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

Proceeding no.	92071596
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Schiebel Industries AG

Petitioner,

v.

CAMERA COPTERS, INC.,

Respondent.

Opposition No. 92071596

Mark: CAMERA COPTERS

REQUESTS FOR JUDICIAL NOTICE

In support of Registrant's Trail Brief, Request for Judicial Notice of the following are hereby submitted:

Official record of the State of Florida, being Articles of Incorporation of Camera Copters, Inc. (CCI-001)

A November 28, 1999 archive from the cameracopters.com website, available at and printed from the Wayback Machine on or about November 10, 2021. (CCI-002)

Statistic re employment in film industry, published at Motion Picture Association website, <https://www.motionpictures.org/what-we-do/driving-economic-growth/>;

A 2008 archive from the Mundus Group, Inc. website, available at and printed from the Wayback Machine on or about November 10, 2021, (CCI-016);

SEC filed annual report for the Mundus Group for the year ending January 31, 2009 (CCI-17);

A 2008 archive from the Airdone, Inc. website from the Wayback Machine (CCI-019);

A PRNewswire dated May 28, 2009

A 2013 New York Times article regarding FAA restrictions regarding commercial drones, (CCI-023)

Images from CHOPPERSHOOT Broadcasting & Media Production Company Instagram page, and FlyingTV aerial filming website (CCI022)

Official record, being Federal Aviation Regulation Part 107 (CCI-023)

Bing search engine search result for, and article from, reflecting that in 2009, Schiebel and Boeing entered into a teaming agreement (CCI-034 and 035)

A screenshot from Petitioner's S-100 Camcopter product page. (CCI-026)

The ImbD (film industry) database of reported productions, in which Paul Barth was engaged. (CCI-013 and 013a);

Archived Boeing website re CAMCOPTERS – proving it was a marketing agent, and categorizing as Military

September 28, 2022

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

SCHIEBEL INDUSTRIES AG

Petitioner,

Cancellation Petition No. 92071596
Mark: CAMERA COPTERS

v.

CAMERA COPTERS, INC,

REGISTRANT'S TRIAL BRIEF

Respondent.

COMES NOW RESPONDENT AND REGISTRANT in this Trial Brief, responding to
Petition for Cancellation of Class 12 goods of the composite mark:



based upon the allegation of Priority and Likelihood of Confusion due to Petitioner's alleged prior use of "helicopters, particularly its unmanned helicopters, continuously and without interruption since at least as early as 12 October 2009 up to the present day." Schiebel Petition, paragraph 3.

On the basis of Petitioner's Brief, it is understood that the claim of Respondent's abandonment, and the claim against Petitioner's class 9 goods are retracted. Nonetheless, the evidence will show that the mark and its use with Class 9 and 12 goods were never abandoned.

All evidentiary citations (CCI___) are to corresponding documents submitted with Registrant's Notice of Reliance (Document upload 33), the Expert Disclosures (Document 41), to Testimonial Declarations submitted under penalty perjury (Document 45), or as specified in Respondent's Request for Judicial Notice.

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4 McCarthy on Trademarks §§26:38, 26:40, 25:53

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INTRODUCTION

Petitioner cannot sustain an argument for cancellation based upon priority. Registrant entered into an industry served by both parties with goods and services for aerial photography and mapping. Petitioner thereafter entered into the same market, utilizing a legally identical name, and introduced an innovation product that serves the same purpose. Schiebel now argues that it should be able to penetrate Registrant's market, with Registrant's mark.

SUMMARY OF ARGUMENT

CAMERA COPTERS, in relationship to both goods and services related to helicopters, "camera ships," aerial cinematography, and in doing business with the US Defense Department and US Defense Contractors, is the senior user of CAMERA COPTERS trademark in the United States. These facts are well-established by both Registrant's and Petitioner's documentary evidence, the testimony of witnesses of both parties, including Paul Bart, CAMERA COPTERS' sole shareholder and CEO, and by Registrant's declared expert witnesses. The use of the word mark CAMERA COPTERS for the stated purpose has continued unabated since 1987, and the subject composite mark, since at least 2004.

To the extent that Petitioner created technology capable of serving the same purposes, and thereafter sought to established common law use of a different, and conjunctive form of CAMERA COPTERS (S-100 Camcopter) within the United States after the senior user, said use was 1) de minimis, 2) nonexclusive, 3) used if at all for sales, within only a narrow channel of commerce, 4) not evidenced sufficiently to meet the burden of by a preponderance of evidence, 5) disproven; and 6) not necessarily in good faith.

Paul Barth developed extensive recognition utilizing the CAMERA COPTERS mark over the lifetime of his career, across a number of industries, including, since approximately 2003, with the composite mark at issue. Affirming the fame of the CAMERA COPTERS mark in the US film and commercial industries is expert Paul Morris, entitling it to a heightened level of protection.

The evidence also clearly establishes CAMERA COPTERS' natural zone of expanded use was into drones, and that CAMERA COPTERS naturally expanded into that zone, introducing is commercial drone, prior to any evidence of actual sales within the United States of Petitioner's goods.

Petitioner makes reference to a Moorehouse defense, and to tacking. The Moorehouse restraint is limited to the prohibition of statutory claims. Tacking refers to use of marks that are alleged to be similar, but also substantially dissimilar to a challenged mark. Neither a Moorehouse defense or tacking are relied upon herein, in defense of the composite mark at issue.

