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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re WGI Innovations, Ltd.

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Serial No. 85141753

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Before Seeherman, Kuhlke and Shaw, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Applicant, WGI Innovations, Ltd., filed an application to register on the Principal Register the mark FIELDVU[1] in standard characters for goods ultimately identified as "handheld computers for viewing, editing and transferring digital pictures obtained from game scouting cameras," in International Class 9.

[1] Application Serial No. 85141753, filed on September 30, 2010, based on an allegation of a bona fide intention to use the mark in commerce, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark, when used with its identified goods, so resembles the registered mark FIELDVIEW in standard characters for:

> Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signaling, checking and supervising, life-saving and teaching apparatus and instruments, namely, wireless, handheld audio and video recorders and transmitters;
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> apparatus and instruments for conducting, distributing, converting, storing, regulating or controlling electricity, namely, wireless, handheld audio and video recorders and transmitters;
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> apparatus for recording, transmitting and reproducing sound or images, namely, wireless, handheld audio and video recorders and transmitters; blank magnetic data carriers and recording discs;
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> videoconferencing systems comprised of telephones, flat panel display screens, videophones and codecs in the nature of digital signal processors;
>
> systems, apparatus and equipment, namely, software and downloadable web-based software applications for real-time, multimedia communications over computer networks;
>
> apparatus for the reception, storage, reproduction, playback, recording and transmission of sounds and images, namely, cameras, microphones, television monitors, video monitors, computer monitors, desktop video phones, audio speakers, amplifiers, echo cancellers in the nature of filters for radio interference suppression, sound mixers, loudspeakers, remote control telephone and video transmitters, television sets, radio sets, audio and video disc players, memory-based players in the nature of mp3 players, telephones, video telephones, mobile telephones and portable telephone terminals;
>
> systems and equipment for digital broadcasting of audio, data and video across cable, satellite, terrestrial, IP and telecom networks, namely, wireless, handheld audio and video recorders and transmitters;

> systems and equipment for streaming of audio, data and video across cable, satellite, terrestrial, IP and telecom networks, namely, wireless, handheld audio and video recorders and transmitters;
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> systems and equipment for communication infrastructure, namely, archives in the nature of Internet servers, sound mixers, gatekeepers in the nature of computer hardware for telecommunications, firewalls in the nature of computer hardware and telecommunications network management software;
>
> computer software for surveillance, security, encryption and authentication of data;
>
> computer software for management of time, appointments, schedules, assets and meeting room management;
>
> downloadable electronic publications, namely, books, manuals and brochures in the field of videoconferencing.[2]

as to be likely to cause confusion, mistake or deception.

When the refusal was made final, applicant appealed and requested reconsideration. After the examining attorney denied the request for reconsideration, the appeal was resumed.

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in 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 Co., Inc., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

[2] Registration No. 3696031 issued on October 13, 2009. The registration also includes telecommunications services; however, the examining attorney focused the refusal on the registered goods listed above.

We begin by considering the du Pont factor of the similarities and dissimilarities between applicant's mark FIELDVU and registrant's mark FIELDVIEW. We analyze "the marks 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, 1691 (Fed. Cir. 2005) quoting du Pont, 177 USPQ at 567.

Similarity, of the marks in one respect may be sufficient to find that the marks are confusingly similar. In re Thor Tech, Inc., 90 USPQ2d 1634 (TTAB 2009). Here, the marks are identical in sound and connotation, and virtually identical in appearance and commercial impression.

We are not persuaded by applicant's unsupported argument that the correct spelling of VIEW "reinforces a more expensive commercial impression" and the incorrect spelling of VU "reinforces a less expensive commercial impression." App. Br. p. 6. There is nothing in the record to support a finding that these different spellings evoke a different price point. Moreover, as noted above, any one element may be sufficient to find confusing similarity and these marks are identical in sound and meaning, and virtually identical in appearance. Thus, we find the marks to be very similar.

