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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Twin Lakes Telephone Cooperative, Inc.

v.

Twin Lakes Internet Service, Inc.

Opposition No. 91155529
to application Serial No. 78122361
filed on April 17, 2002

Thomas L. Kautz of Holland & Knight LLP for Opposer.

Twin Lakes Internet Service, Inc., *Pro Se*.

Before Seeherman, Chapman and Zervas,
Administrative Trademark Judges

Opinion by Seeherman, Administrative Trademark Judge:

Twin Lakes Telephone Cooperative, Inc., a Tennessee corporation, has opposed the application filed by Twin Lakes Internet Service, Inc., a Tennessee corporation, to register the mark TWIN LAKES INTERNET SERVICE, INC. (INTERNET SERVICE, INC. disclaimed) for "providing multiple

user dial-up, dedicated and wireless access to the Internet; consultation services in the field of multiple user dial-up, dedicated and wireless access to the Internet."¹ As grounds for the opposition, opposer alleges:

- that it has used the marks TWIN LAKES and TWIN LAKES TELEPHONE COOPERATIVE CORPORATION in connection with local and long distance telephone services for more than fifty years;
- that since 1994, opposer has used these marks for its Internet services;
- that opposer has also used those marks in connection with high-speed Internet access (DSL) services, voice mail, calling cards, interactive educational television, and access to long distance telephone carriers;
- that as a result of its long-term and widespread use of its marks, opposer has developed public recognition of and substantial goodwill and secondary meaning in its marks;
- that it has become recognized as the exclusive source for the services offered in connection with the marks; and
- that applicant's mark, TWIN LAKES INTERNET SERVICE, INC., is likely to cause confusion, mistake or deception with opposer's marks.

In its answer, applicant admits that opposer has used the mark TWIN LAKES TELEPHONE COOPERATIVE CORPORATION in connection with local telephone service; that opposer "is the exclusive source of telephone services" because it is

¹ Application Serial No. 78122361, filed on April 17, 2002, based on applicant's asserted *bona fide* intention to use the mark in commerce in connection with the identified services.

"a rural non-profit telephone cooperative that is protected from competition in telephone services"; and that the wording TWIN LAKES [if used by both parties] "could be confusingly similar if used exclusively by itself with no added wording."

Applicant specifically denies that opposer has used the mark TWIN LAKES for Internet services and denies that opposer is "recognized as the exclusive source of [Internet] services under such marks." Applicant asserts that it intends to offer its services nationwide, excluding Tennessee,² and mentions that the parties are located in "Twin Lakes," which applicant describes as an "area ... that is situated between two similar lakes in the region." Applicant has effectively denied the other salient allegations in the notice of opposition.

The Record

The record in this proceeding comprises the pleadings, the file of the opposed application, and opposer's notice of reliance. Under the notice of reliance, opposer

² Presumably, applicant's assertion that Tennessee would be excluded from its service area was intended to show that the trade channels of the parties' services would be different. The assertion of a geographical limitation as to where the services are rendered is appropriately made only in a concurrent use proceeding under Sections 2(d), 17 and 18 of the Trademark Act, 15 U.S.C. §§ 1052(d), 1067 and 1068. See *Snuffer & Watkins Management Inc. v. Snuffy's Inc.*, 17 USPQ2d 1815, 1816 (TTAB 1990) and Trademark Rules 2.99(h) and 2.133(c).

submitted the testimony deposition, with exhibits, of Robert Dudney, opposer's General Manager;³ opposer's first and second set of interrogatories; and applicant's answers to both sets of interrogatories.⁴

Applicant has not properly made any evidence of record,⁵ nor has it objected to any of the materials submitted by opposer.

Only opposer submitted a brief on the case. Neither party requested an oral hearing.

The Parties

Opposer, Twin Lakes Telephone Cooperative Inc., was organized in March 1951 to provide telephone service to rural areas in the State of Tennessee (Dudney dep., p. 6, line 24; Exh. A to Dudney dep., pp. 8 and 21). Today, opposer provides local telephone services to the Upper Cumberland region of Tennessee, which includes six counties plus portions of four surrounding counties (or

³ Unlike the interrogatories and answers thereto, which must be submitted to the Board by the inquiring party under a notice of reliance, submission of the testimony deposition under the notice of reliance was unnecessary. See Trademark Rule 2.125(c).

