This Opinion Is Not a Precedent of the TTAB

Mailed: October 29, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

UBTA-UBET Communications Inc.
v.
Stratus Networks, Inc.

Opposition No. 91214143

John C. Stringham, Thomas R. Vuksinick and Matthew A. Barlow of Workman Nydegger,
for UBTA-UBET Communications Inc.

Joshua G. Jones of the Law Office of Joshua G. Jones
for Stratus Networks, Inc.

Before Kuhlke, Cataldo and Goodman,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Stratus Networks, Inc., seeks registration on the Principal Register of the mark displayed below

with a disclaimer of "NETWORKS," identifying

> Provision of communications services, namely, electronic and digital transmission of voice and data telecommunications, voice over internet protocol, providing co-location services for voice and data communications applications, providing virtual private network (VPN) services, namely, private and secure electronic communications over a

> private or public computer network, switched and dedicated voice and data communications and analog and digital voice and data communications, namely, transmission of voice, audio, visual images and data by telecommunications networks, wireless communication networks, the Internet, information services networks and data networks, telecommunication consultation in the nature of technical consulting in the field of audio, text, and visual data transmission and communication, high-speed internet access, telecommunications services, namely, providing fiber optic voice, data and video network services, telephone directory assistance services, transmission of conference call audio, video, and data via telecommunications and computer networks in International Class 38.[1]

Opposer, UBTA-UBET Communications Inc., opposes registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), asserting in its notice of opposition[2] priority and a likelihood of confusion with its STRATA NETWORKS marks, registered on the Principal Register as displayed below:

STRATA NETWORKS[3] in standard characters with a disclaimer of "NETWORKS;" and

[4] with a disclaimer of "NETWORKS," both identifying

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[1] Application Serial No. 85704533, filed August 15, 2012 under Trademark Act Section 1(a), 15 U.S.C. § 1052(a), based upon Applicant's assertion of August 1, 2012 as a date of first use of the mark anywhere and in commerce in connection with the services. The application includes the following description of the mark and color statement: The mark consists of a blue ball with white lines circling the ball and four white clouds at connecting points within the ball. The word "Stratus" is written in blue lettering with the tail end of the "S" flowing into the outside of the blue ball and the word "Networks" written under the word "Stratus" in upper and lower case grey letter.

[2] 1 TTABVUE.

[3] Registration No. 3990586, issued July 5, 2011. Section 8 affidavit accepted; Section 15 affidavit acknowledged.

[4] Registration No. 4049700, issued November 1, 2011. Section 8 affidavit accepted; Section 15 affidavit acknowledged. The application includes the following description of the mark: The mark consists of the letter "S" inside a shaded sphere with the wording "STRATA

> Telecommunications services, namely, cellular telephone and paging services, satellite transmission services, satellite television broadcasting services, providing multiple-user access to a global computer information network, telephone services in International Class 38.

In its amended answer, Applicant denied the salient allegations in the notice of opposition.[5] The parties submitted testimony and evidence and submitted briefs.

I. 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 by Notice of Reliance:

> Opposer's Notice of Reliance #1 (60 TTABVUE), filed on August 23, 2017, upon:
>
> > A copy of the Certificate of Registration for Registration No. 3990586, owned by Opposer, printed from the Trademark Status and Document Retrieval (TSDR) records of the U.S. Patent and Trademark Office (USPTO);
> >
> > A printout of information from the TSDR records showing the current status and title (owner) of Registration No. 3990586;
> >
> > A printout of information from the Trademark Electronic Search System (TESS) records showing the current status and title (owner) of Registration No. 3990586; and
> >
> > A printout from the USPTO's Assignment database demonstrating that Opposer is the current owner of Registration No. 3990586.
>
> Opposer's Notice of Reliance #2 (61 TTABVUE), filed on August 23, 2017, upon:

NETWORKS" next to the sphere, the word "NETWORKS" placed below and to the right of the word "STRATA".