We turn to the du Pont factor of the relatedness of the goods. We base our evaluation on the goods as they are identified in the registration and application. In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). See also Hewlett-Packard Co. v. Packard Press Inc., 281 F.3d 1261, 62

USPQ2d 1001 (Fed. Cir. 2002) and Octocom Systems, Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). It is settled that it is not necessary that the respective goods be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis. That is, the issue is not whether consumers would confuse the goods themselves, but rather whether they would be confused as to the source of the goods. See In re Rexel Inc., 223 USPQ 830 (TTAB 1984). The goods need only be sufficiently related that consumers would be likely to assume, upon encountering the goods under similar marks, that the goods originate from, are sponsored or authorized by, or are otherwise connected to the same source. See In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991).

It is the examining attorney's position that applicant's goods are encompassed by registrant's goods or are complementary. Specifically, the examining attorney argues that:

> [The registration] specifically identifies **computer hardware for telecommunications, wireless handheld audio and video recorders, wireless handheld audio and video transmitters and numerous apparatus and systems for manipulating sounds and images, including cameras, sound equipment and video display and transmission equipment**. ... no assumptions can be made about the nature of the goods identified by the broad wording ... '**wireless, handheld audio and video recorders and transmitters**' or "**computers for telecommunications**.' Rather, the wording encompasses a broad class of goods that would be used to manipulate and transfer sounds and images. Included in that class are **computers used as transmitters or recorders of sounds and images**. Applicant's **handheld computers used for viewing, editing and transferring digital pictures from game cameras**

> would be encompassed in Registrant's goods for several reasons. First, Applicant's product is clearly a **handheld transmitter of digital images**, as one of the functions of Applicant's computers is to **transfer digital pictures to hunters from game cameras**. ... Because of the **transmission function, applicant's goods are also 'computers for telecommunications**.' Second, Registrant's audio and video recorders and transmitters are used to receive, re-play, record, store and reproduce sounds and images. These [are] functions that are quite similar to the downloading, viewing and editing functions carried out by Applicant's computers. Applicant explains on page 8 of its brief that its goods are a 'handheld computer that obtains pictures from the game cameras' and that users 'download pictures from the camera' using Applicant's computers. Thus, the receiving and replaying functions of Registrant's recorders and transmitters are virtually identical to the downloading, viewing and transmitting function of Applicant's more narrowly defined 'computers.'

E. A. Br. pp. 6-8 (emphasis added).

When we compare the identifications of goods we must take each listed good separately and we may not limit it by other matter in the identification that is not modifying the particular goods. Thus, while applicant essentially argues that registrant's goods are limited to video conferencing, certain entries in the identification are not so limited inasmuch as they are separated by semicolons from the limiting language, as shown by the listing reproduced above. However, the examining attorney has accorded the identification in the registration a broader scope than is warranted. Registrant's identification does not include "wireless handheld audio and video recorders and wireless handheld audio and video transmitters." Rather, the identification lists "wireless, handheld audio and video recorders and transmitters." We view this phrase as indicating wireless, handheld devices that record and transmit audio and video. We do not read applicant's "transferring digital pictures" to mean "transmitting" in the sense it is clearly used

in registrant's identification. The wireless transmitters in the registration would encompass goods that send electromagnetic waves, or generate and modulate radiofrequency current and convey it to an antenna, or convert sound waves or mechanical movements into corresponding electric waves or impulses.[3] On the other hand, applicant's function of transferring images either by taking the memory card or stick from the game scouting camera and putting it in the handheld computer to download the pictures or connecting the handheld computer to the game scouting camera with a cable to "transfer" or download the images is not a transmitting or telecommunications function.[4]

Also, the registration does not include the stand alone identification "computer hardware for telecommunications." The "computer" entries in the identification are all further limited, such that they would not include applicant's goods (e.g., "systems and equipment for communication infrastructure, namely, archives in the nature of Internet servers, sound mixers, gatekeepers in the nature of computer hardware for telecommunications, firewalls in the nature of computer hardware and telecommunications network management software"). In addition, the word "transferring" in applicant's identification does not transform that good

