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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Decho Corporation
v.
Brigitte Mueller

Opposition No. 91183001
to application Serial No. 77110761
filed on February 19, 2007

Brett A. August and Daniel I. Hwang of Pattishall,
McAuliffe, Newbury, Hilliard & Geraldson for Decho
Corporation.

Paul E. Thomas of Fredrikson & Byron for Brigitte Mueller.

Before Quinn, Ritchie and Lykos, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

Brigitte Mueller filed an application to register the
mark shown below, in standard characters,

mozie

for "providing on-line, non-downloadable software for
digital photo management, online photo sharing, creating,
sending and tracking customized online invitations and
marketing campaigns, creating and hosting web pages,

Opposition No. 91183001

building and sharing online calendars, managing and sharing online contact lists, posting interactive online discussions, and online social networking" (in Class 42).¹

Decho Corporation opposed registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used in connection with applicant's services, so resembles opposer's previously used and/or registered marks MOZY, MOZYPRO, MOZYHOME and MOZYENTERPRISE for computer software for storing electronic data, and for electronic data storage services, as to be likely to cause confusion. Opposer also claims that applicant committed fraud in connection with prosecuting her application.

Applicant, in her answer, denied the salient allegations in the notice of opposition.

The record consists of the pleadings; the file of the involved application;² trial testimony, with related exhibits, taken by opposer; status and title copies of opposer's pleaded registrations, the file wrapper of its pleaded application, official records, applicant's responses to opposer's interrogatories, excerpts of applicant's

¹ Application Serial No. 77110761, filed February 19, 2007, asserting first use anywhere on April 5, 2005, and first use in commerce on February 19, 2007.

² The involved application is automatically part of the evidentiary record. Trademark Rule 2.122(b). See TBMP §704.03(a) (3d ed. 2011). Thus, opposer's submission of the file wrapper of this application was unnecessary.

Opposition No. 91183001

website, and excerpts of printed publications, all introduced by way of opposer's notices of reliance; opposer's responses to applicant's interrogatories, official records, excerpts of opposer's website, and excerpts of printed publications, all made of record by way of applicant's notice of reliance. The parties also stipulated, pursuant to Trademark Rule 2.120(j), to allow the introduction of depositions and related exhibits of nonparties, taken during the discovery period, to be used as testimony. Both parties filed briefs.

The Board initially notes that the present opposition previously was consolidated with Opposition No. 91185092, captioned "Brigitte Mueller v. Decho Corporation"; as is readily apparent, the current parties were in reverse positions. In the other opposition, Ms. Mueller opposed Decho Corporation's application serial no. 77203187 to register the mark MOZY on the ground of likelihood of confusion with Ms. Mueller's mark MOZIE, that is, the mark being opposed herein. Ms. Mueller withdrew the opposition, and inasmuch as an answer had been filed, the Board, on June 28, 2010, dismissed the opposition with prejudice.³

³ The prior proceeding has no preclusive effect on the current proceeding. Under the doctrine of claim preclusion, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. *Jet Inc. v. Sewage Aeration Systems*, 223 F.3d 1360, 55 USPQ2d 1854 (Fed. Cir. 2000). Because the earlier proceeding involved the cause of action brought by Ms. Mueller to oppose Decho

Opposer owns the following three registrations, all of which are valid and subsisting, and properly of record:

MOZYENTERPRISE (in standard characters) for "computer software for storing electronic data, including backing up and archiving electronic data" (in Class 9); and "electronic storage of data, including remote online backup of electronic data; storage services for archiving databases, images and other electronic data" (in Class 39).⁴

MOZYPRO and **MOZYHOME** (in standard characters) for "downloadable computer software for storing electronic data, including backing up and archiving electronic data" (in Class 9); and "electronic storage of data, including remote online backup of electronic data; storage services for

Corp.'s mark, and the instant proceeding involves the cause of action brought by Decho Corp. to oppose registration of Ms. Mueller's mark, the cause of action is not the same in the two proceedings. Issue preclusion, as distinguished from claim preclusion, does not include any requirement that the claim (or cause of action) be the same: "[W]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same claim or a different claim. *Mother's Restaurant, Inc. v. Mama's Pizza, Inc.*, 723 F.2w 1566, 221 USPQ 394 (Fed. Cir. 1983). Because the prior judgment was entered without any issues being litigated and decided, issue preclusion does not apply. *Cf. Gemini Engine Co. v. Solar Turbines Inc.*, 225 USPQ 620 (TTAB 1985).

