

**THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB**

Mailed: June 19, 2008

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

Utopy, Inc.  
v.  
CallMiner, Inc.

\_\_\_\_\_  
Opposition No. 91168109  
Opposition No. 91166270

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Rony Sagy, of Sagy Law Associates LLP for Utopy, Inc.

Douglas R. Wolf and Cheryl A. Clarkin, of Wolf, Greenfield & Sacks, P.C., for CallMiner, Inc.

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Before Seeherman, Bucher, and Ritchie de Larena,  
Administrative Trademark Judges.

Opinion by Ritchie de Larena, Administrative Trademark Judge:

CallMiner Inc. filed an application for the mark TOPICMINER in standard character format for "software for analyzing audio data" in International Class 9.<sup>1</sup> CallMiner Inc. also filed an application for the mark CALLMINER in standard character format for "software for converting audio data into searchable text used to uncover trends in agent/customer interactions; software for analyzing

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<sup>1</sup> Application No. 78537660, filed December 23, 2004, under Section 1(b) of the Trademark Act of 1946, 15 U.S.C. §1051(b), alleging a bona fide intent to use in commerce.

Opposition No. 91168109

Opposition No. 91166270

processed audio data used to uncover trends in agent/customer interactions" in International Class 9.<sup>2</sup>

Utopy, Inc., opposed both registrations on the ground of likelihood of confusion under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d).<sup>3</sup> Specifically, opposer alleged that applicant's marks are likely to cause confusion with opposer's SPEECHMINER mark, registered in typed drawing form, for "computer systems, comprising software and hardware, for the analysis of speech, text, and audio events, recorded and/or live, between one or more people and/or with computerized systems, namely, software for spoken dialogue analysis, topic and word spotting, scripted dialogue analysis, speaker verification, speaker separation, analysis of non-linguistic audio events such as pitch, pace of speech, and others, call data recording and display, graphical and non-graphical display of analyzed audio content and associated event timing data, and instruction manuals sold as a unit therewith," in

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<sup>2</sup> Application No. 78280987, filed July 20, 2003, under Section 1(a) of the Trademark Act of 1946, 15 U.S.C. §1051(a), alleging first use and first use in commerce on September 1, 2003.

<sup>3</sup> In both cases, opposer later attempted to amend its pleading to add a claim for likelihood of dilution after trial briefs had been filed. In both cases, the Board denied the request to amend due to the unexplained delay and the resulting prejudice to applicant. Additionally, we have not found the issue to have been tried and therefore we do not deem the pleadings amended per Federal Rule of Civil Procedure, Rule 15(b).

Opposition No. 91168109

Opposition No. 91166270

International Class 9.<sup>4</sup> Applicant denied the essential allegations in both notices of opposition.

We note that opposer moved to consolidate these cases. The motion was opposed by applicant and denied by the Board on the grounds that the testimony periods were already closed in both cases, and that the cases had different evidentiary records. In particular, the Board noted that both parties had taken discovery, and applicant had submitted a testimonial deposition in opposition no. 91168109, whereas opposer had failed to take discovery, and applicant had failed to submit its testimonial deposition, in opposition no. 91166270. However, shortly after the Board issued that order, applicant did submit the testimonial deposition in opposition no. 91166270. The cases have common questions of fact and law, and therefore although we will not consolidate them now, we find it appropriate to consider them together in this decision. See Fed. R. Civ. P. 42(a); TBMP § 511; *8440 LLC v. Midnight Oil Company*, 59 USPQ2d 1541 (TTAB 2001) (opposition and cancellation proceedings consolidated on Board's own initiative). Where our findings are based on the different evidentiary records, we will so note.

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<sup>4</sup> Registration No. 2757525, filed on December 4, 2001, issued on August 26, 2003, claiming first use on April 15, 2001, and first use in commerce December 31, 2001.

Opposition No. 91168109  
Opposition No. 91166270

After considering all arguments and evidence properly submitted by the parties in each of the cases, for the reasons discussed herein, we dismiss both oppositions.