[3] Random House Dictionary (2013), retrieved from www.dictionary.com. The Board may take judicial notice of dictionary definitions. In re Red Bull GmbH, 78 USPQ2d 1375, 1378 (TTAB 2006). See also University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

[4] The record includes limited evidence that trail, or game scouting, cameras may be offered with "wifi" capabilities. App. Resp. (May 19, 2011) p. 25; App. Resp. (December 23, 2011 p. 18. However, applicant's identification is limited to those that do not have such capabilities and require the user of the handheld computer to "transfer" the images rather than receive a wifi transmission of the images.

into telecommunications equipment. Put simply, the identifications "'wireless, handheld audio and video recorders and transmitters" and "'gatekeepers in the nature of computers for telecommunications**"** do not include applicant's goods.

Having found that the goods listed in the registration do not include applicant's goods, we turn to the examining attorney's argument that the goods are complementary. The examining attorney states that applicant's computers "are used to transmit downloaded images to hunters. The evidence of record attached to the Office actions show complementary usage of specially adapted computers with audio and video recorders, such as cameras. ... Taken together, the evidence indicates Applicant's computers are the type of product that would be used with Registrant's audio and visual recorders. Consequently, consumers would readily purchase the [sic] both Applicant's specialized computers along with Registrant's audio and video recorders."" E.A. Br. p. 9.

Again we find this reading of the identification overbroad. Each entry for "video recorders" in the registrant's identification is further defined by function, i.e., to transmit audio or video. Applicant's goods are limited to use with "game scouting cameras" which are not identified as having a transmitting function. Applicant's "game scouting camera" is used on trails to photograph animals when they pass by it. Users then manually retrieve the pictures stored on memory cards from the cameras and "transfer" the images to applicant's "handheld computer." See Resp's to Office Actions (May 19, 2011 and December 23, 2011) Exhs 1, 7 and 19. Thus,

there is nothing in the respective identifications to support that registrant's goods encompass game scouting cameras or that these goods are complementary.

Moreover, in view of the differences in the goods, we may not presume an overlap in trade channels and the record does not support a finding that applicant's goods would travel in the same trade channels as registrant's "wireless, handheld audio and video recorders and transmitters."

Applicant's arguments regarding the conditions of sale rely on extrinsic evidence that may not be considered in evaluating whether registrant's identification excludes less expensive type goods.[5] While some of the goods in the identification would on their face indicate expensive goods, purchased by relatively sophisticated consumers, e.g., "videoconferencing systems comprised of telephones, flat panel display screens, videophones and codecs in the nature of digital signal processors" or "systems and equipment for communication infrastructure, namely, archives in the nature of Internet servers, sound mixers, gatekeepers in the nature of computer hardware for telecommunications, firewalls in the nature of computer hardware and telecommunications network management software," the identification "wireless, handheld audio and video recorders and transmitters," is not so limited and could include products in a range of price points and offered to potential purchasers with various levels of sophistication.

[5] Similarly, applicant's arguments regarding any possible abandonment of use by registrant, as noted by the examining attorney, constitute an impermissible collateral attack on the cited registration and are not relevant during an ex parte case. The USPTO, including the Board, must accord the cited registration all presumptions (e.g., validity) provided for under Section 7(b) of the Trademark Act. 15 U.S.C. § 1057.

Any of the du Pont factors may play a dominant role from case to case. Du Pont, 177 USPQ at 567. In fact, a single factor may be dispositive. Champagne Louis Roederer, S.A. v. Delicato Vineyards, 148 F.3d 1373 (Fed. Cir. 1998); Kellogg Co. v. Pack'em Enters., 951 F.2d 330, 21 USPQ2d 1142, 1144-45 (Fed. Cir. 1991). See also Calypso Technology, Inc. v. Calypso Capital Management, LP, 100 USPQ2d 1213 (TTAB 2011). In the present case, the factor of the dissimilarity of the goods strongly outweighs the factors such as similarity of the marks. In conclusion, in view of the differences in the goods we find that confusion is not likely.

Decision: The refusal to register based on a likelihood of confusion under Section 2(d) of the Trademark Act is reversed.