DESCRIPTION OF EVIDENCE AND ISSUES

The determinant facts in this cancellation proceeding are that:

Registrant Camera Copters is the senior user of the composite mark CAMERA COPTERS with film strip, over the legally identical mark CAMCOPTER, as:

- Registrant CAMERA COPTERS, INC was the earlier user of its composite horizontal film strip mark for the sale and leasing of goods and related services in the industry of

helicopters, camera ships, parts therefor, and drones; that use on goods and services that predate use of CAMCOPTER by Petitioner;

- Registrant is the senior user of the CAMERA COPTERS composite mark doing business within the US defense industry, both directly with the US Department of Defense and providing helicopter services as a contractor to Defense Contractors and these uses in service to the U.S. Defense industry continue;
- CAMERA COPTERS INC has engaged in very intensive marketing, resulting in such broad commercial recognition for aerial cinematography and related goods and services provided across multiple US industries, that the mark is entitled to a heightened level of protection;
- Petitioner is not and cannot be the senior common law user of the CAMCOPTERS mark for commercial drones. The FDA specifically classifies Registrant's battery powered unmanned helicopters – also commercial known as drones – separately from Petitioner's fuel-powered unmanned helicopters, and provides distinct regulations and requirements for each. Petitioner has never introduced commercial drones into the US marketplace.
- The CAMERA COPTERS INC marks were regularly policed since establishing the CAMERACOPTERS.com website, and resulted in no discovery of competing uses of CAMCOPTER by Schiebel, until after the instant petition was filed.
- Expert evidence confirms that Petitioner's US usage of CAMCOPTERS by volume was so narrow and remote as to be unheard of in the U.S. commercial aircraft and aerial industry.
- Petitioner's purported evidence does not establish use in the U.S., given that

- Through its own witness, Petitioner establishes only development, manufacturing, and marketing collaboration, and continuing document exchanges and communications with Boeing as a licensee/collaborator. (CCI-034 and 035) Thus, substantially the entire body of Petitioner’s collection of evidence is classified as internal by operation of law, and incapable of bearing witness to U.S. trademark use.
- The Petitioner’s U.S. licensee/collaborator, Boeing, markets the goods using *camcopter* only in its descriptive sense.
- Boeing is a multinational corporation that provides commercial and military craft to countries around the world.
- Invoices to and payments from Boeing, appear to be only in the nature of the collaborative investment, and ultimately, sales from Boeing as Petitioner’s marketing collaborator. However, no facts were introduced to establish that those sales were to any U.S. entity, or that Boeing utilized CAMCOPTERS in a trademark sense, to effectuate any such sales.
- Supporting this conclusion that the Schiebel-Boeing relationship did not reflect commercial arms-length sales is that the Petitioner’s shipping manifests, specifically exempting the S-100 craft from tariffs, do not certifying them as civilian.¹

¹ Section 234 of the Trade and Tariff Act of 1984 authorizes duty-free coverage to importers of civil aircraft parts. Importers are required to certify that the imported article is a civil aircraft, or has been imported for use in a civil aircraft and will be so used. “Civil aircraft” does not include any aircraft, aircraft engines, or ground flight simulators purchased for use by the Department of Defense.

- Likewise, in evidence, is the multinational Boeing's marketing of Petitioner's helicopter to and as military, and that in Boeing's marketing *camcopter* is used only descriptively.
- Petitioner's own landing page for its product describes it as a helicopter, never making use of the word "drone".
- Petitioner does not meet the burden of establishing proprietary ownership of CAMCOPTERS for drones through substantially exclusive use by a preponderance of evidence.
 - The weight of its evidence is thin if not fabricated, directly contradicting published and public evidence that is entitled to judicial notice of simultaneous uses by several third parties from at least 2008.
 - The evidence of third party use establishes that even if it attempted to police the mark, Petitioner was unable to exercise dominance.
- To the extent that Registrant did establish any protectable US trademark interest in the CAMCOPTERS mark, it is narrow, limited to the US Defense industry.
- Based upon expert market research, Registrant appears to be attempting to utilize its sales into foreign markets as the basis of the claim of priority.
- Survey evidence conducted by a marketing expert, establishes that
 - there is significant market recognition of the CAMERA COPTERS brand, and no recognition the CAMCOPTERS brand; and
 - if Petitioner introduces CAMCOPTERS branded drones into the commercial marketplace,

- the public will become confused and believe that the product is related, comes from, or is endorsed by Registrant, and
 - CAMERA COPTERS INC will suffer significant erosion of its good will and significant economic loss.
- In evidence are search results reflecting organic and unmanipulated placement of CAMCOPTER, reflecting that the term is so highly descriptive, that Petitioner cannot establish standing.

LAW AND ARGUMENT

STANDARD OF REVIEW

15 U.S.C. § 1057(b) provides that a “ certificate of registration of a mark upon the principal register ... [is] prima facie evidence ... of the owner’s exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate, subject to any conditions or limitations stated in the certificate.” In the likelihood of confusion analysis “doubts are to be resolved against the newcomer and in favor of the prior user.” *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 684 (CCPA 1977).

A party seeking to cancel a registered mark must prove the grounds for cancellation and overcome the statutory presumption of validity that attaches to a registered mark by a preponderance of the evidence. *See Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 1358 (Fed.Cir.2009) (“The burden of producing additional evidence or argument in defense of registration only shifts to the registrant if and when the party seeking cancellation

establishes a prima facie showing of invalidity... The Board must then decide whether the party seeking cancellation has satisfied its ultimate burden of persuasion, based on all the evidence made of record during prosecution and any additional evidence introduced in the cancellation proceeding.”); 3 *McCarthy on Trademarks* § 20:64; see also *Material Supply Int'l, Inc. v. Sunmatch Indus. Co.*, 146 F.3d 983, 990 (D.C.Cir.1998). In determining whether a party has established prior use, Board should look at the evidence as a whole *West Florida Seafood, Inc., v. Jet Restaurants, Inc.*, 31 F.2d 1122, 31 USPQ2d 1660, 1663 (Fed. Cir. 1994). *Moke America LLC v. Moke USA, LLC*, 2020 USPQ2d 10400 (TTAB 2020) (failed to prove priority of use), *civil action filed*, No. 3:20-CV-00400 (E.D.Va. June 5, 2020).