#### Evidentiary Issues

In a Board proceeding, particular documents may be introduced by filing the document(s) accompanied by a notice of reliance.

The notice shall specify the printed publication (including information sufficient to identify the source and the date of the publication) or the official record ...; indicate generally the relevance of the material being offered; and be accompanied by the official record ... whose authenticity is established under the Federal Rules of Evidence, or by the printed publication....  
Trademark Rule 2.122(e).

Exhibits 3 through 8 of Opposer's Notice of Reliance in opposition no. 91168109 and the corresponding Exhibits 5 through 10 of Opposer's Notice of Reliance in opposition no. 91162270 are printouts of web pages. There is no evidence on the face of the documents or in the notice of reliance to indicate that these are printed publications available to the general public in libraries or of general circulation to the relevant public as required by Trademark Rule 2.122(e).

Opposer's Rebuttal Notice of Reliance in both cases also consists of printouts of web pages, which are purportedly the Internet archives for the website associated with the URL [www.speechminer.com](http://www.speechminer.com). These printouts are also

Opposition No. 91168109

Opposition No. 91166270

not printed publications in general circulation and are not properly submitted via a notice of reliance. Applicant objected to the errors in Opposer's Notice of Reliance and Opposer's Rebuttal Notice of Reliance via its trial brief. Opposer responded by trying to authenticate the web printouts via a declaration from its attorney filed with its rebuttal trial brief.<sup>5</sup> The declaration is too little too late. While parties may agree to present testimony by affidavit or declaration, absent such a stipulation (and there is no such stipulation of record), testimony in a Board proceeding must be presented by way of a testimonial deposition, allowing the opposing party an opportunity for cross-examination of the person making the statements. *Boyd's Collection Ltd. v. Herrington & Co.*, 65 USPQ2d 2017 (TTAB 2003); see generally, Trademark Rule 2.123(a)-(b). Moreover, testimony or rebuttal testimony must be taken during the appropriate testimony period; clearly, testimony filed with a reply brief is untimely. Applicant's objection is sustained.

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<sup>5</sup> Opposer also claimed that applicant's objection was untimely according to TBMP 707.02. However, that section specifically references a case sustaining an objection raised for the first time in a trial brief where, as here, web pages were improperly submitted as printed publications. *Colt Industries Operating Corp. v. Olivetti Controllo Numerico S.p.A.*, 221 USPQ 73, 74 n.2 (TTAB 1983) (objection that items submitted by notice of reliance were neither official records nor printed publications raised in brief sustained).

Opposition No. 91168109

Opposition No. 91166270

Opposer, meanwhile, objected in its rebuttal trial brief in both cases to applicant's introduction of third-party trademark registrations and applications for registration containing the term "miner" as "irrelevant" and "inadmissible." On the contrary, we consider the third-party registrations for registration to be quite relevant to the strength of opposer's mark in our likelihood of confusion analysis, and we consider them accordingly.<sup>6</sup> Opposer's objection is overruled.

#### The Record

By operation of law, the record includes the pleadings and the application file. Trademark Rule 2.122(b), 37 CFR §2.122(b). The record also includes the following testimony and evidence. We have indicated those instances in which the evidence was submitted in a particular case, otherwise the evidence was submitted in both proceedings:

#### A. Opposer's Evidence.

##### 1. Notice of Reliance on:

##### a. Status and title copy of its pleaded

registration for SPEECHMINER, registration no.  
2757525.

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<sup>6</sup> Third-party applications have limited probative value, because they show only that the applications were filed. However, we do not consider them to be irrelevant.

Opposition No. 91168109

Opposition No. 91166270

b. Dictionary definitions for the word "topic" (in opposition no. 91168109), "call," "speech," and "utterance" (in opposition no. 91166270).

c. Documents from the trademark file history of CALLMINER, application no. 78280987, and CALLMINE, registration no. 2785121.

d. Applicant's responses to certain of opposer's discovery requests, in opposition no. 91168109.