⁴ Registration No. 3551508, issued December 23, 2008.

archiving databases, images and other electronic data" (in Class 39).⁵

In addition, opposer made of record the file wrapper (retrieved from the Office's electronic database) of its pleaded application Serial No. 77203187 to register the mark **MOZY** (in standard characters) for "computer software for storing electronic data, including backing up and archiving electronic data" (in Class 9); "electronic storage of data, including remote online backup of electronic data; storage services for archiving databases, images and other electronic data" (in Class 39); and "on-line journals, namely, blogs featuring general information on computer related services, including electronic data storage" (in Class 41). So as to be clear, the Board does not take judicial notice of a party's registration(s).⁶ A plaintiff

⁵ Registration Nos. 3427915 and 3427916, respectively, issued May 13, 2008.

⁶ Opposer, in its brief, also refers to its ownership of a "family" of MOZY trademarks (see discussion, *infra*), including the following registrations that were *not* made of record: Registration Nos. 3887183 and 3887184, issued December 7, 2010, of MOZY and design (one claiming color as a feature of the mark) for "downloadable computer software for storing electronic data, including backing up and archiving electronic data"; and Registration Nos. 3823214 and 3823220, issued July 20, 2010, of the mark MOZY and design (one claiming color as a feature of the mark) for "electronic storage of data, including remote online backup of electronic data." Registration Nos. 3823214 and 3823220 issued as trial commenced, yet opposer did not seek to introduce these registrations into the record during its case-in-chief testimony period. The other two registrations did not issue until after trial ended.

Opposition No. 91183001

who pleads ownership of an application in its complaint must, in order to rely on the subsequently issued registration, make the registration of record. However, the plaintiff does not have to amend its pleading to assert the registration. The pleading of the application is viewed as providing sufficient notice to the defendant of the plaintiff's intention to rely on any registration that issues from the pleaded application. However, if the registration issues after the plaintiff's testimony period closes, even if the defendant has admitted that the plaintiff is the owner of the application and the plaintiff has introduced a copy of the application into evidence, the Board will not consider the registration. See TBMP §704.03(b)(1)(A) (3d ed. 2011). In the present case, opposer's Registration No. 3944539 issued on April 12, 2011, that is, after the briefs were filed in this case. To state the obvious, there was no way for opposer to timely introduce its recently issued registration into the record. Accordingly, although we have considered opposer's underlying application, the subsequently issued registration does not form part of the evidentiary record. *UMG Recordings Inc. v. O'Rourke*, 92 USPQ2d 1042, 1045-46 (TTAB 2009).

Opposer has established its standing to oppose registration of the involved application. In particular,

Opposition No. 91183001

opposer has properly made its pleaded registrations of its MOZYENTERPRISE, MOZYPRO and MOZYHOME marks of record, and essentially has shown that it is not a mere intermeddler. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

Priority with respect to opposer's marks MOZYENTERPRISE, MOZYPRO and MOZYHOME is not in issue in view of opposer's ownership of valid and subsisting registrations of these marks. *King Candy, Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

As indicated above, however, opposer's registration of the mark MOZY is not of record so, to the extent that opposer relies on its ownership of this mark, opposer is left to its common law rights in order to establish priority of use of the mark MOZY.

In this connection, we initially note that applicant does not directly challenge opposer's priority of use of the mark MOZY for opposer's goods and services. Rather, it merely states that opposer's "priority arguments lose their significance" because there is no likelihood of confusion. (Brief, p. 18). Be that as it may, we find that the record establishes opposer's prior common law rights in the mark MOZY.

Opposition No. 91183001

Joshua Coates, opposer's founder, testified that opposer began development of opposer's electronic data storage services in 2004, and alpha testing (an initial public release of the services to a limited user base) of the services began in July, 2005. That same month Mr. Coates referred to the mark in a presentation to a bank. After the successful alpha testing, opposer conducted beta testing of its services in September, 2005; the beta testing utilized a more robust and mature version of the services, and this testing involved greater public participation. Opposer's testing quickly garnered media attention, and the technology press began to follow the development of opposer's MOZY services. The record includes numerous examples of these articles.

