVANT) has been registered for advertising and marketing services, not wine (*id.* at Questions 81-82 & ¶¶ 109-10, 15 TTABVUE 24-25).

In light of the small number of the third-party uses of record and Opposer's active policing efforts, we do not find the evidence sufficient to establish that the term SAVANT is in such widespread use that consumers have come to distinguish marks containing that term based on minute differences. *See In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017) (stating that evidence of third-party use for similar goods "falls short of the 'ubiquitous' or 'considerable' use of the mark components present in [applicant's] cited cases"); *cf. Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (discussing "voluminous evidence" of registration and use of paw print design elements); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015) (referring to evidence of "a fair number" of third-party marks).

Considering the record as a whole, including evidence pertaining to both conceptual and commercial strength, we find that Opposer's mark is inherently distinctive and has achieved at least some marketplace recognition during its nearly twelve years of use. The record does not establish that the mark SAVANT is entitled to only a narrowed scope of protection due to third-party use of confusingly similar

marks for similar or related goods. We therefore accord Opposer's mark the normal scope of protection to which inherently distinctive marks are entitled. *See Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (stating that likelihood of confusion fame varies along a spectrum from very strong to very weak).

B. Similarity of the Marks

The first *DuPont* factor is the similarity or dissimilarity of the parties' marks. In a likelihood of confusion analysis, we compare the marks in their entireties for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014). "The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties." *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (quotation omitted).

Applicant's mark HOP SAVANT, in which HOP is disclaimed, incorporates the entirety of Opposer's distinctive mark SAVANT and merely adds a word that is highly descriptive in association with beer. *See* Yakobson Affidavit at 5, Responses to Questions 4 and 5, 16 TTABVUE 6 ("Hops are used extensively throughout the entire production of Hop Savant and the cornerstone of the beer itself, including on the label."). While there is no rule that likelihood of confusion automatically applies where one mark encompasses another, in this case, as in many others, the fact that Opposer's entire mark is incorporated in Applicant's mark increases the similarity

between the two. *See, e.g., Wella Corp. v. California Concept Corp.*, 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (finding CALIFORNIA CONCEPT marks substantially similar to prior mark CONCEPT); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (finding applicant's mark VANTAGE TITAN confusingly similar to registered mark TITAN); *In re U.S. Shoe Corp.*, 229 USPQ 707, 709 (TTAB 1985) (finding applicant's CAREER IMAGE marks similar to registered mark CREST CAREER IMAGES).

The presence of HOP as the leading term in Applicant's mark distinguishes it somewhat visually and aurally from Opposer's mark. This point of distinction, however, does not significantly diminish the strong similarities in connotation and overall commercial impression of these two marks. We find that the first *DuPont* factor weighs in favor of a finding that confusion is likely.

C. Similarity of the Goods

We next consider the second *DuPont* factor, the similarity or dissimilarity of the parties' goods. In any likelihood of confusion analysis, the similarities between the goods or services and the similarities between the marks – the first two *DuPont* factors – are key considerations. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”); *see also Oakville Hills Cellar, Inc. v. Georgallis Holdings, LLC*, 826 F.3d 1376, 119 USPQ2d 1286, 1288 (Fed. Cir. 2016) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus . . . on dispositive factors, such as similarity of the

marks and relatedness of the goods.”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 303 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)). Our decision is based on the identification of goods as set forth in the application and Opposer’s pleaded registration. *Stone Lion*, 110 USPQ2d at 1162.

Likelihood of confusion is a question of law based on underlying findings of fact. *E.g., Oakville Hills Cellar*, 119 USPQ2d at 1288. Under *DuPont*, it is Opposer’s burden to prove that beer and wine are similar or related goods. This is a separate, and critical, inquiry in a likelihood of confusion analysis, distinct from the *DuPont* factors assessing similarity of trade channels and classes of consumers.

Opposer submitted no evidence that beer and wine are similar or related. Instead, Opposer relies on decisions by the Board and the Court of Appeals for the Federal Circuit, our primary reviewing court, in which beer and wine have been found to be related. Applicant counters by citing cases in which confusion was not found between alcoholic beverages, and argues that beer and wine “are distinct product segments in the overall alcoholic beverages market.” Applicant’s Brief at 13, 19 TTABVUE 20.

