

UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL APPEAL BOARD

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MAGNADYNE CORPORATION )

Opposer )

Vs. )

MOVIEVISION, INC, )

Applicant )

Opposition No. 91175280

Serial No 76/655,958

Mark:

MOVIE  
VISION

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APPLICANT'S MAIN BRIEF



02-17-2009

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Polaroid Co. v. Polarad Electronics Co. (2nd Cir. 1961)

Hormel Foods Corp. v. Jim Henson Prods., 73 F.3d 497 (2d Cir. 1996)

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(S.D.N.Y.1992),

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Kohler Co. v. Moen Inc., 12 F.3d 632 (C.A.7 (Ill.), 1993)

Caterpillar Inc. v. Walt Disney Co., 287 F.Supp.2d 913, 919 (C.D.Ill.2003)

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1 Does Applicant's proposed mark MOVIEVISION for:

2  
3 "pay-per-view television transmission services featuring recently released movies in  
4 English, Spanish, Cantonese and Russia via cable," in International Class 38,  
5  
6 so resemble Opposer's previously used and registered marks MOVIE VISION and  
7 MOVIE VISION MV for:

8  
9 "video entertainment systems for vehicles; namely, electronic audio, video and video  
10 game components in the nature of video cassette tape players, digital video disk  
11 players, video game players and television receivers with video display devices," in  
12 International Class 9,

13  
14 that confusion would be likely to result from Applicant's use of MOVIEVISION in  
15 commerce in connection with the services specified in its application?

16 Applicant's answers: No  
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1 Argument in support

2 §2(d) Legal Standards

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4 The likelihood of confusion determination is a question of law based on the underlying  
5 factual determination Recot, inc v. M.C. Becton, 214 F.3d 1326, 54 USPQ2d 1894,  
6 1896 (fed Cir. 2000) In deciding whether consumers are likely to be confused, the  
7 courts will typically look to a number of factors, including: (1) the strength of the mark;  
8 (2) the proximity of the goods; (3) the similarity of the marks; (4) evidence of actual  
9 confusion; (5) the similarity of marketing channels used; (6) the degree of caution  
10 exercised by the typical purchaser; (7) the defendant's intent. Polaroid Co. v. Polarad  
11 Electronics Co. (2nd Cir. 1961)  
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15 In deciding this case, the court must question the strength of the mark; how well  
16 known is the product, what share of the mark place does this product hold and how long  
17 had the mark been used. In the case of Hormel Foods Corp. v. Jim Henson Prods., 73  
18 F.3d 497 (2d Cir. 1996) the court stated

19 There is little doubt that SPAM is a distinctive, widely recognized  
20 trademark. Hormel has sold over five billion cans of its luncheon meat  
21 under the SPAM mark and invested millions of dollars in advertising. As  
22 a result, Hormel has a 75 percent share of the canned meat market and  
23 SPAM is eaten in 30 percent of all American homes. Thus, SPAM truly  
24 is a household name.

25 In this case the Opposer's mark is not strong, the mark Movie vision is not a widely  
26 recognized trademark nor do they hold a full 1% of the mark place. When in search of a  
27 product carried by Movie Vision such as a "10.0" widescreen" a diligent search would  
28 result in a list of competitors such as Matsunichi, Coby, Photoblitz, Impecca, and alpine

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In deciding this case, the court must question the strength of the mark; how well known is the product, what share of the mark place does this product hold and how long had the mark been used. In the case of Hormel Foods Corp. v. Jim Henson Prods., 73 F.3d 497 (2d Cir. 1996) the court stated