By November 11, 2005, opposer's MOZY website had received about 8,000 visitors, and more than 1,400 of them had signed up for opposer's electronic storage services. By December 16, 2006, opposer reached a milestone, with over 100,000 customers signed up for its services. Opposer continued to expand and, as of December 10, 2009, opposer was providing its storage services under the MOZY marks to over one million customers, including over 40,000 business customers. Recent expansion included a partnership launch with Comcast of a service that allows customers to share

their photos, videos, music and documents with family and friends.

Applicant hired Carlos Lima, a website developer, in April 2005 to begin creation of a site for applicant's MOZIE services. Mr. Lima, through his company Red Blizzard, LLC, hosted a development site for applicant's project until June, 2007; a development site is essentially a website that is under construction. Melissa Dennis was hired as the "lead programmer" and Ms. Dennis confirmed that the site was still under development in March, 2006. The MOZIE website became directly available to the public on June 15, 2007, but the evidence shows that applicant still had not conducted any beta testing by mid-2008. Applicant indicates that the website has generated less than \$1,000 in revenue.

Based on the record before us, opposer has established its common law rights in the mark MOZY for electronic storage of data, including remote online backup of electronic data, and storage services for archiving databases, images and other electronic data, prior to any date that applicant is entitled to claim.⁷ Accordingly, opposer has priority of use of its mark MOZY.

⁷ As indicated earlier, applicant claimed in her application first use anywhere on April 2005, and first use in commerce on February 17, 2007. Suffice it to say, the current record does not support these dates. First use dates set forth in an application are mere allegations that must be proved at trial in order for the applicant to rely on them for priority. We should also add that opposer has not claimed that the application is

Opposition No. 91183001

We now turn to the issue of likelihood of confusion. Our determination of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). Opposer must establish that there is a likelihood of confusion by a preponderance of the evidence. *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1007-08 (Fed. Cir. 1988).

We first focus on opposer's assertion that its MOZY mark "has wide acclaim," referencing the legal maxims that famous marks are entitled to a wide scope of protection and that fame plays a dominant role in the process of balancing the likelihood of confusion factors.

To the extent that opposer's contentions may be construed as a claim of fame, we begin with this *du Pont* factor. Fame of the prior mark plays a dominant role in

void *ab initio* for failure to use the mark prior to the filing date of the application. This distinct and specific claim

Opposition No. 91183001

likelihood of confusion cases featuring a famous mark. *Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303 (Fed. Cir. 2002); *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894 (Fed. Cir. 2000); and *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992). Because of the extreme deference accorded to a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, it is the duty of the party asserting fame to clearly prove it. *Lacoste Alligator S.A. v. Maxoly Inc.*, 91 USPQ2d 1594, 1597 (TTAB 2009); and *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007).

The record includes evidence that opposer has garnered several awards for its services, which also have been the subject of unsolicited articles in the technology press. Indeed, opposer's customer base has quickly grown, and it would appear that opposer has enjoyed an appreciable degree of success with its goods and services sold under its MOZY marks. Moreover, the record is devoid of evidence of any third-party uses or registrations of marks similar to MOZY in the electronic storage field. However, opposer has not provided specific dollar figures for its sales or advertising expenses, nor has opposer placed its degree of

neither was raised in the pleading nor tried by the parties,

Opposition No. 91183001

success in any context. See *Bose Corp. v. QSC Audio Products Inc.*, 63 USPQ2d at 1309. We find, therefore, that the record falls short of clearly proving fame as contemplated by case law. Thus, while we find that opposer's MOZY marks have some notoriety in the electronic data storage field, we decline to confer on any of opposer's marks, based on the record before us, the exalted status of "famous."

We next direct our attention to the ninth *du Pont* factor involving a "family" of marks. Opposer at various points in its brief refers to its "family" of MOZY marks. However, opposer did not plead in the notice of opposition ownership of a family of marks, and opposer's witnesses did not specifically make such a claim or otherwise testify as to any asserted family of marks. Accordingly, opposer's claim in its brief that it owns a family of MOZY marks has not been considered in making our determination herein.