[5] 24 TTABVUE. In addition, Applicant asserted as affirmative defenses matters that serve to amplify its denials of the notice of opposition, and have been so construed.

A copy of the Certificate of Registration for Registration No. 4049700, owned by Opposer, printed from the TSDR records of the USPTO;

A printout of information from TSDR records showing the current status and title (owner) of Registration No. 4049700;

A printout of information from TESS records showing the current status and title (owner) of Registration No. 4049700; and

A printout from the USPTO's Assignment database demonstrating that Opposer is the current owner of Registration No. 4049700.

Opposer's Notice of Reliance #3 (62 TTABVUE), filed on August 23, 2017, upon:

Definitions of "Virtual Private Network" and "Voice over IP" from Microsoft Computer Dictionary, Fifth Edition, (2002); and

Definition of "Internet" from Merriam-Webster Online Dictionary https://www.merriam-webster.com/dictionary/Internet.

Opposer's Notice of Reliance #4 (64 TTABVUE), filed on August 23, 2017, upon:

Definitions of "Stratum" and "Stratus" from the American Heritage Dictionary of the English Language, Third Edition (1996).

Opposer's Notice of Reliance #4 (63 TTABVUE), filed on August 23, 2017, upon:

Applicant's Answers to Interrogatories Nos. 6 and 10, served on March 22, 2015.

In addition, Opposer submitted the following testimony:

Testimony Declaration of Tyler Rasmussen, Opposer's Marketing and Public Relations Manager (66 TTABVUE) and accompanying Exhibits A-R, filed on August 23, 2017.[6]

Applicant submitted the following evidence by Notice of Reliance:

Applicant's Notice of Reliance #2 (72 TTABVUE), filed on October 23, 2017, upon:

A printout of the prosecution history for Opposer's application Serial No. 86927939, obtained from the USPTO's TSDR system;

A printout of Opposer's December 22, 2016 response to the examining attorney's office action refusing registration of U.S. Application Serial No. 86927939 obtained from the USPTO's TSDR system;

A printout of the prosecution history for Opposer's application Serial No. 86982892 obtained from the USPTO's TSDR system; and

A printout of Opposer's July 18, 2017 response to the examining attorney's office action refusing registration of U.S. Application Serial No. 86982892 obtained from the USPTO's TSDR system.

Applicant's Notice of Reliance #3 (73 TTABVUE), filed on October 23, 2017, upon:

A printout of https://en.oxforddictionaries.com/definition/stratus showing the dictionary definition of "Stratus" which was accessed on October 18, 2017;

A printout of https://en.oxforddictionaries.com/definition/stratum showing the dictionary definition of "Stratum" which was accessed on October 18, 2017;

A printout of https://www.merriam-webster.com/dictionary/stratus showing the dictionary

[6] The confidential version of this testimony is at 65 TTABVUE.

definition of "Stratus" which was accessed on October 18, 2017; and

A printout of https://www.merriam-webster.com/dictionary/stratum showing the dictionary definition of "Stratum" which was accessed on October 18, 2017.

Applicant's Notice of Reliance #5 (75 TTABVUE), filed on October 23, 2017, upon:

Opposer's responses to Interrogatories Nos. 8-10.

Applicant's Notice of Reliance #1 (71 TTABVUE), filed on October 23, 2017, upon:

A copy of the third-party Certificate of Registration for Reg. No. 5295016 for the mark SOCIAL STRATA, obtained from the electronic records of the USPTO's automated search system;

A copy of the third-party Certificate of Registration for Reg. No. 4447708 for the mark STRATA POINTE, obtained from the electronic records of the USPTO's automated search system;

A copy of the third-party Certificate of Registration for Reg. No. 4321111 for the mark STRATACENTER, obtained from the electronic records of the USPTO's automated search system;

A copy of the third-party Certificate of Registration for Reg. No. 4558379 for the mark STRATACORE, obtained from the electronic records of the USPTO's automated search system; and

A copy of the third-party Certificate of Registration for Reg. No. 3988858 for the mark STRATUM LOGIC, obtained from the electronic records of the USPTO's automated search system.

