

This Opinion is not a
Precedent of the TTAB

Mailed: April 23, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Pointivity

v.

*ChannelVission, assignee of Aman Sehgal,
formerly Sehgal Aman dba Channelvission, Inc.*¹

—
Cancellation No. 92055731
—

Matthew H. Swyers of The Trademark Company, PLLC for Pointivity.

Thomas W. Cook for ChannelVission.

—
Before Seeherman, Bucher, and Kuczma,
Administrative Trademark Judges.

¹ The cancellation proceeding was brought against Sehgal Aman dba Channelvission, Inc., who at the time was the record owner of the registration. On October 2, 2013, Respondent filed an uncontested motion to correct what it described as a “typographical error” in the name of the registrant as it appears on the certificate of registration, to change it from “Sehgal Aman dba Channelvission, Inc.” to “Aman Sehgal.” However, Office records show that an assignment to ChannelVission was recorded on July 24, 2013, Reel No. 5077, Frame 0870. Accordingly, since Aman Sehgal is no longer the owner of the registration, we deny the motion as moot. We note that although the cover sheet for the assignment identifies the assignee as ChannelVission, the underlying assignment document refers to the assignee as Channelvission, Inc. It is Office policy to record the assignment based on the information provided in the cover sheet, see TMEP § 503.06. Accordingly, if Respondent wishes to have title in the registration in the name Channelvission, Inc., it should record a corrected cover sheet. See Rule 3.34, 37 C.F.R. § 3.34.

Opinion by Seeherman, Administrative Trademark Judge:

Pointivity (“Petitioner”) has petitioned to cancel a registration owned by ChannelVission (“Respondent”) for the mark **ChannelCloud** in standard characters for “consulting services in the field of cloud computing” in International Class 42.²

Petitioner seeks cancellation of Respondent’s registration on the ground of likelihood of confusion, alleging in the petition for cancellation, 7 TTABVUE, that it is the owner of the mark **ChannelCloud**,³

used on or in connection with an application service provider (ASP), namely, hosting computer software applications of others; computer services, namely, remote and on-site management of cloud computing systems and applications of others; computer services, namely, remote and on-site management of the information technology (it) [sic] cloud computing systems of others; consulting services in the field of cloud computing; hosting the software, websites and other computer applications of others on a virtual private server; hosting the web sites of others; technical consulting services in the fields of datacenter architecture, public and private cloud computing solutions, and evaluation and implementation of internet technology and services” (¶ 1);

that Petitioner has used the mark in connection with these services since “on or about June 1, 2008” (¶¶ 2, 3), prior to Respondent’s claimed date of first

² Registration No. 3960895, issued May 17, 2011, claiming first use anywhere and first use in commerce at least as early as April 19, 2010. The underlying application was filed on April 20, 2010 – one day after Petitioner’s alleged date of first use.

³ In the petition to cancel Petitioner referred to its application as being for the mark CHANNEL CLOUD, depicting it in all capital letters, and as two words. See ¶ 1, 1 TTABVUE 3. However, the specimen in Petitioner’s application Serial No. 85145105 depicts the applied-for mark as ChannelCloud, without a space (see 21 TTABVUE 19-22), as do the exhibits showing Petitioner’s use of the mark. Petitioner also depicts the mark without a space in its briefs. Accordingly, we refer to the mark as **ChannelCloud** throughout our opinion.

use of April 19, 2010; and that on October 5, 2010, Petitioner filed an application to register **ChannelCloud** for the above-identified services, and that such application has been refused on the basis that it is likely to cause confusion with Respondent's mark. Petitioner also alleges that the services listed in Respondent's registration and the services listed in Petitioner's application are "similar in kind and closely related" (§ 13) and are sold in similar trade channels; and that consumers will be confused into believing that Respondent's services offered under the mark **ChannelCloud** are connected with Petitioner.