We hasten to add that, in any event, opposer has not established a family of MOZY marks. In the past, the Board has looked at whether the marks asserted to comprise a "family" have been used and advertised in promotional material or used in everyday sales activities in such a manner as to create common exposure and, thereafter, recognition of common ownership based upon a feature common

either explicitly or implicitly.

to each mark. *American Standard, Inc. v. Scott & Fetzer Co.*, 200 USPQ 457, 461 (TTAB 1978).

We obviously recognize that opposer uses at least four different MOZY marks in connection with its software and related storage services. The use of four MOZY marks is, of course, sufficient to comprise a family. This fact, however, is not the end of the story. That is, the mere fact of adoption, use and/or registration of four MOZY marks does not in itself prove that a family of marks exists. *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); *Polaroid Corp. v. Richard Mfg. Co.*, 341 F.2d 150, 144 USPQ 419 (CCPA 1965); *Trek Bicycle Corp. v. Fier*, 56 USPQ2d 1527, (TTAB 2000); and *Consolidated Foods Corp. v. Sherwood Medical Industries, Inc.*, 177 USPQ 279 (TTAB 1973). Although the record reveals some conjoint use of various combinations of opposer's marks, the evidence falls short of showing that a family of marks has been promoted together.

Accordingly, we find, based on the record before us, that opposer has not established a family of MOZY marks. Inasmuch as we are not considering opposer's belated claim of a family of marks, the likelihood of confusion determination herein rests on a comparison between each of opposer's marks, and the goods and/or services offered

Opposition No. 91183001

thereunder, and applicant's mark and the services set forth in the application.

The first *du Pont* factor involves the similarity/dissimilarity between opposer's marks MOZY, MOZYENTERPRISE, MOZYPRO and MOZYHOME, and applicant's mark MOZIE. We must compare the marks in their entireties as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them.

Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). The test, under the first *du Pont* factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods and/or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Opposer's mark MOZY obviously is the one that is closest in similarity to applicant's mark MOZIE. These marks are identical in sound, and very similar in appearance; the "-Y" and "-IE" endings are virtually interchangeable. As to meaning, both marks appear to be

Opposition No. 91183001

arbitrary as used in connection with the parties' services. With coined words which are meaningless, slight variations in spelling are often insignificant to direct a buyer's attention to the distinction between the marks. Given the similarities between MOZIE and MOZY, the marks engender substantially similar overall commercial impressions.

Likewise, we find applicant's mark MOZIE to be similar to each of opposer's other marks, MOZYENTERPRISE, MOZYPRO and MOZYHOME. Each of opposer's marks begins with the arbitrary portion, "MOZY," followed by a term that is at least suggestive of opposer's various types of storage services. Although we must compare the marks in their entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ("There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable."). See *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002).

Opposition No. 91183001

Each of opposer's marks is dominated by the first portion, "MOZY"; in each case, the second portion of opposer's marks, being at least suggestive, plays a subordinate role. The "MOZY" portion of opposer's marks is the portion that is most likely to be remembered and used by consumers in calling for and referring to opposer's goods and/or services. Purchasers in general are inclined to focus on the first word or portion in a trademark. *Presto Products, Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is likely to be impressed upon the mind of a purchaser and remembered"). See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1692.

The entirety of applicant's mark MOZIE is identical in sound and similar in appearance to the dominant portion of opposer's MOZY-formative marks. Any difference in meaning engendered by the remaining suggestive portions of opposer's marks is outweighed by the similarity in sound and appearance. Given the similarities, the marks have similar overall commercial impressions.

The similarity between each of opposer's marks and applicant's mark weighs in favor of a finding of a likelihood of confusion.

