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

Proceeding	92059235
Party	Defendant Zhangwei Mo
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Submission	Opposition/Response to Motion
Filer's Name	P. Jay Hines
Filer's e-mail	mailroom@mg-ip.com
Signature	/pjh/
Date	03/04/2015
Attachments	2015-03-04 Respondent's Motion for Leave to Enter its Brief in Opposition to Petitioner's Motion for Summary Judgment Out of Time.pdf(1271827 bytes)

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

NITE IZE, INC. Petitioner v. ZHANGWEI MO Respondent.	Cancellation No. 92059235 Registration No. 4179234 Mark: NITEYE Filed: December 2, 2011 Issued: July 24, 2012
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**RESPONDENT’S MOTION FOR LEAVE TO ENTER ITS BRIEF IN OPPOSITION TO
PETITIONER’S MOTION FOR SUMMARY JUDGMENT OUT OF TIME**

Respondent, Zhangwei Mo (“Respondent”), hereby moves the Board for an Order entering the attached Respondent’s Brief in Opposition to Petitioner’s Motion for Summary Judgment out of time due to the extended Chinese Lunar New Year.

BACKGROUND

The Motion for Summary Judgment was served on January 21, 2015 by email and first class mail. Respondent's counsel reported the Motion to its Taiwanese associate on January 22, 2015, indicating that Respondent's reply brief was due no later than February 20, 2015. On the same day, Respondent's Taiwanese counsel requested clarification regarding the client's obligation to respond to outstanding written discovery due on February 16, 2015 and the new deadline for addressing the Motion for Summary Judgment, which was provided on January 23, 2015. Please see the attached Declaration of Counsel.

Respondent's counsel reported the Board Order of February 2, 2015 to Respondent's Taiwanese counsel on February 3, 2015. Taiwanese counsel confirmed receipt on February 5, 2015. On February 20, 2015, Respondent's counsel reported to its docketing department that no instructions had been received. On February 23, 2015, Respondent's counsel reported the potential consequences of not addressing the Motion for Summary Judgment to its Taiwanese associate. It was not until February 24, 2015 that Respondent's counsel received an email from its Taiwanese associate indicating that the client would like to reply to the Motion for Summary Judgment. The email, attached to the Declaration of Counsel, stated: "Due to our Lunar New Year holiday, we had a long term break for, we can't immediately revert to you before due date. Thus could you please kindly help us to extend this response period of time. I do apologize for your inconvenience, we would be highly appreciated of this matter." In a further email exchange of March 2, 2015, Respondent's counsel requested that Taiwanese counsel provide the exact date of the long term break for the Lunar New Year. Taiwanese counsel stated that: "The Lunar New Year is the biggest and most important Holiday in China, all Chinese pay great attention to it. According to Chinese Official Rules, the Lunar New Year is from Feb. 18, 2015 to Feb. 24, 2015. But some offices take the holiday from Feb. 14 to Feb. 24 due to their long trip back hometown." Attached to the Declaration of Counsel.

ARGUMENT

The TBMP states at § 528.03: Examples of papers which are or may be germane to a motion for summary judgment include a brief in opposition to the summary judgment motion, a motion for an extension of time in which to respond to the summary

judgment motion, a motion under fed. R. Civ. P. 56(d) for discovery needed to enable the nonmoving party to respond to the summary judgment motion, a cross-motion for summary judgment, etc. Respondent is not asking for discovery pursuant Fed. R. Civ. P. 56(d). It is just requesting that, under the extraordinary circumstances, fairness dictates that the attached Reply Brief be considered by the Board.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the Board issue an order granting Respondent's Motion for Leave to enter its brief in opposition to petitioner's motion for summary judgment out of time.

Respectfully submitted

Dated: March 4, 2015

By:  _____

P. Jay Hines
Muncy, Geissler, Olds & Lowe, P.C. 4000
Legato Road, Suite 310
Fairfax, VA 22033
Telephone: 703-621-7140
Fax: 703-621-7155
Email: mailroom@mg-ip.com

Attorneys for Respondent
Zhangwei Mo

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing RESPONDENT'S MOTION FOR LEAVE TO ENTER ITS BRIEF IN OPPOSITION TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT OUT OF TIME was served by email and by First Class Mail, postage prepaid, on this on this 4th day of March 2015, upon counsel for Petitioner at the following address of record:

Robert P. Ziemian

Squire Patton Boggs LLP

1801 California Street, Suite 4900

Denver, CO 80202



Akiyo Yoshida

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

<p>NITE IZE, INC.</p> <p style="text-align: center;">Petitioner</p> <p style="text-align: center;">v.</p> <p>ZHANGWEI MO</p> <p style="text-align: center;">Respondent.</p>	<p>Cancellation No. 92059235</p> <p>Registration No. 4179234 Mark: NITEYE Filed: December 2, 2011 Issued: July 24, 2012</p>
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DECLARATION OF P. JAY HINES

I, P. Jay Hines, declare as follows:

1. I am a partner at Muncy, Geissler, Olds & Lowe, P.C., and counsel for Respondent Zhangwei Mo ("Respondent") in this case. The facts set forth in this declaration are based on my personal knowledge and/or on communications related to this cancellation proceeding.
2. The Motion for Summary Judgment was served on January 21, 2015 by email and first class mail. Respondent's counsel reported the Motion to its Taiwanese associate on January 22, 2015, indicating that Respondent's reply brief was due no later than February 20, 2015. On the same day, Respondent's Taiwanese counsel requested clarification regarding the client's obligation to respond to outstanding written discovery due on February 16, 2015 and the new deadline for addressing the Motion for Summary

Judgment, which was provided on January 23, 2015. Please see the attached Declaration of Counsel.

3. Respondent's counsel reported the Board Order of February 2, 2015 to Respondent's Taiwanese counsel on February 3, 2015. Taiwanese counsel confirmed receipt on February 5, 2015. On February 20, 2015, Respondent's counsel reported to its docketing department that no instructions had been received. On February 23, 2015, Respondent's counsel reported the potential consequences of not addressing the Motion for Summary Judgment to its Taiwanese associate.
4. It was not until February 24, 2015 that Respondent's counsel received an email from its Taiwanese associate indicating that the client would like to reply to the Motion for Summary Judgment. The email, attached to the Declaration of Counsel, stated: "Due to our Lunar New Year holiday, we had a long term break for, we can't immediately revert to you before due date. Thus could you please kindly help us to extend this response period of time. I do apologize for your inconvenience, we would be highly appreciated of this matter."
5. In a further email exchange of March 2, 2015, Respondent's counsel requested that Taiwanese counsel provide the exact date of the long term break for the Lunar New Year. Taiwanese counsel stated that: "The Lunar New Year is the biggest and most important Holiday in China, all Chinese pay great attention to it. According to Chinese Official Rules, the Lunar New Year

is from Feb. 18, 2015 to Fe. 24, 2015. But some offices take the holiday from Feb. 14 to Feb. 24 due to their long trip back hometown."

I declare under the penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct pursuant to 28 U.S.C. § 1746.

Respectfully submitted,

Dated: March 4, 2015

By: 

P. Jay Hines
Muncy, Geissler, Olds & Lowe, P.C.
4000 Legato Road, Suite 310
Fairfax, VA 22033
Telephone: 703-621-7140
Fax: 703-621-7155
Email: mailroom@mg-ip.com

Attorneys for Respondent
Zhangwei Mo

CERTIFICATE OF SERVICE

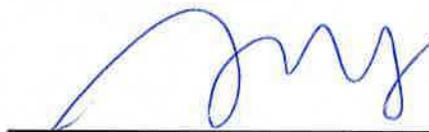
I certify that a true and accurate copy of the foregoing DECLARATION OF P. JAY HINES was served by email and by First Class Mail, postage prepaid, on this on this 4th day of March 2015, upon counsel for Petitioner at the following address of record:

Robert P. Ziemian

Squire Patton Boggs LLP

1801 California Street, Suite 4900

Denver, CO 80202



Akiyo Yoshida

Jay Hines

From: AIPT Patent, Trademark & Law Office-lily <lily_su@actionip.com>
Sent: Monday, March 02, 2015 9:54 PM
To: Jay Hines
Cc: Ken Muncy; Loria M. Grindle
Subject: RE: [URGENT]inquiry-the response fee for cancellataion_due date July 1, 2014_mark: NITEYE(MG-IP); Our Ref.: 4994/0338OT(AHY-TM-CN/US-BJ14017-TR)

Dear Jay,

Thank you for your understanding and tolerance, please assist filing the Motion for an extension of time to respond to the Motion for Summary Judgment as soon as possible.

The Lunar New Year is the biggest and most important Holiday in China, all Chinese pay great attention to it.