Respondent, in its amended answer, 11 TTABVue, admits that "it first used its mark **ChannelCloud** in connection with consulting services in the field of cloud computing in International Class 42 on or about April 19, 2010" (§ 12) and that these services are "similar in kind" to the "consulting services in the field of cloud computing" and the "technical consulting services in the fields of datacenter architecture, public and private cloud computing solutions, and evaluation and implementation of internet technology and services" identified in Petitioner's application. (§ 13). Respondent denies the remaining salient allegations of the petition, and asserts the affirmative defenses of acquiescence, estoppel and laches.⁴

⁴ Respondent did not pursue these defenses in its brief, and we therefore deem them to be waived. Respondent also asserted that Petitioner has failed to establish and maintain a viable trademark right in the alleged mark. This is not an affirmative defense, as it is Petitioner's burden to demonstrate its trademark rights in order to prevail in this proceeding.

Petitioner and Respondent filed briefs on the case, and Petitioner filed a reply brief.

OBJECTIONS

There is one pending objection. Specifically, Petitioner objects to certain testimony by Aman Sehgal, Respondent's CEO and President, regarding emails Respondent allegedly sent promoting its services in 2007, because the emails were not produced during discovery.⁵ In testifying regarding Exhibit 2, a 2008 email, Mr. Sehgal stated that he sent similar emails in 2007, and it is this testimony, regarding Respondent's use of the mark dating back to 2007, to which Petitioner objects.

We need not engage in an extensive discussion regarding this objection. It is clear from Respondent's brief that it does not claim use of its mark as of 2007. *See* 27 TTABVUE 8 ("Upon its formation in 2008, ChannelVission began its marketing efforts by direct email to potential customers"). Therefore, Respondent does not rely on the testimony to which Petitioner objects. In any event, as discussed *infra*, the objected-to testimony has no effect on our decision.

THE RECORD

The record includes the pleadings, and pursuant to Trademark Rule 2.122(b), the file of Respondent's involved registration.

⁵ Petitioner's Trial Brief, 24 TTABVUE 8.

In addition, Petitioner introduced the testimony deposition of Kent Erickson, Petitioner's CEO, with attached exhibits, and Respondent introduced the testimony, with exhibits, of Aman Sehgal, Respondent's CEO and President, and of David Natwick, its Vice President of Global Business Development. Respondent also submitted, under a Notice of Reliance, Petitioner's pleaded application (taken from the TSDR database) and the specimen filed with the application, third-party registrations for marks containing the word "Channel," Internet materials consisting of articles and dictionary definitions, and Petitioner's discovery responses.⁶

STANDING

Standing is a threshold issue that must be proved in every *inter partes* case. *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F. 2d 1024, 213 USPQ 185 (CCPA 1982). A party has standing to seek cancellation of a trademark registration if the party believes it is likely to be damaged by the registration; its belief in likely damage can be shown by establishing a direct commercial interest. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842,

⁶ 21 TTABVUE. Respondent submitted with its notice of reliance documents Petitioner produced in response to Respondent's document production requests. Documents produced in response to such requests may not be made of record by notice of reliance. *See* Trademark Rule 2.120(j)(3)(ii). However, in its brief Petitioner treated the entire notice of reliance as being of record, *see* 24 TTABVUE 6, and we therefore consider the documents produced by Petitioner in response to the requests and submitted with Respondent's notice of reliance to be stipulated into the record. Respondent also submitted Petitioner's responses to Respondent's requests for admission. Since Petitioner denied all of these requests, the submission has no probative value. In addition, Respondent submitted documents that were part of its own registration file. As noted, this registration file is automatically of record by operation of the rules, and therefore the submission under notice of reliance was unnecessary; submission of duplicate material is discouraged by the Board.

1844 (Fed. Cir. 2000); *Lipton*, 213 USPQ at 189. Petitioner has submitted testimony regarding its use of **ChannelCloud**, and that its application for **ChannelCloud** has been refused on the basis of the subject registration. Further, Respondent concedes that Petitioner has standing to maintain this action.⁷ Thus, Petitioner has established its standing.