We next turn to compare opposer's goods and services with applicant's services, but we will focus on the

Opposition No. 91183001

services. It is well settled that the goods and/or services of the parties need not be identical or competitive, or even offered through the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective goods and/or services of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods and/or services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993); and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978). The issue, of course, is not whether purchasers would confuse the goods and/or services, but rather whether there is a likelihood of confusion as to the source of the goods and/or services. *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

Insofar as the goods and/or services in opposer's registrations are concerned, it is well established that the issue of likelihood of confusion herein must be determined based on an analysis of the services recited in applicant's application vis-à-vis the goods and/or services identified in opposer's pleaded registrations. *Cunningham v. Laser Golf Corp.*, 55 USPQ2d at 1846; and *Canadian Imperial Bank v.*

Opposition No. 91183001

Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992). Thus, where the goods and/or services in an involved registration and/or application are broadly identified as to their nature and type, such that there is an absence of any restrictions as to the channels of trade and no limitation as to the classes of purchasers, it is presumed that in scope the identification of goods and/or services encompasses all the goods and/or services of the nature and type described therein, that the identified goods and/or services are offered in all channels of trade which would be normal therefor, and that they would be purchased by all potential buyers thereof. *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); and *In re Elbaum*, 211 USPQ 639 (TTAB 1981).

Opposer's goods are identified as "computer software for storing electronic data, including backing up and archiving electronic data." Opposer's services are recited as "electronic storage of data, including remote online backup of electronic data; storage services for archiving databases, images and other electronic data." We also find, as indicated earlier, that the record establishes opposer's prior common law rights in these same services, namely electronic storage of data, including remote online backup

Opposition No. 91183001

of electronic data; and storage services for archiving databases, images and other electronic data. These services must be compared to applicant's services identified as "providing on-line, non-downloadable software for digital photo management, online photo sharing, creating, sending and tracking customized online invitations and marketing campaigns, creating and hosting web pages, building and sharing online calendars, managing and sharing online contact lists, posting interactive online discussions, and online social networking."

The record establishes that opposer's electronic data storage services feature photos and videos, and that these services are closely related to a portion of applicant's services, namely "online digital photo management and online photo sharing." TIME Magazine, in naming opposer as an award winner in the publication's "50 Best Websites 2007," described opposer's services as follows:

Backing up all your computer files is like flossing: it's a chore, but you know you should do it, or you risk losing something forever - not your teeth, of course, but your digital photos, music, financial records or that rough draft of your first novel. Mozy can keep all of that stuff safe and encrypted on its own servers. It will store 2 gigabytes worth of your files for free (enough to cover, say, a couple thousand pictures, depending on the image resolution).

(Robinson dep., p. 11, ex. no. 86).

Applicant's services are offered through her website that allows users to upload photos, and then share the photos with other people through e-mails, e-cards, and slide shows. Focusing on the portion of opposer's services that we find are most similar to this portion of applicant's services, opposer's electronic data storage services allow a user to remotely archive and create a safe storage site to backup critical data and images. As explained by David Robinson, opposer's vice president for marketing, the data and images stored by opposer may include electronic files such as photos and videos, as well as music; in point of fact, these are the most common type of files backed-up through the use of opposer's storage services. As explained by Mr. Robinson:

A. [W]e have run reports that will give us the breakdown of file types that are being stored on our servers...We are always interested in the types of files being backed up and from time to time we run queries against the database to see what they are and music is typically one of the top three or four types of files being stored with our service.

Q. Does the Mozy service also allow for the storage of photos?

A. It does. Photos are, I believe, our number one or number two most commonly-stored type of file.

Q. And at the risk of being redundant, could you tell us how you know that to be true?

A. Again, it's based on file extension. There - you know, there is a list of 20 or so file extensions that we know are associated with photos, whether that be JPEGs or GIFs or TIFFs or, you know, PNGs or - you know, name it. Again, we run these queries to see what types of files are being backed up with the service.

Q. Are videos also being backed up by Mozy?

A. That is correct. Videos and - between videos and photos, those are typically the number one and number two most commonly-stored files.

(Robinson dep., pp. 22-24). Mr. Robinson went on to describe the photo file-sharing aspect of its storage services:

A. Sharing. Once the data is backed up, users will be able to share photos, documents, music and videos with family and friends via an easy-to-use dashboard that's available across multiple devices.

Q. Can you tell us in layman's terms how the sharing works, how it takes place?

A. Yes. The user creates a collection. So let's say, for example, that I wanted to share vacation photos with you. I would create a collection of photos within my personalized website. I would then click "share" to share them, you know, with - with you. You would receive an email that said, "Dave wants to share these photos with you." You would then click that link within the email and have access to the collection which I have chosen to share with you.