According to Chinese Official Rules, the Lunar New Year Holiday is from Feb.18, 2015 to Feb.24, 2015. But some offices take the holiday from Feb.14 to Feb.24 due to their long trip back hometown.

Look forward to hearing from you soon, thank you again for your kind help!

Please acknowledge the safe receipt of the e-mail.

To avoid missing out on any important emails, please be advised to always send to "actionip@actionip.com" so that your rights could be maintained.

Sincerely Yours,

Ares Yang / Director Partner
By Lily Su

AIPT Patent, Trademark & Law Office
5F, No.928, Zhongzheng Rd.,
Zhonghe Dist., New Taipei City 235, Taiwan(R.O.C.).
TEL: +886-2-2225-0986 Ext. 1655
FAX: +886-2-2225-2685; 886-2-8228-2387
Email:actionip@actionip.com

----- Original Message -----

From: Jay Hines
To: actionip@actionip.com
Cc: [Ken Muncy](#) ; [Loria M. Grindle](#)
Sent: Tuesday, March 03, 2015 6:24 AM
Subject: RE: [URGENT]inquiry-the response fee for cancellataion_due date July 1, 2014_mark: NITEYE(MG-IP); Our Ref.: 4994/0338OT(AHY-TM-CN/US-BJ14017-TR)

Dear Mr. Yang,

Jay Hines

From: AIPT Patent, Trademark & Law Office-nicole <nicole_hsu@actionip.com>
Sent: Tuesday, February 24, 2015 9:09 PM
To: Loria M. Grindle
Cc: Ken Muncy; Jay Hines
Subject: RE: [URGENT]inquiry-the response fee for cancellataion_due date July 1, 2014_mark: NITEYE(MG-IP); Our Ref.: 4994/0338OT (AHY-TM-CN/US-BJ14017-TR)

Dear Sirs,

Thank you for your email below.

With regard to this cancellation, our client would like to make a response to them.

Due to Lunar New Year holiday, we had a long term break for it, we can't immediately revert to you before due date.

Thus could you please kindly help us to extend this response period of time. I do apologise for your inconvenience, we would be highly appreciated of this matter. If the extension need to incur extra charge, please be informed us first.

Kindly acknowledge safe receipt by return email

We look forward to hearing from you soon

Sincerely Yours,

Ivan Chen / Trademark Attorney
By Nicole Hsu

AIPT Patent, Trademark & Law Office
5F, No.928, Zhongzheng Rd.,
Zhonghe Dist., New Taipei City 235, Taiwan(R.O.C.).
TEL: 886-2-2225-0986 EXT. 1657
FAX: 886-2-2225-2685; 886-2-8228-2387
Email: actionip@actionip.com

----- Original Message -----

From: Loria M. Grindle
To: actionip@actionip.com
Cc: [Ken Muncy](#) ; [Jay Hines](#)
Sent: Tuesday, February 24, 2015 3:23 AM
Subject: RE: [URGENT]inquiry-the response fee for cancellataion_due date July 1, 2014_mark: NITEYE(MG-IP); Our Ref.: 4994/0338OT (AHY-TM-CN/US-BJ14017-TR)

Via e-mail only

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

<p>NITE IZE, INC.</p> <p style="text-align: center;">Petitioner</p> <p style="text-align: center;">v.</p> <p>ZHANGWEI MO</p> <p style="text-align: center;">Respondent.</p>	<p>Cancellation No. 92059235</p> <p>Registration No. 4179234 Mark: NITEYE Filed: December 2, 2011 Issued: July 24, 2012</p>
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**RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S MOTION FOR
SUMMARY JUDGMENT**

Respondent, Zhangwei Mo ("Respondent"), hereby opposes the Motion for Summary Judgment filed by Petitioner, Nite Ize, Inc. ("Petitioner"), on the ground that there are genuine issues of material fact in dispute, particularly with respect to the perceived similarity of the marks, the sophistication of the purchaser the nature and extent of actual confusion and the priority of use.

I. BACKGROUND

The Petition for Cancellation in this matter, filed on May 8, 2014, is based on likelihood of confusion under Section 2(d) of the Trademark Act, on likelihood of dilution under Section 43(c) of the Trademark Act, some form of misrepresentation as to source under Section "14(3)" (stet) and on fraud in the procurement. The subject Motion appears to be limited to the issue of likelihood of confusion.

II. ARGUMENT

A. The Similarity of the Marks

Respondent does not disagree that the first four letters of the respective marks are identical. However, Respondent takes issue with Petitioner's position that the remaining portions of the marks, when viewed in their entireties as is required by *In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973), have the same appearance, connotation and overall commercial impression and that potential purchasers will perceive them as the same.