LIKELIHOOD OF CONFUSION

Petitioner asserts likelihood of confusion as the ground to cancel Respondent's issued registration.⁸ There are two elements to this ground, priority and likelihood of confusion.

Priority

A respondent may rely on its issued registration as proof of constructive use of the mark as of the filing date of its underlying application, which in this case is April 20, 2010. *Hydro-Dynamics Inc. v. George Putnam & Company, Inc.* 811 F.2d 1470, 1 USPQ2d 1772 (Fed. Cir. 1987); *Brewski Beer Co. v. Brewski Brothers Inc.*, 47 USPQ2d 1281 (TTAB 1998). A respondent may also prove, through testimony and other evidence, earlier use. That is what Respondent is attempting to do in this case.

⁷ Respondent's brief, 27 TTABVUE 11.

⁸ Petitioner has asserted in its brief that Respondent is not using the mark for the consulting services identified in Respondent's registration, but the ground of non-use and/or abandonment was never pleaded or tried by consent. On the contrary, Petitioner has acknowledged that it cannot attack Respondent's registration on the ground of non-use, and that its arguments regarding non-use go solely to the priority date claimed by Respondent. Petitioner's brief, 24 TTABVUE 15. Accordingly, likelihood of confusion is the sole ground in this cancellation proceeding.

First, we note that in its amended answer, 11 TTABVUE, Respondent admitted that “it first used its mark **ChannelCloud** in connection with consulting services in the field of cloud computing in International Class 42 on or about April 19, 2010” (§ 12). An admission in an answer has the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. *See American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224 (9th Cir. 1988). However, failure to contend that an opposing party’s admission barred entry of conflicting evidence can be a waiver of the argument that the issue was conclusively settled. *Id.*

In this case, we have the odd situation that Petitioner did not specifically invoke Respondent’s admission in connection with Petitioner’s arguments regarding priority. Nevertheless, when Respondent attempted to elicit testimony regarding its use of the mark in 2007, Petitioner objected to this questioning (22 TTABVUE 38). Although Petitioner based its objection on the lack of responses to discovery requests, clearly Petitioner did not treat the testimony or evidence as showing earlier use of Respondent’s mark, or otherwise indicate that it was aware that Respondent was seeking to withdraw its admission, or that it was agreeable to Respondent doing so. In these circumstances, we find that the admission should be treated as effective, and therefore that Petitioner was entitled to rely on the admission and prove only that it had used its mark for its services prior to April 19, 2010 in order to establish its priority.

Even if we were to treat Respondent's admission as having been withdrawn, such that Petitioner waived its right to rely on the admission, Respondent has still failed to prove use of its mark for its identified services prior to April 19, 2010. Because in its underlying application Respondent asserted first use dates of April 19, 2010 (one day prior to filing the application), for Respondent to establish that it made use earlier than the dates alleged in its application (now-registration), Respondent must do so by clear and convincing evidence. *Hydro-Dynamics*, 1 USPQ2d at 1773 (a date of first use earlier than that alleged in the application is a change of position from one "considered to have been made against interest at the time of filing the application," and therefore must be established by "clear and convincing evidence."); *Threshold.TV Inc. v. Metronome Enterprises Inc.*, 96 USPQ2d 1031, 1036 (TTAB 2010) (a party "is entitled to prove an earlier date of use than the date alleged in its application, but its proof must be clear and convincing and must not be characterized by contradiction, inconsistencies or indefiniteness."); *American Hygienic Laboratories Inc. v. Tiffany & Co.*, 12 USPQ2d 1979, 1984 (TTAB 1989) (testimony of manager regarding use of TIFFANY on compacts nine years earlier was not clear and convincing absent corroborating documents showing use of the mark).

