

This Opinion is not a
Precedent of the TTAB

Mailed: March 11, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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NetCloud, LLC

v.

East Coast Network Services, LLC
—

Opposition No. 91210559
against Serial No. 85777557
—

Morris E. Turek of YourTrademarkAttorney.com,
for NetCloud, LLC.

Russell Logan, for East Coast Network Services, LLC.
—

Before Bucher, Zervas and Shaw,
Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

East Coast Network Services, LLC (hereinafter “Applicant”) seeks registration on the Principal Register of the mark **NETCLOUD** (*in standard character format*) for the following services:

computer monitoring service which tracks application software performance, performs periodic maintenance and provides reports and alerts concerning such performance; computer services, namely, cloud hosting provider services; computer services, namely, computer system administration for others; computer services, namely, filtering of unwanted e-mails; computer services, namely, integration of private and public

cloud computing environments; computer services, namely, on-line scanning, detecting, quarantining and eliminating of viruses, worms, [T]rojans, spyware, adware, malware and unauthorized data and programs on computers and electronic devices; computer services, namely, remote and on-site management of the information technology (IT) systems of others; hosting the software, websites and other computer applications of others on a virtual private server; providing virtual computer systems and virtual computer environments through cloud computing, in International Class 42.¹

NetCloud, LLC (hereinafter “Opposer”) pleaded that it has prior, common law use of the identical mark **NETCLOUD** for many of the same services, such as web hosting, cloud hosting, and email services as well as system backups, monitoring, and administration support, and should prevail herein on the ground of priority and likelihood of confusion under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d).

I. Evidentiary Issues

Before proceeding to the merits of the refusal, we address the following evidentiary matters.

Opposer submitted business records to show that its predecessors-in-interest had continuously provided cloud hosting and email service under the NetCloud trademark. In its brief, Applicant objects to the admission by Opposer of invoices that were addressed to “NetCloud” and marked “paid” by third party providers, received by Opposer’s predecessor-in-interest in the course of rendering his services² on the basis

¹ Application Serial No. 85777557 was filed on November 12, 2012, and claims first use anywhere and use in commerce since at least as early as November 10, 2012.

² The invoices at issue were introduced as Exhibits 14-23 of Mehul Satasia’s testimony deposition. 9 TTABVue 79-88 of 88. Mr. Satasia bought his web hosting business from Raj

that they are inadmissible hearsay. Applicant's Brief at 5. It appears as if Applicant is arguing that Opposer cannot authenticate the invoices, for example, because Mr. Satasia, as a sole proprietor and an immediate predecessor-in-interest to Opposer, and later, Opposer, merely received these invoices from third parties such as WebProSys, HostRocket.com, NetDepot and FDCservers.NET LLC. Applicant asserts that these exhibits have not been properly authenticated or certified under Rule 803(6)(D) of the Federal Rules of Evidence. *Id.* However, the business records hearsay exception of Rule 803(6) includes third-party business records of regularly conducted activities received during ordinary course of the witness' business. The fact that the invoices were pieces of paper which had earlier been the records of different businesses, namely WebProSys, HostRocket.com, NetDepot and FDCservers.NET LLC, is irrelevant. Because they were relied upon by Satasia, these invoices were integrated into Satasia's own records, especially having the additional notations showing they had been "Paid." *See also United States v. Mendel*, 746 F.2d 155, 166 (2d Cir.1984), *cert. denied*, 469 U.S. 1213, 105 S.Ct. 1184, 84 L.Ed.2d 331 (1985); *United States v. Ullrich*, 580 F.2d 765, 771-72 (5th Cir.1978); *United States v. Pfeiffer*, 539 F.2d 668, 671 (8th Cir.1976); and *U.S. v. Doe*, 960 F.2d 221 (D.C. Mass. 1992). Moreover, subsection (D) permits the requisite foundation testimony to be provided by the "custodian or another qualified witness." In this regard, Mr. Satasia testified as to the company from which he had received the invoices, the dates of the various invoices, exactly what services were covered thereby, and a demonstration that payment of the invoices was made by

Viradia (both of whom functioned as sole proprietors), Satasia was an immediate predecessor-in-interest to Opposer, and now serves as Opposer's managing member.