CAMERA COPTERS INC, AS SENIOR USER
PROPERLY REGISTERED ITS COPOSITE MARK

As Registrant was the first to use its composite film strip CAMERA COPTERS mark in the United States for aerial photography goods and services, and has not abandoned the mark, it is the senior user. As the senior owner, now registered, Petitioner had no standing to bring this Petition. *Brookfield Communications, Inc. v. W. Coast Entm't Corp.*, 174 F.3d 1036, 1047 (9th Cir. 1999). In fact, being the first to use a mark, deemed the “senior” user, Registrant has the right to enjoin “junior” Petitioner from using its confusingly similar marks in the same industry and market, and certainly within Registrant’s natural zone of expansion. *Ibid.* See also *Union Nat'l Bank of Tex., Laredo, Tex. v. Union Nat'l Bank of Tex., Austin, Tex.*, 909 F.2d 839, 842–43 (5th Cir.1990); *Tally–Ho, Inc. v. Coast Community College Dist.*, 889 F.2d 1018, 1023 (11th Cir.1989); *New West Corp. v. NYM Co. of Cal.*, 595 F.2d 1194, 1200–01 (9th Cir.1979); *Media Online Inc. v. El Clasificado Inc.*, 88 USPQ2d 1285, 1287 (TTAB 2008) (El Clasificado entitled

to move for judgment on the pleadings on the issue of priority, despite not asserting priority as an affirmative defense, as priority was a required element of the claim.); *Kemi Organics, LLC v. Gupta*, 126 USPQ2d 1601, 1607 (TTAB 2018). *Life Zone Inc. v. Middleman Group Inc.*, 87 USPQ2d 1953, 1960 (TTAB 2008) (failure to prove priority by preponderance of the evidence). Petitioner does not and cannot meet its burden of establishing priority by a preponderance of evidence. TBMP section 314 provides that as provided in FRCP12(h)(2), failure to state a claim upon which relief can be granted may be raised at trial, and is here raised.

CAMERA COPTERS COMMERCIAL

STRENGTH IS DISTINCTIVE

A mark's strength is measured both by its conceptual strength and its marketplace or commercial strength. *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010); *In Re Marissa Paine*, 2022 WL 1555265, at *3 (Apr. 27, 2022). The owner of a famous mark shall be entitled, subject to the principles of equity and upon such terms as the court deems reasonable, to an injunction against another person's commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark, and to obtain such other relief as is provided in this subsection. *Ibid.*

In determining whether a mark is distinctive and famous, a court may consider factors such as, but not limited to the duration and extent of use of the mark in connection with the goods or services with which the mark is used; the duration and extent of advertising and publicity of the mark; the geographical extent of the trading area in which the mark is used;

the channels of trade for the goods or services with which the mark is used; the degree of recognition of the mark in the trading areas and channels of trade used by the marks' owner and the person against whom the injunction is sought; the nature and extent of use of the same or similar marks by third parties; and. whether the mark was registered on the principal register.

Ibid.

All of these factors weigh in favor of finding Petitioner's CAMERA COPTERS marks, including the one at issue herein, as highly distinctive if not famous.

CCI-13.(IMBD) -036 Paul Barth first received his SAG union card, in 1994, providing aerial photography services as a stunt pilot. Paul Barth's name has become is synonymous with CAMERA COPTERS in the film industry, as for the past two decades, he has only submitted bids as, been retained as, and contracted as, CAMERA COPTERS, INC, and he provide services utilizing the CAMERA COPTERS branded Rig. Thus, Paul's ImbD profile is the profile of CAMERA COPTERS. Credits include, but are far from limited to: Ace Ventura: Pet Detective (1994); CSI: Miami (2002), Man of Steel (2013); Burn Notice (2013); X-Men: Days of Future Past (2014), Succession (2018) and Black Widow (2021). CAMERA COPTERS INC.

Further attesting to the CAMERA COPTERS fame are Respondent's expert witnesses, one of whom is a film industry insider, and the other, who conducted a survey that makes clear, CAMERA COPTERS has an entrenched and established reputation in the U.S. film industry as a source of aerial photography, while survey respondents had not even heard of CAMCOPTERS. This survey also makes clear that in this major market, a driver of US industry that pays out \$192 billion in wages every year. [Request for Judicial Notice of Motion Picture Association published statistic at <https://www.motionpictures.org/what-we-do/driving-economic-growth/>], Paul Barth's famous CAMERA COPTERS brand would be tarnished and diluted, and consumer

confusion would unquestionably result, if a third party were allowed to enter, providing aerial photograph goods and services, utilizing the CAMERA COPTERS, or legally identical CAMCOPTERS brand.

Registrant would be entitled to enjoin Petitioner's expansion even without a registered trademark based upon the strength of the CAMERA COPTERS marketplace and commercial strength.

