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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91175280
Party	Plaintiff Magnadyne Corporation
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UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

MAGNADYNE CORPORATION

Opposer,

v.

Opposition No. 91175280
Serial No. 76/655,958
Mark: MOVIEVISION

MOVIEVISION, INC.

Applicant.

OPPOSER'S REPLY BRIEF

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I. REPLY

Magnadyne Corporation (“Opposer”) submits the following reply to Movievision Inc.’s (“Applicant”) Main Brief.

A. The Record

Applicant has not objected to Opposer’s Statement of the Record or Opposer’s evidence submitted therewith. The Applicant has not submitted any evidence in support of its position that its application is not likely to cause confusion with Opposer’s incontestable marks, nor has Applicant submitted any evidence to rebut Opposer’s position.

As Applicant has failed to make any relevant, supported legal arguments against Opposer’s claims of priority and likelihood of confusion, and its assertions are unsupported by any evidence, Opposer respectfully requests that the Board sustain the opposition.

B. 2(d) Factors Considered

In lieu of rebutting Opposer’s position on the relevant *DuPont* factors, Applicant erroneously states that “the court will typically look to a number of factors, including: (1) the strength of the mark; (2) the proximity of the goods; (3) the similarity of the marks; (4) evidence of actual confusion; (5) the similarity of the marketing channels used; (6) the degree of caution exercised by the typical purchaser; (7) the defendant’s intent,” citing *Polaroid Co. V. Polarad Electronics Co.* (2d Cir. 1962), and proceeds to analyze this matter under the *Polaroid* factors.

Foremost, the “strength” of Opposer’s mark is not at issue. Although the fame of the prior mark may be considered under *DuPont*, if relevant, the factors of similarity of the marks and relatedness of the goods may dominate the inquiry. *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1336, 57 USPQ2d 1557, 1559 (Fed. Cir. 2001). See also *In re Dixie Rests., Inc.*, 105

F.3d 1405, 1406-07, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997) (“any one of the factors may control a particular case”). In this case, the marks are identical. Furthermore, Applicant has not submitted any evidence in support of its claim that “the Opposer’s mark is not strong.” This totally unsupported argument is irrelevant and should not be considered by the Board.

In addition, in arguing that the parties’ marks are not similar, Applicant appears to argue that its mark is *more* similar to Universal Studio’s Globe Design, stating that “Applicant’s mark conjure up the ideal of television or theater because of the upward arc shape made popular by Universal Studios.” However, any similarities that Applicant’s mark may bear to third-party marks do not diminish its overall similarity to Opposer’s mark. For the convenience of the Board, the parties’ marks are reproduced below:

MOVIE VISION



Opposer’s Marks



Applicant’s Mark

Applicant also states that there is no actual confusion between the parties. However, the subject application is based on intent-to-use, and although the length of concurrent use without evidence of actual confusion may be considered under *DuPont*, this factor is not relevant where the opposed application is not yet in use. *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1547, 14 USPQ2d 1840 (Fed. Cir. 1990) (unnecessary to show actual confusion in establishing likelihood

of confusion). Moreover, Applicant has not properly made of record any affidavit or evidence in support of its claim that there is no actual confusion. As such, this point is not only irrelevant, but should not be considered by the Board.

Regarding the trade channels, the Applicant agrees that “there may be some confusion with an average consumer who want to watch a movie and a consumer who want to purchase a video entertainment systems for vehicles.” Opposer’s position regarding the similarity of the trade channels was fully briefed in its January 12, 2009 Main Brief.

Finally, regarding intent, Applicant cites *Caterpillar Inc. v. Walt Disney Co.*, 287 F. Supp.2d 913 (C.D. Ill. 2003) in support of Applicant’s position that Applicant’s lack of bad intent weighs in its favor. However, this is not a suit for trademark infringement but an opposition to a trademark application, seeking a determination as to whether Applicant is entitled to registration of the subject application. Applicant’s apparent claim – unsupported by any affidavit properly submitted for the record – that it did not have an intent to confuse the public into thinking that its product was that of Opposer’s, is irrelevant in this proceeding.

C. Improper Service

Every paper filed in the Patent and Trademark Office in inter partes cases must be served upon the other party. 37 CFR 2.119. “The Board will accept, as prima facie proof that a party filing a document in a Board inter partes proceeding has served a copy of the document upon every other party to the proceeding, a statement **signed by the filing party**, or by its attorney or other authorized representative, clearly stating the date and manner in which service was made. ” TBMP 113.03 (“Manner of Service”) (**emphasis added**). Applicant attached to its Main Brief a “Proof of Service” form from the Superior Court of California, signed by a Tony Bland. Moreover, it does not appear as though the Applicant provided the Board with such a document indicating service on the

Applicant. As such, this reply brief is the only confirmation for the Board that Opposer received Applicant's brief, although late. Applicant's Main Brief indicates that it was signed and sent out on February 10, 2009, the deadline for Applicant to submit its Main Brief. However, the Board and Opposer did not receive Applicant's Main brief until February 17 and 18, 2009, respectively. In comparison, the Board received Opposer's Testimony on February 12, 2009, two days after it was sent via First Class Mail.

Applicant has not complied with the Board's service requirements. Therefore, the Board need not consider Applicant's Main Brief in this proceeding. "When a party to an inter partes proceeding before the Board files a document required by 37 CFR § 2.119(a), to be served upon every other party to the proceeding, **proof that the required service has been made ordinarily must be submitted before the filing will be considered by the Board.**" TBMP 113.02 ("Requirement for Proof of Service") (**emphasis added**).

II. CONCLUSION

The marks are identical. The Examining Attorney's initial refusal was well-founded and should have been maintained. Given 1) that the Applicant's mark is identical to the marks covered by Opposer's incontestable registrations, 2) the relatedness of the goods/services, 3) and the parties are in agreement as to possible confusion in the channels of trade, confusion would be likely to result from Applicant's registration and use of MOVIEVISION.

Accordingly, Opposer respectfully requests the Board to determine there to be a likelihood of confusion, and sustain the opposition.

Respectfully submitted,

BROOKS KUSHMAN P.C.

A handwritten signature in black ink, appearing to read "Hope Shovein". The signature is written in a cursive style with a large initial "H" and a long, sweeping tail.

By: _____

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Dated: February 25, 2009

CERTIFICATE OF SERVICE

I certify that I served:

OPPOSER'S REPLY BRIEF

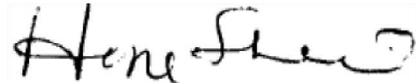
on February 25, 2009 by:

- delivering
- mailing (via First-Class mail)

a copy to:

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Applicant



HOPE V. SHOVEIN