Opposer's predecessor-in-interest. With invoices stamped as "PAID" or machine generated receipts showing electronic payments, and Applicant has not otherwise demonstrated that they lack trustworthiness, we find that Exhibits 14-23 of Mehul Satasia's testimony deposition are admissible under the business records hearsay exception of the Federal Rules of Evidence to the extent that they were received and paid by Mr. Satasia for the services identified.³

Applicant also objects to the admission of all of Opposer's evidence purporting to show use of the term NETCLOUD by any entity or individual other than Opposer on the basis that all such evidence is beyond the scope of the pleadings and, therefore, irrelevant.⁴ Applicant's Brief at 5-6. Specifically, Applicant argues that the Notice of Opposition failed to provide any notice that Opposer intended to rely on use of NETCLOUD by Opposer's predecessors-in-interest, and that Applicant "was not provided any notice that would prompt Applicant to investigate, take discovery, and explore affirmative defenses such as abandonment regarding any usage of the NETCLOUD mark by Opposer's multiple purported predecessors-in-interest." Applicant's Brief at 6.

However, Opposer's Initial Disclosures specifically listed Raj Viradia and Mehul Satasia as potential witnesses. Opposer's discovery responses served on Opposer early in the discovery period revealed the purported transfer of the NETCLOUD name from Raj Viradia to Mehul Satasia, the formation of Opposer as an entity, and then the

³ See especially Satasia Exs. 19-23 at 9 TTABVue 84-88 of 88.

⁴ Applicant objects to Satasia Depo. at 18-22, 25-43, as well as Satasia Exs. 6, 10-17, and 19-21, 9 TTABVue 18-23, 26-44, 63-67, 72-88. Applicant also objects to the Viradia deposition in its entirety including all exhibits attached thereto. Viradia Depo. and Exs., 10 TTABVue 2-59 of 59.

purported transfer from Mehul Satasia to Opposer. Accordingly, we find that Applicant was on notice of trademark use by Opposer's predecessors-in-interest and that it was not deprived of an opportunity to meet Opposer's evidence at trial. As to the overall relevance of the claimed usage by Opposer's predecessors-in-interest, this continuous chain of ownership is most relevant to the hotly-contested question of priority of use between the parties to this litigation.

Finally, Applicant objects to all of the deposition testimony evidence and associated exhibits proffered by Opposer to establish priority through use analogous to service mark use on the basis that analogous use was not pleaded in the Notice of Opposition. Applicant's Brief at 6. Applicant is correct that the elements of each claim should be stated concisely and directly, and include enough detail to give the defendant fair notice. *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007). Under the standards applied to "notice pleadings," it seems to us that the Notice of Opposition, in alleging use "[s]ince long before any date on which Applicant could reasonably rely ...," did not need explicitly in such pleading to name either use through its predecessors-in-interest or analogous use in order to preserve these proofs at trial. In any case, as stated in its final briefs, Opposer appears to be relying on actual service mark usage of the term NETCLOUD in commerce by Opposer's predecessors-in-interest, not use analogous, dating back to a date prior to Applicant's filing date of November 12, 2012. Accordingly, we do not rely upon non-technical service mark usage to establish Opposer's priority date. On the other hand, we do find that Opposer's alleged analogous use is consistent with the follow-on dates that

Opposer alleges for actual, technical service mark use. Accordingly, we overrule this objection.

Applicant moved to strike Exhibits A, B, and C attached to Opposer's Reply Brief. *See* TBMP § 539 (2014). Applicant's motion is granted for two reasons: (1) all evidence must be entered into the record during the trial period. As a result, any evidentiary matter not made of record during Opposer's trial period constitutes untimely evidence when submitted for the first time with Opposer's reply brief. 37 C.F.R. § 2.121; *See also Angelica Corp. v. Collins & Aikman Corp.*, 192 USPQ 387, 391 n.10 (TTAB 1976) ("Evidence submitted by opposer for the first time with its brief has not been considered because it was not regularly made of record during its testimony period in chief or rebuttal testimony period."); *L. Leichner (London) Ltd. v. Robbins*, 189 USPQ 254, 255 (TTAB 1975) (same); *Tektronix, Inc. v. Daktronics, Inc.*, 187 USPQ 588, 589 n.1 (TTAB 1975), *aff'd*, 534 F.2d 915, 189 USPQ 693 (CCPA 1976); *Ortho Pharmaceutical Corp. v. Hudson Pharmaceutical Corp.*, 178 USPQ 429, 430 n.3 (TTAB 1973); and (2) Opposer cannot make of record its own Responses to Interrogatories (except under limited circumstances not applicable here), Responses to Requests for Documents, and Initial Disclosures. 37 C.F.R § 2.120(j)(5), TBMP §§ 704.10, 704.14 (2014). Finally, requests for discovery, responses thereto, and disclosed documents should only be filed with the Board in five circumstances not applicable here. *See* 37 C.F.R. § 2.120(j)(8); TBMP § 704.10 (2014). Accordingly, we have not taken into consideration Exhibits A, B, and C attached to Opposer's Reply Brief.