PETITIONER, NOT REGISTRANT CREATED

A LIKELIHOOD OF CONFUSION

A likelihood of confusion claim requires an analysis of the facts relevant to the following: The marks at issue are similar in appearance, sound, connotation, and commercial impression. Petitioner's goods serving the purpose of aerial photography and useful to serve a cross-section of the same industries as the goods and services of senior user CAMERA COPTERS, are highly related. Both parties are providers to the U.S. defense industry, thus the marks are in the same trade channels. Buyers to whom sales are made are careful, and sophisticated, particularly given the vast differences of price points between the Petitioner one product, and Registrant's multiple products, such that there has as yet, been no known confusion as to source. However, the senior mark, CAMERA COPTERS, has achieved a degree of fame. No others in industry are utilizing the CAMERA COPTERS mark. However, *camcopters* is in broad descriptive use. The market interface between the Registrant and Petitioner has not been notable, but not for lack of Petitioner's prior efforts. Despite CAMERA COPTERS serving the film industry since last decade, and having achieved significant acclaim, Petitioner sought a registrant as a service provider for the CAMCOPTER helicopters and aerial cinematography services. CCI040.

Having had the mark in use for such a long time, CAMERA COPTERS is entitled to, and does police its mark. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 1361 (C.C.P.A. 1973); Scott Paper Co. v. Liquid Gold, Inc., 589 F.2d 1225 (3d Cir. 1978). CAMERA COPTERS admits to engaging in more leasing and services than sales. These activities are nonetheless directly relevant to this proceeding, as is well-established at law. *Miss Universe L.P., v. Community Marketing, Inc.*, 82 USPQ2d 1562, 1566 (TTAB 2007) ("Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue (the *du Pont* factors)")

Other relevant factors are the strength of the CAMERA COPTERS mark, whether they are marketed through the same channels of trade, advertised through the same media, whether the goods compete directly, and the extent of sales efforts. *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492 (2d Cir. 1961); *Interpace Corp. v. Lapp, Inc.*, 721 F.2d 460 (3d Cir. 1983). Advertisement for the S-100 in the US was sparse prior to the Petitioner's application for registration, while the CAMERA COPTERS composite mark was advertised heavily in film industry targeted publications, as well as through direct engagement with the public. The S-100 marketing appears to have been limited to being on Boeing's website as a military craft, and two conference, one targeting others who are making and involved in development of UAVs that is held by a lobbying group, and the highly important, but very small group of those who are, or are engaged with Special Forces. Finally, the S-100 helicopter was not designed to compete directly with Registrant's drone, but could be used to compete directly with registrant's services.

"The term 'reverse confusion' has been used to describe the situation where a significantly larger or prominent newcomer 'saturates the market' with a trademark that is confusingly similar to that of a smaller, senior registrant for related goods or services." *In re*

Shell Oil Co., 992 F.2d 1204, 1208 (Fed. Cir. 1993) (quoting *Sands, Taylor & Wood Co. v. Quaker Oats Co.*, 978 F.2d 947, 957 & n.12 (7th Cir. 1992)). If Petitioner could established itself as the senior user, CAMERA COPTERS INC is still entitled to prevail. In re I.AM.Symbolic, LLC, 866 F.3d 1315, 1329 (Fed. Cir. 2017)

SENIORITY IS PROPERLY ESTABLISHED EVEN
WHEN GOODS AND SERVICES ARE DISTINCT

The key case in this matter, is Theia Techs. LLC v. Theia Group, Inc., CV 20-97, 2021 WL 291313, at *2 (E.D. Pa. Jan. 28, 2021), appeal dismissed sub nom. Theia Techs. LLC v. Theia Group Inc., 21-1303, 2021 WL 3669376 (3d Cir. July 27, 2021), wherein Technologies “owned its trademark THEIA for lenses and related software in the United States since at least November 2007 and October 2010...Technologies' THEIA mark appears on lenses used in high altitude drones and balloons, weather monitoring, and surveillance and security applications. Technologies sells its lenses and related software throughout the United States and around the world, including in Asia, the European Union, the Middle East, South America, Australia, Russia, and Eastern Europe. Technologies contends that its ownership of, and prior rights in, THEIA have been public since 2008 and that its use of the THEIA mark has been open and notorious since inception.

“Group recently began using THEIA in advertising its 112-satellite network. It markets this network as capable of spanning the globe to deliver “data analytics” to a wide variety of customers in many industries, including atmospheric sciences, agriculture, natural resources exploration, insurance, infrastructure protection, and security. In May 2019, the Federal Communications Commission (FCC) granted in part Group's application for the THEIA satellite

network. Group also has two U.S. trademark applications pending, one for the word mark THEIA and another for a THEIA design mark, for goods and services ... Group's Madrid extension of its U.S. trademark application has blocked Technologies' efforts to register the THEIA mark in Japan... [T]he parties' marketing and advertising channels overlapped. although Group initially focused its marketing efforts on sovereign nations to secure the build-out funds for its satellite network, it admits that vast majority of its expected revenue will come from major industries and individual consumers alike.”

The THEIA court held that “target markets need not be identical for this factor to support a finding of likelihood of confusion. *See, e.g., MedAvante*, 2006 WL 2927623, at *10 (finding targets sufficiently related where both parties were in healthcare industry and both met doctors in hospital and office settings). *Id.* “[T]he question is not whether it is possible to distinguish between the products but whether, and to what extent, the products seem related, whether because of [their] near-identity, ... or similarity of function, or other factors.” *Kos Pharm.*, 369 F.3d at 723 (internal quotation marks and citation omitted). Courts may consider “whether buyers and users of each parties' goods are likely to encounter the goods of the other, creating an assumption of common source[,] affiliation or sponsorship.” *Checkpoint Sys.*, 269 F.3d at 286. Moreover, the goods and services need not be identical. *Kos Pharm.*, 369 F.3d at 723; *A & H*, 237 F.3d at 224 (affirming that relatedness of the goods factor favored plaintiff where products were only “somewhat interchangeable” due to “slightly different functions”). Theia, at *30 (Emphasis added.).