Applicant's Notice of Reliance #4 (74 TTABVUE), filed on October 23, 2017, upon:

> A printout of www.stratatec.com showing the website for the third-party Strata Technologies which was accessed on October 18, 2017;
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> A printout of www.stratait.com showing the website for the third-party Strata Information Technology which was accessed on October 18, 2017;
>
> A printout of www.stratamanagement.net showing the website for the third-party Strata Technology Management LLC which was accessed on October 18, 2017;
>
> A printout of stratacommunications.com showing the website for the third-party Strata Communications which was accessed on October 18, 2017; and
>
> A printout of www.stratum-tech.com showing the website for the third-party Stratum which was accessed on October 18, 2017.

In addition, Applicant submitted the following testimony:

> Testimony Declaration of Kevin Morgan, Applicant's co-founder and CEO (70 TTABVUE) and accompanying Exhibits A-C, filed on October 23, 2017.[7]

With its brief,[8] Opposer filed a motion to strike Exhibit A to the testimony declaration of Kevin Morgan[9] on the ground that "it lacks foundation and is unintelligible."[10] Opposer's concerns go more toward the weight the evidence is to be given rather than its admissibility, and none of the evidence is material to our outcome-determinative findings of fact. Ultimately, the Board is capable of weighing the relevance and strength or weakness of the objected-to evidence in this specific

[7] The confidential version of this testimony is at 69 TTABVUE.

[8] 84 TTABVUE 44-81.

[9] 79 TTABVUE 5; 69 TTABVUE 5-32.

[10] 84 TTABVUE 47.

case, including any inherent limitations, and this precludes the need to strike the evidence. *Luxco, Inc. v. Consejo Regulador del Tequila, A.C.*, 121 USPQ2d 1477, 1479 (TTAB 2017). Given the circumstances herein, we choose not to make specific rulings on these objections. As necessary and appropriate, we will point out in this decision any limitations applied to the evidence or otherwise note that the evidence cannot be relied upon in the manner sought. *See Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1755 (TTAB 2013), *aff'd mem.*, 565 Fed. Appx. 900 (Fed. Cir. 2014); *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1104 (TTAB 2007). While we have considered all the evidence and arguments submitted by the parties, we do not rely on evidence not discussed herein. Opposer's motion to strike otherwise is denied.

II. 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 registrations, 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 registrations are of record and Applicant did not counterclaim to cancel them, priority is not an issue with respect to the services identified by Opposer's registrations. *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)).

III. 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. 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)).

A. Focus on Registration No. 4049700

For purposes of the *du Pont* factors that are relevant to this opposition we will consider Applicant's involved mark and identified services and the mark

(Opposer's mark) that is the subject of Opposer's pleaded Registration No. 4049700 (pleaded registration). If likelihood of confusion is found as to the mark and services in this registration, it is unnecessary to consider Opposer's other pleaded registration. Conversely, if likelihood of confusion is not found as to the mark and services in this registration, we would not find likelihood of confusion as to the mark and services in the other pleaded registration. *See, e.g., In re Max Capital Grp. Ltd.,* 93 USPQ2d 1243, 1245 (TTAB 2010).

A. Similarity of the Services and Trade Channels

We first consider the second and third *du Pont* factors, the similarity or dissimilarity of the parties' services and the parties' established, likely-to-continue trade channels. Our decision is based on the identification of services as set forth in the application and Opposer's pleaded registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 110 USPQ2d 1157 1162 (Fed. Cir. 2014).

