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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re WGI Innovations, Ltd.*

Serial No. 85726368

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WGI Innovations, Ltd.

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G. Howell, Managing Attorney).

Before Ritchie, Wolfson and Adlin, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

WGI Innovations, Ltd. (“Applicant”) seeks registration of FUZE, in standard characters, for “game scouting cameras.”<sup>1</sup> The Examining Attorney refused registration of the mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, when used in connection with Applicant’s goods, so resembles the previously-registered mark shown below

<sup>1</sup> Application Serial No. 85726368, filed September 11, 2012 based on an intent to use the mark in commerce under Section 1(b) of the Act.



for, *inter alia*, “camera cases and accessories for digital cameras, namely, digital video viewers and tripods,”<sup>2</sup> that use of Applicant’s mark in connection with Applicant’s goods is likely to cause confusion or mistake or to deceive. After the refusal became final, Applicant appealed and filed a request for reconsideration which was denied. Applicant and the Examining Attorney filed briefs.

#### **Evidentiary Issue**

Applicant’s objection to the evidence attached to the Examining Attorney’s November 2, 2013 denial of Applicant’s Request for Reconsideration is overruled. Contrary to Applicant’s assertion, the evidence is not untimely. Thus it may be and has been considered. *In re HerbalScience Group LLC*, 96 USPQ2d 1321, 1323 (TTAB 2010); *In re Davey Products Pty Ltd.*, 92 USPQ2d 1198, 1201 (TTAB 2009); TBMP §§ 1204, 1207.04 (3d ed. rev.2 2013).

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<sup>2</sup> Registration No. 4218170, issued October 2, 2012. The Registration’s identification of goods, in its entirety, is: “Accessories for cellular and cordless phones, namely, cases and holders, headsets, battery chargers, faceplates, covers, batteries, lighter adapters, antennas; accessories for portable MP3 players and CD players, namely, cases and armband cases, headsets and earphones; camera cases and accessories for digital cameras, namely, digital video viewers and tripods; carrying cases for computers; carrying cases for GPS receivers; accessories for electronic book readers, namely, cases, battery chargers, and earphones.”

**Likelihood of Confusion**

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *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 Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

Turning first to the marks, as the Examining Attorney points out, they are likely to be pronounced identically. “Similarity in sound alone may be sufficient for a finding of likelihood of confusion.” *In re 1st USA Realty Professionals, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007).

Moreover, the dominant element of the cited mark is the word FUSE, which looks quite similar to Applicant’s mark, differing by only one letter. *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987) (holding that “if one of the marks comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services” and “because applicant’s mark shares with registrant’s mark that element responsible for creating its overall commercial impression, the marks are

confusingly similar.”); *see also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012). Marks which differ by a single letter are often found to be confusingly similar. *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985) (CANYA and CANA); *United States Mineral Products Co. v. GAF Corp.*, 197 USPQ 301, 306 (TTAB 1977) (AFCO and CAFCO); *In re Bear Brand Hosiery Co.*, 194 USPQ 444, 445 (TTAB 1977) (KIKS and KIKI).

Applicant argues, however, that the word portion of the cited mark is not dominant because the mark’s design element is to the left of the word FUSE and the mark will be read from left to right. We disagree. The design will not be “read” at all, especially because it is offset from the word FUSE, appearing above it, and because it is relatively small.

Applicant’s argument that the marks look different because the cited mark appears in a distinctive font in all lower-case letters is also not well-taken. In fact, because Applicant seeks registration of its mark in standard characters, Applicant’s mark would not be “limited to any particular font, size, style, or color,” and could be displayed in the same manner as the cited mark. *In re Viterra*, 101 USPQ2d at 1909; *In re Strategic Partners Inc.*, 102 USPQ2d 1397, 1399 (TTAB 2012).

We accept Applicant’s argument that the marks could convey different meanings, in that Registrant’s mark may convey “‘fusing’ or ‘fusion’, that is a coming together,” whereas Applicant’s mark may convey a device used to detonate an explosive, and therefore “an explosion, surprise and an uncontrolled outdoor environment.” However, in this case, the argument is overstated because it would

be irrelevant to consumers hearing the marks spoken, as they sound identical. In any event, to the extent that the marks convey different meanings, this dissimilarity is outweighed by the similar appearance and identical pronunciation of the marks. “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). This factor weighs in favor of finding a likelihood of confusion.