Contrary to the April 19, 2010 date of first use asserted in its underlying application, Respondent now claims July 7, 2008 as the date of first use of its **ChannelCloud** mark. Respondent's brief, 27 TTABVUE 8. Respondent relies

primarily on the testimony of Aman Sehgal in connection with Exhibit 2 of his deposition to show use of its mark as of July 7, 2008.⁹ However, in his testimony deposition Mr. Sehgal never testified that July 7, 2008 was the date Respondent first used **ChannelCloud** as a *trademark*; instead, his testimony was that Respondent was marketing its services on that date, and points to Exhibit 2, an email dated July 7, 2008, as indicative of Respondent's marketing efforts as of the July 7th date.¹⁰ The email references the company name, "ChannelVission Inc.," but the only mention of "**ChannelCloud**" is in the sentence, "ChannelVission Inc. strategizes and executes on the market introduction structures of small and medium companies – **ChannelCloud** service." This mention and the accompanying testimony is not sufficient to demonstrate by clear and convincing evidence that Respondent was making trademark use of **ChannelCloud** on July 7, 2008, for the "consulting services in the field of cloud computing" identified in its registration.

The testimony of David Natwick, 22 TTABVUE, is similarly unpersuasive. He testified that Mr. Sehgal had discussions with him when Mr. Natwick was with a different company. However, the testimony regarding when the discussions occurred is vague and inconsistent with the testimony of Mr. Sehgal. More importantly, discussions about Mr. Sehgal's "intent of ChannelVission, and discussing his product **ChannelCloud**," 22 TTABVUE

⁹ 22 TTABVUE 92-94. The testimony regarding this exhibit was the subject of the objection discussed *supra*.

¹⁰ 22 TTABVUE 41.

11, do not show that **ChannelCloud** was in use as a trademark for consulting services in the field of cloud computing. As far as Mr. Natwick's testimony regarding the July 7, 2008 email, as we have already discussed, the email is not sufficient to show use of the trademark for the identified services.

Other documentary evidence and testimony indicate a later first use date. For example, the following cross-examination testimony indicates that Respondent's first use did not occur until essentially the time it filed its underlying application:¹¹

Q. Ok. And this [Exhibit J] appears to be a printout of the website – the home page as it existed in February 2nd 2011. Would you agree with me?

A. Yeah, I – I – I would agree.

Q. Okay. And here at the bottom we see “**ChannelCloud**,” in a – I'll call it a cloud. Is that fair to say?

A. That's right.

Q. Okay. And this is the first time that “**ChannelCloud**” appears on the website?

A. On the website?

Q. Yes.

A. Yes, because until now we were not granted trademark, and only then we wanted to use it after granting trademark.

Q. Okay.

¹¹ 22 TTABVUE 70. The testimony discusses Exhibit J, archived web pages from Respondent's website. 22 TTABVUE 181-183.

- A. If I may, just to add to it, we wanted to follow the legal aspects of having a trademark be in our pocket before we even launched anything.

This testimony indicates that Respondent did not want to make use of the mark **ChannelCloud** until it had filed its application, a point that was further clarified during redirect:

- Q. When – when we were on this exhibit [Exhibit J] you used the words “after granting the trademark.” And it was I think in the context of when you began to use the trademark “**ChannelCloud**.” Can you – does granting the trademark mean to you after the filing of an application to register the trademark “**ChannelCloud**,” or does it mean something different than that?

- A. No, You are right.

- Q. Are there – are there – so is it fair to say that you wanted to at least clear the mark for its use and then file this application before the – the mark was present to the public?

- A. You are absolutely correct. And – (pause).

- Q. Do you have something else to say on that, or –

- A. No. I – all I was going to say was you are absolutely correct, because as we all have a target in mind, but we do not ever want to bring that target out for public. And we worked towards the goal. And after achieving milestones, that’s when you slowly let the cat out of the bag, as we all call in business. We have been using that strategy because we did not want any of our competitors to be following on what ChannelVission is doing.¹²

We have also considered the other evidence of use submitted by Respondent, but none of it shows clearly and convincingly that Respondent began using its mark for consulting services in the field of cloud computing either as of July 7, 2008 or at any date prior to the filing date of its

¹² 22 TTABVUE 80-81.

application. In particular, there is testimony that Exhibit 15, materials used to market Respondent's services, was prepared some time in 2010, but there is no clear evidence as to when. Moreover, as discussed *infra*, Petitioner has shown use of its mark in 2009.