B. Applicant's Evidence.

1. Notice of Reliance on

a. Third-party trademark registrations and applications for registration containing the term "miner."

b. Opposer's responses to certain of applicant's discovery requests.

2. The testimony deposition of Clifford L.

LaCoursiere, Senior Vice-President for Business Development, and one of the founders of CallMiner Inc., together with exhibits thereto.

Standing

A party has standing to oppose a registration under Section 13 of the Trademark Act of 1946, 15 U.S.C. §1063, if that party can demonstrate that it has a real interest in the proceeding (*i.e.*, a direct and personal stake in the outcome of the proceeding). *Ritchie v. Simpson*, 170 F.3d

Opposition No. 91168109  
Opposition No. 91166270

1092, 50 USPQ2d 1023, 1025-1026 (Fed. Cir. 1999); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). In both of these cases, opposer has submitted status and title copies of its pleaded registration for SPEECHMINER. Therefore, opposer has established its standing to oppose applicant's registration. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 213 USPQ 185 at 189.

#### Priority

Because opposer has made its registration for the SPEECHMINER mark properly of record in both of these cases, Section 2(d) priority is not an issue with respect to the goods identified therein. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974); *B.V.D. Licensing Corp. v. Rodriguez*, 83 USPQ2d 1500, 1506 (TTAB 2007). In addition, in opposition no. 91168109, applicant introduced evidence of opposer's use of the mark SPEECHMINER since 2001, which is prior to the December 23, 2004 filing date of applicant's application, and the earliest date on which applicant may rely. (Oppr's Resp. to Appl's Inter. No. 3 in Opp. No. 91168109).

#### Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are

Opposition No. 91168109

Opposition No. 91166270

relevant to the factors bearing on a 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 or dissimilarities between the marks and the similarities or dissimilarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

The similarity or dissimilarity and the  
strength of the marks

We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). The marks at issue here are SPEECHMINER on the one hand and TOPICMINER and CALLMINER on the other. Each are compound words containing the common word "miner." Visually, the marks are not very similar, since each has a completely different first word, consisting of different letters. For the same reason, the marks do not sound alike.

Opposer argues that the connotation and commercial impression of the marks are alike. To support that contention, opposer submitted in its notices of reliance dictionary definitions of the words "speech," "topic," and

Opposition No. 91168109

Opposition No. 91166270

"call." The American Heritage Dictionary<sup>7</sup> provides, in relevant part, the following dictionary definitions for those three words:

**SPEECH**: **1a.** The faculty or act of speaking. **b.** The faculty or act of expressing or describing thoughts, feelings, or perceptions by the articulation of words. **2.** Something spoken; an utterance. **3.** Vocal communication; conversation. **4a.** A talk or public address: "*The best impromptu speeches are the ones written well in advance*" (Ruth Gordon). **b.** A printed copy of such an address. **5.** One's habitual manner or style of speaking. **6.** The language or dialect of a nation or region: *American speech*.

**TOPIC**: **1.** The subject of a speech, essay, thesis, or discourse. **2.** A subject of discussion or conversation. **3.** A subdivision of a theme, thesis, or outline. See synonyms at subject. **4.** *Linguistics* A word or phrase in a sentence, usually providing information from previous discourse or shared knowledge, that the rest of the sentence elaborates or comments on. Also called *theme*.

**CALL**: **1.** A loud cry; a shout. **2a.** The characteristic cry of an animal. **b.** A sound or an instrument made to imitate such a cry, used as a lure: *a moose call*. **3.** A telephone communication or connection. **4.** Need or occasion:

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<sup>7</sup> American Heritage Dictionary (4<sup>th</sup> ed. 2000). The Board may take judicial notice of dictionary definitions not included in the record. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594, 596 (TTAB 1982) *aff'd* 703 F.2d 1372 (Fed. Cir. 1983).