⁴ Opposer also unnecessarily attached copies of the notice of opposition and the answer, which were already part of the record.

⁵ The Board has not considered the documentation that applicant attached to its answer. Except under limited circumstances that are not present here, exhibits attached to pleadings may not be considered as evidence unless such evidence is properly made of record during the testimony period. Trademark Rules 2.122(c) and 2.123(1). See also TBMP §§ 317 and 704.05(a) (2d ed. rev. 2004).

approximately 1853 square miles), and uses over 38,000 access lines (Dudney dep., p. 8, lines 1-18). In addition, opposer provides dial-up, Integrated Services Digital Network (ISDN) and digital subscriber (DSL) Internet access and related services⁶ (Dudney dep., p. 9, lines 21-25; p. 10, lines 8-10; Exh. A to Dudney dep., p. 27). As a cooperative entity, opposer is owned by its members who comprise all persons that receive active telephone services from opposer (Dudney dep., p. 7, lines 19-25). Opposer also has customers who are not members to whom opposer provides Internet access services (Dudney dep., p. 11, lines 5-9).

Opposer advertises its various telephone and Internet access services by means of monthly and bi-monthly newsletters sent to all recipients of its services, radio spots distributed through local radio stations, advertisements that are inserted in members' and customers' bills, advertisements in area telephone directories, and references to its various on-line services at its website (Dudney dep. p. 11, lines 15-22; p. 12, lines 22-24; p. 13, lines 10-11; p. 26, lines 8-14; Exh. I to Dudney dep.).

⁶Opposer's advertisement in the July 2001 TWIN LAKES telephone directory describes opposer's Internet services as including the following: web hosting, ISDN, DSL, E-Mail, Modem Speeds Up to 56K, "24 Hour" technical support, and free personal home page (Exh. D to Dudney Dep., p. 018).

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Opposer also distributes an annual report to its members, which includes information regarding new services provided by the cooperative (Dudney dep., p. 12, lines 5-11). Between 1994 and 2004,⁷ opposer has expended between \$100,000 and \$110,000 annually on the marketing and promotion of its various services (Dudney dep., p. 14, lines 9-14).

Opposer has submitted evidence showing that it has used the following four marks in the course of advertising its telephone and/or its Internet access services:

- TWIN LAKES TELEPHONE COOPERATIVE CORPORATION,
- TWIN LAKES TELEPHONE COOPERATIVE,
- TWIN LAKES TELEPHONE, and
- TWIN LAKES and design, as shown below.



Opposer's use of these marks is evidenced by information provided in the deposition of Mr. Dudney and in the

⁷We presume that the ten-year period referred to by Mr. Dudney when testifying about opposer's marketing and promotional expenditures is the ten-year period prior to the date of the deposition, i.e., August 18, 2004.

exhibits thereto. Specifically, the record indicates that opposer has used the marks as of the following dates:

- TWIN LAKES TELEPHONE COOPERATIVE CORPORATION in connection with its telephone services since at least as early as 1961 (Dudney dep., p. 6, lines 23-24; p. 20, lines 23-25; and p. 21, lines 4-8 and 12-14; Exh. A to Dudney dep., p. 8);
- TWIN LAKES TELEPHONE in connection with its Internet access services since at least December 1995 (Dudney dep. p. 23, line 10; Exh. E to Dudney Dep., p. 75) and in connection with its telephone directory services since at least June 1997 (Exh. D to Dudney dep., p. 24); and
- TWIN LAKES and design and TWIN LAKES TELEPHONE COOPERATIVE in connection with its Internet access services since at least January 1997 (Dudney dep., p. 22, lines 12-25; Exh. E to Dudney dep., p. 66).

Opposer does not own any federal registrations issued under the Lanham Act for any of its TWIN LAKES marks. However, opposer has pending service mark applications for TWIN LAKES and design,⁸ for TWIN LAKES BROADBAND SERVICES,⁹ and

⁸Application Serial No. 76447667, filed on September 3, 2002, based on opposer's alleged use of the mark in commerce, in connection with "services in the nature of local and long distance telephone service, Internet, wireless and entertainment services," with TELEPHONE COOPERATIVE CORPORATION disclaimed.