After reviewing all of the evidentiary pieces and looking at the evidence as a whole, see *West Florida Seafood Inc. v. Jet Restaurants Inc.*, 31 F.3d 1122, 31 USPQ2d 1660, 1663 (Fed. Cir. 1994), we find that Respondent has failed to show by clear and convincing evidence that it used its mark for its identified services as of its now-alleged June 7, 2008 first use date. Instead, we find that Respondent may rely only on the filing date of its underlying application, April 20, 2010, for purposes of establishing Respondent's priority.¹³ Therefore, for Petitioner to prevail, Petitioner must show it used the mark **ChannelCloud** in connection with its services prior to April 20, 2010.

Because Petitioner does not own a registration, it must rely on its common law rights,¹⁴ and must show that it obtained rights in the mark **ChannelCloud** prior to Respondent. In certain cases a plaintiff must show that its mark has acquired distinctiveness in order to determine a date for

¹³ As noted previously, Respondent has admitted that it did not make use of its mark for its identified services prior to April 19, 2010; the evidence of record does not show use for those services prior to the filing date of the underlying application.

¹⁴ We recognize that Petitioner owns an application, and can therefore rely on the filing date as its constructive use date (contingent on a registration issuing), but since that date is subsequent to the filing date of Respondent's underlying application, we need not consider it.

priority purposes, see *Towers v. Advent Software Inc.*, 913 F.2d 942, 16 USPQ2d 1039, 1041, (Fed. Cir. 1990), citing *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40 (CCPA 1981). However, in this case, Respondent has not challenged the distinctiveness of Petitioner's mark and, indeed, the marks are identical so presumably Respondent considers **ChannelCloud** to be inherently distinctive. In this connection, we note that Respondent's challenged registration issued on the Principal Register without disclaimer and without a showing of acquired distinctiveness. Accordingly, because no challenge to the lack of inherent distinctiveness of Petitioner's **ChannelCloud** mark has been made, we find Petitioner's mark **ChannelCloud** is inherently distinctive. Therefore, Petitioner acquired trademark rights in the mark as of the date it first began using it for its services.

In its brief, Petitioner states that it "offers cloud computing solutions for its customers in the form of consulting and other cloud-related services," and that it "launched this **ChannelCloud** service to assist others to make the transition to cloud computing," 24 TTABVUE 8, citing Kent Erickson's testimony in support. Mr. Erickson's testimony is not that clear. Although Mr. Erickson testified that Petitioner began using **ChannelCloud** in 2008,¹⁵ the services in connection with which the mark was used are not clearly

¹⁵ 30 TTABVUE 26.

defined. Petitioner's counsel asked him several times about the services; here are some examples of his answers:

A: ChannelCloud's clients are other computing resellers, systems integrators. And what ChannelCloud does is offer them a cloud-based computing platform that they are able to then resell and offer to their clients. We offer educational – they spend almost a week with us personally in San Diego. It's the intellectual property of proposals, sales materials, consulting materials, business model, legal documents, the whole enabler so that they can compete very quickly in the cloud computing space.¹⁶

Q: Now, just to get to be clear, so at this time [2008], what if any services were offered in connection with the **ChannelCloud** mark:

A: Well, at the point we were then – you know, we had a channel program that we were recruiting partners into. Partners were using these – these automated Parallel tools and these systems to provision and sell services. You know, Pointivity¹⁷ was also using these for ourselves. So, you know, we were a partner to ChannelCloud in the same way. Pointivity used the same tools that ChannelCloud offered to partners. So it was a growing suite of applications during that time that partners could offer.¹⁸

What is clear is that in 2009 Petitioner published a pricing sheet showing the different types of services it offered at that time. Exhibit 5, 30 TTABVUE 160. Mr. Erickson testified that this sheet was distributed to its partners, and that these services have been provided under the **ChannelCloud** mark continuously since 2009.¹⁹ The services, as listed on Exhibit 5, are headed “Hosted Email Services,” “Hosted SharePoint Services” and “Instant

¹⁶ 30 TTABVUE 25.