Opposition No. 91183001

(Robinson dep., pp. 26-27). Opposer's on-line sharing tools permit multi-user access to photos, videos and music that are stored remotely, not just on the user's physical computer.

In sum, opposer's electronic data storage services for photos and videos are very similar to applicant's services featuring online digital photo management and online photo sharing. Likelihood of confusion may be found based on *any* item that comes within the identification of goods and/or services in the involved registrations and application (and, as stated above, opposer's common law rights are consistent with the identification of services in opposer's registrations). *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

Given that the parties' services are closely related, we find that they travel in the same trade channels over the Internet, and that the same classes of purchasers buy the respective services. These purchasers would include ordinary consumers looking to backup and/or share their photos and videos, and these consumers would be expected to exercise nothing more than ordinary care in making their purchasing decision. In this connection, we note that opposer's unlimited plan costs \$4.95 per month; applicant's projected cost is \$29.95.

Opposition No. 91183001

The close relationship between the services, and the identity in trade channels and purchasers, as well as the conditions of sale, are *du Pont* factors that weigh in favor of a finding of a likelihood of confusion.

Opposer points to instances of purported actual confusion as a *du Pont* factor to consider in our analysis. More specifically, opposer relies upon the fact that prospective users of opposer's MOZY branded services mistakenly have typed "mozie" while searching for opposer's services on the Internet. Opposer, through its business relationship with Google Analytics, obtains information about users who ultimately find their way to opposer's website through various means. The result of this tracking service shows that in the time period January 2010-August 2010, in over 1500 instances, prospective users typed in "mozie" as a search term in their browsers and, when faced with the search results, navigated to opposer's website at www.mozy.com. According to opposer, "MOZIE and MOZY are aurally identical, and it is likely these users heard about MOZY by word of mouth or from one of [opposer's] television advertisements and then typed in 'mozie' as their search query." (Brief, p. 18, citing Robinson dep., p. 20).

Applicant responds by contending that there is no way of knowing the reason why these mistypings occurred. Opposer's explanation, applicant argues, is nothing more

Opposition No. 91183001

than guesswork, and mere speculation without any evidentiary support in the record.

Contrary to opposer's urgings, we agree with applicant's assessment on this *du Pont* factor. There simply is no way of knowing the reasons why these mistypings occurred, that is, whether by confusion, a distraction or the user simply being a poor typist. Mr. Robinson's testimony does not support a finding that there has been actual confusion. In this connection we also note opposer's response to applicant's interrogatory no. 12 stating that it "is not aware of any such actual confusion." In sum, the evidence falls short of demonstrating actual confusion.

On the flip side, applicant asks us to give probative weight to the five years of contemporaneous use of the marks without any reported actual confusion. The problem with applicant's argument is that the record is devoid of probative evidence relating to the extent of either opposer's or applicant's marks and, thus, whether there have been meaningful opportunities for instances of actual confusion to have occurred in the marketplace. See *Cunningham v. Laser Golf Corp.*, 55 USPQ2d at 1847; and *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992).

A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of

Opposition No. 91183001

confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight. *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965). In view of the above, the *du Pont* factor of the length of time during and conditions under which there has been contemporaneous use without evidence of actual confusion is considered neutral.

In arguing that there is a likelihood of confusion, opposer also points to applicant's earlier notice of opposition filed against opposer's mark MOZY (see discussion, *supra*). In the complaint, applicant (as opposer) alleged that opposer's mark was likely to cause confusion with the mark she now seeks to register herein, a contrary position to the one she currently takes in this proceeding. What opposer conveniently overlooks, however, is its own action in the prior proceeding. In its answer in the prior proceeding, opposer (as applicant) denied the claim of likelihood of confusion, a contrary position to the one it currently takes herein. Although we have considered the parties' prior statements on likelihood of confusion, each of which is contrary to the respective arguments espoused herein, suffice it to say that we have based our decision on the other evidence of record bearing on the *du Pont* factors. See *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151, 153 (CCPA

Opposition No. 91183001

1978) (while the earlier statement respecting the issue of likelihood of confusion is "illuminative of shade and tone in the total picture confronting the decision maker," it does not "relieve the decision maker of the burden of reaching his own ultimate conclusion on the entire record."). See also *Maremont Corp. v. Air Lift Co.*, 463 F.2d 1114, 174 USPQ 395, 396 n.4 (CCPA 1972); and *Bakers Franchise Corp. v. Royal Crown Cola Co.*, 404 F.2d 985, 160 USPQ 192, 193 (CCPA 1969).