⁹Application Serial No. 76447051, filed on September 3, 2002, based on applicant's asserted *bona fide* intention to use the mark in commerce in connection with "broadband communications services, namely local and long distance telephone services, providing multiple user dial up and dedicated access to the Internet, high speed Internet access, providing wireless services, namely wireless telephone, wireless Internet, wireless voice and data messaging and wireless imaging services," with BROADBAND SERVICES disclaimed.

for TWIN LAKES DSL.¹⁰

Applicant, Twin Lakes Internet Service, Inc., was organized as a Tennessee corporation on February 12, 2002 (applicant's responses to Interrogatory Nos. 1C and 1H in opposer's first set of interrogatories). There is no evidence that applicant made any use of its proposed mark, TWIN LAKES INTERNET SERVICES, INC., in connection with the services recited in the subject application.

Standing

A party has standing to oppose a particular application when it demonstrates that it has a real interest in the proceeding, and a reasonable basis for the belief that it will be damaged by the issuance of a registration. *Herbko International v. Kappa Books Inc.*, 308 F.3d 1156, 64 USPQ2d 1375 (Fed. Cir. 2002); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000). Opposer has shown that it has used four marks containing the words TWIN LAKES in connection with telephone and/or Internet access services. Therefore,

¹⁰ Application Serial No. 78447050, filed on September 3, 2002, based on applicant's asserted *bona fide* intention to use the mark in commerce in connection with "communication services, namely, local and long distance telephone services, providing multiple user dialup and dedicated access to the Internet, high speed Internet access, providing wireless services, namely wireless telephone, wireless Internet, wireless voice and data messaging and wireless imaging services," with DSL disclaimed.

opposer has demonstrated that it has a reasonable basis for its belief that it will be damaged by the issuance of a registration for TWIN LAKES INTERNET SERVICE, INC. to applicant. Accordingly, opposer has established its standing in this proceeding.

Priority

Because opposer is relying on its common law rights, rather than on a registration, it must establish that it has priority of use. As previously stated, opposer has shown that it began using the marks TWIN LAKES TELEPHONE COOPERATIVE CORPORATION for telephone services; and TWIN LAKES TELEPHONE COOPERATIVE, TWIN LAKES TELEPHONE, and TWIN LAKES and design for Internet access services prior to April 17, 2002, the filing date of applicant's application and the earliest date on which applicant can rely. Section 7(c) of the Trademark Act, 15 U.S.C. § 1057; *Zirco Corp. v. American Telephone and Telegraph Co.*, 21 USPQ2d 1542, 1544 (TTAB 1991).

We note that, in its answer, applicant made the statement that "Twin Lakes is an area that Applicant and Opposer are located in that is situated between two similar lakes in the region." We do not view this statement as raising an "Otto Roth" defense. See *Otto Roth & Company, Inc. v. Universal Foods Corporation*, 640 F.2d 1317, 209

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USPQ 40, 43-45 (CCPA 1981). Applicant made this statement as part of a larger response to an allegation in the notice of opposition. The allegation and the response are as follows:

Notice of Opposition, paragraph 4:

The Opposer has expended a substantial amount of time, effort and monetary resources to promote its TWIN LAKES Marks in Tennessee and the surrounding area. As a result of its long term and widespread use of the TWIN LAKES Marks, the Opposer has developed substantial good will, public recognition and secondary meaning in and to the TWIN LAKES Marks, and has become recognized as the exclusive source of services offered under such marks in the service area.

Answer, paragraph 4:

Applicant does not have sufficient information or knowledge to accept or deny that the Opposer has expended a substantial amount of time, effort and monetary resources to promote its Mark. Applicant denies that the Opposer is "recognized as the exclusive source of services offered under such marks." The Opposer is a rural non-profit telephone cooperative that is protected from competition in telephone services, not internet services, based on the rural exemption clause in the Telecommunications Act of 1996. Therefore, Applicant accepts that the Opposer is the exclusive source of telephone services, but not internet services. Furthermore, Twin Lakes is an area that Applicant and Opposer are located in that is situated between two similar lakes in the region. Applicant has included a telephone directory listing that names four more companies that also use the Twin Lakes name that have no affiliation with the Opposer or Applicant.

