

ESTTA Tracking number: **ESTTA300995**

Filing date: **08/14/2009**

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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Date	08/14/2009
Attachments	opposers response to motion for reconsideration.PDF ( 8 pages )(220295 bytes )

UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL AND APPEAL BOARD

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MAGNADYNE CORPORATION

Opposer,

v.

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

MOVIEVISION, INC.

Applicant.

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**OPPOSER'S RESPONSE TO  
APPLICANT'S MOTION FOR RECONSIDERATION**

Magnadyne Corporation (“Opposer”) submits this response to Movievision Inc.’s (“Applicant”) Motion for Reconsideration from the final Board decision in above identified proceeding. As set forth below, the Board’s holding is correct and well-supported in both fact and law, and Opposer respectfully requests the Board to deny Applicant’s Motion for Reconsideration.

### **I. HISTORICAL BACKGROUND**

Opposer filed a notice of opposition against Applicant’s intent-to-use application for the mark MOVIEVISION (Application Serial No. 76/655,958), based on Opposer’s previously used and registered MOVIE VISION and MOVIE VISION MV trademarks (incontestible U.S. Registration No. 2,518,066, and No. 2,520,719, respectively). Opposer filed the opposition pursuant to §2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d).

On April 9, 2009, the Board sustained the §2(d) opposition. The Board found:

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

*Magnadyne Corporation v. Movievision, Inc.*, April 9, 2009 Opinion, pp. 10-11.

Applicant filed a Request for Reconsideration of the Board’s decision that Applicant’s MOVIEVISION and Design is likely to cause confusion with Opposer’s MOVIE VISION marks. For the foregoing reasons, reconsideration is unwarranted in this case.

## II. ARGUMENT

### A. **Applicant's Motion For Reconsideration Is Unwarranted Because The Board's Ruling Was Not In Error**

Reconsideration is not warranted in this case. According to Section 543 of the TBMP:

Generally, the premise underlying a request for rehearing, reconsideration, or modification under 37 CFR § 2.129(c) is that, based on the evidence of record and the prevailing authorities, the Board erred in reaching the decision it issued. The request may not be used to introduce additional evidence, nor should it be devoted simply to a reargument of the points presented in the requesting party's brief on the case. Rather, the request normally should be limited to a demonstration that, based on the evidence properly of record and the applicable law, the Board's ruling is in error and requires appropriate change.

Based on the evidence of record and the prevailing authorities, the Board did not err in reaching the decision in favor of the Opposer.

The Board correctly considered the factors set forth in *In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). The Board based its determination under § 2(d) on “an analysis of all of the probative facts in evidence that are relevant to the factors bearing on likelihood of confusion.” *Magnadyne Corporation*, p. 5. The Board, relying on *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), stated, “[i]n any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services.” *Magnadyne Corporation*, p. 5.

Applicant argues that the Applicant's MOVIEVISION mark is “highly dissimilar” from Registrant's MOVIE VISION and MOVIE VISION MV registrations. *Applicant's Motion*

*For Reconsideration*, p. 2. The Board found, “the marks [MOVIE VISION and MOVIEVISION] are substantially similar in terms of their appearance, sound, meaning, and commercial impression.” *Magnadyne Corporation*, p. 8. The Board, relying on *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977) and other authorities stated, “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 markets is likely to result.” *Magnadyne Corporation*, p. 6. The Board reasoned, “[i]n comparing the marks of the parties, any differences in the way they are displayed is inconsequential . . . MOVIE VISION and MOVIEVISION are virtually identical.” *Magnadyne Corporation*, pp. 7-8. It is clear that Applicant fails to establish that the Board’s decision was in error in light of proper evaluation of the law and facts in the proceeding.

Applicant additionally argues that the Board’s evaluation of the similarity in goods and services was in error. This argument cannot be supported based on a review of the decision. In the Board’s analysis of the similarities between the nature of the goods and services, the Board found, “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.” *Magnadyne Corporation*, p. 10. Relying on *In Re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993), the Board reasoned, “[w]here, 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.” *Magnadyne Corporation*, p. 9.