II. The record

The record includes the pleadings and the file of the opposed application. Trademark Rule 2.122(b). In addition, Opposer proffered the testimony depositions of Raj Viradia, the former owner of the NETCLOUD mark, and Mehul Satasia, also a former owner of the NETCLOUD mark and the founder and managing member of Opposer, along with the exhibits thereto.⁵

III. Standing

Section 13(a) of the Trademark Act, 15 U.S.C. § 1063(a), allows for opposition to the registration of a mark by anyone “who believes that they would be damaged by the registration of a mark” The party seeking to oppose the registration of the mark must prove two elements: (1) that it has standing and (2) that there is a valid ground to prevent the registration of the opposed mark. *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1755 (Fed. Cir. 1998).

Standing is a threshold issue that the plaintiff in a Board *inter partes* proceeding must prove. Hence, Opposer must show that it is not a mere intermeddler, *i.e.*, that it has a real interest in the outcome of the proceeding and a reasonable basis for its belief that it would be damaged by issuance or maintenance of the defendant’s registration. *See Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999). To establish standing in this case, Opposer must prove it has a “direct and personal stake” in the outcome and is more than a “mere intermeddler.” *See Ritchie v. Simpson*,

⁵ Although Opposer filed a Notice of Reliance (8 TTABVue), given that Applicant submitted no evidence during its trial period, Opposer decided that it has no need to rely upon this document, namely “Applicant’s responses to Opposer’s first set of interrogatories,” dated September 26, 2013.

50 USPQ2d at 1026-27. In the present case, the marks are identical, and Opposer's testimony and exhibits demonstrate that it is involved in many of the same services recited by Applicant in its involved application, such as web hosting, cloud hosting, and email services as well as system backups, monitoring, and administration support. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727 (Fed. Cir. 2012); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982); and *Time Warner Entm't Co. v. Jones*, 65 USPQ2d 1650, 1657 (TTAB 2002). Hence, Opposer has shown it has standing to bring this cause of action.

IV. Priority

Opposer's priority is in issue with respect to Opposer's claimed mark **NETCLOUD** because it is unregistered.⁶ Hence, Opposer bears the burden of establishing priority with respect to this mark for which it has alleged prior common law rights.⁷ The following background information is necessary to determine priority.

Around November 2009, Raj Viradia, a sole proprietor, began use of the name "Netcloud" in the Atlanta metro area in connection with the advertising and sale of his web hosting services, cloud hosting services, data backup, email service and support, and technical support.⁸ His clients were individuals and small businesses in Georgia

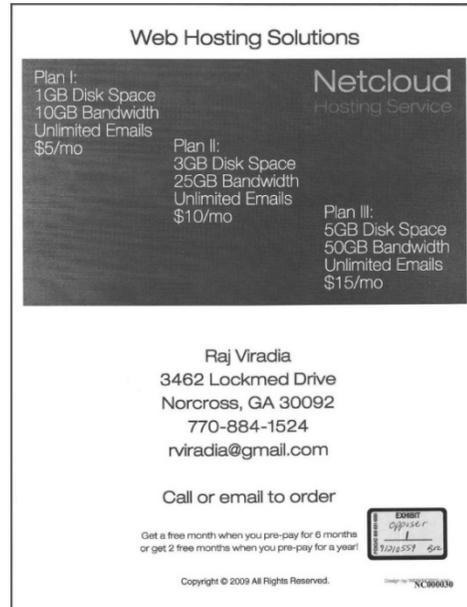
⁶ For purposes of this decision, we make no legal distinction among Opposer's / Opposer's predecessor's usage of "NETCLOUD," "NetCloud" and "Netcloud."

⁷ Inasmuch as neither party has questioned whether this term – upon adoption and use in connection with these services – is inherently distinctive, that question is not before us.

