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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85726368
Applicant	WGI Innovations, Ltd.
Applied for Mark	FUZE
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRAIL AND APPEAL BOARD

In Re: WGI Innovations, Ltd.

Application Serial No. 85/726,368

Mark: FUZE

BRIEF OF APPELLANT (Applicant)

On Appeal from the

United States Patent and Trademark Office

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I. INTRODUCTION

As Applicant demonstrates, there is no likelihood of confusion between Applicant's mark and the mark cited (US Registration No. 4,218,170, the "Reference Mark") by the Examining Attorney for a number of reasons, namely 1) the marks have very different commercial impressions, with Applicant's mark reinforcing the outdoors, which is where the goods, game scouting cameras are used by hunters, and the Reference Mark reinforcing a laboratory impression of fusion and 2) the respective goods are very different with Applicant's goods being a specialty product, game scouting cameras, while the Reference Mark's goods are camera accessories (for example cases).

II. DESCRIPTION OF THE RECORD

Before appeal, Applicant introduced into evidence and into the record a number of exhibits. These exhibits are summarized immediately below:

Unnumbered Exhibit - Screen shot of web site of Reference Mark

Exhibit 1	website www.venaticfanatics.com, Article "Trail Camera Theft on the Rise", - security boxes
Exhibit 2	website www.midwestwhitetail.com, Article "Protecting Your Trail Cameras" - boxes
Exhibit 3	website www.callingbears.com, Article "Trail Camera Basics, Tips and More", (6 pages) - metal protective boxes
Exhibit 4	website www.tecomate.com, Article "Six Helpful Trail Camera Tips" - security box-set in tree
Exhibit 5	website www.squidoo.com, Article "Deer Hunting Tips – Game Cameras" (9/23 pages) - protective housing
Exhibit 6	website cheaperthandirt.com, Article "Game Cameras – Money on a Tree" - security lock box
Exhibit 7	website www.basspro.com, Article "Understanding Game Cameras" - security box
Exhibit 8	website www.thearizonahunter.com, Forum "How do you protect your trail camera's?" - lockboxes

Exhibit 9	website discussions.texasbowhunter.com, Forum "What have you done to protect your game camera" - lockboxes
Exhibit 10	website www.nefga.org, Forum "Stolen trail camera" – bear boxes
Exhibit 11	website www.archerytalk.com, Forum "Archery Talk – Trail camera security" – security box
Exhibit 12	website www.onyourownadventures.com, Forum "Hunt Talk – Trail Cam Security" – cam box
Exhibit 13	website www.coueswhitetail.com, Forum "Camera Theft in the Payson Area" – metal camera box
Exhibit 14	website www.texashuntingforum.com, Forum "Texas Hunting Forum – Securing game camera ideas" – security boxes
Exhibit 15	website www.kentuckyhunting.net , Forum "Kentucky Hunting – Stolen camera-New camera suggestions – security boxes
Exhibit 16	website www.amazon.com, Bushnell Bear Safe Security Case,
Exhibit 17	website www.cabelas.com, Bushnell HD Security Case – security case, lockbox
Exhibit 18	website www.amazon.com Camlock Box Moultrie Game Camera Security Box
Exhibit 19	website www.sportsmansguide.com, Moultrie Game Camera Security Box and Tree Mounts
Exhibit 20	website www.uwayoutdoors.com , Python Lock for Trail Cameras/Security Boxes – Camo
Exhibit 21	website www.cheaptrailcameras.com, Cheap Trail Cameras – Bushnell security box,
Exhibit 22	website www.outdoortrailcams.com, Outdoor Trail Cams – security box
Exhibit 23	website www.reconyx.com, Reconyx, – security enclosures, utility box, bear box
Exhibit 24	website www.store.camlockbox.com Bushnell Camlock box– security box
Exhibit 25	website www.camlockbox.com, Digital Trail Camera – security box
Exhibit 26	website www.bestgamecamera.com, Theft box
Exhibit 27	website www.ebay.com, New Game Security Tree Mount Box, Protect Hunting Cameras: Tracking
Exhibit 28	website www.cabelas.com, Reconyx Security Enclosure, Moultrie Mini-Cam Security Box, Wildgame Compact Camera Lockbox, Cuddeback – CuddeSafe mounting unit
Exhibit 29	website www.academy.com, Moultrie Mini Cam Security Box website www.academy.com
Exhibit 30	website www.basspro.com, Bushnell Security Box, Cuddeback Security Box, Moultrie Security Box, Stealth Cam Security Bear Box
Exhibit 31	website www.dickssportinggoods.com, Covert Bear Camera Security Safe, SpyPoint Security Steel Box, SpyPoint Steel Security Box, Stealth Came Security/Bear Box, Cuddeback Camera Protector
Exhibit 32	website www.amazon.com, Moultrie Security Box, 2/5
Exhibit 33	website www.amazon.com, Digital Camera Cases

Exhibit 34 website www.bestbuy.com, Digital Camera Bags
Exhibit 35 website www.crutchfield.com, Digital Camera Cases

An objection to evidence introduced by the Examining Attorney after the appeal is discussed more fully below.