The issue is not whether purchasers would confuse the parties' services, but whether there is a likelihood of confusion as to their source. *In re Cook Med. Techs. LLC,* 105 USPQ2d 1377, 1380 (TTAB 2012). "Even if the goods and services in question are not identical, the consuming public may perceive them as related enough to cause confusion about the source or origin of the goods and services." *Hewlett-Packard Co. v. Packard Press, Inc.,* 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) *quoted in In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014). "When analyzing the similarity of the services, 'it is not necessary that the products of the parties be similar or even competitive to support a finding of likelihood

of confusion.' *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007). Instead, likelihood of confusion can be found 'if the respective products 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*."

Coach Servs. Inc. v. Triumph Learning LLC, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quotation omitted). Again, Opposer's services are:

> Telecommunications services, namely, cellular telephone and paging services, satellite transmission services, satellite television broadcasting services, providing multiple-user access to a global computer information network, telephone services.

Applicant's services identified in its involved application are:

> Provision of communications services, namely, electronic and digital transmission of voice and data telecommunications, voice over internet protocol, providing co-location services for voice and data communications applications, providing virtual private network (VPN) services, namely, private and secure electronic communications over a private or public computer network, switched and dedicated voice and data communications and analog and digital voice and data communications, namely, transmission of voice, audio, visual images and data by telecommunications networks, wireless communication networks, the Internet, information services networks and data networks, telecommunication consultation in the nature of technical consulting in the field of audio, text, and visual data transmission and communication, high-speed internet access, telecommunications services, namely, providing fiber optic voice, data and video network services, telephone directory assistance services, transmission of conference call audio, video, and data via telecommunications and computer networks.

Opposer introduced into the record the following definition of Voice over IP (VoIP):

> The use of the Internet Protocol (IP) for transmitting voice communications. VoIP delivers digitized audio in packet form and can be used for transmitting over intranets, extranets, and the Internet. It is essentially an inexpensive alternative to traditional telephone

> communication over the circuit switched Public Switched Telephone Network (PSTN).[11]

Opposer's services include broadly worded telephone services. Applicant's services include electronic and digital transmission of voice telecommunications, switched and dedicated voice communications, analog and digital voice communications, transmission of voice communications by various means, and transmission of audio conference calls. Applicant's services also include voice over Internet protocol – or VoIP – services, defined above as an inexpensive alternative to traditional telephone communication utilizing the Internet, intranets and extranets. These services provide the same function as telephone services, i.e., voice communication. Thus, as identified, these services are legally equivalent to telephone services.

In addition, Opposer's Marketing/Public Relations Manager, Tyler Rasmussen, declared, *inter alia*:

> For instance, the '533 Application lists "electronic and digital transmission of voice and data telecommunications." Both "cellular telephone and paging services" and "telephone services," as listed in the STRATA Registrations, are routinely performed by transmitting voice communications and data communications in electronic and in digital form.[12]
>
> Likewise, the '533 Application lists "voice over internet protocol," or "VoIP", which is merely an "inexpensive alternative to traditional telephone communications" and covers "computer-to computer, computer-to-telephone, and telephone-based communications." *See* Exhibit P, "*Voice Over Internet Protocol*", Microsoft Computer Dictionary, Fifth Edition, (2002). This type of communication is a subset of the "telephone services" described in the STRATA Registrations.[13]

[11] 62 TTABVUE 9.

[12] 66 TTABVUE 11.

[13] *Id*. at 12, 55-59. 62 TTABVUE 9.

Additionally, the '533 Application lists "providing virtual private network (VPN) services, namely, private and secure electronic communications over a private or public computer network." A VPN is a collection of "nodes on a public network such as the Internet that communicate among themselves using encryption technology so that their messages are as safe from being intercepted and understood by unauthorized users as if the nodes were connected by private lines." *See* Exhibit P, "*Virtual Private Network*" Microsoft Computer Dictionary, Fifth Edition, (2002). Each of these nodes on the virtual private network is an access point for a user to the information network (the Internet). As a result, VPN services is merely a subset of "providing multiple-user access to a global computer information network" as described in the STRATA Registrations.[14]