“There is no per se rule that holds that all alcoholic beverages are related.” *In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009). Even though beer and wine have been found related in other cases, we must decide the outcome of this proceeding based on its own facts and evidence. The decisions cited by Opposer are not to the contrary. In *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816 (TTAB 2015), for example, the Board acknowledged that “beer and wine (among other alcoholic beverages) certainly can be, and frequently are, found to be related,”

but stated in the same sentence that “each case must be decided on its own record.” *Id.* at 1827.

Parfums de Coeur Ltd. v. Lazarus, 83 USPQ2d 1012 (TTAB 2007), is instructive. There, the opposer argued that the applicant’s animated television series was related to the opposer’s fragrance products “because the titles of television programs are used as trademarks for merchandising products,” citing decisions in other cases. *Id.* at 1018. The Board rejected this argument:

It would appear to be opposer’s position that once television services and goods have been found to be related in one case, they must be deemed related in all cases, no matter what the circumstances of the particular case. However, as has been frequently stated, each trademark case must be decided on its own merits. While we may look to other cases for guidance, these cases do not present hard and fast rules as to when confusion is likely and when it is not. Thus, there is no general rule that television programs and products are related goods and services despite the fact that likelihood of confusion has been found in some cases involving marks used for a television series and for goods. It is still opposer’s burden to show that its goods are related to the applicant’s services.

Id. at 1018-19; *see also, e.g., Stocker v. Gen. Conf. Corp. of Seventh-day Adventists*, 39 USPQ2d 1385, 1398 (TTAB 1996) (“As often stated, each case must be decided on its own facts. In reaching our decision we are, of course, confined to the record introduced by the parties.”).

Moreover, the cases decided within the past quarter-century on which Opposer relies credit at least some evidence that beer and wine are related, rather than merely bootstrapping such a finding from prior decisions. *Anheuser-Busch*, 115 USPQ2d at 1827 (finding that six third-party registrations in which the same mark was

registered for both beer and wine provided some evidence that the goods may emanate from a single source); *In re Kyselá Pere et Fils Ltd.*, 98 USPQ2d 1261, 1265-66 (TTAB 2011) (relying on some 20 third-party registrations listing wine and beer and webpages showing that companies make and sell both types of goods, finding: “The third-party registration evidence and the website evidence together amply demonstrate the relatedness of beer and wine, and show that consumers, if they encountered both goods sold under confusingly similar marks, are likely to believe that they emanate from the same source.”).

Here, in contrast, there is no evidence supporting a conclusion that beer and wine are sufficiently related that consumers expect them to emanate from the same source under the same mark. Based on this record, the second *DuPont* factor does not support a finding that confusion is likely.

The Federal Circuit has instructed that a single *DuPont* factor may be dispositive in any particular case. *Kellogg Co. v. Pack'em Enters. Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) (“*DuPont* recognized that in determining likelihood of confusion ‘each case must be decided on its own facts.’ *DuPont*, 476 F.2d at 1361, 177 USPQ at 567. It also recognized that ‘each [of the thirteen elements] may from case to case play a dominant role.’ *Id.*”). We find the second *DuPont* factor dispositive here. *See, e.g., North Face Apparel Corp. v. Sanyang Indus. Co.*, 116 USPQ2d 1217, 1230-34 (TTAB 2015) (dismissing opposition as to classes of goods and services for which opposer did not establish relatedness to its goods); *Itel Corp. v. Ainslie*, 8 USPQ2d 1168, 1171 (TTAB 1988) (dismissing opposition in which marks were identical but opposer failed to prove relatedness of the goods and services). Because Opposer has

not met its burden to establish that its goods are similar or related to Applicant's goods, we dismiss the opposition.

Although we have found the second *DuPont* factor dispositive, for the sake of completeness, we briefly address the remaining factors for which the parties submitted evidence or argument.

