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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Magnadyne Corporation  
v.  
Movievision, Inc.

Opposition No. 91175280  
to application Serial No. 76655958  
filed on March 2, 2006

Hope V. Shovein of Brooks Kushman P.C. for Magnadyne Corporation.

Movievision, Inc. *pro se*.

Before Grendel, Mermelstein and Bergsman, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Movievision, Inc. ("applicant") filed an intent-to-use application for the mark MOVIEVISION and Design, shown below, for services ultimately identified as "pay-per-view television transmission services featuring recently released movies in English, Spanish, Cantonese, and Russian via cable," in Class 38.

The logo for MovieVision, featuring the word "Movie" in a bold, sans-serif font and "Vision" in a similar font, with a stylized "V" that has a vertical line through it.

Magnadyne Corporation ("opposer") filed a notice of opposition against the registration of applicant's mark on the ground of priority of use and likelihood of confusion pursuant to Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d).<sup>1</sup> Specifically, opposer alleged that it has used and that it is the owner of two federally-registered marks for MOVIE VISION, in standard character form,<sup>2</sup> and in a logo format, shown below,<sup>3</sup> both for "video entertainment systems for vehicles; namely, electronic audio, video and video game components in the nature of video cassette players, digital video disk players, video game players and television receivers with video display devices," in Class 9, and that applicant's mark is likely to cause confusion with opposer's marks.



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<sup>1</sup> Opposer also alleged that applicant's mark consists of matter which falsely suggests an association with opposer pursuant to Section 2(a) of the Trademark Act of 1946, 15 U.S.C. §1052(a), and that applicant's mark is likely to dilute the distinctive character of opposer's mark under Section 43(c) of the Trademark Act of 1946, 15 U.S.C. §1125(c). However, because opposer did not refer to either of these grounds in its brief, we find that opposer has waived those grounds of opposition.

<sup>2</sup> Registration No. 2518066, issued December 11, 2001; Section 8 and 15 affidavits accepted and acknowledged. Applicant disclaimed the exclusive right to use the word "movie."

<sup>3</sup> Registration No. 2520719, issued December 18, 2001; Section 8 and 15 affidavits accepted and acknowledged. Applicant disclaimed the exclusive right to use the word "movie."

Applicant, in its answer, denied the allegations in the notice of opposition.

The Record

By rule, the record includes applicant's application file and the pleadings. Trademark Rule 2.122(b), 37 CFR §2.122(b). In addition, opposer introduced the following testimony:

1. The testimony deposition of Barry Lawrence Caren, the President and CEO of opposer, with attached exhibits; and,

2. The testimony deposition of Indiana Retana, the President and owner of applicant, with attached exhibits.

Applicant did not introduce any testimony or evidence during its testimony period.

Opposer submitted its brief with evidentiary attachments comprising duplicates of evidence and testimony previously filed during its assigned testimony period. Evidence which was timely filed during the parties' trial periods need not, and should not, be resubmitted. *Life Zone Inc. v. Middleman Group, Inc.*, 87 USPQ2d 1953, 1955 (TTAB 2008); *Entm't Group Ltd. v. Nintendo of Am. Inc.*, 45 USPQ2d 2021, 2022 (TTAB 1998). Opposer seems to be under the impression that attaching previously-filed evidence to a brief (and citing to the attachments, rather than to the original testimony) is a courtesy or a convenience to the

Board. It is neither. When considering a case for final disposition, the entire record is readily available to the panel. Because we must determine whether such attachments are properly of record, Trademark Rule 2.123(1), citation to the attachment requires examination of the attachment and then an attempt to locate the same evidence in the record developed during trial, requiring more time and effort than would have been necessary if citations were directly to the trial record. Accordingly, we did not consider the attachments to the brief. We only considered the evidence that was timely filed during the assigned testimony periods.

Standing and Priority

Barry Lawrence Caren, the President and CEO of opposer, testified that since 1999, opposer has continuously been using the mark MOVIE VISION in connection with the products listed in its federal registrations (*i.e.*, "video entertainment systems for vehicles; namely, electronic audio, video and video game components in the nature of video cassette players, digital video disk players, video game players and television receivers with video display devices").<sup>4</sup> Because applicant proffered no testimony

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<sup>4</sup> Curan Dep., pp. 6-8 and 24. Opposer failed to establish that its pleaded registrations were subsisting pursuant to the requirements of Trademark Rule 2.122(d)(2) (testimony by a witness having knowledge of the current status and title of the registration). Mr. Curan never testified regarding the current status of opposer's pleaded registrations (*e.g.*, Mr. Curan did not testify that the registrations were subsisting, active, live,

regarding the use of its mark, the earliest date on which applicant may rely to establish priority is the filing date of its application (*i.e.*, March 2, 2006).<sup>5</sup> *Mason Engineering v. Mateson Chemical*, 225 USPQ 956, 960 (TTAB 1985) (in the absence of evidence regarding its date of first use, the earliest date of first use on which applicant may rely is the filing date of its application). In view of the foregoing, we find that Mr. Curan's testimony proves both opposer's personal interest in the outcome of the proceeding and opposer's priority of use.

Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d

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etc.). *See Cadence Industries Corp. v. Kerr*, 225 USPQ 331, 332, n.2 (TTAB 1985) (no probative value where testimony established opposer's ownership of the registration, but not the current status).

<sup>5</sup> Ms. Retana, applicant's President, testified that applicant had not rendered any services under the mark. (Retana Dep., p. 6).

1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks").

A. The similarity of the marks in their entirety in terms of appearance, sound, meaning, and connotation.

We turn first to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 9 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1988). In addition, in comparing the marks, we are mindful that the test 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 so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer,

who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Opposer's MOVIE VISION marks and applicant's mark MOVIEVISION and Design mark are very similar. While the marks must be compared in their entireties, in analyzing the similarity or dissimilarity of two marks, there is nothing improper in stating that for rational reasons, more or less weight has been given to a particular feature of a mark. *In re National Data Corporation*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). In the case of marks consisting of words and a design, the words are normally given greater weight because they would be used by consumers to request the products. *See In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); *In re Appetito Provisions Co.*, 2 USPQ2d 1553, 1554 (TTAB 1987).

In this case, the word "MovieVision" is the dominant element of applicant's mark. The design element is merely a stylized presentation of the words. By the same token, the term "Movie Vision" is the dominant portion the opposer's MOVIE VISION and design mark. The design element is subordinate to the term "Movie Vision" and the letters MV reinforce the term "Movie Vision," rather than create a separate commercial impression. In comparing the marks of

the parties, any differences in the way they are displayed is inconsequential. Inasmuch as MOVIE VISION and MOVIEVISION are virtually identical, we find that the marks are substantially similar in terms of their appearance, sound, meaning and commercial impression.

B. The similarity or dissimilarity and nature of the goods and services at issue, as well as the classes of consumers.

Having found that applicant's mark is very similar to opposer's marks, we turn to the similarity or dissimilarity and nature of applicant's proposed "pay-per-view television transmission services featuring recently released movies in English, Spanish, Cantonese, and Russian via cable" and opposer's "video entertainment systems for vehicles; namely, electronic audio, video and video game components in the nature of video cassette players, digital video disk players, video game players and television receivers with video display devices."

It is not necessary that the goods and services be competitive to support a finding of likelihood of confusion. Rather, it is sufficient that the goods and services are related in some manner, or that the circumstances surrounding their marketing are such, that they would be encountered by the same persons in situations that would give rise, because of the marks, to a mistaken belief that they originate from the same source or that there is an

association or connection between the sources of the goods. See *In re Opus One, Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001); *In re Melville Corp.*, 18 USPQ2d 1386, 1387 (TTAB 1991).

Moreover, the greater the degree of similarity between applicant's mark and opposer's marks, the lesser the degree of similarity between the applicant's services and opposer's goods is required to support a finding of likelihood of confusion. *In re Opus One, Inc.*, 60 USPQ2d at 1815; *In re Concordia International Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983). Where, as in this case, the applicant's mark is substantially similar to the opposer's mark, there need only be a viable relationship between the goods and services to find that there is a likelihood of confusion. See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993) ("even when the goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source"); *In re Concordia International Forwarding Corp.*, 222 USPQ2d at 356.

There is very little evidence in this record regarding the relationship between pay-per-view cable services, on the one hand, and video entertainment systems on the other. However, Mr. Curan testified that when a user turns on opposer's MOVIE VISION equipment, the system displays the

legend, "You have now entered Movie Vision."<sup>6</sup> Furthermore, Mr. Curan asserted that opposer's systems are capable of receiving broadcast movies and other programming through an antenna,<sup>7</sup> and that "[c]ontent and usage are more or less the same. People are going to be downloading product via the Internet, via whatever means they can. And that will be played on our units."<sup>8</sup> The "people" referred to by Mr. Curan is "[a]nyone who would like to watch a movie," "ordinary purchasers," "people who buy minivans," "anyone."<sup>9</sup> By the same token, Ms. Retana testified that applicant intends to render its services through cable television providers to cable television subscribers.<sup>10</sup>

In view of the foregoing, we find that purchasers of opposer's video entertainment systems and purchasers of applicant's pay-per-view cable services would overlap and said purchasers would be likely to ascribe a common origin or sponsorship to the goods and services.

C. Balancing the factors.

Because of the similarity of the marks, the similarity of the goods and services, and similarity of the purchasers, we find that applicant's mark MOVIEVISION and Design for "pay-per-view television transmission services featuring

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<sup>6</sup> Curan Dep., p. 12.

<sup>7</sup> Curan Dep., p. 16.

<sup>8</sup> Curan Dep., p. 24.

<sup>9</sup> Curan Dep., pp. 13-14.

<sup>10</sup> Retana Dep., p. 20.

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recently released movies in English, Spanish, Cantonese, and Russian via cable" is likely to cause confusion with opposer's MOVIE VISION marks for "video entertainment systems for vehicles; namely, electronic audio, video and video game components in the nature of video cassette players, digital video disk players, video game players and television receivers with video display devices."

Decision: The opposition is sustained and registration to applicant is refused.