

Applicant believes there is no likelihood of confusion between OFFLINE and Offline TV because the marks are directed to goods and services in distinct sectors of a broad industry and cases where the sectors do overlap are significantly different from the present case.

In *Therma-Scan, Inc. v. Thermoscan, Inc.*, 295 F.3d 623 (6th Cir. 2002) the district court concluded that the parties might coexist "in a very broad industry of medical applications of thermology and infrared identification of heat," but that the goods are not so related that any confusion is likely to occur. The circuit court agreed with this analysis because the parties offer goods and services that utilize similar technology, but in very different ways. Moreover, because they market their goods and services to different segments of the population, they do not compete in the marketplace.

Regarding Offline TV and OFFLINE, each operates within entertainment generally. Their operations entail a video game related show and music and concerts, respectively. Entertainment, however, is a very broad industry similar to the medical field. The case above is even more focused than just being in the medical field since it pertained to medical applications of a specific technology. Here, it is very likely that, in addition to providing significantly different entertainment services, Offline TV and OFFLINE target equally different segments of the population. Offline TV targets a very specific, gaming market segment while the specification of OFFLINE dominantly involves music and areas of business only pertaining to those found in the music industry. This is very evident from the Previous Registrant's use of the OFFLINE mark since registration in 2016. Previous Registrant's online presence entails a Facebook profile (<https://www.facebook.com/offline.global>). The Facebook profile shows the OFFLINE mark being used in conjunction with digital albums and digital compilations of albums; most recently

on November 27, 2018. Previous Registrant also has been using the OFFLINE mark in conjunction with an Instagram profile

(<https://www.instagram.com/offline.global/>). The Instagram profile shows the OFFLINE mark being used in conjunction with digital albums, backstage photos, and digital compilations of albums; most recently on August 29, 2019. Previous Registrant's main website is currently not active and hasn't been since 2019 or early 2020 as evident by the "Wabyack Machine".

(https://web.archive.org/web/20200701000000*/offline.global). There is nothing remotely similar to within period of 4 years since registration to show that the OFFLINE mark is or will ever be used in conjunction with the video game industry, e-sports, or any variation thereof.

Another important case to consider is *Learning Internet v. Learn.com, Inc.*, No. CV 07-227-AC, 2009 U.S. Dist. LEXIS 126180 (D. Or. Nov. 25, 2009). Here, the parties' products were arguably related under the broad characterization of educational materials delivered over the Internet. Both the functionality and the customers of the respective products, however, are distinct. One party's technology is used to teach core curriculum to elementary and secondary school students and sold exclusively to teams of K-12 educators. In contrast, the other party's products are used primarily for training and education in the workplace and are sold almost exclusively to business and corporate entities. Again, sharing a broad area of commerce is not determinative. The above case presents a set of facts that shows that the parties operated far more similarly to each other than our set of facts provide. The above two parties both operated within educational materials with the only distinction being one providing their services to K-12 and the other to the workplace. Such a similarity of service is not seen between Offline TV and OFFLINE. The fact that the market segment difference between K-12 and the workplace was enough to weigh against

any likelihood of confusion in this case , despite both parties providing identical services in concept shows that there should be no likelihood of confusion between Offline TV and OFFLINE.

A relevant case is also described in *M2 Software, Inc. v. M2 Communications, Inc.*, 450 F.3d 1378, 1380 (Fed. Cir. 2006). In this case the first party primarily developed and licensed database software used for processing and managing data of major record companies' musical works. The second party is a recording and distribution company that specializes in low-price collections of recorded music that generally licenses the music it distributes from other companies. The court recognized that, at a minimum, both parties distributed music and CDs and thus held that this factor weighed in favor of infringement, however, only slightly so because the genres of the music CDs are very significantly different. Again, the above case presents a situation where both parties operate within a broad area of commerce. While the case above was determined to establish a likelihood of confusion between their activities, this was only slightly made. Having significant differences in genres nearly established no likelihood of confusion. Thus, while musical genres played such a significant role in the above situation, the fact that Offline TV operates in the area of commerce pertaining to video games while OFFLINE predominantly works with music shows that there should be no likelihood of confusion between Offline TV and OFFLINE.

Examiner argues that it is not unusual for parties offering entertainment services related to video games or children's entertainment to also offer computer game software under the same mark. Applicant argues this is only common in particular circumstances such as for video games including Sonic the Hedgehog, Pokémon, and Castlevania, which eventually develop into a cartoon television series to drive further sales for the video game series. Other examples would be cartoon series such as Nature Cat, Clifford, Sesame Street, and Curious George, (<https://pbskids.org/games/>) that have a complimentary video games dedicated to small children

to assist in covertly helping children learn one or more developmental skills. These type of games are typically found on flash or web browsers. The common trend for both of these examples is that the entertainment series and video games are usually linked with cartoon series and developmental age programs but not ordinarily found in areas directed for an older demographic such as Offline TV and OFFLINE which are geared more towards teenagers and adults.

Also video games and entertainment services are so intertwined with branding for their characters, themes, and settings, that it would be impossible to cause a likelihood of confusion between the marks. For instance Examiner has cited “Video Game High School” which is a television series that developed into a web browser video game <https://www.rocketjump.com/channels/vghs-season-1-the-flash-game>. It is clear based on everything included on the website, from the characters, to the font, to the advertisements that the video game is the connected to the show Video Game High School. It is unlikely that anywhere a consumer is able to see the mark that they would not be able to figure out it is related to Video Game High School. This is because of the ecosystem effect. A video game or entertainment series only branches off into a spinoff media format to drive sales back to the original format and this can only be accomplished by using an ample amount of call backs or provided familiarity with the original format so that the consumer feels comfortable and wanting to engage with more content tangentially related to the original format. The spinoff media format is not a replacement for the original format and only grants a temporary sense of enjoyment that can only be replicated by returning to the original format for newer content.

With this in mind if OFFLINE were to develop a video game, the game would be a stark departure from the introspective entertainment series of the everyday life of video game players and content creators. An OFFLINE game could only develop into two types of video games. First,

a video game that allows users to create or reproduce music such as DJ Hero or Rock band. Second, but very unlikely, a video game that focuses on the actual people who are behind the OFFLINE mark such as the producers in a parallel world of their everyday life. These cases would not cause a likelihood of confusion with the Offline TV mark because they would be completely based around a different set of people of whom would be immediately recognizable to a consumer who would be playing the video game. Also the video game would still only be supplementary to the original format thus directing back to the music industry which is in a completely different sector of the entertainment industry. Thus there should be no likelihood of confusion between Offline TV and OFFLINE.