Turning to the goods, they need not be identical or even competitive in order to support a finding of likelihood of confusion. It is enough that the goods are related in some manner or that the circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used, to a mistaken belief that Applicant’s and Registrant’s goods originate from or are in some way associated with the same source or that there is an association between the sources of the goods. *Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423, 1432 (TTAB 1993); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *Schering Corp. v. Alza Corp.*, 207 USPQ 504, 507 (TTAB 1980); *Oxford Pendaflex Corp. v. Anixter Bros. Inc.*, 201 USPQ 851, 854 (TTAB 1978); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978). The issue is not whether purchasers would confuse the goods, but rather whether there

is a likelihood of confusion as to the source of the goods. *In re Rexel Inc.*, 223 USPQ 830, 832 (TTAB 1984).

Here, there is a relationship between Applicant's game scouting cameras and Registrant's camera cases and tripods. The Examining Attorney has established that "game scouting cameras" are digital cameras, and Applicant admits as much. Applicant's Appeal Brief at 8 ("While game scouting cameras incorporate digital cameras ...."). Therefore, Registrant's camera cases and tripods encompass cases and tripods for game scouting cameras.

Applicant explains, however, that game scouting cameras "are automatically operated cameras that contain a motion sensor" which are used to photograph wildlife automatically, without being operated by a user. Applicant relies on extrinsic evidence that game scouting cameras therefore "have integral housings that are rugged and waterproof," that the camera and housing are "sold as a single unit" and that Registrant's camera cases, unlike game camera housings, are "soft sided, more to protect the cameras from bumping or dropping, as the cameras are carried by a user." Applicant's Appeal Brief at 8-9. The problem with Applicant's argument and extrinsic evidence is that these details are not reflected in the identifications of Applicant's or Registrant's goods. In fact, Applicant's extrinsic evidence is irrelevant, because we must base our decision on the goods identified in the involved application and cited registration, rather than extrinsic evidence. *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, \_\_\_ F.3d \_\_\_, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) ("the question of registrability of an applicant's mark

must be decided on the basis of the identification of goods set forth in the application”) (quoting *Octocom Sys., Inc. v. Houston Comps. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1637-38 (TTAB 2009) (“we must also analyze the similarity or dissimilarity and nature of the goods based on the description of the goods set forth in the application and the registration at issue ... we may not limit or restrict the trailers listed in the cited registration based on extrinsic evidence.”); *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764-65 (TTAB 1986) (“the question of likelihood of confusion must be determined by an analysis of the marks as applied to the goods identified in the application vis-à-vis the goods recited in the registration, rather than what extrinsic evidence shows those goods to be.”). Therefore, we must assume that Registrant’s camera cases and tripods can be used with Applicant’s game scouting cameras.

In any event, the Examining Attorney has introduced evidence that camera cases and tripods are in fact offered for sale for use in connection with game scouting cameras. Specifically, the Examining Attorney relies on the following Internet printouts:

- a listing from “cabelas.com” for the “Moutrie Game Camera Tripod Mount;” Office Action of April 4, 2013;
- an “ebay.com” listing for a “Tripod Mount Plug & Play Acorn Trail Scouting Camera;” *Id.*;
- a trail camera mount description from “backwoodswhitetails.com” which indicates that mounts are designed for cameras with different types of “tripod inserts;” *Id.*;

- a “google.com” Shopping listing for the “Primos Camera Glove Protective Case 63091,” intended for “all TRUTH® Cam models” which include game cameras; *Id.*;
- “google.com” Shopping listings for the “Bushnell BUS-119653C Security Case” intended for Trophy Cams and the “Bushnell Outdoor Products 1196,” identified as a “trail camera case,” among others; *Id.*;
- “google.com” Shopping search results for “game scouting camera cases” which include listings for game cameras, steel and other hard game camera security boxes and a game camera carrying bag made of nylon, i.e. a “soft” case such as those Registrant offers. Denial of Reconsideration November 2, 2013; and
- “walmart.com” listings for “game cameras” including a number of cameras and hard cases as well as a “stealth cam camera carry bag” for “scouting cameras” made of nylon, i.e. a “soft” case such as those Registrant offers. *Id.*