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1 all maker of that product. Nevertheless if Plaintiff's mark was strong, the court also said  
2 "In the usual trademark case, such an undeniably strong mark would be a factor  
3 favoring the trademark plaintiff. The more deeply a plaintiff's mark is embedded in the  
4 consumer's mind, the more likely it is that the defendant's mark will conjure up the  
5 image of the plaintiff's product... However, this does not always lead to confusion. As  
6 then District Judge Leval explained in Yankee Publishing Inc. v. News America  
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8 Co. v. Polarad Electronics Co. (2nd Cir. 1961) the court said ... "Here plaintiff's mark is a  
9 strong one and the similarity between the two names is great, but the evidence of actual  
10 confusion, when analyzed, is not impressive. . . ."  
11 Further Trademark protection is dependent only on public reaction to the trademark in  
12 the marketplace Kohler Co. v. Moen Inc., 12 F.3d 632 (C.A.7 (Ill.), 1993)  
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17 **When considering the proximity of the goods,**

18  
19 we find that this case is like the case of Universal City Studios, Inc. v. Nintendo Co.,  
20 746 F.2d 112 (2d Cir.1984) The marks are dissimilar in practice by the fact that  
21 Applicant and Opposer occupy distinct merchandising markets. The Opposer's would  
22 merchandise his products in magazines such as audio electronic, shows for car  
23 enthusiasm such as Electronic Entertainment Expo's and any place where consumer  
24 would be interested in "car gadget" Although Applicant would enjoy having such a large  
25 marking place the truth of the matter is that her consumer would most likely not be  
26 found in such market. Unlike the wide range of market the Opposer enjoy, the Applicant  
27 would only market to T.V. watchers and movie goers.  
28

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1 **similarity of the marks**

2  
3 When considering the similarity of the marks the court stated ...”an inquiry into the  
4 degree of similarity between two marks does not end with a comparison of the marks  
5 themselves.... 'the setting in which a designation is used affects its appearance and  
6 colors the impression conveyed by it.'... In this connection, placement of the marks next  
7 to other identifying but dissimilar symbols is clearly relevant.

8 The Opposer’s mark is a black rectangle with a circle containing two zig-  
9 zag lines and the words Movie Vision printed in white ink. Whereas the  
10 Applicant’s mark is the letters Movievision printed in an upward arc shape which  
11 is common in cinema to indicate that the word is going around. An example  
12 would be as the mark of universal Studios whereas the name Universal Studios  
13 go around a picture of the globe. Currently the Opposer’s mark do not conjure  
14 up any product association; however the Applicant’s mark conjure up the ideal  
15 of television or theater because of the upward arc shape made popular by  
16 Universal Studios.

17  
18 Evidence of actual confusion:

19  
20 Currently there is no actual confusion between these two companies based  
21 primarily on the fact that Opposer’s main business, as sited on their company  
22 web site, is “...automotive electronics and wireless industry...vehicle security  
23 systems, wireless products, mobile video and high-performance car audio  
24 products...” This suggests that Opposer is in the business of providing  
25 hardware. Opposer’s clientele are specific industry professionals and resellers  
26 as opposed to general public. Applicants main business is providing video  
27 streams much like CNN or HBO on a similar platform of Pay-Per-View movies.  
28 Applicant does not sell the actual box to view such videos and would not be

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The Opposer's mark is a black rectangle with a circle containing two zig-zag lines and the words Movie Vision printed in white ink. Whereas the Applicant's mark is the letters Movievision printed in an upward arc shape which is common in cinema to indicate that the word is going around. An example would be as the mark of universal Studios whereas the name Universal Studios go around a picture of the globe. Currently the Opposer's mark do not conjure up any product association; however the Applicant's mark conjure up the ideal of television or theater because of the upward arc shape made popular by Universal Studios.

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1 confused by the aforementioned industry professionals to which Opposer  
2 obtains their revenue.

### 3 4 **Similarity of trade channels**

5 While the Opposer describe its consumer as "anyone who would like to watch a  
6 movie" to make it's case the description cannot be accurate. To make such an  
7 conclusion is to state that any person who goes to the movies has "cable and  
8 subscribe to additional pay per view channels" further any person who has a  
9 television set is a subscriber to a pay service such as cable.