We cannot conclude from the statement, as it appears in context in applicant's answer, that applicant is

asserting that opposer's mark is primarily geographically descriptive under Section 2(e)(2) of the Trademark Act, 15 U.S.C. § 1052(e)(2). Nor can we construe this paragraph to have adequately apprised opposer that applicant was raising an affirmative defense to which opposer would need to respond. Fed. R. Civ. P. 8(b), 8(c) and 12(b); Trademark Rule 2.106(b)(1). See *Levi Strauss & Co. v. Joseph*, 36 USPQ2d 1328, 1330 (TTAB 1994) ("Although the purpose of notice pleading is to obviate the need to allege particular 'magic words,' the pleading must give [...] fair notice of the ground[s] [or defenses] alleged"); and TBMP §§ 311.02(b) and 311.02(c) (2d ed. rev. 2004). Rather, opposer is more likely to have viewed applicant's response as an assertion that opposer's mark is only entitled to a limited scope of protection, particularly because applicant itself is attempting to register TWIN LAKES INTERNET SERVICE, INC. (with INTERNET SERVICE, INC. disclaimed) without resort to the provisions of Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f).

Moreover, applicant has not submitted any evidence to support a claim that opposer's marks are primarily geographically descriptive. The only evidence that we could possibly consider as relating to this point is applicant's answer to opposer's interrogatory in which

opposer requested that applicant explain how it selected TWIN LAKES INTERNET SERVICE, INC. Applicant responded, "[w]e are located in the Twin Lakes area of Tennessee; therefore, we elected to use that name for the company" (applicant's response to Interrogatory No. 3A in opposer's first set of interrogatories). This statement is not sufficient to demonstrate that opposer's TWIN LAKES marks are primarily geographically descriptive. Furthermore, we do not read opposer's statement in paragraph four of the notice of opposition that it has developed secondary meaning in its marks as an acknowledgement by opposer that its marks are not inherently distinctive. Accordingly, we treat opposer's marks as inherently distinctive, such that opposer may claim priority of use of its trademarks as of the date that opposer began using each mark. As stated above, these dates of first use predate the April 17, 2002 filing date of applicant's application.¹¹

¹¹ Even if we were to find that applicant had adequately pleaded that opposer's marks are primarily geographically descriptive, and even if we were to accept the minimal evidence in this record as supporting such a claim, we would find, based on the evidence of opposer's use and advertising of its marks, as discussed *supra*, that opposer had acquired trademark rights in its marks prior to the filing of the subject application. In particular, opposer has used and advertised the mark TWIN LAKES TELEPHONE COOPERATIVE for telephone services for over forty years; the mark TWIN LAKES TELEPHONE in connection with Internet access services since December 1995 and TWIN LAKES COOPERATIVE and TWIN LAKES and design in connection with Internet access services since January 1997.

Accordingly, because opposer acquired common law trademark rights in its TWIN LAKES service marks in connection with telephone and Internet access services prior to applicant's filing date of April 17, 2002, opposer has clearly established its priority.

Likelihood of Confusion

As with any determination of likelihood of confusion, our analysis is based on a review of the probative facts in the record that are relevant to the thirteen factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003); and *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). While we have considered each factor for which we have evidence, we focus our analysis herein on the five *du Pont* factors that are primarily relevant to this proceeding, namely, the nature of the parties' services, the similarities/dissimilarities of the marks, the channels of trade, the conditions of sale of the services, and the number and the nature of similar marks in use on similar goods and services. *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1336, 57 USPQ2d 1557, 1560 (Fed. Cir. 2001). We note that there is no evidence in the record to support a

finding that opposer's marks are "famous". See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1374, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005). In addition, inasmuch as there is no evidence that applicant has used its mark in connection with its services, there is no evidence relevant to market interface or actual confusion.