III. STATEMENT OF THE ISSUE

The issue on appeal is whether there is a likelihood of confusion between Applicant's mark, used on or in connection with the stated goods, with the Reference Mark, under Section 2(d) of the Trademark Act.

IV. PROCEDURAL HISTORY

Applicant filed its application to register the mark FUZE on the Principal Register on September 11, 2012. The application was made pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051 et. seq. (the "Trademark Act") based upon Applicant's intent to use the mark in commerce.

The Examining Attorney issued a non-final Office Action on November 26, 2012, refusing registration under Section 2(d) of the Trademark Act, contending that Applicant's mark was likely to be confused with the Reference Mark. Applicant responded on March 8, 2013 and on April 4, 2013, the Examining Attorney issued a final office action, maintaining the likelihood of confusion refusal.

Applicant filed a Request for Reconsideration and a Notice of Appeal on October 3, 2013. The Examining Attorney denied the Request for Reconsideration on November 2, 2013, thereby continuing the appeal.

In the denial of the Request for Reconsideration, the Examining Attorney introduced references purportedly showing that game scouting cameras and camera

cases may be sold by the same entities and are related goods. For the reasons set forth below, Applicant objects to this evidence.

V. OBJECTION TO EVIDENCE

After the appeal was lodged and the Request for Reconsideration filed, the Examining Attorney denied the Request for Reconsideration. Included in the denial was new evidence purportedly showing that game scouting cameras and camera cases may be sold by the same entities and are related goods.

Because this evidence was filed after the appeal, it is untimely and Applicant objects to its introduction into the record. TMEP 710.01(c)

VI. ARGUMENT

The 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 likelihood of confusion issue. *See In re E.I. du Pont de Nemours and Co.,* 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772,* 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.,* 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.,* 105 F.3d 41 USPQ2d 1531 (Fed. Cir. 1997).

The Court in *du Pont* listed over a dozen evidentiary elements and said, "Each may from case to case play a dominant role." supra, pp. 1361-1362. The evidentiary elements of record are:

- The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

- The similarity or dissimilarity and nature of the goods or services as described in the application for registration and in connection with which a prior mark is in use.

- Any other established fact probative of the effect of use.

A. THE MARKS HAVE DIFFERENT COMMERCIAL IMPRESSIONS

In determining the similarity or dissimilarity of marks, the marks are compared in their entireties as to appearance, sound, connotation and commercial impression. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005).

While the word elements of the marks are phonetically similar, the marks convey a different commercial impression that is reinforced by their appearance. Sound is only one factor. TMEP 1201.01(b)(iv), citing *In Re White Swan Ltd.,* 8 USPQ 2d 1534, 1535 (TTAB 1988).

The marks are different in appearance. The Reference Mark is a logo, having a graphical element and a word element. The graphical element, or design, is a model of a molecule and is located to the left of the word element "fuse". Therefore, reading from left to right, as is normal, one sees the molecule first, before the word "fuse". Furthermore "fuse" is all lower case letters. Because of the left to right reading arrangement, and the use of all lower case letters, it cannot be said that the word element is dominant. Applicant's mark lacks the design element.

Furtherstill, the Reference Mark "fuse" element has two different fonts. The "f" and "u" have serifs, while the "s" and "e" lack serifs and in fact have unfinished or incomplete ends. For example the bottom of the "e" would keep curving to the right as

shown by:

e

Applicant's mark lacks these features.

The commercial impression of the Reference Mark is "fusing" or "fusion", that is a coming together, such as in a laboratory (a controlled indoor environment). This is reinforced by the use of the molecule building block and by the use of two different fonts "fu" on the one hand and "se" on the other (the fusing of two fonts or styles of letters into one word). This is also reinforced by the registrant's web site which shows use of the logo in conjunction with "plus you" (see Unnumbered Exhibit, a screen shot of registrant's web site).

Conversely, Applicant's mark is spelled "Fuze" which connotes an explosion, surprise and an uncontrolled outdoor environment. Fireworks have fuzes and are lit outdoors. A proximity fuze causes an explosion when a target comes near. With a game scouting camera, the wildlife is photographed as it comes near; the wildlife may be surprised if they sensed or detected a camera was taking their picture. Game scouting cameras are located outside in uncontrolled environments (subject to cold, rain, moving tree branches and finicky wildlife) (Exhibits 1-15). Applicant's mark is well suited for game scouting cameras. The Reference Mark is not suited at all for game scouting cameras or any other outdoor product because it connotes a laboratory or urban environment.