Opposition No. 91168109

Opposition No. 91166270

*There was no call for an apology. 5. Demand: There isn't much call for buggy whips today. 6. A claim on a person's time or life: the call of duty. 7. A short visit, especially one made as a formality or for business or professional purposes. 8. A summons or invitation.*

Although generally related, the words "speech," "topic," and "call" are not synonymous. Adding the word "miner" to them does not make them magically look or sound the same, nor does it make them automatically confusing. As applicant points out, each of the three marks suggests the purpose of both opposer's and applicant's goods, which is to mine calls for speech and topic (which opposer refers to as the field of "speech analytics"). With these not significantly similar marks, that are at best highly suggestive of the goods in the parties' recitals, we turn to the evidence of third-party use.

Applicant has produced substantial evidence that numerous third parties use and market products containing the word "miner" in the field of speech analytics, indicating that with a crowded field of "mining" products, the relevant consumers will look to other identifying factors. In particular, applicant's trial witness testified to the use of a speech analytics product called "Nexminer" by a company called Nexidia. (LeCoursiere depo. at 82:11-12; 82:24; and exhibit 3 at 4) In the 91168109 proceeding, opposer actually identified Nexidia as one of its three

Opposition No. 91168109

Opposition No. 91166270

closest competitors (Oppr's Resp. to Appl's Inter. No. 12, in opposition no. 91168109) and further admitted to being familiar with the NexMiner product. (Oppr's Resp. to Appl's Req. for Adm. No. 8 in opposition no. 91168109) Another competitor identified by opposer was Verint, (Oppr's Resp. to Appl's Inter. No. 12 in opposition no. 91168109), which also produces a competing product called IntelliMiner.

(LeCoursiere depo. at 80:6-15; 88:11-12; and exhibit 4)

Applicant's witness testified as to the existence and use of other competing products including the term "miner" or a close derivative, including "Dragon Audiomining"

(LeCoursiere depo. at 88:24; and exhibit 5) and "TextMiner."

(LeCoursiere depo. at 89:16-17; and exhibit 6) This use by third parties of the term "miner" substantially weakens both opposer's mark and its argument as to likelihood of confusion. *Empire Nat'l Bank v. Empire of America*, 559 F.Supp. 650, 655, 222 USPQ 518 (W.D. Mich. 1983) (multiple uses of "Empire" discussed in finding mark to be relatively weak).

In addition, applicant submitted evidence of its own mark TRENDMINER along with five other registrations and four other applications all containing the word "miner" for similar services, as follows:

TRENDMINER, registration no. 2945186, for "software for analyzing processed data."

Opposition No. 91168109

Opposition No. 91166270

CHANGEMINER, registration no. 3108744, for, *inter alia*, "computer software for use in data information and document retrieval management."

NEXMINER, registration no. 2928803, for, *inter alia*, "computer software in the field of voice search technology."

DATA MINER, registration no. 2649502, for "computer software for automatic scanning and capture of medical information from electronically stored medical reports."

MEDIAMINER, registration no. 3042214, for, *inter alia*, "computer software for analysis, delivery seaching, measuring or presentation of data for decision support, for transaction analysis, predictive modeling, or for analysis of advertising or marketing data."

STORYMINERS, registration no. 2933359, for "business consulting services relating to customer experience design and management."

KNOWLEDGEMINER, application no. 78778042, for "downloadable software for data modeling, by taking data and creating visual models and outcome prediction based on the data found."

FONEMINER, application no. 78637287, for "software design and support services for data transmission on telecommunications networks."

CHANGEMINER & design, application no. 78740820 for, *inter alia*, "computer software for use in data information and document retrieval, management, and display."

Opposition No. 91168109

Opposition No. 91166270

PROCESSMINER, application no. 78912048 for "a hardware and/or software based system for realtime utilization of industrial databases for process datamining for predictive or alarming control purposes."