We first address the nature of the services of the parties. Because this opposition relies on opposer's service mark rights accrued at common law, opposer's services are defined by what the record shows opposer has actually provided and continues to provide in connection with its mark(s). As for the applicant's services, it is well settled that the determination of whether there is a likelihood of confusion must be based on the goods or services as they are identified in the involved application. See *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 1463, 18 USPQ2d 1889, 1882 (Fed. Cir. 1991); *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); and *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

The record clearly establishes that opposer provides Internet access services, in addition to local telephone services. For example, as evidenced in opposer's July 2001 telephone directory advertisement, opposer offers Internet access services comprising web hosting, ISDN, DSL, E-Mail, "24 Hour" technical support, and a free personal home page, among others.¹² Opposer's Internet access services also comprise providing "dial-up" Internet access (Dudney dep., p. 9, lines 21-25; p. 10, lines 18-23; Exh. A to Dudney dep., p. 27). Opposer's "dial-up" Internet access services are virtually identical to the services identified in the subject application, namely, "providing multiple user dial-up, ... access to the Internet."

The identification in the application also includes services related to providing multiple-user dial-up access to the Internet, namely, "consultation services in the field of multiple user dial-up, dedicated and wireless access to the Internet." These consultation services, because they deal with dial-up Internet access services, are closely related to opposer's dial-up Internet access services.

¹² Exh. D to Dudney Dep., p. 18.

Thus, the services of the parties are in part identical, and are otherwise closely related. The *du Pont* factor of the similarity of the services favors opposer.

We now consider the similarities/dissimilarities of the marks, keeping in mind that "when marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 877, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992), *cert. denied* 506 U.S. 1034 (1992).

Opposer's marks are all comprised of the words TWIN LAKES, followed by, in the particular mark, the wording TELEPHONE, TELEPHONE COOPERATIVE or TELEPHONE COOPERATIVE CORPORATION. Likewise, applicant's mark comprises the words TWIN LAKES, followed by INTERNET SERVICE, INC. Noting this different wording, applicant contends that the parties' marks could be confusingly similar only if the TWIN LAKES portion were used "exclusively by itself with no added wording" or "solely on its own" (answer, para. 5). Thus, applicant seems to assert that the parties' marks are distinguishable because each contains wording in addition to TWIN LAKES.

Applicant's contention is not well founded. While marks must be compared in their entireties, one feature of

a mark may be recognized as more significant in creating a commercial impression. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 218 USPQ 390, 395 (Fed. Cir. 1983). See also *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (CCPA 1976). For that reason, in determining whether there is a likelihood of confusion, it is appropriate for us to give greater weight to the wording that is the dominant feature in the parties' marks.

The wording TWIN LAKES is the dominant part of each of the parties' marks because the other wording, namely, TELEPHONE COOPERATIVE CORPORATION, TELEPHONE COOPERATIVE, TELEPHONE and INTERNET SERVICE, INC., is highly descriptive, if not generic, for the services provided in connection with the mark and/or for the type of entity providing the services. Thus, because this wording merely and immediately informs the potential customer of the type of services to be rendered in connection with the mark, such wording does not serve to distinguish the parties' marks from each other. *In re National Data Corporation, supra*, 224 USPQ at 751. See also *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). Rather, consumers will look to the TWIN LAKES portions of these marks as the source identifier. Although the

additional wording in the marks is different, consumers will ascribe these differences to the differences in the services offered, rather than to a difference in the source of the services. Similarly, the words TWIN LAKES are the dominant portion of opposer's TWIN LAKES and design mark; they are visually the most prominent part of the mark and, again, the additional wording TELEPHONE COOPERATIVE CORPORATION is merely descriptive and has little or no source-identifying significance. As for the stylized design in the mark, because it is not entirely clear what the design even is, it does not make as strong an impression as the prominently displayed words TWIN LAKES.

Finally, we note that applicant has admitted, in a letter to opposer dated November 3, 2003, that "our name does closely resemble yours" (Dudney dep., p. 28, lines 5-14; Exh. J to Dudney dep., p. 171).

Accordingly, viewing the marks in their entirety, albeit giving greater weight to the dominant portions of the marks, we find that the parties' respective marks are very similar in appearance, pronunciation, connotation and commercial impression.

The third *du Pont* factor we consider is the trade channels of the parties' services. The record demonstrates that opposer offers its Internet access services not only

to its own telephone cooperative customers, but also to people who live outside opposer's telephone service area. Opposer advertises its Internet access services in newsletters that are distributed to all its members and to its Internet access customers. Advertising inserts are also distributed to opposer's Internet access customers, who may live outside its telephone service area. In addition, opposer's Internet access services have been advertised on its website (Dudney dep., pp. 26-27; Exh. I, pp. 162-170). Thus, opposer's Internet access services are offered to the public at large, and the channels of trade for opposer's services extend beyond the geographical limits of its local telephone service area.