D. Similarity of the Trade Channels

The third *DuPont* factor assesses the similarity of the parties' established, likely-to-continue trade channels. Applicant admits that: "In this case, the parties' goods both are distributed in restaurants, convenience stores, grocery stores, bars, and liquor stores." Applicant's Brief at 15, 19 TTABVue 22. Applicant argues, however, that the respective goods are distributed in different forms (e.g., kegs and cans for beer vs. bottles and glasses for wine), and that they are sold "on different shelves and different sections or departments of liquor stores." *Id.* Even so, Opposer submitted screen captures from three third-party websites offering wine, beer, and liquor (applejack.com, klwines.com, and totalwine.com) demonstrating that a search for SAVANT on each site returns both Opposer's wine and Applicant's beer for purchase. Exhibit M to Chia Affidavit, 15 TTABVue 114-17. The record establishes that the parties' trade channels overlap, even if the goods are sold on different shelves or in different sections of the same brick-and-mortar liquor stores. We find that the third *DuPont* factor weighs in favor of a likelihood of confusion.

E. Inexpensive Goods Subject To Impulse Purchase

The fourth *DuPont* factor is the conditions under which and buyers to whom sales are made. Applicant argues that the parties' products are relatively expensive and

sold to sophisticated consumers, and the evidence indicates that the parties' actual goods indeed are comparatively costly. Opposer's SAVANT wines are priced at \$36.99 to \$123 per bottle, while Applicant's HOP SAVANT beer costs \$7.99 to \$8.99 per bottle and \$9.99 per four-pack cans retail, \$45 per case and \$75-\$165 per keg wholesale. See Yakobson Affidavit at ¶ 19, 16 TTABVUE 4; Exhibits K and M to Chia Affidavit, 15 TTABVUE 88, 116-17.

Because the descriptions of goods are not restricted to premium products but simply "beer" and "wine," we must assume that both identifications include beer and wine, respectively, of all kinds and price points offered to the full range of usual consumers for such goods. *Stone Lion*, 110 USPQ2d at 1162 (stating that registrability must be decided based on the identification of goods "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 sales of the goods are directed") (quoting *Octocom Sys., Inc. v. Houston Comps. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)); *In re Hughes Furn. Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015). This includes inexpensive beer and wine subject to impulse purchase. "When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care." *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016). We find that the fourth *DuPont* factor weighs in favor of a finding of likely confusion.

F. Absence of Evidence of Actual Confusion

Finally, we assess Applicant's argument under the eighth *DuPont* factor, the length of time during and conditions under which there has been concurrent use without evidence of actual confusion.

Opposer's mark has been in use with wine since 2006, as noted *supra*, while Applicant's mark was first used for beer in May 2013. Chia Affidavit at ¶¶ 18, 15 TTABVUE 7; Yakobson Affidavit at ¶ 14, 16 TTABVUE 3. The marks thus have been used concurrently for five years, and the record contains no evidence of actual confusion. As also noted *supra*, Opposer's evidence demonstrates that the parties' trade channels overlap, which suggests that actual confusion has had some opportunity to arise. While we have considered that there is no evidence of actual confusion, we are also aware that in most cases, "the lack of any occurrences of actual confusion is not dispositive inasmuch as evidence thereof is notoriously difficult to come by." *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992).

In any event, as our primary reviewing court has noted, it is unnecessary to show actual confusion to establish a likelihood of confusion. *See, e.g., Herbko Int'l*, 64 USPQ2d at 1380; *Weiss Assocs. Inc. v. HRL Assocs. Inc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1842-43 (Fed. Cir. 1990). "A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not necessarily true, however. The lack of evidence of actual confusion carries little weight." *Majestic Distilling*, 65 USPQ2d at 1205. Therefore, while we find that the eighth *DuPont* factor favors Applicant, we do not find that it strongly supports Applicant's position.

V. Conclusion

We have carefully considered all arguments and evidence of record, including any not specifically discussed herein. Because there is no evidence supporting a finding that the parties' goods are related, we find that Opposer has not carried its burden to establish by a preponderance of the evidence that Applicant's mark is likely to cause consumer confusion when used in association with beer.

Decision: The opposition to registration of application Serial No. 86794630 is dismissed.