⁸ Viradia Depo. at 6–10, 10 TTABVue at 7-11 of 59.

and Tennessee, who usually ordered Mr. Viradia’s services over the telephone and would pay for his services with cash or check.⁹

Initially, in November 2009, Mr. Viradia relied primarily upon word-of-mouth recommendations, flyers, and business cards to market his business. In November 2009, Viradia hired WebProSys to create the marketing flyer shown at right in order to advertise his web hosting services.¹⁰ Viradia handed out this flyer to individuals in the Indian community during frequent social functions in order to promote his services.



Similarly, in November 2011, Mr. Viradia designed business cards to hand



Card, Viradia Ex. 2

out to prospective clients in need of a web presence, which card (shown at left) promoted his NetCloud service



Flyer, Viradia Ex. 3

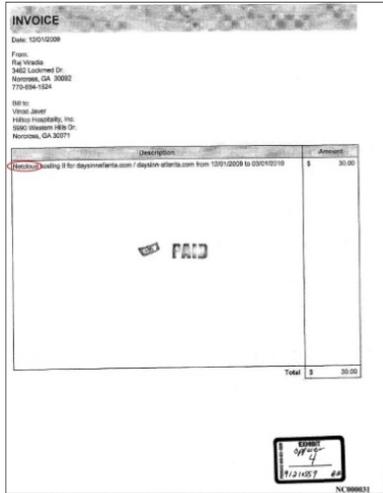
mark in connection with the offering of three different web hosting plans, as well as a second marketing flyer (above, at right).¹¹

⁹ *Id.* at 9, 10 TTABVue at 10 of 59.

¹⁰ *Id.* at 9-11, and Viradia Ex. 1, 10 TTABVue at 10-12, 43 of 59.

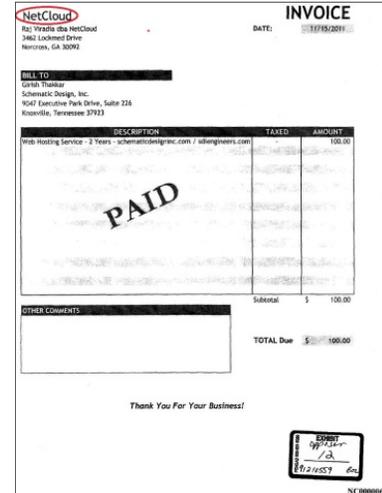
¹¹ *Id.* at 12-16, 10 TTABVue at 13-17 of 59.

In support of Mr. Viradia’s having offered web hosting services during this period, Opposer submitted into evidence nine separate invoices, all dated between 2009 and 2011, eight of which listed “NetCloud Hosting” in the description of services rendered



Invoice, Viradia Ex. 4,
dated 12/01/2009

(see invoice at left), and the ninth of which prominently displays the NetCloud name on the very top as a service mark or trade name (at right).¹²



Invoice, Viradia Ex. 12,
dated 11/15/2011

Having decided in late 2011 that he wanted to also use the name NetCloud as the brand name for his business, in January 2012 Mr. Viradia purchased the <netcloud.com> domain name for \$25,000 from a company in the business of reselling domain names.¹³ Then, facing an ultimatum from his partners in their construction company to divest himself of this business, Mr. Viradia sold his NetCloud web hosting business to Mehul Satasia, a resident of Texas, in February 2012.¹⁴ Mr. Satasia paid \$26,656 for the assets of the business, the majority of which was essentially a reimbursement for the domain name that Mr. Viradia had just purchased for \$25,000.

¹² *Id.* at 16-26, 10 TTABVue at 18-27 of 59.

¹³ *Id.* at 10-13, 10 TTABVue at 11-14 of 59.

¹⁴ *Id.* at 26-27, 10 TTABVue at 27-28 of 59.