Without providing any support for its position, Petitioner claims that the "IZE" that forms the second term of its mark equates to "eyes" in connotation and commercial impression. Paragraph 12 of the Petition for Cancellation states: "Respondent's NITEYE Mark is similar to the NITE IZE Mark in that they both use the term "nite" and refer to eyes or eye." However, "-IZE" is a suffix with a set meaning in the English language. Merriam-Webster's online dictionary provides the following meanings:

: to cause to become or become like something specified - crystalize;

: to become or become like (something specified) – Americanize, aluminize;

: to treat like something specified – iodize;

: to talk or write about someone or something in a specified way – hypothesize, mesmerize. (See Exhibit A).

There is no basis for assuming that "ize" and "eyes" are similar in connotation or commercial impression. Further, Applicant's mark is the telescoped single word

NITEYE, which based on the words common meaning suggests an ability to see in the dark. Petitioner's mark possesses no such connotation.

The Board must view the evidence in the light most favorable to the nonmovant. Since opposing factual inferences may arise from the same set of undisputed subsidiary facts, the Board must draw all reasonable inferences in favor of the nonmovant. *United States, v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Thus, comparing the marks as though they reach the widest range of "average" purchasers with a common understanding of the English language, a reasonable fact finder could find that the marks differ in appearance and do convey different connotations and commercial impressions. In order to establish that a factual dispute is genuine, the nonmoving party "need only present evidence from which a jury might return a verdict in [its] favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). For this reason alone, the Motion for Summary Judgment should be denied.

Respondent also notes that "[P]honic similarity alone is insufficient in this case to establish as a matter of law that the uses of the respective marks are likely to cause confusion." *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 22 USPQ 2d 1542 (CAFC 1992) (grant of SJ motion by Board reversed on appeal finding that marks YE OLDE TIME and OLD TIME not shown as a matter of law to be similar in their entireties as to appearance, connotation, and commercial impression).

B. The Sophistication of the Purchaser

Petitioner claims that the respective goods are low-priced products that are purchased on impulse. While that may be true for some items, Petitioner's own

evidence points to high-end flashlights in the \$100 to \$350 dollar range. (Exhibits D, E and I of Petitioner's SJ Motion). Certainly, these goods are not purchased on impulse but only after careful consideration. See *Dynamics Research Corporation v. Langenau Manufacturing Company*, 217 USPQ 649 (CAFC 1983).

C. The Nature and extent of Any Actual Confusion

Petitioner claims that the fact that a search for its mark on a site called www.lightmalls.com shows two of Respondent's products but none of Petitioner's products creates an inference of actual confusion in the marketplace. (See Petitioner's SJ Motion at page 14 and its Exhibit D). Yet the circumstance does not show that any actual confusion by a prospective purchaser has occurred. Unless there is actual confusion on the part of a consumer, there is no evidence of actual confusion to be weighed by the Board.

D. The Priority of Use

Respondent claims use in commerce since at least as early as May 1, 2010. Petitioner claims use of its mark in commerce in general since at least as early as February 13, 1990. With respect to flashlights, Petitioner states that it acquired INOVA brand LED performance flashlights on February 1, 2010 and that it has been "selling and co-branding INOVA brand LED performance flashlights since shortly thereafter." (See Petitioner's SJ Motion at page 7 and the Clinton Todd Declaration at paragraph 7). However, paragraph 11 of the Petition for Cancellation states: "at least as early as May 24, 2010, Petitioner began selling INOVA brand flashlights under the NITE IZE Mark." Petitioner then references a webarchive.com record of Petitioner's website claimed to be recorded on May 24, 2010. This date is subsequent to Respondent's claimed date

of first use and contradicts Petitioner's claim in paragraph 10 of the Petition for Cancellation which also feature the MAG-LITE flashlights of Inova, claiming a date of May 3, 2005. Respondent also notes that Petitioner concedes that its WayBack Machine evidence from www.archive.org is not determinative. (See Petitioner's SJ Motion at pages 14 – 15). This points to genuine issues of material facts in dispute with regard to priority.

III. CONCLUSION

For all of the foregoing reasons and authorities, Respondent respectfully requests that the Board issue an order denying Petitioner's Motion for Summary Judgment.