“[I]t is appropriate to consider *whether a reasonably prudent consumer would see Group's goods and services and assume the same source also offers Technologies' goods and services*. *See Fisons*, 30 F.3d at 481. Group's use of optics, or lenses, to obtain imaging data and

the sale of that data manipulated by software is sufficiently related to Technologies' optics and software for analyzing data obtained from optics. For example, Technologies' lens technology is currently used on a spacecraft flown by the Japanese Space Agency JAXA and was flown by NASA on the “Global Hawk” drone used to monitor weather events. So, there is evidence that it is already used as a component part on satellites and on devices to study “atmospheric sciences,” which is one of the industries that Group intends to penetrate...

“Moreover, the name “Theia *Group*” suggests the existence of other Theia subdivisions handling various aspects of Group's goods and services—which is indeed the case. Even though Group produces and operates satellites—and not the lenses used on satellites as Technologies does—it is not unreasonable for a consumer to conclude that a company that produces satellites may produce the component parts too...

“The parties' goods and services need not be identical, as is the case here, for this factor to favor finding a likelihood of confusion. *Alfred Dunhill of London, Inc. v. Kasser Distillers Prod. Corp.*, 350 F. Supp. 1341, 1352(E.D.Pa. 1972), *aff'd*, 480 F.2d 917 (3d Cir. 1973) (“Goods are related if they are used in conjunction with one another or are associated together in some way in the minds of the consuming public.”). Instead, the likelihood of association between the part and the whole of a satellite is compelling evidence that weighs in Technologies' favor.

“...The *critical factor in this entire exercise—the similarity of the mark (Factor 1)—weighs heavily in Technologies' favor. The marks are identical. Further, the parties overlap in their targeted markets (Factor 8) (although they are not identical) and make use of similar trade channels to reach their targets (Factor 7) (again, with some peripheral distinctions). The relative strength of Technologies' mark (Factor 2) likewise supports a finding of likelihood of confusion. And, a reasonable consumer may likely associate the parties' products (Factor 9), a*

finding which is buttressed by Group's own name. Although deliberate intent is difficult to establish in a reverse confusion case (Factor 5), this factor weighs slightly in favor of Technologies too.

137. The length of time factor (Factor 4) is accorded minimal weight because of the amount of time Group has publicly used the mark. So, it favors neither party. But, *given the isolated incident of actual confusion, this factor (Factor 6) weighs in Technologies' favor—albeit weakly.*

138. *The care and attention of consumers (Factor 3) weighs against Technologies because the relevant purchasers are sophisticated. But because there still may be confusion as to source or affiliation, the factor does not weigh strongly in Group's favor.*

139. On balance, the Court finds that Group's use of the THEIA mark is likely to create confusion... facts suggesting that consumers might expect the plaintiff to manufacture both products, to manufacture a product in defendant's market, or that plaintiff is likely to expand into defendant's market. Ibid. (Emphasis added.)

Petitioner's helicopters, whether flown with or without a pilot, if camera enabled, serve the same purpose of, are in the same channel of trade as CAMERA COPTERS goods and services. The goods and services were strongly related well prior to Registrant's natural expansion into drones. Registrant is unquestionably the senior user, being the first selling, leasing, servicing, remanufacturing, and providing services with camera enabled helicopters using the composite mark under attack. Registrant was also the first to provide services to defense contractors; in fact, directly to the military, which use continued through the time when it adopted the CAMERA COMPOSITE film strip mark at issue. On balance, if the CAMCOPTER mark has not already, it is likely to create confusion.

REGISTRATION OF CAMERA COPTERS

CURTAILS JUNIOR USER CAMCOPTER's MARKET

“[F]ederal registration has the practical effect of freezing a prior user's enforceable trademark rights thereby terminating any right to future expansion beyond the user's existing territory. *Allard Enters., Inc. v. Advanced Programming Res., Inc.*, 249 F.3d 564, 572 (6th Cir.2001). “ In the case in which a junior user applies for registration, ... the extent of the senior user/non-registrant's territory is frozen as of the date of actual registration to the junior user.” *Tana v. Dantanna's*, 611 F.3d 767, 780–81 (11th Cir. 2010). *Tally–Ho, Inc. v. Coast Cmty. Coll. Dist.*, 889 F.2d 1018, 1023 (11th Cir.1989); *see also Echo Drain v. Newsted*, 307 F.Supp.2d 1116, 1127 (C.D.Cal.2003) (“A senior user of a trademark is entitled to assert its trademark rights in all areas in which it has legally sufficient market penetration and a zone of natural expansion.”). Good faith junior users who later use the same or similar mark on alike products or services also may establish rights to the mark *provided there is no competitive overlap with the senior user.* *Paeteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. De C.V.*, 69 F. Supp. 3d 175, 206 (D.D.C. 2014) (Emphasis added.).

As Registrant is the senior user, and Petitioner's S-100 is in competitive overlap, Petitioner has NO right to registration of CAMCOPTER.