The Asset Purchase Agreement executed February 9, 2012, confirms that the sale of the NetCloud business included all accounts, customer lists, customer records, domain names, trademarks, service marks, and associated goodwill.¹⁵ All the listed assets in this Agreement were transferred to Mr. Satasia, and Mr. Viradia did not retain any rights whatsoever in the NetCloud business, service mark or domain names.¹⁶

Upon purchasing the business from Mr. Viradia, Mr. Satasia continuously provided cloud hosting and email service under the NetCloud trademark.¹⁷



Flyer, Satasia Ex. 11

Similar to Mr. Viradia, Mr. Satasia initially relied upon an advertising flyer distributed at business networking and Meetup



Invoice, Satasia Ex. 12

events, and his invoices show a continuing relationship

with some of Mr. Viradia's clients, such as Days Inn Atlanta.¹⁸ Throughout 2012, Mr. Satasia rented servers from Linode.com for hosting his clients' websites as well as his own business operations.¹⁹ Until such time as he was able to acquire his own server resources, Mr. Satasia also maintained the web hosting account with HostRocket.com that was

¹⁵ *Id.* at 27, Viradia Ex. 13, 10 TTABVue at 28, 55-59 of 59; Satasia Depo. at 19-20, Satasia Ex. 6, 9 TTABVue at 20-21, 63-66 of 88.

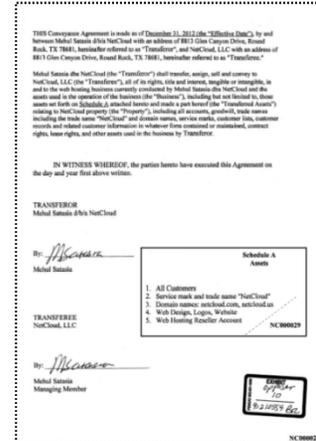
¹⁶ Viradia Depo. at 29-30, 10 TTABVue at 30-31 of 59; Satasia Depo. at 20-21, 9 TTABVue at 21-22 of 88.

¹⁷ Satasia Depo. at 27-31, 9 TTABVue at 28-32 of 88.

¹⁸ *Id.* at 27-30, 9 TTABVue at 28-31 of 88.

¹⁹ *Id.* at 31-36, Satasia Exs. 14-18, 9 TTABVue at 32-37, 79-88 of 88.

transferred to him by Mr. Viradia as part of the Asset Purchase Agreement.²⁰ Thereafter, Mr. Satasia started developing his own <netcloud.com> website by contracting with WebProSys.²¹ Mr. Satasia's new website was launched towards the end of 2012.²² In December 2012, Mr. Satasia formed Opposer, NetCloud, LLC, an active limited liability company in the State of Texas, having an effective date of December 28, 2012.²³ Then on December 31, 2012, Mr. Satasia transferred all the assets of his web hosting business – all tangible and intangible assets, including the service mark NetCloud and associated goodwill – to Opposer.²⁴



The record shows that, as contended by Opposer, NetCloud, LLC has always used the NetCloud service mark to advertise and sell its services, has never done business under any other name, and continues to provide cloud hosting services, backups, systems monitoring, and system administration support.²⁵ Opposer currently advertises its services on its publicly accessible website located at

²⁰ Satasia Depo. at 40-41, Satasia Ex. 21, 9 TTABVue at 41-42, 86 of 88.

²¹ Satasia Depo. at 36-39, Satasia Exs. 19-20, 9 TTABVue at 37-427, 86 of 88.

²² Satasia Depo. at 40, 9 TTABVue at 41 of 88.

²³ *Id.* at 22-24, Satasia Exs. 7-9, 9 TTABVue at 23-25, 68-73 of 88. Mr. Satasia filed with the Secretary of State of Texas, on December 11, 2012, a Certificate of Formation for “NetCloud, LLC” a Domestic Limited Liability Company (LLC). Satasia Ex. 7. This document set the effective date of the LLC formation as January 1, 2013, but that did not fit with Satasia’s tax planning. Accordingly, he filed a Certificate of Correction, Satasia Ex. 8, 9 TTABVue at 69-71 of 88, resulting in an effective filing date of December 28, 2012. Satasia Depo. at 22-25, Satasia Ex. 9, 9 TTABVue at 23-26, 72 of 88.

²⁴ Satasia Depo. at 25-27; Satasia Ex. 10, 9 TTABVue at 26-28, 74-75 of 88.

²⁵ Satasia Depo. at 8, 9 TTABVue at 9 of 88.

www.netcloud.com where members of the public can order and pay for Opposer's services electronically through its website. Opposer also uses Facebook and Twitter to publicly promote its services under the NetCloud name. At the time of Mr. Satasia's trial testimony, he testified that Opposer served more than 170 clients located throughout the United States and in a number of foreign countries.²⁶ This is substantially more than the four clients Mr. Satasia, as a sole proprietor, had inherited in February 2012. However, we cannot be sure from this record how many more clients Mr. Satasia had on November 12, 2012.