10  
11 According to subsections 14(1) and 14(2) of the Trade Marks Act 1995. They  
12 are directly equivalent to the expressions "same goods" or "goods of the same  
13 description" and "same services" and "services of the same description". The  
14 expression "similar goods" is defined in note 2 of §44(1) of the Act, Here the Act  
15 confined that goods are similar to other goods if they are the same as the other  
16 goods, or if they are of the same description as that of the other goods. The  
17 Opposer;s products would be defined as entertainment systems for vehicles  
18 where the Applicant's would be describe as pay per view movies. Clearly  
19 according to the definition they are not the same and their class of consumer is  
20 not the same. Applicant is limited to consumers who has subscribed to a pay  
21 service such as cable, whereas the Opposer's consumer is any class of person  
22 who own a vehicle.

23  
24 The Opposer would like to convince this body that there may be some  
25 confusion with an average consumer who want to watch a movie and a  
26 consumer who want to purchase a video entertainment systems for vehicles;  
27 namely, electronic audio, video and video game components in the nature of  
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## INFORMATION SHEET FOR PROOF OF SERVICE BY FIRST-CLASS MAIL—CIVIL

(This information sheet is not part of the Proof of Service and does not need to be copied, served, or filed.)

**NOTE:** This form should **not** be used for proof of service of a summons and complaint. For that purpose, use *Proof of Service of Summons* (form POS-010).

Use these instructions to complete the *Proof of Service by First-Class Mail—Civil* (form POS-030).

A person over 18 years of age must serve the documents. There are two main ways to serve documents: (1) by personal delivery and (2) by mail. Certain documents must be personally served. You must determine whether personal service is required for a document. Use the *Proof of Personal Service—Civil* (form POS-020) if the documents were personally served.

The person who served the documents by mail must complete a proof of service form for the documents served. **You cannot serve documents if you are a party to the action.**

### INSTRUCTIONS FOR THE PERSON WHO SERVED THE DOCUMENTS

The proof of service should be printed or typed. If you have Internet access, a fillable version of the Proof of Service form is available at [www.courtinfo.ca.gov/forms](http://www.courtinfo.ca.gov/forms).

Complete the top section of the proof of service form as follows:

First box, left side: In this box print the name, address, and telephone number of the person for whom you served the documents.

Second box, left side: Print the name of the county in which the legal action is filed and the court's address in this box. The address for the court should be the same as on the documents that you served.

Third box, left side: Print the names of the Petitioner/Plaintiff and Respondent/Defendant in this box. Use the same names as are on the documents that you served.

First box, top of form, right side: Leave this box blank for the court's use.

Second box, right side: Print the case number in this box. The case number should be the same as the case number on the documents that you served.

Complete items 1–5 as follows:

1. You are stating that you are over the age of 18 and that you are not a party to this action. You are also stating that you either live in or are employed in the county where the mailing took place.
2. Print your home or business address.
3. Provide the date and place of the mailing and list the name of each document that you mailed. If you need more space to list the documents, check the box in item 3, complete the *Attachment to Proof of Service by First-Class Mail—Civil (Documents Served)* (form POS-030(D)), and attach it to form POS-030.
4. For item 4:  
Check box a if you personally put the documents in the regular U.S. mail.  
Check box b if you put the documents in the mail at your place of business.
5. Provide the name and address of each person to whom you mailed the documents. If you mailed the documents to more than one person, check the box in item 5, complete the *Attachment to Proof of Service by First-Class Mail—Civil (Persons Served)* (form POS-030(P)), and attach it to form POS-030.