The '533 Application also lists "switched and dedicated voice and data communications and analog and digital voice and data communications, namely, transmission of voice, audio, visual images and data by telecommunications networks, wireless communication networks, the Internet, information services networks and data networks." The "cellular telephone and paging services" listed in the STRATA Registrations correspond to the "transmission of voice, audio, visual images and data by telecommunications networks" described in the '533 Application. Cellular telephones transmit voice, audio, visual images, and data using analog or digital technologies. The "cellular telephone services" listed in the STRATA Registrations correspond to "wireless communication networks" described in the '533 Application, as a cellular telephone is a wireless means of communication. And "multiple-user access to a global computer information network" listed in the STRATA Registrations corresponds to "Internet, information services networks and data networks" described in the '533 Application, as the Internet and the other identified networks are global computer information networks that enable the transmission of voice, audio, visual images and data.[15]

The '533 Application also lists "high-speed internet access" which is identical to "providing multiple-user access to a global computer information network" as listed in the STRATA Registrations. "Internet" is defined as "an electronic communications network that connects computer networks and organizational computer facilities around the world." [*See* Exhibit Q, which is a printout of the definition of "*Internet*" from the Merriam-Webster Online Dictionary (https://www.merriam-webster.com/dictionary/Internet), accessed 15 August 2017.] The services listed in the STRATA Registrations are not limited to any

[14] *Id*.

[15] *Id*. at 12-13.

> stated speed of the Internet access, and thus encompass both high- and low-speed access. Thus, providing "high speed internet access" is precisely the same as providing multiple users access to a global computer information network (i.e., the Internet).[16]
>
> Finally, the "cellular telephone services," "telephone services," and "providing multiple-user access to a global computer information network" as listed in the STRATA Registrations encompass the "transmission of conference call audio, video, and data via telecommunications and computer networks" listed in the '533 Application, as those services listed in the STRATA Registrations are not limited to single-line services, and thus encompass and include multiple-line conference calls.[17]

Mr. Rasmussen's declaration testimony is clear, convincing and, on this point, uncontroverted by any rebuttal thereof. Mr. Rasmussen's declaration further is supported by documentary evidence. *See, e.g., Stockpot, Inc. v. Stock Pot Restaurant, Inc.*, 220 USPQ 52, 55 (TTAB 1983). This testimony and evidence provides further support for a finding that the parties' services are related.

Applicant argues that Mr. Rasmussen is a marketing specialist who lacks technical expertise, and that the evidence fails to support Opposer's assertions that the services are related.[18] However, as discussed above, Opposer's telephone services encompass certain of Applicant's more specifically identified voice communication services and are legally equivalent thereto. Further, Applicant has not introduced any testimony or evidence to rebut Mr. Rasmussen's testimony.

There are no restrictions in the identifications of services as to the parties' respective channels of trade. *See Octocom Sys., Inc. v. Hous. Computs. Servs. Inc.*, 918

[16] *Id*. at 13-14.

[17] *Id*.

[18] 85 TTABVUE 20-21.

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 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." (citations omitted)). As a result, despite Applicant's arguments to the contrary, the parties' services are presumed to move in all trade channels customary therefor, and to be available to all classes of consumers.

Furthermore, because Opposer's services encompass Applicant's services in part and thus are legally identical thereto, we presume that such services move in the same channels of trade and are offered to the same classes of consumers. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *see also American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute,* 101 USPQ2d 1022, 1028 (TTAB 2011); *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade"); *In re Smith and Mehaffey,* 31 USPQ2d 1531, 1532 (TTAB 1994).

Accordingly, we find that the *du Pont* factors of the relatedness of the services and their trade channels weigh heavily in favor of finding a likelihood of confusion.

B. Strength of Opposer's Mark

We next evaluate the strength of Opposer's mark and the scope of protection to which it is entitled. Opposer submitted no evidence with regard to the strength of its mark.