Applicant is correct that it may rely without any proof upon the filing date of its application, November 12, 2012, as a "constructive use" date for purposes of priority." *Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1119 (TTAB 2009). Given the totality of Applicant's evidentiary objections and legal arguments, and inasmuch as Opposer's formation date was December 28, 2012, Applicant argues that "Applicant's first use of its **NETCLOUD** mark *ipso facto* precedes Opposer's usage of any similar mark."

Of course, Opposer acknowledges that NetCloud, LLC was not legally formed until after Applicant's application was filed. However, as outlined above, Opposer contends that it acquired all rights in the NetCloud name and associated goodwill from Mehul

²⁶ *Id.* at 11-18, 9 TTABVue at 12-19 of 88. Mr. Satasia testified that the top states for customers, as he remembered them, were California, New York, New Jersey, and Utah. *Id.* at 11-12, 9 TTABVue at 12-13 of 88. He also enumerated "[a] lot of European countries, Mexico, Brazil, India, Philippines, Russia." *Id.* at 12, 9 TTABVue at 13 of 88. However, of the 170 customers, he did not provide a total number for those in the United States. Finally, we note that Mr. Satasia testified to the 170 number on April 16, 2014, almost eighteen months after Applicant's constructive use date is November 12, 2012.

Satasia, who had previously acquired all rights in the NetCloud name and associated goodwill from Raj Viradia back in February 2012. As such, Opposer argues that Applicant's argument has no merit.

Having determined above that Opposer's testimony and exhibits are included in the record, we proceed to discuss Applicant's legal arguments against Opposer's claims of priority.

Applicant argues that all the alleged trade name usage of NetCloud by Messrs. Viradia and Satasia prior to NetCloud, LLC's Formation was illegal under Georgia's fictitious names law and Texas' assumed name state law.²⁷

Applicant is correct that the Lanham Act's "use in commerce" language means "lawful" use. *See* 37 C.F.R. § 2.69: "Compliance with other laws." However, by the terms of this regulation, the reference is to statutes and regulations issued pursuant to Acts of Congress. *Western Worldwide Enters. Group Inc. v. Qinqdao Brewery*, 17 USPQ2d 1137, 1141 (TTAB 1990).

Moreover, in determining whether use of a mark is lawful, we hold a use in commerce unlawful only when the issue of compliance has previously been determined (with a finding of non-compliance) by a court or government agency having competent jurisdiction under the statute involved, or where there has been a *per se* violation of a statute regulating the sale of a party's goods. *Kellogg Co. v. New Generation Foods Inc.*, 6 USPQ2d 2045 (TTAB 1988). We are reminded that "a rigid approach serves the

²⁷ As noted by Opposer, Applicant has not submitted into evidence copies of these respective state laws alleged to have been violated by Mr. Satasia and Mr. Viradia. We cannot be sure that lack of compliance with the statutes would result in all subsequent commerce being considered *per se* illegal.

interests of neither justice nor common sense and such an approach is not mandated by the case law on this matter.” *General Mills, Inc. v. Health Valley Foods*, 24 USPQ2d 1270, 1274 (TTAB 1992) (“[W]e decline to find that the omission of nutritional information on opposer’s initial packages was of such gravity and significance that the October 1984 shipment affords no basis for opposer’s registration.”). *Id.* at 1275.

Applicant also alleges that Opposer has failed to demonstrate sufficient usage to create prior common law trademark rights. Certainly under Section 45 of the Trademark Act, 15 U.S.C. § 1127, the term “use in commerce” means “the *bona fide* use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark.” As to a mark for services, a service mark shall be deemed to be in use in commerce “when it is used or displayed in the sale or advertising of services.” This requirement of “ordinary course of trade” is the result of the amendments to the Act made by the Trademark Law Revision Act of 1988, Pub.L. 100-667, 102 Stat. 3935 (1988) (“Revision Act”), which provided for a higher quantum and nature of use than that which had been required in the past under so-called “token use.” A quantum of use that is “sporadic, casual and nominal” or a pattern of use that does not reflect a “continual effort to create a viable business” in the products so marked could not qualify as a use in a volume which is typical in the affected industry. *See James E. White, d/b/a R.I. Prods. v. Paramount Pictures Corp.*, 108 F.3d 1392, 1997 WL 76957 (Fed. Cir. 1997).