In finding on behalf of the opposer, the Board found that Applicant’s services were

closely related to opposer's protected goods and held, "because of the similarity of the marks, the similarity of the goods and services, and the similarity of the purchasers, we find that the applicant's mark MOVIEVISION and Design . . . is likely to cause confusion with opposer's MOVIE VISION marks." *Magnadyne Corporation*, pp.10-11. The Board's decision was based on the evidence properly of record and the applicable law. As such, the Board did not err in its decision issued on April 9, 2009. Applicant fails to establish any error on the Board's part in this proceeding.

**B. Applicant Attempts To Introduce Additional Arguments Without Citation To Supporting Evidence In The Record**

According to Section 543 of the TBMP, "the premise underlying a request for rehearing . . . may not be use to introduce additional evidence." In Applicant's Motion For Reconsideration, Applicant inappropriately makes new arguments with reference to purported evidence that is not of record.

In Applicant's Motion For Reconsideration, Applicant argues, "the words "Movie" and "Vision" or "Movievision" is a generic mark." *Applicant's Motion For Reconsideration*, p. 3. Further, in Applicant's Motion For Reconsideration, Applicant argues, "[i]t has been established that generic marks are not entitled to any protection under trademark law." *Id.* Applicant's request for reconsideration is the first and only time Applicant has raised this issue. The record is devoid of any evidence supporting Applicant's argument.

Applicant also argues that "Applicant's product or service is not, and cannot be made available in [an] individual's vehicle." *Applicant's Motion For Reconsideration*, p. 5. There is no evidence of record that supports this argument. The Board found, based on the evidence of record, because of the substantial similarity of the marks, only a "viable relationship" is required between the goods and services of the Applicant and the Opposer. *Magnadyne Corporation*, p. 9. The Board

found the goods and services at issue met that requirement. *Id.* Notwithstanding the Board's accurate finding with respect to this argument, Opposer submits that, pursuant to Section 543 of the TBMP and 37 CFR § 2.129(c), Applicant's additional arguments are not supported by evidence properly of record, are not in accordance with the applicable law, and do not warrant reconsideration in this proceeding.

**C. Applicant Attempts to Reargue  
Points Presented In Main Brief**

According to Section 543 of the TBMP, "the premise underlying a request for rehearing...may not be used to introduce additional evidence, *nor should it be devoted simply to a reargument of the points presented in the requesting party's brief on the case.*" (*Emphasis added.*) In Applicant's Motion for Reconsideration, Applicant reargues the points argued below that were fairly decided by the Board in accordance with the evidence properly of record and the applicable law.

Applicant attempts to raise again that Applicant's mark, MOVIEVISION "is highly dissimilar" to Opposer's mark MOVIEVISION, and that "[a]lthough these marks use the same words 'movievision', their logo, design, or emblem appear differently." *Applicant's Motion For Reconsideration*, p. 2. Relying on *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999) and *In re Appetito Provisions Co.*, 2 USPQ2d 1553, 1554 (TTAB 1987), the Board explained that when marks consist of words and a design, the words are "given greater weight." *Magnadyne Corporation*, p. 7. The Board appropriately used controlling authority to decide the issue of similarity of trademarks in its opinion on April 9, 2009. No further consideration should be given to Applicant's reargument of this properly decided issue.

**III. CONCLUSION**

Based on the reasons set forth above, Opposer respectfully requests that the Board deny Applicant's Motion for Reconsideration from the Board's well-reasoned and final decision in this case.

Respectfully submitted,

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Dated: August 14, 2009

**CERTIFICATE OF SERVICE**

I certify that I served:

**OPPOSER'S RESPONSE TO  
APPLICANT'S MOTION FOR FOR RECONSIDERATION**

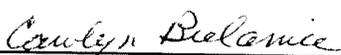
on August 14, 2009 by:

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*Applicant*

  
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