In view of the above, the *du Pont* factors, on balance, weigh in favor of a finding of likelihood of confusion. We conclude that purchasers familiar with opposer's computer software for storing electronic data, including backing up and archiving electronic data, and electronic storage of data, including remote online backup of electronic data, and storage services for archiving databases, images and other electronic data, sold under each of opposer's MOZY, MOZYENTERPRISE, MOZYPRO and MOZYHOME marks, would be likely to believe, upon encountering applicant's mark MOZIE for "providing on-line, non-downloadable software for digital photo management, online photo sharing, creating, sending and tracking customized online invitations and marketing campaigns, creating and hosting web pages, building and sharing online calendars, managing and sharing online contact lists, posting interactive online discussions, and

Opposition No. 91183001

online social networking," that the services and/or related goods originated from or are associated with or sponsored by the same entity.

Lastly, to the extent that any of the points argued by applicant raises a doubt about our finding of a likelihood of confusion, we resolve that doubt, as we must, in favor of opposer as the prior user and registrant. See *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 395 (Fed. Cir. 1983).

Opposer also asserts that applicant is guilty of fraud. Opposer points out that applicant filed the application by herself without the assistance of an attorney, and that she "repeatedly" has made false statements regarding her use of the mark MOZIE for her services. Opposer essentially contends that while applicant swore to the dates of first use set forth in the involved application, the services were still in development and not yet available. Thus, opposer argues, the mark could not have been used in connection with the recited services. Opposer also points to the specimen, which purportedly is merely a mock-up of the homepage still in development. Opposer further asserts that applicant has never provided on-line social networking services, as indicated in the recitation of services, and applicant has made false statements in her responses to discovery requests.

Opposition No. 91183001

Our primary reviewing court, the U.S. Court of Appeals for the Federal Circuit, made it clear that for a fraud claim to be successful, a plaintiff must prove by clear and convincing evidence that a defendant knowingly made a false statement with the intent to deceive the USPTO. *In re Bose Corp.*, 530 F.3d 1240, 91 USPQ2d 1938, 1939 (Fed. Cir. 2009). The court set out the relevant standard for proving fraud:

"Fraud in procuring a trademark registration or renewal occurs when an applicant knowingly makes false, material representations of fact in connection with his application."
Torres v. Cantine Torresella S.r.l., 808 F.2d 46, 48, [1 USPQ2d 1483] (Fed. Cir. 1986)...Indeed, "the very nature of the charge of fraud requires that it be proven 'to the hilt' with clear and convincing evidence. There is no room for speculation, inference or surmise and, obviously, any doubt must be resolved against the charging party."
Smith Int'l, Inc. v. Olin Corp., 209 USPQ 1033, 1044 (TTAB 1981).

Id. at 1939.

Opposer has not proven fraud. The fact that a party has set forth erroneous dates of first use, by itself, does not necessarily constitute fraud. *See, e.g., L. & J.G. Stickley Inc. v. Cosser*, 81 USPQ2d 1956, 1970 n.17 (TTAB 2007). Opposer has not introduced any evidence of applicant's "deceptive intent" to knowingly deceive the Office. *In re Bose Corp.*, 91 USPQ2d at 1942 ("Unless the challenger can point to evidence to support an inference of deceptive intent, it has failed to satisfy the clear and

Opposition No. 91183001

convincing evidence standard required to establish a fraud claim."). In sum, the proofs regarding the first use dates, as well as with respect to the other instances relied upon by opposer, fall short of proving "to the hilt" an intention by applicant to deceive the USPTO. Accordingly, the fraud claim is dismissed.

Decision: The opposition is sustained on the ground of likelihood of confusion, and registration to applicant is refused. The opposition is dismissed on the ground of fraud.