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# UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

**U.S. APPLICATION SERIAL NO.** 85726368

**MARK:** FUZE



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**APPLICANT:** WGI Innovations, Ltd.

**GENERAL TRADEMARK INFORMATION:**

<http://www.uspto.gov/trademarks/index.jsp>

**TTAB INFORMATION:**

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>

**CORRESPONDENT'S REFERENCE/DOCKET NO:**

2223.37111

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EXAMINING ATTORNEY'S APPEAL BRIEF

The applicant has appealed the trademark examining attorney's refusal to register the trademark FUZE on the ground that a likelihood of confusion exists under Section 2(d) of the Trademark Act between the applicant's mark and the mark FUSE and design in registration number 4218170.

## FACTS

The applicant applied to register the mark FUZE for “game scouting cameras.” Registration was refused under Trademark Act Section 2(d), based on a likelihood of confusion between the applicant’s mark and the mark FUSE and design in Registration No. 4218170 as applied to, in pertinent part, “camera cases and accessories for digital cameras, namely, tripods.”

The refusal was made FINAL, April 4, 2013. The applicant’s subsequent request for reconsideration was considered but found unpersuasive, whereupon applicant filed its appeal.

## ARGUMENT

Taking into account the relevant *du Pont* factors, a likelihood of confusion determination in this case involves a two-part analysis. First, the marks are compared for similarities in their appearance, sound, connotation and commercial impression. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). Second, the services are compared to determine whether they are similar or commercially related or whether the activities surrounding their marketing are such that confusion as to origin is likely. *In re Total Quality Group, Inc.*, 51 USPQ2d 1474, 1476 (TTAB 1999); TMEP §§1207.01 *et seq.*

#### A. THE MARKS OF THE PARTIES ARE SIMILAR

In a likelihood of confusion determination, the marks are compared for similarities in their appearance, sound, meaning or connotation and commercial impression. *In re E. I. du Pont de Nemours & Co., supra*. Similarity in any one of these elements may be sufficient to find a likelihood of confusion. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); see TMEP §1207.01(b).

The applicant's mark is FUZE and the registrant's mark is FUSE and design. The marks of the parties are similar in sound, appearance, meaning and commercial impression. With the exception of the design element in the registrant's mark, the marks are essentially phonetic equivalents and thus sound similar. Similarity in sound alone may be sufficient to support a finding that the marks are confusingly similar. *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007); TMEP §1207.01(b)(iv). Therefore, the similarities in the elements that exist are sufficient to find a likelihood of confusion.

The applicant argues that the marks of the parties are different, because the registrant's mark contains a design of a molecule. In addition, the applicant believes the design element in the registrant's mark is the dominant feature of that mark. Respectfully, the examining attorney disagrees with this conclusion.

The applicant's mark is FUZE and the registrant's mark is FUSE and design. With the exception of the design element in the registrant's mark, the marks of the parties sound exactly the same. Although marks must be compared in their entireties, the word portion generally may be the dominant and most significant feature of a mark because consumers will request the goods using the wording. See *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). For this reason, greater weight is often given to the word portion of marks when determining whether marks are confusingly similar. *Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1431 (TTAB 2013).

The word portions of the marks are nearly identical in appearance, sound, connotation, and commercial impression; therefore, the addition of a design element does not obviate the similarity of the marks in

this case. See *In re Shell Oil Co.*, 992 F.2d 1204, 1206, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993); TMEP §1207.01(c)(ii).

The applicant believes that the marks create a different commercial impression, because the word “fuze” connotes an explosion while the registrant’s mark “fuse” means coming together. For this reason, the applicant believes the marks of the parties are different. Respectfully, the examining attorney disagrees with this line of reasoning.

As noted before, marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). Similarity in any one of these elements may be sufficient to find the marks confusingly similar. TMEP §1207.01(b).

The applicant’s mark is FUZE and the registrant’s mark is FUSE and design. If a consumer requests the goods by saying either mark, there is no way to distinguish between the marks of each party. The marks of the parties are identical in sound. Therefore, the similarities in the elements that exist are sufficient to find likelihood confusion.

The issue is not whether the marks are different or could be distinguished from each other, but whether the public would mistakenly believe that because of the similarities of the marks, the services originate from a common source. *Golden Skillet Corp. v Carmel Self Service, Inc.*, 201 USPQ790 (TTAB 1979). In this instance, the similarities of the marks portend a great likelihood of confusion as to the source of the goods.

#### B. THE GOODS OF THE PARTIES ARE RELATED

The goods of the parties need not be identical or directly competitive to find a likelihood of confusion. *See Safety-Kleen Corp. v. Dresser Indus., Inc.*, 518 F.2d 1399, 1404, 186 USPQ 476, 480 (C.C.P.A. 1975). Rather, it is sufficient that the goods are related in some manner and/or the conditions surrounding their marketing are such that they would be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that the goods come from a common source. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086-87, 56 USPQ2d 1471, 1475-76 (Fed. Cir. 2000).

With respect to applicant's and registrant's goods, the question of likelihood of confusion is determined based on the description of the goods stated in the application and registration at issue, not on extrinsic evidence of actual use. *See, e.g., Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369-70, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012).

