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**THIS DISPOSITION  
IS NOT CITABLE AS PRECEDENT  
OF THE T.T.A.B.**

Paper No. 13  
BAC

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

In re TimeLine Computer Entertainment, Inc., by changes of  
name from TimeLine Studios, Inc.<sup>1</sup>

Serial No. 75/672,214

Miles J. Alexander of Kilpatrick Stockton LLP for TimeLine  
Computer Entertainment, Inc., by changes of name from  
TimeLine Studios, Inc.

Michael H. Kazazian, Trademark Examining Attorney, Law  
Office 113 (Meryl Hershkowitz, Managing Attorney).

Before Simms, Hanak and Chapman, Administrative Trademark  
Judges.

Opinion by Chapman, Administrative Trademark Judge:

TimeLine Computer Entertainment, Inc. (by changes of  
name from TimeLine Studios, Inc.) has filed an application  
to register the mark TIMELINE for "computer game programs  
and video game software" in International Class 9.<sup>2</sup>

<sup>1</sup> The changes of name are recorded at the Assignment Branch of  
this Office at Reel 2053 - Frame 0959, and Reel 2053 - Frame  
0964.

<sup>2</sup> Application Serial No. 75/672,214, filed March 31, 1999, based  
on applicant's assertion of a bona fide intention to use the mark  
in commerce.

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground of likelihood of confusion with the registered mark TIME LINE for "computer programs" in International Class 9.<sup>3</sup>

The refusal has been appealed and both applicant and the Examining Attorney have filed briefs.<sup>4</sup> Applicant did not request an oral hearing.

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

Looking first to the marks, we find that applicant's mark TIMELINE and the cited registered mark TIME LINE are virtually identical. The marks are identical in sound, meaning, and commercial impression, and are very similar in appearance. The deletion of a space between the words does not serve to distinguish these marks. Purchasers are

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<sup>3</sup> Registration No. 1,338,960, issued June 4, 1985, Section 8 affidavit accepted. The claimed date of first use and first use in commerce is May 10, 1984.

<sup>4</sup> Applicant's brief on appeal exceeds the 25-page limit set forth in Trademark Rule 2.142(b)(2) as it includes 22 pages using Arabic numbers and 10 pages using Roman numerals. Some of the Roman numeral pages are the table of contents and the table of authorities, and the Board exercises its discretion to consider applicant's brief. However, applicant would be well advised to note that generally when a party seeks to file a brief over the page limit, it should seek prior leave of the Board to do so.

unlikely to remember that minor difference between the marks due to the recollection of the average purchaser, who normally retains a general, rather than a specific, impression of the many trademarks encountered. That is, the purchaser's fallibility of memory over a period of time must also be kept in mind. See *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); and *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd unpub'd* (Fed. Cir., June 5, 1992).

Applicant argues that "the marks convey very different commercial impressions" because applicant's mark is being marketed<sup>5</sup> "at least initially" (brief, p. 13) with the goods reflecting "the characters, plots and themes found in the novel *TimeLine*" by Michael Crichton" (declaration of Matt Langie, applicant's vice president, business development, paragraph 2), whereas registrant is a company specializing in computer programs designed to maintain the integrity of personal computer systems; and that "given these facts, the commercial impressions of the marks at issue could not be any more different." (Brief, p. 13.) Of course, the Board must consider the similarities/dissimilarities of the marks

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<sup>5</sup> The record shows that applicant has commenced use of the mark *TIMELINE* for "computer game programs and video game software."

as applied for and as registered, and in light of the goods as identified in the respective application and registration, not the actual goods. When the marks TIME LINE and TIMELINE are so considered, the meaning thereof for computer programs and computer game programs is the same. Further, the commercial impressions of the marks TIMELINE and TIME LINE are the same.

Turning then to a consideration of the goods, the Examining Attorney correctly contends that registrant's goods are identified broadly as "computer programs" and thus, encompass all varieties of computer programs, including applicant's specific "computer game programs and video game software."

Our primary reviewing Court has repeatedly held that, when evaluating the issue of likelihood of confusion in Board proceedings regarding the registrability of marks, the Board is constrained to compare the goods and/or services as identified in the application with the goods and/or services as identified in the registration. That is, the Board must look to the registration to determine the scope of the goods (or services) covered thereby. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000) ("Proceedings before the Board are concerned with registrability and not use of a mark.