These third-party marks show that those in the field consider "mining" to be suggestive or descriptive of the act of searching data. The "PROCESSMINER" application even uses the term "datamining" in its recital of goods, showing that it has a meaning within the relevant industry. We take judicial notice of the following definition for the term "datamining":

DATA MINING: "search for hidden information: the locating of previously unknown patterns and relationships within data using a database application, e.g. the locating of customers with common interests in a retail establishment's database."<sup>8</sup>

Even opposer adds to applicant's argument that "miner" has significance in speech analytics, by acknowledging in the 91168109 proceeding that in settling on the mark SPEECHMINER, opposer first considered a number of other terms containing the word "miner," including "CALLMINER" as

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<sup>8</sup> Encarta® World English Dictionary [North American Edition] © & (P)2007 Microsoft Corporation. All rights reserved. Developed for Microsoft by Bloomsbury Publishing Plc.

Opposition No. 91168109

Opposition No. 91166270

later adopted by applicant.<sup>9</sup> (Oppr's Resp. to Appl's Inter. No. 1 in opposition no. 91168109) We find the evidence of record to be highly probative that opposer's SPEECHMINER mark lacks both inherent and market strength. Of course even weak marks are entitled to protection against registration of confusingly similar marks. See *Giant Food Inc. v. Rosso and Mastracco, Inc.*, 218 USPQ 521 (TTAB 1982) However, we find that applicant's marks are sufficiently different, and opposer's mark is sufficiently weak, for this *du Pont* factor to favor finding no likelihood of consumer confusion.

The conditions under which, and buyers  
to whom, sales are made

Applicant has submitted probative evidence of the high degree of care likely to be exercised in purchasing of the speech analytics products sold by opposer under the SPEECHMINER mark on the one hand and by applicant under the TOPICMINER or CALLMINER marks on the other. Applicant's trial witness has testified that the goods are expensive; they take awhile to purchase; and they are considered by several people in a company before a purchasing decision is made. Each of these elements points to a lessened likelihood of confusion by consumers purchasing the products.

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<sup>9</sup> With this in mind and on the present record, we find credible applicant's explanation that it registered the domain name "speechminer.com" in good faith, while exploring names for its company just as opposer explored using "CALLMINER."

Opposition No. 91168109

Opposition No. 91166270

Applicant's goods average about \$200,000 per installation. (LeCoursiere depo. at 35:1-8; confidential portions redacted; and exhibit 1 at 170-174). With expensive goods, a buyer can be expected to exercise greater care, leading to a lessened likelihood of confusion. *Homeowners Group, Inc. v. Home Mktg. Specialists, Inc.*, 931 F.2d 1100, 18 USPQ2d 1587, 1596 (6<sup>th</sup> Cir. 1991). The typical sales cycle for a speech analytics product averages about four to six months (LeCoursiere depo. at 40:1-3) and involves several meetings between the seller and the purchaser. (LeCoursiere depo. at 39:7-24) Again, there is lessened likelihood of confusion where both buyer and seller are highly involved in the purchase of a product. *Astra Pharm. Prods., Inc. v. Beckman Instr., Inc.*, 718 F.2d 1201, 220 USPQ 786, 790 (1<sup>st</sup> Cir. 1983). For the foregoing reasons, we find that this *du Pont* factor favors finding no likelihood of consumer confusion. In short, the sophisticated purchasers for these goods are not likely to believe that they emanate from a single source merely on the basis that the marks share the common element "MINER."

The similarity or dissimilarity  
and nature of the goods

The products at issue in this dispute are the same or highly related in the field that opposer refers to as "speech analytics." Applicant does not dispute that products sold under its TOPICMINER and CALLMINER

Opposition No. 91168109

Opposition No. 91166270

registrations do or would compete with those sold by opposer under the SPEECHMINER mark, and the goods included in the application recitals are substantially similar.

Accordingly, this *du Pont* factor weighs in favor of finding a likelihood of confusion. However, it is overridden by the weight of the other *du Pont* factors.

#### Balancing the Factors

Considering all of the evidence of record as it pertains to the *du Pont* factors, we conclude that there is no likelihood of confusion since, although the goods are the same or highly related, the marks are not sufficiently similar, opposer's mark is weak, and the conditions of sale show that purchasers are both sophisticated and discriminating.

Decision: The oppositions are dismissed.