Respectfully submitted,

Dated: March 4, 2015

By: 
P. Jay Hines

Muncy, Geissler, Olds & Lowe, P.C. 4000
Legato Road, Suite 310
Fairfax, VA 22033
Telephone: 703-621-7140
Fax: 703-621-7155
Email: mailroom@mg-ip.com

Attorneys for Respondent
Zhangwei Mo

EXHIBIT A



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-ize



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zulily

daily deals up to 70% off

SHOP NOW

-ize

verb suffix

Share

: to cause to become or become like something specified : to become or become like (something specified)

: to treat like something specified

: to talk or write about someone or something in a specified way

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Full Definition of -IZE

1 a (1) : cause to be or conform to or resemble <systemize> <Americanize> : cause to be formed into <unionize> (2) : subject to a (specified) action <plagiarize> (3) : impregnate or treat or combine with <aluminize>

b : treat like <idolize>

c : treat according to the method of <bowdlerize>

2 a : become : become like <crystallize>

b : be productive in or of <hypothesize> : engage in a (specified) activity <philosophize>

c : adopt or spread the manner of activity or the teaching of <Platonize>

Usage Discussion of -IZE

The suffix *-ize* has been productive in English since the time of Thomas Nashe (1567–1601), who claimed credit for introducing it into English to remedy the surplus of monosyllabic words. Almost any noun or adjective can be made into a verb by adding *-ize* <hospitalize> <familiarize>; many technical terms are coined this way <oxidize> as well as verbs of ethnic derivation <Americanize> and verbs derived from proper names <bowdlerize> <mesmerize>. Nashe noted in 1591 that his *-ize* coinages were being criticized, and to this day new words ending in *-ize* <finalize> <prioritize> are sure to draw critical fire.

Origin of -IZE

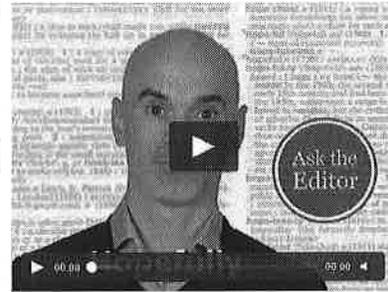
Middle French *-iser*, from Late Latin *-izare*, from Greek *-izein*

Browse

Next Word in the Dictionary: Izod test

Previous Word in the Dictionary: izba

All Words Near: -ize



Word of the Day

MARCH 03, 2015

thanatology

The study of death and grieving

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7 Downton Abbey Terms Americans Are Not Familiar With

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Is It 'Attorney Generals' Or 'Attorneys General'?



Fun, Funner, Funnest



Turns Out You Can Unboil an Egg

Trend Watch



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Seen & Heard

What made you want to look up -ize? Please tell us where you read or heard it (including the quote, if possible).

12 comments



Add a comment...

Comment using...

pandemo.geo (signed in using yahoo)

While nearly asleep, a line of dialog by a spouse to a poet popped into my head: Are you trying to poemcize?

Reply · Like · February 3, 2014 at 7:56am



John Harris · Crossell High School

just found out my first name was ize.

Reply · Like · February 21, 2013 at 5:48pm

Leonard Oh (signed in using Hotmail)

words ending with -alize like institutionalize got me here.

Reply · Like · February 22, 2012 at 1:17am

Leonard Oh (signed in using Hotmail)

and environmentalization

Reply · Like · February 22, 2012 at 3:18am



Diana Moon · Staff Writer/Photographer/Cartoonist/Copyeditor at The Beacon Newspaper @ FIU

The Strokes' "Ize of the World".

Reply · Like · 2 · January 13, 2012 at 7:15pm



Jen Kepler

I don't like the word "Problematize"... so negative!

Reply · Like · November 8, 2011 at 8:46pm



Par Ell Petteson

How 'bout simplisize, facillize, goodsize, spicitalize, yummisize, goodsize, "notsobadsize", happisize etc etc Basically, I very much agree(-isize) :-)

Reply · Like · November 8, 2011 at 9:12pm



Jen Kepler

Par Ell Petteson I like the way you anal-IZEd this! :-)

Reply · Like · 1 · November 10, 2011 at 9:05am

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When "Literally" isn't, well, literal How to use a word that (literally) drives some people nuts.



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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing RESPONDENT'S BRIEF
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served by email and by First Class Mail, postage prepaid, on this on this 4th day of
March 2015, upon counsel for Petitioner at the following address of record:

Robert P. Ziemian

Squire Patton Boggs LLP

1801 California Street, Suite 4900

Denver, CO 80202



Akiyo Yoshida