¹⁷ Petitioner is Pointivity, but it is clear from Mr. Erickson's testimony that he views Pointivity and ChannelCloud as separate divisions.

¹⁸ 30 TTABVUE 31.

¹⁹ 30 TTABVUE 34-35.

Messaging Services.” Thus, the record shows that Petitioner was using the mark **ChannelCloud** for such hosting services prior to Respondent’s use of its mark for consulting services in the field of cloud computing, and Petitioner has priority for these particular services.²⁰

Likelihood of Confusion

Turning now to the issue of likelihood of confusion, our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence relevant to the factors bearing on the likelihood of confusion issue. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

The parties agree that the marks in question are identical. Therefore, we find that the first *du Pont* factor weighs heavily in Petitioner’s favor.

With respect to the services, Petitioner, in its brief, relies on the recitation in its application, and asserts that Petitioner’s identified consulting services in the field of cloud computing are identical to Respondent’s consulting services in the field of cloud computing. However, as noted *supra*, Petitioner may rely in this proceeding only on its common law rights, which arise

²⁰ We add that the record does not show that Petitioner made prior use of its mark for consulting services in the field of cloud computing. Although Mr. Erickson testified that “quite a lot” of consulting was being done as early as 2008, 30 TTABVUE 31-32, it is clear from his testimony that he interpreted “consulting” as providing business information to Petitioner’s partners, rather than “consulting services in the field of cloud computing” as that identification in Respondent’s registration is understood.

through use.²¹ Thus, Petitioner's services are restricted to those for which it has proven priority of use of its mark.

Petitioner has shown prior common law use of its mark **ChannelCloud** for hosted email services, hosting software of others and instant messaging services, as noted *supra*. However, Petitioner has not shown that these services are related to Respondent's services. Petitioner's argument regarding the *du Pont* factor of the similarity of the services is limited to the fact that both are listed in the identification of services of their respective application and registration. As discussed, this argument has no merit because Petitioner cannot rely on its application. With respect to the services for which Petitioner has actually shown use, Petitioner points to no evidence or testimony to show that these services are related to Respondent's. We recognize that both Petitioner's and Respondent's services are in the field of cloud computing, but given that cloud computing, like computers and the Internet, is fast becoming ubiquitous, the fact that Petitioner's and Respondent's services both involve cloud computing in some manner is not a sufficient basis on which to find the services to be related. *See Electronic Data Systems Corp. v. EDSA Micro Corp.*, 23 USPQ2d 1460, 1463 (TTAB 1992); *Reynolds & Reynolds Co. v. I.E. Systems Inc.*, 5 USPQ2d 1749, 1751 (TTAB 1985). Thus, Petitioner has failed to show that its services for which there is

²¹ A plaintiff may also rely on the constructive use conferred by the filing date of its application, contingent on the registration issuing, but that is not applicable to the present case because Petitioner's application was filed after the constructive use date conferred by the filing of Respondent's underlying application.

evidence of use of its mark are similar to Respondent's consulting services. The *du Pont* factor of the similarity or dissimilarity of the services favors Respondent.

With respect to the *du Pont* factor regarding trade channels, in its brief Petitioner argues that because Petitioner and Respondent both list "consulting services in the field of cloud computing" in their respective application and registration, Petitioner's and Respondent's services are presumed to be marketed and travel in the same channels of trade. Again, this argument fails because Petitioner has not shown that it made prior use of the mark **ChannelCloud** in connection with consulting services.