Accordingly, the identification of goods/services statement in the registration, not the goods/services actually used by the registrant frames the issue.") See also, *In re Dixie Restaurants, Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and *Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

In the case of *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992), the Board found that the cited registrant's goods "computer programs recorded on magnetic disks" would encompass all types or varieties of such computer programs, without any limitation as to the kind of program or the field of use, and certainly including the applicant's more specific type of computer programs. The *Linkvest*, supra, decision has not become outdated; the propriety of interpreting goods identified in this broad manner has not been overruled. Although the USPTO may no longer permit the issuance of registrations with such broad identifications (e.g., "computer programs"), the scope of protection to which earlier registrations with broader identifications are entitled has not been diminished. When faced with the citation of such a registration, an

applicant's recourse lies in seeking partial cancellation of the registration under Section 18 of the Trademark Act.

Accordingly, we find applicant's specific "computer game programs and video game software" to be fully encompassed by the "computer programs" of the cited registration.

Applicant urges that duPont factors beyond the similarities/dissimilarities of the marks and the goods must be considered in determining the issue of likelihood of confusion in this case, and those factors are the following (brief, p. ix):

(1) the marks create different commercial impressions because applicant's mark "to date, has been used solely in connection with" the novel TimeLine;

(2) registrant markets goods "with technical application, which are worlds apart" from the "entertainment" of applicant's computer game programs;

(3) applicant markets and sells its goods to "the typical computer game user who has completely different purchasing motivations" from those who purchase registrant's goods;

(4) there are numerous third-party registrations on the Principal Register using the words "TIME" and "LINE,"

thereby narrowing the scope of protection afforded the registered mark;

(5) there have been no instances of actual confusion;  
and

(6) lack of any wrongful intent on the part of applicant.

The argument that the marks are dissimilar as they create different connotations and commercial impressions was discussed earlier in this decision, wherein we held that TIMELINE and TIME LINE connote the same thing in connection with the involved identified goods, and they create very similar commercial impressions. In addition, we note that applicant offered no limitation in the identification of goods relating to the marketing of the goods in connection with Michael Crichton's novel, TimeLine; and that applicant could change how the goods are marketed and in relation to what they are marketed at any time.

Applicant submitted printouts of pages from the web site of the current owner of the cited registration to show that the assignee of the original registrant company is known for marketing computer programs designed to maintain the integrity of business and personal computer systems (e.g., Norton AntiVirus and Norton Utilities programs).

Applicant contrasts this with its marketing of its computer game programs and video game software, which it asserts are interactive play and entertainment, not work. Further, applicant contends that registrant's goods are targeted to administrators of computer systems, while applicant's goods are targeted to very different purchasers, specifically, computer game and video game players. Applicant concludes that because this case involves different goods, different purchasers and different uses (that is, the two companies sell goods which "have almost nothing in common" (brief, p. 16). there is no likelihood of confusion.

The problem with applicant's analysis is that its identification of goods is not limited in any way as to channels of trade or purchasers, and, as discussed earlier herein, registrant's broad identification encompasses all computer programs including computer game programs. Again, in matters before this Board the only issue is registrability (not trademark infringement, unfair competition, etc.) and the Board must consider the goods and the marks as set forth in the application and in the cited registration. See *Cunningham v. Laser Golf*, supra.

Applicant strenuously argues that the registered mark TIME LINE is a weak mark entitled to a narrow scope of protection because there are numerous third-party

applications and registrations "related to business applications." (Brief, p. 8.)<sup>6</sup> The listing in applicant's brief consists of five registrations and ten applications. Applications have virtually no probative value on the issue of registrability, as they are evidence only of the fact that the applications were filed.

With regard to the weight given to third-party registrations, these registrations are not evidence of use in the marketplace or that the public is familiar with them. Thus, we cannot assume that the public will (presumably) come to distinguish between them. As the Court of Appeals for the Federal Circuit stated in the case of *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992):

Under *Du Pont*, "[t]he number and nature of similar marks in use on similar goods" is a factor that must be considered in determining

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<sup>6</sup> Applicant first made this argument and included a typed listing of registrations in its response to the first Office action. The Examining Attorney did not object to the improper format of these registrations (i.e., typed listing rather than photocopies of the registrations) [see *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230 (TTAB 1992); *Cities Service Company v. WMF of America, Inc.*, 199 USPQ 493 (TTAB 1978); and *In re Duofold Inc.*, 184 USPQ 638 (TTAB 1974)], but rather argued the merits of the probative value of the third-party registrations. In its request for reconsideration applicant referenced one additional third-party registration and several pending applications, but included photocopies of the registrations and applications from USPTO records. For clarity of the record, we have considered the third-party applications and registrations for whatever probative value they may have.

likelihood of confusion. 476 F.2d at 1361, 177 USPQ at 567 (factor 6). Much of the undisputed record evidence relates to third party registrations, which admittedly are given little weight but which nevertheless are relevant when evaluating likelihood of confusion. As to strength of a mark, however, registration evidence may not be given any weight. *AMF Inc. v. American Leisure Prods., Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269 (CCPA 1973) ("The existence of [third party] registrations is not evidence of what happens in the market place or that customers are familiar with them. ...") (Italics emphasis in original.)