Specifically, Applicant argues that Opposer has failed to show more than nominal, *de minimis* usage of the NetCloud mark prior to Applicant’s date of first use. Referring to Mr. Viradia’s description of his cloud hosting business as being a “personal hobby”

and his four clients with whom he had a personal relationship who were “left over” from his spinning off an earlier web hosting business, Applicant argues that together these four clients generated *de minimis* revenue for Mr. Viradia, actually totaling \$250 annually. Applicant argues that from Mr. Viradia’s commencement of his “hobby” in 2009 through November 2012, Opposer’s evidence of use of the NETCLOUD mark displayed to the purchasing public consists of “three flyers and a business card.” Applicant argues that based on their own testimony, neither Mr. Viradia nor Mr. Satasia was able to name a single additional client that either of them gained through their promotional efforts prior to Applicant’s priority date of November 12, 2012. Given a failure by Opposer to proffer any evidence showing a level of recognition of Opposer’s trademark by any segment of the purchasing public, and with such *de minimis* sales and promotional efforts, Applicant concludes that Opposer’s accumulated evidence is clearly insufficient to establish prior common law trademark rights in the NetCloud mark, and that Opposer has therefore failed to establish priority over Applicant in this mark.

We disagree with Applicant’s theory of the case, and find for Opposer. In summarizing the record, we make the following conclusions as to the relevant facts supporting our conclusion that Opposer has established its priority in the NetCloud trademark by a preponderance of the evidence:

Raj Viradia used the NetCloud mark in connection with his web hosting services, from 2009 to 2012, serving ongoing, paying clients.²⁸ While his business remained small, it did not have a hint of being a casual, sporadic, illegitimate, or transitory commercial enterprise. It was more than a “hobby” (Applicant’s claim) but rather involved “the *bona fide* use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark.” Trademark Act, Section 45. Viradia even purchased a domain name (<netcloud.com>) for \$25,000 at the beginning of 2012 in anticipation of “getting more serious” about growing the NetCloud business. Inasmuch as Mr. Viradia previously owned and sold two other web hosting businesses, we find him to be a legitimate entrepreneur in this field.

In February 2012, Mr. Viradia sold his business in an arms-length transaction to Mehul Satasia via an Asset Purchase Agreement. Satasia paid Viradia \$26,656.50 for the business included all accounts, customer lists, customer records, domain names, trademarks, service marks, and associated goodwill. The three or four clients Viradia had been servicing were transferred to Satasia. He continued to provide cloud hosting and email service under the NetCloud trademark after purchasing the business from Viradia. He also continued to actively advertise his business under the NetCloud mark through the distribution of flyers at business networking events and Meetup events. All of this was done prior to the filing date of Applicant’s involved application for **NETCLOUD**.

²⁸ For example, Viradia rendered web hosting services to Hilltop Hospitality (a.k.a. Days Inn of Atlanta), Ohmshiv Construction, and Schematic Design. Viradia Depo. 16-26, Viradia Exs. 4-12, 10 TTABVue at 17-27, 46-54 of 59.

On December 31, 2012, Satasia transferred all assets of his web hosting business to Opposer. This included all tangible and intangible assets, including the service mark NetCloud and its associated goodwill. Satasia retained no ownership interest in any of the assets transferred to Opposer, including the NetCloud service mark. Opposer continues to provide cloud hosting services, backups, systems monitoring, and system administration support, along with other unadvertised services that go along with these services.

Looking then to the claims of priority set out in Opposer's Notice of Opposition, we conclude that Opposer (though its predecessors-in-interest) commenced use of NetCloud at least three years prior to the filing of Applicant's application for **NETCLOUD**, and that such use continued uninterrupted for approximately four and a half years to the point that Opposer's testimony period closed in the case at bar.

V. Likelihood of Confusion

Applicant's brief includes substantially no discussion of the *du Pont* factors upon which we make a final determination as to whether there is a likelihood of confusion. Perhaps this is not surprising inasmuch as both parties seem to agree that the outcome of this case turns solely upon our determination of priority of use. Nonetheless, we note that both the recited services and the claimed marks are identical, and hence find a clear likelihood of confusion in the case at bar.

Decision: The opposition is hereby sustained and registration of Applicant's **NETCLOUD** mark is refused under Section 2(d) of the Lanham Act.