Notwithstanding who was first to use the mark, Registrant prevails, as the CAMCOPTER S-100 marketplace reach is de minimis. “In the case in which a junior user applies for registration, however, the extent of the senior user/non-registrant's territory is frozen as of the date of actual registration to the junior user. 4 McCarthy §§ 26:40, 25:53; Lanham Act § 15, 15 U.S.C. § 1065.). *Allard Enterprises, Inc. v. Advanced Programming Res., Inc.*, 249 F.3d 564, 572 (6th Cir. 2001) citing 4 McCarthy § 26:38 (4th ed. 2000). Schiebel's rights to its mark extend

only as far as the channel of trade in which its continuous prior use of that mark preempted plaintiff's constructive use of its mark, if any. *Allard Enterprises, Inc. v. Advanced Programming Res., Inc.*, 249 F.3d 564, 572 (6th Cir. 2001), citing *Allard*, 146 F.3d at 361; *CAMERA COPTERS INC*'s "federal registration has the practical effect of freezing a prior user's enforceable trademark rights thereby terminating any right to future expansion beyond the [Schiebel's existing use]. *Tana v. Dantanna's*, 611 F.3d 767, 780–81 (11th Cir. 2010) citing *Allard Enters., Inc. v. Advanced Programming Res., Inc.*, 249 F.3d 564, 572 (6th Cir. 2001). Accord, *Thrifty Rent-A-Car Sys., Inc. v. Thrift Cars, Inc.*, 639 F. Supp. 750, 756 (D. Mass. 1986), aff'd, 831 F.2d 1177 (1st Cir. 1987) (the date of Thrifty Rent-a-Car's federal trademark registration—emerges as the crucial date for determining the rights of the parties.); *Quill Corp. v. LeBlanc*, 654 F.Supp. 380, 385 (D.N.H.1987) ("At the point in time of registration, the junior user's current market—its 'area [of] continuous prior use' ...—is frozen, and ... the junior user's reputation, advertising, and sales delimit its frozen area." [citations omitted]); and 3 *McCarthy*, *supra*, § 26.12[1] at 26–41 ("The territorial scope of a trademark and its goodwill must be defined in terms of the area from which customers are drawn, the coverage of advertising media and the nature of goods or services sold."). *Peaches Entm't Corp. v. Entm't Repertoire Associates, Inc.*, 62 F.3d 690, 693 (5th Cir. 1995)

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PETITIONER FAILS TO MEET ITS BURDEN TO
ESTABLISH US TRADEMARK USE
USE BY A PREPONDERANCE OF EVIDENCE

INADEQUATE WEIGHT OF EVIDENCE

Petitioner claims once a year attendance at two “tradeshows.” In fact, AUVSI is an acronym for the Association for Uncrewed Vehicle Systems International, a trade lobby. SOFIC, an acronym for Special Operation Forces Industry Conference is hosted by the National Defense Industrial Association, for the US government and defense industry, a very narrow target. It is also unknown which AUVSI conference were attended by Petitioner, those held for the purpose of networking within the unmanned systems and robotics community, or more likely given Petitioner’s U.S. “client”, the PROGRAM REVIEW, where information is provided to the membership on government and industry, now known as Unmanned System Defense Review.

There is also no evidence that marketing in either conference was commercially effective, or resulted in a single commercial sale. Accord, *In re Redken Labs., Inc.*, 170 USPQ 526, 529 (TTAB 1971) (holding evidence adduced by applicant pursuant to §2(f) insufficient to establish acquired distinctiveness of THE SCIENTIFIC APPROACH, for lectures concerning hair and skin treatment, notwithstanding ten years of use, over \$500,000 in promotion and sponsorship expenses, and the staging of over 300 shows per year); *In re E.I. Kane, Inc.*, 221 USPQ 1203, 1206 (TTAB 1984) (affirming refusal to register OFFICE MOVERS, INC., for moving services, notwithstanding §2(f) claim based on, *inter alia*, evidence of substantial advertising expenditures.).

Petitioner's booths at these two shows do not establish trademark use. There is, however, evidence (CCI-23) being published material from 20___, wherein Schiebel admits that it was only just developing drones for the general commercial market, and that at the time, developments of drones for commercial deployment within the United States had been halted.

PETITIONER'S USE WAS TOO REMOTE TO ESTABLISH
MARKET PENETRATION OR RECOGNITION

“Because commercial use of a mark in one market does not automatically create priority to use that mark in all other markets, a market-by-market analysis is required to determine priority....” Paleria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. De C.V., 69 F. Supp. 3d 175, 206 (D.D.C. 2014). Substantial evidence is more than a mere scintilla and such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. Consol. Edison Co. v. NLRB, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938)).

In Green Spot (Thailand) Ltd. v. Vitasoy International Holdings Ltd., 86 USPQ2d 1283, 1284-85 (TTAB 2008), an applicant was found unable to establish priority in the United States based on the fact that applicant's mark is well-known in other countries. See also *Sun Hee Jung v. Magic Snow, LLC*, 124 USPQ2d 1041, 1044 (TTAB 2017) (insufficient pleading of priority based on recognition, rather than use, in the United States as well as United States-Korea Free Trade Agreement).

With respect to unregistered US trademarks, [even if Petitioner had been the first to use] the party that first uses a mark in commerce in the United States does not automatically obtain a nationwide right to use the mark. Rather, the first party to use the mark in the United States, referred to as the “senior user,” acquires rights only for those territories in which it uses

its mark, and [then] into which it might naturally expand. Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. DE C.V., 188 F. Supp. 3d 22, 87–88 (D.D.C. 2016), aff'd, 743 Fed. Appx. 457 (D.C. Cir. 2018).

Where “PROLACTO fail[ed] to demonstrate substantial familiarity with its marks within any relevant American market such that the famous mark doctrine might apply, its trademark infringement claim, like that of the thousands of plaintiffs before it, [was] constrained by the territoriality doctrine, and as such, the actual commercial use of the marks within the United States. Ibid. In “*La Societe Anonyme des Parfums Le Galion v. Jean Patou, Inc.*, 495 F.2d 1265 (2d Cir.1974), the Second Circuit considered a perfume manufacturer that recorded eighty-nine sales of perfume bearing a particular trademark over a period of twenty years. The court concluded that “such a meager trickle of business [failed to] constituted the kind of bona fide use intended to afford a basis for trademark protection.” *Id.* at 1272; Allard Enterprises, Inc. v. Advanced Programming Res., Inc., 146 F.3d 350, 359 (6th Cir. 1998).