However, there is evidence regarding Petitioner's trade channels. Mr. Erickson testified that its clients are "other computing resellers, systems integrators" to whom Petitioner offers "a cloud-based computing platform that they are able to then resell and offer to their clients."²² Petitioner markets its services through email, speaking engagements, webinars, membership groups, other consultants, white papers, blog articles and partnerships.²³ Petitioner also stated that "Petitioner provides cloud-based application hosting to IT companies to sell and provide to their clients." Response to Interrogatory #5, 21 TTABVUE 48.

Respondent's services, as listed in the identification in its registration, are "consulting services in the field of cloud computing." There are no restrictions

²² 30 TTABVUE 25.

²³ 30 TTABVUE 132.

in the channels of trade for the services, and therefore we must deem the services to travel in all appropriate channels of trade. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905 (Fed. Cir. 2012). Because consulting services in the field of cloud computing can be rendered to anyone that has a need for cloud computing, and because Petitioner's services are rendered to businesses that also use cloud computing, to this extent there is an overlap in trade channels. However, there is no evidence that the employees or department within a business that requires consulting services in the field of cloud computing would be the same employees or department that would seek or obtain hosted email services, hosted share point services, and instant messaging services. *See Electronic Design & Sales, Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388 (Fed. Cir. 1992). Thus, we treat this *du Pont* factor as neutral, or favoring Petitioner only slightly.

To the extent that there is an overlap in channels of trade, that overlap would only involve careful and sophisticated consumers. Because Petitioner's channels of trade are limited to the channels in which it has shown it has used its mark, those are the only customers that would be common to both parties. Petitioner's customers are described as "partners" who act as resellers for its various services. Mr. Erickson testified that in 2008 "most of those partners were paying in excess of \$20,000, which was probably the most expensive partnership program out there in the computing industry." 30

TTABVUE 31. Thus, the *du Pont* factor of the conditions of purchase favors Respondent.

Finally, although neither party addressed this in their briefs, the strength of Petitioner's mark must be considered in assessing the likelihood of confusion. The evidence shows that the individual elements of the mark **ChannelCloud** are highly suggestive or descriptive. "Channel" appears to be a term of art in this industry. Both Petitioner and Respondent use "channel" in reference to their services. Petitioner stated in its response to Respondent's Interrogatory #1 that it chose its mark because its "business activities consist of enabling their channel clients to sell cloud services to their customers." 21 TTABVUE 47. Respondent's witness Aman Sehgal gave the following testimony about Respondent's business:

We were – as "ChannelVission" the word itself means, it talks about channel. Our main focus was how to improvise [sic] the channels for a lot of multibillion-dollar corporations that I have also worked for in the past. ...
So the services that we had provided were to deal with bringing those services – bringing those channels to be a lot more effective for vendors or for these multibillion-dollar companies.²⁴

As for "cloud," there is no question that it is descriptive, if not generic, of services involving cloud technology.

Petitioner's mark, **ChannelCloud**, is highly suggestive of its services. When asked how Petitioner came up with the trademark, Mr. Erickson provided the following response:

²⁴ 22 TTABVUE 82.

You can name something ... a name that really doesn't have any connection ... or you can choose a name that in a sense speaks exactly to what the service or the product is.

In this case, **ChannelCloud** was exactly the two words that we were targeting. It was the computing channel and a cloud offering, and like I say, it speaks exactly to it. And somebody in the channel, in the computing channel would know instantly what the – we would have to do no – education. They would see immediately what the offering and what the – what we are in the marketplace.²⁵

As such, we find that Petitioner's mark **ChannelCloud** mark is not strong, and that this *du Pont* factor favors Respondent.

The parties have not presented argument or evidence on the remaining *du Pont* factors and we therefore treat them as neutral. When we weigh the relevant *du Pont* factors for which there has been argument or evidence, we find that Petitioner has failed to meet its burden of proving likelihood of confusion. The lack of proof as to the relatedness of the services, coupled with the sophistication and care of the purchasers and the lack of strength of Petitioner's mark, outweigh the fact that the marks are identical.

Decision: The petition for cancellation is dismissed.

²⁵ 30 TTABVUE 26.