**At the bottom, fill in the date on which you signed the form, print your name, and sign the form. By signing, you are stating under penalty of perjury that all the information you have provided on form POS-030 is true and correct.**

ATTORNEY OR PARTY WITHOUT ATTORNEY <i>(Name, State Bar number, and address)</i> :   TELEPHONE NO. _____ FAX NO. <i>(Optional)</i> _____ E-MAIL ADDRESS <i>(Optional)</i> _____ ATTORNEY FOR <i>(Name)</i> : _____	FOR COURT USE ONLY
<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF</b>  STREET ADDRESS _____ MAILING ADDRESS: _____ CITY AND ZIP CODE: _____ BRANCH NAME: _____	
PETITIONER/PLAINTIFF: _____  RESPONDENT/DEFENDANT: _____	
<b>PROOF OF SERVICE BY FIRST-CLASS MAIL—CIVIL</b>	CASE NUMBER: _____

*(Do not use this Proof of Service to show service of a Summons and Complaint.)*

1. I am over 18 years of age and not a party to this action. I am a resident of or employed in the county where the mailing took place.
2. My residence or business address is: 14029 S Hawthorne Blvd  
Hawthorne, CA 90250  
310 679-9798
3. On *(date)*: 2/10/09 I mailed from *(city and state)*: Hawthorne, CA 90250  
the following documents *(specify)*: Applicant brief

The documents are listed in the *Attachment to Proof of Service by First-Class Mail—Civil (Documents Served)* (form POS-030(D)).

4. I served the documents by enclosing them in an envelope and *(check one)*:
  - a. **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid.
  - b.  **placing** the envelope for collection and mailing following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.
5. The envelope was addressed and mailed as follows:
  - a. **Name** of person served: Tony Bland
  - b. **Address** of person served:

The name and address of each person to whom I mailed the documents is listed in the *Attachment to Proof of Service by First-Class Mail—Civil (Persons Served)* (POS-030(P)).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 2/10/09\*

Tony Bland \_\_\_\_\_

(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

\_\_\_\_\_

(SIGNATURE OF PERSON COMPLETING THIS FORM)

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  - b. Address of person served:

**PO BOX 1451**  
**ALEXANDRIA, VIRGINIA 22313-1451**

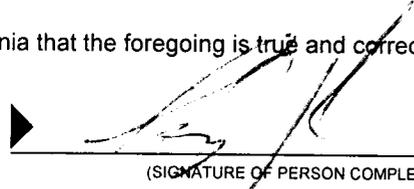
The name and address of each person to whom I mailed the documents is listed in the Attachment to Proof of Service by First-Class Mail—Civil (Persons Served) (POS-030(P)).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 2/10/09\*

Tony Bland

(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

  
 \_\_\_\_\_  
 (SIGNATURE OF PERSON COMPLETING THIS FORM)

1 video cassette tape players, digital video disk players, video game players and  
2 television receivers with video display devices.

3  
4 **Applicant's intent:**

5  
6 This factor weighs in favor of the Applicant as there is no evidence in that the  
7 Applicant intended to confuse the public. Although proof of bad intent is not  
8 required for success in a trademark infringement or unfair competition claim, the  
9 absence of such intent is a factor to be considered. See Caterpillar Inc. v. Walt  
10 Disney Co., 287 F.Supp.2d 913, 919 (C.D.Ill.2003) (stating that the absence of  
11 bad intent on the part of the defendant "troubles the Court"). Applicant did not  
12 intend to confuse the public into thinking that Applicants product was that of  
13 Opposer's in an effort to receive some gain from Opposer's specific and special  
14 clientele.

15 **V. Conclusion**

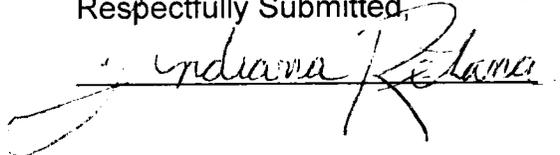
16 Based on the foregoing analysis, a likelihood of confusion does not exist  
17 between Applicant's proposed MOVIEVISION trademark and Opposer's.

18 Opposer will not be harmed if Application Serial No. 76/655,958 is  
19 granted registration.

20 Accordingly, Application respectfully requests the Board to determine  
21 there is not to be a likelihood of confusion, and deny the opposition.

22 In the alternative, Applicant requests that the Board remand the subject  
23 application to the Examining Attorney for a complete examination supported a  
24 written record.

25 Respectfully Submitted, 2/10/05

26   
27  
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