Thus, with the differences in commercial impression, the marks are different.

B. APPLICANT'S GOODS ARE DIFFERENT

The goods are different and noncompetitive. Game scouting cameras are different from, and do not compete with, the goods of the Reference Mark. The goods of the Reference Mark are not game scouting cameras. Nor are the goods of the Reference Mark typically used with game scouting cameras.

In *Electronic Design & Sales, Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 716, 717 (Fed. Cir. 1992), the court said it was error to deny the registration on the basis of relatedness of goods and services simply because the Applicant sold some of its goods in some of the same fields in which the Opposer provided its services, without determining who the relevant persons (or purchasers) were. The court said this was especially true where the goods and services were specifically different and non-competitive, as in this instant case.

Game scouting cameras, or trail cameras, are automatically operated cameras that contain a motion sensor. Game scouting cameras are used by hunters to learn about wildlife. Game scouting cameras are mounted on trees, posts, etc. A common practice is to point the camera at a wildlife feeder or trail. As deer or other animals visit the feeder or walk the trail, the camera takes their picture. When an animal moves into the field of view, the motion sensor senses this and activates the camera to take a picture. Once the camera is mounted and set up, the user leaves the area because humans will scare away wildlife from visiting the area. While game scouting cameras incorporate digital cameras, they are a very specialized type of digital camera, being autonomous and operating without any human intervention.

Game scouting cameras have integral housings that are rugged and waterproof. The housings protect the cameras from the elements. The camera and housing is sold as a single unit; the user mounts the housing to a tree, post, etc.

The Examining Attorney states that the goods are related because cases can be sold as accessories for game scouting cameras. Applicant respectfully disagrees. As noted, game scouting cameras come complete with weatherproof housings; the housings are mounted to a tree, post, etc.

Because game scouting cameras are left outdoors unattended for long periods of time, they are subject to several problems (Exhibits 1-15). One is theft. An unsecured game camera left out in the open is subject to being stolen, whether the camera is on public or private lands. Another problem is damage by animals, namely bears. Apparently, bears are attracted to human scent on a camera and will engage the camera, tearing it off its mount, biting it and causing damage.

Many game scouting cameras are used as is with only the housing. If they need further protection from theft or bears, they are put into metal locked enclosures. The overwhelming evidence shows enclosures are referred to as security boxes, lock boxes, bear boxes, security enclosures and security safes (Exhibits 16-32).

Camera cases as referred to by the Reference Mark are typically different products, being soft sided, more to protect the cameras from bumping or dropping, as the cameras are carried by a user (Exhibits 33-35). For example, a user could drop a camera; a case offers protection from dropping.

Regarding tripods, game scouting cameras are typically mounted on trees or in

concealed locations to protect the cameras from theft, not out in the open on tripods where they can be easily stolen or knocked over by wind or animals. (Exhibits 1-15).

In denying the Request for Reconsideration, the Examining Attorney introduced new evidence, which has been objected to. Even if the evidence is considered, it does not support the Examining Attorney's position, and even supports Applicant's. These will now be discussed.

The Walmart web pages show "game cameras" such as action cameras. Action cameras are small, compact and may be worn by a cyclist, skier, etc. to record action. They can be mounted on rifles used for hunting. They lack motion sensors however and are not "game scouting cameras".

However, the vast majority of cameras on the Walmart web pages are "game scouting cameras". The fact that these were found under the "game cameras" category in Walmart shows that these are specialty cameras not easily confused with other types of cameras.

A Cabela's web page is on an action camera case. As discussed above, an action camera is not a game scouting camera. Other pages (e.g. Simmons, Scoutguard) discusses the color (e.g. grey) of a case, which is not an accessory but instead the integral housing. A Primos web page shows a security case. Made of heavy duty, 14 gauge steel with locking tabs for up to a ½ inch padlock and holes for a security cable, this is not a typical camera case that protects from dropping.

Thus, Applicant respectfully disagrees that the Reference Mark is used on related goods. Consumers of game scouting cameras are sophisticated enough to

know a security box and mount for a game scouting camera versus a case or a tripod for an ordinary digital camera.

VII. CONCLUSION

The marks have different commercial impressions, a fact which is reinforced by the appearance and use. The goods are very different with game scouting cameras being a specialty item in a specialty market with purchasers who understand their use. Thus, there is no likelihood of confusion.

Applicant respectfully request the refusal be overturned and the application passed on to publication.

Dated: January 2, 2014

Respectfully submitted,

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