With regard to the sixth *du Pont* factor, Applicant introduced into the record copies of the following third-party registrations (all marks appear in standard characters):[19]

> Reg. No. 5295016 for the mark SOCIAL STRATA, identifying Internet-based application service provider, namely, hosting, managing, developing, analyzing, and maintaining the code, applications, and software for web sites of others in International Class 42;
>
> Reg. No. 4447708 for the mark STRATA POINTE, identifying various services related to installation, maintenance and repair of computer hardware in International Class 37 and various computer disaster recovery planning, information technology management, technical support consulting, monitoring and backup services in International Class 42;
>
> Reg. No. 4321111 for the mark STRATACENTER, identifying various services related to providing computer servers to third-party computing and data storage facilities in International Class 42;
>
> Reg. No. 4558379 for the mark STRATACORE, identifying various business brokerage services in the field of online communication in International Class 36; consulting services in the field of voice, data and telecommunications in International Class 38; consulting services in the fields of digital hosting and content delivery in International Class 42; and
>
> Reg. No. 3988858 for the mark STRATUM LOGIC, identifying computer consulting, programming, software design, development and maintenance in International Class 42.

[19] 71 TTABVUE 6-15.

Applicant also introduced into the record screenshots from the following third-party websites:[20]

> Strata Technologies advertises itself as "Sage ERP Software Experts, Managed Services and IT (information technology) Support Specialists;"[21]
>
> Strata Information Technology offers managed IT services, cloud IT services and data security services;[22]
>
> Strata Technology Management LLC offers IT solutions including quarterly business reviews, private cloud services, asset management, networking and Wi-Fi, remote access, backup and disaster recovery, and network security;[23]
>
> SCI Strata Communications offers support services in the fields of telephone system, cabling, data and voice networks and sound systems, all relating to Toshiba products;[24] and
>
> Stratum offers managed IT support services for businesses.[25]

Evidence of third-party use and registration of a term in the relevant industry is considered in the likelihood of confusion analysis. *Juice Generation, Inc. v. GS Enterprises LLC,* 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015); *Jack Wolfskin Ausrustung Fur Draussen GmbH v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015). The "existence of [third party] registrations is not evidence of what happens in the market place or that customers are familiar with them." *AMF Inc. v. American Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973). Nevertheless, in determining the degree of

[20] 74 TTABVUE 6-10.

[21] *Id*. at 6.

[22] *Id*. at 7.

[23] *Id*. at 8.

[24] *Id*. at 9.

[25] *Id*. at 10.

weakness, if any, in the shared terms, we must "adequately account for the apparent force of [third-party use] evidence," regardless of whether "specifics" pertaining to the extent and impact of such use have been proven. *Juice Generation,* 115 USPQ2d at 1674-75. "[E]xtensive evidence of third-party use and registrations is 'powerful on its face,' even where the specific extent and impact of the usage has not been established." *Jack Wolfskin,* 116 USPQ2d at 1136 (citing *Juice Generation*, 115 USPQ2d at 1674).

In the case before us, however, Applicant's evidence of third-party use demonstrates that five entities display trademarks or trade names that differ from Opposer's 

mark in relation to services that, in all but one instance, differ from Opposer's services. Specifically, four of the third-party websites discuss various types of information technology services, while only one discusses telephone-related services directed toward Toshiba products, and that website displays the mark SCI Strata Communications that differs from Opposer's mark. Applicant argues that Opposer acknowledges that "it uses its STRATA marks in connection with 'IT consulting services and support,' thus illustrating the overlap of the above examples and the fact that consumers encounter the STRATA mark in connection with IT services offered by a host of different companies."[26] However, as discussed more fully above, we must make our likelihood of confusion determination based upon the services as identified in the subject application and pleaded registration. *See*

[26] 85 TTABVUE 18.