Absent restrictions in an application and/or registration, the identified goods are "presumed to travel in the same channels of trade to the same class of purchasers." *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). Additionally, unrestricted and broad identifications are presumed to encompass all goods of the type described. *See In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006).

The applicant's goods are "game scouting cameras" and the registrant's goods are, in pertinent part, "camera cases and accessories for digital cameras, namely, tripods." "Game scouting cameras" are digital cameras. The registrant offers "camera cases" and "tripods" for digital cameras. The goods of the parties are related, because "game scouting cameras" and "camera cases and accessories for digital cameras, namely, tripods" are typically sold together or offered by the same entities.<sup>1</sup> The registrant's "camera cases and accessories for digital cameras, namely, tripods" may be used for "game scouting cameras." In this case, the identification set forth in the registration has no restrictions as to nature, type, channels of trade, or classes of purchasers. Therefore, it is presumed that these goods travel in all normal channels of trade, and are available to the same class of purchasers. Further, the registration

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<sup>1</sup> Excerpts Attached to the November 2, 2013, Request for Reconsideration Denied.

uses broad wording to describe the goods and this wording is presumed to encompass all goods of the type described, including those in applicant's more narrow identification. The conditions surrounding the marketing of the goods may be such that they could be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that the goods come from a common source.

Because of the similarities between the marks and the goods of the parties, a likelihood of confusion is created.

The applicant believes the goods of the parties are different, because "game scouting cameras" come with weatherproof housings and the registrant's camera cases are soft sided to protect a camera from bumping or dropping. Respectfully, the examining attorney disagrees with this analysis.

The applicant's goods are "game scouting cameras" and the registrant's goods are, in pertinent part, "camera cases and accessories for digital cameras, namely, tripods." The registrant's goods are identified in the identification of goods as "camera cases for digital cameras." "Game scouting cameras" are digital cameras. The excerpts of the Internet references attached to the Final Office action dated April 4, 2013, demonstrate that "game scouting cameras" are considered digital cameras. From those references:

- The Bushnell 8MP Trophy Camera has been upgraded from 24 to 32 night-vision LEDs for improved image quality after dark.
- Wildgame Action Cam Infrared Game Camera 5 MP. The AC5x features a highly informative LCD command console and comes with a clear water resistant...
- Ltl Acom12MP Stealth Trail Scouting Hunting Game Wildlife Deer Camera US
- NEW OLDBOYS OUTDOORS LTL Digital SCOUTING/TRAIL/GAME CAMERA,12 MEGAPIXELS

In fact, the applicant readily admits "game scouting cameras" are digital cameras.<sup>2</sup>

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<sup>2</sup> Applicant's Brief, pg. 8.

The registrant's goods "camera cases and accessories for digital cameras, namely, tripods" are identified broadly as simply "camera cases" and "tripods." The registrant's goods are identified broadly. As the evidence has shown, "game scouting cameras" are sold with both camera cases and tripods for digital cameras.<sup>3</sup> The presumption under Trademark Act Section 7(b), 15 U.S.C. §1057(b), is that the registrant is the owner of the mark and that use of the mark extends to all goods identified in the registration. The presumption also implies that the registrant operates in all normal channels of trade and reaches all classes of purchasers of the identified goods. *In re Melville Corp.*, 18 USPQ2d 1386, 1389 (TTAB 1991). Therefore it is conceivable that the registrant's camera cases for digital cameras may also include cases for "game scouting cameras" which are digital cameras.

Because of the possibility that registrant's "camera cases" and "tripods" may include "game scouting cameras," confusion as the source of the respective goods is likely.

#### C. OBJECTION TO EVIDENCE SUBMITTED IN THE REQUEST FOR RECONSIDERATION DENIAL

The applicant has objected to the examining attorney's submission of evidence in the examining attorney's Request for Reconsideration Denied, dated November 2, 2013. It is the applicant's belief that this evidence was filed after the notice of appeal and, therefore, is untimely.

Respectfully, the examining attorney disagrees. Generally, the record in any application should be complete prior to appeal. TMEP 710.01(c). However on October 3, 2013, the case was remanded to the examining attorney for consideration of the applicant's request for reconsideration. In denying the applicant's request for reconsideration, the examining attorney attached additional evidence showing that "game scouting cameras" and "camera cases and accessories for digital cameras, namely, digital video viewers and tripods" may be sold together. The law is very clear on submission of additional evidence if a case is remanded to the examining attorney.

Absent a remand, no evidence should be submitted to the Board following a notice of appeal, except with or in response to an applicant's timely filed request for reconsideration. TMEP section 1504.05. It is the examining attorney's position that this additional evidence was timely. The additional evidence submitted was in response to the applicant's October 3, 2013, Request for Reconsideration.

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<sup>3</sup> Excerpts attached to the April 4, 2013, Final Office Action.

Because of the similarities between the marks and the goods of the parties, a likelihood of confusion is created.

#### CONCLUSION

For the foregoing reasons, the refusal to register the mark under Section 2(d) should be affirmed, especially since any doubt regarding a likelihood of confusion determination is resolved in favor of the prior registrant. *In re Hyper Shoppes(Ohio), Inc.* 837 F. 2d. 463, 6 USPQ 2d 1025 (Fed Cir., 1988).

Respectfully submitted,

/Charles L. Jenkins, Jr./

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