Of the five third-party registrations assertedly related to "business applications," one is not for the word *TIMELINE*, but rather it includes the word *TIMELINER*<sup>7</sup>; and three of the registrations are for goods which are not closely related to those involved in this case. Specifically, the goods in three of the third-party registrations are "diaries for personal, business and professional use, appointment books, and engagement pads," and "calendars, appointment books, address books and telephone/address books," both in International Class 16 and both owned by the same entity; and "employee benefit

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<sup>7</sup> Registration No. 2,387,670 issued for the mark *TIMELINER EVENT SEQUENCING SYSTEM* and design (with all the words disclaimed) for "computer software used in broadcast stations to control tape transports, routers, servers, disk recorders and other studio broadcast peripherals."

record keeping services" in International Class 35. We do not find that these goods and/or services are closely related to computer programs or computer game programs.

The fifth third-party registration is Registration No. 1,673,332 for the mark TIMELINE for "computer programs primarily used for financial or accounting purposes and spreadsheet programs." Applicant argues that if the cited registrant's mark for "computer programs" should preclude registration of a similar mark for all other types of computer programs, then Registration No. 1,673,332 would not have issued from the USPTO; and the fact that it did issue (despite the existence of the cited Registration No. 1,338,960) means that the USPTO determined that consumers are not likely to be confused.

The existence of one registration for the mark TIMELINE for financial and accounting computer programs, and no evidence of third-party use, does not establish that the cited registrant's mark is weak, and entitled to a narrow scope of protection. The Board can only speculate as to why Registration No. 1,673,332 issued over Registration No. 1,338,960--whether it was Examiner error, or consent agreement with the earlier registrant, etc. But, in any event, each case must be decided on its own merits, on the basis of the record therein. See *In re Nett*

Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001). See also, In re Kent-Gamebore Corp., 59 USPQ2d 1373 (TTAB 2001); and In re Wilson, 57 USPQ2d 1863 (TTAB 2001).

Applicant has not established that the cited mark is weak. Even if applicant had established that fact, weak marks are still entitled to protection against registration by a subsequent user of the same or similar mark for the same or related goods.<sup>8</sup> See Hollister Incorporated v. Ident A Pet, Inc., 193 USPQ 439 (TTAB 1976).

According to applicant, there have been no instances of actual confusion in approximately one year of coexistence of applicant's mark and the mark in the cited registration. However, there is no evidence of registrant's geographic areas of sales, or the amount of either applicant's or registrant's sales under the respective marks.<sup>9</sup> Further, there is no information from the registrant. In any event, the test is likelihood of confusion, not actual confusion. See Weiss Associates Inc.

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<sup>8</sup> We specifically note that the cited registered mark is on the Principal Register with no disclaimer and no claim of acquired distinctiveness under Section 2(f) of the Trademark Act; and it is, of course, entitled to the statutory presumptions under Section 7(b).

<sup>9</sup> In paragraph 2 of the declaration of Matt Langie, he avers that applicant created a "marketing 'sell sheet'" for its goods and applicant distributed it "to retailers nationwide." There is nonetheless, no evidence of applicant's sales nationwide, or otherwise.

v. HRL Associates Inc., 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990); and In re Kangaroos U.S.A., 223 USPQ 1025 (TTAB 1984).

Applicant's argument that it never had any intent to trade off the goodwill or any other entity, including registrant, is unpersuasive of a different result in this case. As our primary reviewing Court stated in the case of J & J Snack Foods Corp. v. McDonald's Corp., 932 F.2d 1460, 18 USPQ2d 1889, 1891 (Fed. Cir. 1991): "Whether there is evidence of intent to trade on the goodwill of another is a factor to be considered, but the absence of such evidence does not avoid a likelihood of confusion."

Accordingly, upon consideration of all relevant duPont factors, we find confusion likely when applicant uses its TIMELINE mark on the goods as identified in the application.

**Decision:** The refusal to register under Section 2(d) is affirmed.