Octocom, 16 USPQ2d at 1787. Moreover, even if we consider Opposer's services to include IT services, Applicant's evidence of third-party use of tangentially similar marks for various IT services is modest evidence of potential consumer exposure to similar marks used in connection with assertedly related services. The five screenshots otherwise contain little additional information by which we may find that these third parties offer services related to those identified herein.

Of the five third-party registrations introduced into the record by Applicant that include formatives of the term STRATA, or its singular form STRATUM, none include the term alone or in combination with the term NETWORK. Thus, all of the marks differ in appearance, sound, meaning and commercial impression from the marks at issue herein. In addition, none of the third-party registrations includes a circular logo, a stylized letter S, or a combination thereof. Further, only one of the third-party registrations (Reg. No. 4558379) recites services relating to voice, data and telecommunications. The rest recite services that are, at best, only arguably related to Opposer's services.

We further note that the term STRATA appears to be arbitrary or, at most, slightly suggestive of Opposer's services in that it connotes levels or divisions in an organized telecommunications system. The parties introduced into the record the following definitions of STRATA:

Stratum (pl. Strata) – a horizontal layer of material, especially one of several parallel layers arranged one on top of another; one of a number of layers, levels, or divisions in an organized system;[27]

Stratum (pl. Strata) – a bed or layer artificially made; one of a series of layers, levels, or gradations in an ordered system;[28]

The term NETWORKS appears to be highly descriptive of Opposer's services and the circular design incorporating the letter S appears to be arbitrary. Concerning conceptual strength, we find on this record that while the wording in Opposer's mark 

is, at most, slightly suggestive of the recited services in that it connotes a layered or leveled telecommunications system, the circular design with the S is not conceptually limited in its scope of protection. Thus, while the wording may be slightly suggestive, the mark as a whole is not conceptually limited.

From the totality of the evidence, including the dictionary definitions and third-party websites and registrations, we find that Opposer's mark only slightly suggests the characteristics of Opposer's services, and that a modest number of third parties have used and registered marks less similar to the marks at issue herein for services that are related to Opposer's services in one instance each. Even if we consider Opposer's services to encompass IT services, the record still includes only modest evidence of third-party use. The evidence does not support

[27] 64 TTABVUE 11-13.

[28] 73 TTABVUE 5.

a finding that Opposer's mark is so widely used and registered for related services that the cited registration is only entitled to a narrow scope of protection. As discussed above, the STRATA formative marks all differ from Opposer's mark, and none of them also includes the term NETWORK or a similar design, but rather all incorporate additional, unrelated, wording.

Overall, given the nature and quantity of the dictionary and third-party use and registration evidence, we find it insufficient to diminish the scope of protection to be afforded the mark in the Registration. *Cf. Juice Generation*, 115 USPQ2d at 1675 (weakness shown by at least 26 third-party uses and registrations containing the same phrase for the same services); *Jack Wolfskin*, 116 USPQ2d at 1136 (third-party weakness evidence characterized as "voluminous"). We thus accord the mark in Opposer's registration with the scope of protection typical for a somewhat suggestive mark.

C. Similarity of the Marks

We turn then to the *du Pont* factor regarding 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).

Applicant's mark 

is similar in appearance to Opposer's mark 

in that both consist of a first term, STRATUS versus STRATA,

which differ by a syllable, the identical term NETWORKS similarly positioned in smaller font beneath the first term, and similar circular designs incorporating the letter S preceding the wording. The marks are similar in sound inasmuch as the wording, STRATUS NETWORKS, in Applicant's mark is nearly identical to the wording, STRATA NETWORKS, in Opposer's mark. It is not clear to what extent, if any, consumers viewing the marks will articulate the letter S present in the design in Opposer's mark. There is no evidence that consumers otherwise will articulate the design portions of the marks.