Similarly, Applicant introduced an article entitled “Deer Hunting Tips – Game Cameras” which includes what appears to be an advertisement stating “Easily mount game cameras on food plots or cutovers with Moultrie’s Camera Tripod.” Applicant’s October 3, 2013 Request for Reconsideration Ex. 5. The essential point is that Registrant’s “camera cases” are identified broadly enough to include “soft sided” cases such as those used for typical consumer digital cameras, “glove protective cases” such as those offered by Primos and “metal locked” and “security” enclosures more often used with game scouting cameras. Because Registrant’s camera cases and tripods are sold and may be used with Applicant’s game scouting cameras, the goods are complementary, and therefore related. *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984);

*General Mills, Inc. v. Fage Dairy Processing Industry SA*, 100 USPQ2d 1584, 1597-98 (TTAB 2011), *judgment set aside on other grounds*, 2014 WL 343267 (TTAB 2014); *In re Toshiba Medical Systems Corp.*, 91 USPQ2d 1266, 1272 (TTAB 2009).

As for the channels of trade, Applicant's and Registrant's identifications of goods include no limitations as to channels of trade or classes of consumers, and their goods are therefore presumed to move in all normal channels of trade for those goods and be available to all classes of consumers. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *see also Stone Lion Capital*, 110 USPQ2d at 1162 ("Even assuming there is no overlap between Stone Lion's and Lion's current customers, the Board correctly declined to look beyond the application and registered marks at issue. An application with 'no restriction on trade channels' cannot be 'narrowed by testimony that the applicant's use is, in fact, restricted to a particular class of purchasers.'").

Moreover, the Examining Attorney has introduced evidence that camera cases, tripods and game scouting cameras in fact travel in the same channels of trade. Office Action of April 4, 2013 (printouts from a "google.com Shopping search showing tripods promoted in connection with game scouting cameras; "amazon.com" showing game scouting cameras and security cases therefor listed among search results for "trail cameras bushnell;" "google.com" Shopping showing game scouting cameras and security cases therefor listed among search results for both "camera

cases for digital cameras and game scouting cameras” and “game scouting camera cases”); Denial of Request for Reconsideration November 2, 2013 (“google.com” Shopping search results for “game scouting camera cases” which include listings for game cameras, steel and other hard game camera security boxes and a game camera carrying bag made of nylon, i.e. a “soft” case such as those Registrant offers; and “walmart.com” listings for “game cameras” including a number of cameras and hard cases as well as a “stealth cam camera carry bag” for “scouting cameras” and made of nylon, i.e. a “soft” case such as those Registrant offers). In short, the channels of trade also weigh in favor of finding a likelihood of confusion.<sup>3</sup>

Finally, Applicant argues that consumers are “sophisticated enough” to distinguish between Applicant’s and Registrant’s goods and marks. Applicant’s Appeal Brief at 7. Even if we assume that consumers may exercise at least some care in purchasing Applicant’s and Registrant’s products, even careful purchasers can be confused as to source when presented with highly similar marks used on related and/or complementary goods. *See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) *citing Carlisle Chemical Works, Inc. v.*

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<sup>3</sup> Applicant’s reliance on *Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388 (Fed. Cir. 1992) is misplaced. There, our primary reviewing court held that the relevant channels of trade were not necessarily similar merely because both parties conducted business in the same fields and with some of the same companies. *Id.* at 1391. However, in that case, in sharp contrast to this one, the applicant’s goods and the opposer’s services were found to be “specifically different and noncompetitive.” Here, as the Examining Attorney established, Applicant’s and Registrant’s goods are related and/or complementary and their identifications of goods, and the evidence of record, establish that they are or may be marketed to hunters. They are not marketed to corporations like the goods and services in *Electronic Design & Sales*. In any event, as indicated, because there are no limitations in the identifications, Applicant’s and Registrant’s goods must be presumed to travel in the same channels of trade.

*Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) (“Human memories even of discriminating purchasers ... are not infallible.”). This factor therefore does not outweigh the similarity of the marks, related goods and overlapping channels of trade.

There is no relevant evidence or argument concerning the remaining likelihood of confusion factors, and we therefore treat them as neutral.

### **Conclusion**

After considering all of the evidence of record as it pertains to the relevant *du Pont* factors, including all of Applicant’s arguments and evidence, even if not specifically discussed herein, we find that confusion is likely because the marks are similar, the goods related and the channels of trade overlapping.

**Decision:** The Section 2(d) refusal to register Applicant’s mark is affirmed.