“[N]or can the Court locate, any case in which a court has denied a national senior user rights in a mark because the mark was previously used outside of the United States and the national senior user adopted the mark in bad faith.” Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. DE C.V., 188 F. Supp. 3d 22, 89 (D.D.C. 2016), aff'd, 743 Fed. Appx. 457 (D.C. Cir. 2018).

Laverne Daley, an international branding expert, conducted a survey to form her opinions, and supplemental market research in response to Petitioner’s submission of evidence, in forming her opinions. Ms. Daley finds that CAMERA COPTERS, as the first user of the mark for aerial photography goods and services, would be damaged by the entry into the marketplace

of a third party with an abbreviated form of its mark for use on drones, creating significant and economically erosive damage. Accordingly, had CAMERA COPTERS INC become aware of any such use, it would have had the right to, and would have forced the cessation of such use.

Ms. Daley was also tasked with conducted subsequent research to independently verify the extent of the S-100's use in the US, testing Petitioner's vague allusions to sales agent/licensee invoices and communications. Ms. Daley's independent research findings support the conclusion that the S-100 was only in foreign markets, and that if it entered the US marketplace, it was years after the filing of the application that formed the basis of the registration under attack. [EVIDENCE] That research additional found that Petitioner's US reach was limited solely to the US military. [EVIDENCE]

In addition to being the national senior user, CAMERA COPTERS captured the entire nation in its advertisement and market penetrating reach, whereas CAMCOPTERS was virtually unheard of, and had only meager if any US sales.

DOCUMENTATION AND TRANSACTIONS WITH BOEING

DO NOT ESTABLISH TRADEMARK USE OF CAMCOPTERS

Under "15 U.S.C. § 1057(c), the owner of a federally registered mark may claim constructive use of that mark as of the date of filing of the application for registration. Under this statutory scheme, defendants' rights to its mark extend only as far as the area where its continuous prior use of that mark preempted plaintiff's constructive use of its mark. Allard Enterprises, Inc. v. Advanced Programming Res., Inc., 146 F.3d 350, 360–61 (6th Cir. 1998) Petitioner has no exclusive and continuous US territory.

The court is *Moreno v. Pro Boxing Supplies, Inc.*, 124 USPQ2d 1028, 1036 (TTAB 2017) found that a licensee cannot rely on her licensor's use to prove priority. In *General Motors Corp. v. Aristide & Co., Antiquaire de Marques*, 87 USPQ2d 1179, 1181 (TTAB 2008), opposer's proof of priority was insufficient, as licensing by itself without sales is not use of a mark. The sale of clothes to its sales managers "was insufficiently public to secure trademark ownership," because "[s]ecret, undisclosed internal shipments are generally inadequate to support the denomination 'use.'" *Allard Enterprises, Inc. v. Advanced Programming Res., Inc.*, 146 F.3d 350, 358 (6th Cir. 1998). In *Avakoff v. Southern Pacific Co.*, 765 F.2d 1097, 226 USPQ 435, 436 (Fed. Cir. 1985), shipment to owner of mark by manufacturer, advertising in the nature of form letter solicitation to retailers, and subsequent sales were found insufficient to constitute use in commerce for applicant. Likewise, in *City National Bank v. OPGI Management GP Inc./Gestion OPGI Inc.*, 106 USPQ2d 1668, 1676-78 (TTAB 2013), internal use of a mark by applicant was not found to constitute use in commerce. See also *Syngenta Crop Protection Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1119 (TTAB 2009) (insufficient record evidence of prior use).

In this matter, Petitioner requests Judicial Notice be may taken of BOEING's archived website for the S-100, of Petitioner's landing page for the S-100 (CCI-026), and of a New Atlas Article dated from August of 2008, entitled "Boeing to Market S-100 Camcopter" (CCI-034 and 035) calls into question the allegation that Boeing was purchasing the S-100 Camcopter, as opposed to being a sales agent/licensee of the craft. *Wella Corp. v. California Concept Corp.*, 192 USPQ 158 (TTAB 1976), *rev'd* on other grounds, 558 F.2d 1019, 194 USPQ 419, 422 n.5 (CCPA 1977) (Judicial Notice may be taken at any stage of a Board proceeding, even on review of the Board's decision on appeal. Fact of common knowledge, e.g., of purchasers and channels

of trade for home permanent wave kits, appropriate for judicial notice); *Continental Airlines Inc. v. United Air Lines Inc.*, 53 USPQ2d 1385, 1393 n.5 (TTAB 1999) (judicial notice may be taken at any time).

Also raising a question regarding whether the relationship between Boeing and Schiebel was one at arms length, is the testimony of Petitioner's witnesses, revealing that Boeing was assisting Petitioner with development. It is notable that invoices submitted by Petitioner were during the time when Boeing is alleged to have been assisting with development. *Pennwalt Corp. v. Sentry Chemical Co.*, 219 USPQ 542, 550 (TTAB 1983) (nonuse in commerce based on experimental shipment not available ground for registration over five years old).

All Boeing related evidence is nonuse in commerce, and insufficient ground for registration.

EXCLUSIVE USE OF CAMCOPTER

ALLEGED PRIORITY DATE IS NOT PROVEN

There is insufficient evidence to establish that Schiebel developed any exclusive rights in Camcopters in 2009. In fact, the evidence suggests that another company altogether, unrelated to Petitioner, was the dominant known drone provider using CAMCOPTER.