With regard to meaning, Opposer introduced into the record the following definitions:

> Stratum (pl. Strata) – a horizontal layer of material, especially one of several parallel layers arranged one on top of another; one of a number of layers, levels, or divisions in an organized system;[29] and
>
> Stratus (pl. Strati) – a low-altitude cloud formation consisting of a horizontal layer of gray clouds.[30]

Applicant also made of record the following definitions:

> Stratum (pl. Strata) – a bed or layer artificially made; one of a series of layers, levels, or gradations in an ordered system;[31]
>
> Stratus – a low cloud form extending over a large area at altitudes of usually 2000 to 7000 feet.[32]

Thus, the meaning of Applicant's mark differs somewhat from the meaning of Opposer's mark to the extent that STRATUS connotes a type of cloud while STRATA

[29] 64 TTABVUE 11-13.

[30] *Id*.

[31] 73 TTABVUE 5.

[32] *Id*. at 7.

connotes layers or levels of materials. However, there is little evidence of the extent to which consumers would recognize these terms as they appear in the respective marks as having significance in relation to the parties' services.

Viewed in their entireties, the parties' marks are far more similar than dissimilar in appearance and sound. We acknowledge that the marks differ somewhat in meaning with regard to the terms STRATUS and STRATA. This point of distinction, however, does not significantly diminish the strong similarities in appearance and sound engendered by these two marks with a result that the marks convey overall commercial impressions that are more similar than dissimilar. "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*, 101 USPQ2d at 1721(quotation omitted).

We further note that the parties' services are, in part, legally identical. "When marks would appear on virtually identical ... services, the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines." *See Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992), cert. denied, 506 U.S. 1034 (1994). *See also ECI Division of E-Systems, Inc. v. Environmental Communications Inc.*, 207 USPQ 443, 449 (TTAB 1980).

We find that the first *du Pont* factor weighs in favor of a finding that confusion is likely.

D. Consumer Sophistication

The fourth *du Pont* factor is the conditions under which and buyers to whom sales are made. Applicant argues that its services are marketed solely to businesses at custom pricing and cost, on average, $130,000.[33] Even if we accept, in considering the fourth *du Pont* factor, Applicant's assertion that the involved services may be the subjects of sophisticated purchases, even careful purchasers are likely to be confused by similar marks used in connection with services that are, in part, legally identical. As stated by the Federal Circuit, "[t]hat the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar goods. 'Human memories even of discriminating purchasers ... are not infallible.'" *In re Research and Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) quoting *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970). Therefore, the fact that the purchasers may exercise care before purchasing these services does not mean there can be no likelihood of confusion. In the present case, the legal identity in part of the services and similarity of the marks outweigh any sophisticated purchasing decision. *See HRL Associates, Inc. v. Weiss Associates, Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff'd*, *Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods).

[33] 70 TTABVUE 3.

We find that the fourth *du Pont* factor is neutral or weighs slightly in favor of a finding of no likelihood of confusion.

E. Evidence of Actual Confusion

Finally, we assess the parties' arguments under the eighth *du Pont* factor, the length of time during and conditions under which there has been concurrent use without evidence of actual confusion. Applicant argues that the absence of evidence of actual confusion mitigates in favor of a finding of no likelihood of confusion. However, even if there is no evidence of actual confusion, we are 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 the Federal Circuit 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 *du Pont* factor is neutral.

IV. Conclusion

We have carefully considered all arguments and evidence of record, including any not specifically discussed herein. Based thereupon, we find that Applicant's mark is similar to Opposer's mark; that the services are legally identical in part and may be

encountered in the same channels of trade. Applicant's modest evidence of the sophistication of consumers and weakness of Opposer's mark is insufficient to overcome our findings with regard to the first, second and third *du Pont* factors. The absence of evidence of actual confusion is neutral. Accordingly, we find that Opposer has carried its burden to establish by a preponderance of the evidence its standing and priority, and that Applicant's mark is likely to cause consumer confusion when used in association with its services.

Decision: The opposition to registration of application Serial No. 85704533 is sustained.