The subject application does not include in the identification of services any limitation as to customers or channels of trade. Therefore, we must presume that applicant's services would move in all normal channels of trade for Internet access services, and that they are available to all potential customers for such services, including consumers in opposer's service area. *Paula Payne Products Co. v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76 (CCPA 1973); *Kalart Co. v. Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139 (CCPA 1958); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Thus, for purposes of determining

the issue of likelihood of confusion, we must consider the parties' services to move in the same channels of trade as opposer's services, and to be offered to the same potential customers. Accordingly, we find that the trade channels of the parties' services are legally identical. This *du Pont* factor favors opposer.

This brings us to the *du Pont* factor of the conditions of sale of the services. We note that opposer's telephone and Internet access services are provided at a relatively low cost. For instance, in November 2002, opposer advertised unlimited Internet access for \$16.95 per month (Dudney Dep., p. 16, lines 17-21; Exh. B to Dudney dep., p. 2). In addition, some of opposer's advertising indicates that its target audiences include all family members, as well as children (Exh. E to Dudney Dep., p. 60, which states, "INTERNET: The Tool for School"; and p. 41, which states "Technology for All Ages" "From Homework to Home Improvement, the Internet Has Something for Everybody!"). The record thus shows that opposer's services are provided to the general public, which includes relatively unsophisticated consumers. See *On-Line Careline, Inc. v. America Online, Inc.*, 229 F.3d 1080, 56 USPQ2d 1471[, 1476] (Fed. Cir. 2000) ("[B]ecause of the broad proliferation of computer and Internet use, there is

no basis for concluding that Internet users are any more knowledgeable or sophisticated than the general public.") For this reason, the *du Pont* factor of the lack of sophistication of purchasers (conditions of sale) weighs in favor of a finding of likelihood of confusion.

Finally, there is no evidence of record showing that parties other than opposer use the wording TWIN LAKES in trademarks for telephone and/or Internet access services. We note that opposer has made of record telephone directories that list four businesses in its telephone service area using the wording TWIN LAKES in their trade names: Twin Lakes Medical Imaging, Twin Lakes Oil Co. Inc., Twin Lakes Orthopedic Center, and Twin Lakes Stone Inc. (Dudney dep., pp. 19-20, lines 20-25; Exh. D to Dudney dep., p. 20).¹³ However, these uses of TWIN LAKES in connection with different services does not affect the scope of protection to be accorded opposer's marks in terms of being able to prevent the registration of the highly similar mark TWIN LAKES INTERNET SERVICE, INC. for the same and closely related services. The factor of the number and nature of similar marks in use on similar goods and services is neutral.

¹³ This is the same submission that was attached to applicant's answer, but was not properly made of record by applicant. See footnote 5, *supra*.

Conclusion

After considering all of the evidence on the relevant *du Pont* factors, and giving appropriate weight to each factor in the context of the facts of record, we find that applicant's mark, if used in connection with its identified services, is likely to cause confusion with opposer's TWIN LAKES marks.

Although we have no doubt that confusion is likely, if there were any doubt on this issue we would have resolved it in opposer's favor. Applicant has acknowledged that it has known that opposer has provided dial-up Internet access services under the mark TWIN LAKES TELEPHONE COOPERATIVE INTERNET SERVICE since 1996, six years prior to the filing of applicant's application for registration (applicant's response to Interrogatory No. 6C in opposer's first set of interrogatories). Thus, applicant had the opportunity to avoid confusion with existing marks, but chose not to do so. See *In re Shell Oil Co.*, 992 F.2d 1204, 1209, 26 USPQ2d 1687, 1691 (Fed. Cir. 1993) ("the newcomer has the opportunity of avoiding confusion, and is charged with the obligation to do so"). See also *Burroughs Wellcome Co. v. Warner-Lambert Co.*, 203 USPQ 191, 200-201 (TTAB 1979) ("the newcomer has ... a legal duty to select a mark which is

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totally dissimilar to trademarks already being used in the field" (citation omitted)).

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