Schiebel's sales were not to the general public, but very narrowly targeted to a single industry, and (allegedly) a single buyer within the United States, never marketed to, never entered into, and remained essentially unknown in the world of commercial drones, according to both of Registrant's experts, one based upon deep familiarity with the industry, and the other, based upon market research.

Supplementing the above evidence that Petitioner did not have first use of the CAMERA COPTERS mark in the US for goods and services in the field of aerial photography, are documents that call into question Schiebel's allegation that it ever policed its mark, and calling into significant doubt that that it ever had exclusive of the mark for unmanned vehicles within the United States.

Mundus Group evidence is from a publication entitled to be judicially recognized and accepted into evidence, to demonstrate the lack of weight in the allegation by Petitioner, that the mark was policed and shut down. Clearly, Mundus continued its marketing with its CAMCOPTER products thereafter. First, the publications, bearing a date prior to applicant's alleged first use. Further, the publications directly contradict the purported effect of a purported cease and desist letter, with no proof of any receipt by, or evidence of an agreement by Mundus to stop use.

CCI-16 In a 2008 archive from the Mundus Group, Inc., website, the company touted itself as an advanced aerospace technology consortium, researching experimental aircraft and Unmanned Air Vehicles (UAV) since 1990, including computer assisted auto flight technologies and Remote Controlled (RC) technologies. CCI-17. Page 20 of the Mundus Group annual report, issued May 13, 2009, filed with the SEC and publicly available, indicates that it signed an agreement in 2008 with AirStar "to build the next generation of VTOL UAVs as their commercial professional grade Aero Drone and aerial surveillance systems." CCI-19 an archive of the Airdrone Inc website, (also bearing a 2008 Mundus group copyright attribution) reflects that a CamCopter Basic Camera, CamCopter 360 degree VariScope, and the CamCopterXTreme were in commercial production, had been utilized for a long list of commercials and films, and that Airdone Camcopters had been delivered to ABC, CBS, NBC, WB, and FOX studios.

Whether or not the press release contains true statements, six months after Schiebel's alleged cease and desist letter to Mundus, purportedly served on December 29, 2008 (prior the date alleged as Petitioner's herein alleged first use in the United States), MUNDUS AIRGROUP commissioned PRNewswire, a long-established news wire e-distribution service to distribute a same day press release (May 28, 2009), announcing its advancements in panoramic viewing, accomplished in collaboration with "*Airstar Camcopter*." CCI-015. The press release broadcasted that "*Mundus Airstar Camcopter*" provided services to George Lucas, such a while prior, that the *Airstar Camcopter* deliverable was broadcast during the 2004 superbowl to capture extreme action – five years prior to the alleged date of first use by Petitioner.

Schiebel was not positioned, as the junior user, to "police" the senior Mundus' Airstar or Mundus' Airdrone use of Camcopters. CCI-22 & 23 Evidence has not been presented to explain the Mundus continued promotion of the CAMCOPTERS brand after the alleged cease and desist. The Mundus uses defeat any effort to establish Petitioner had senior or exclusive use of Camcopter for unmanned vehicles since 2009.²

There are no facts in evidence to establish when Mundus finally ceased utilizing *Camcopter*, or why. However, we do know from Paul Barth's testimony, Paul Morris' testimony, and a New York Times article, [CITATIONS] that in 2013, commercial drones were prohibited from being developed for U.S. airspace, pending the release of updated FAA rules, as consequences of dangerous activities by a laypersons operating. *Primrose Retirement*

² That Petitioner may have fabricated evidence to defraud the Board into ruling that Schiebel maintained exclusive ownership of the CAMCOPTERS is plausible. At minimum, the entirety of Mr. Schiebel's very biased testimony should be excluded as unreliable.

Communities, LLC v. Edward Rose Senior Living, LLC, 122 USPQ2d 1030, 1040 (TTAB 2016)
(dismissing opposition; third party evidence demonstrates weakness of mark);

In sum, the overwhelming preponderance of evidence is, that even with regarding to unmanned vehicles, there is no proof of a date of first exclusive use established by Petitioner.³

EVIDENCE OF SCOPE OF THE
CAMERA COPTERS' MARKET

CCI-001 and CCI-010 Paul Barth formalized the use of the brand CAMERA COPTERS, by establishing a corporation within the State of Florida, called Camera Copters, Inc., as evident from its Articles of Incorporation dated 1997. By 1999, the CAMERA COPTERS mark was in use as a trademark within cameracopters.com, with images of helicopters, expressly advertising aerial photography services, and expressly targeting interstate commerce, namely, Miami, New York, and Los Angeles.

CCI-4a & b Is a Cover and page from a CAMERA COPTER/AIRBORNE VIDEO SERVICES joint venture catalogue. This archive of a CAMERA COPTERS catalogue featuring both a camera mounted helicopter and plane, proves that the CAMERA COPTERS brand had been an indication of source of helicopters and planes with cameras, for over 20 years at the time of its issue. Even if this catalogue had been released just prior to the introduction of drones by CAMERA COPTERS, in 2016, it suggests use of CAMERA COPTERS in commerce as far back

³ Although the S-100 CAMCOPTER was made to dominate Google search results for *camcopters*, whomever worked toward improving Google results, forgot to attend to optimization of the other search engines, in which the S-100 is not found among top results. (CCI-032 and CCI-034). In accord are Amazon.com search engine results for Camcopters (CCI-034).

as 1996. CCI (28 – duplicate of) 29 and 29a and 29c. The earliest dates of proof that Registrant can locate for use of CAMERA COPTERS with the parties' shared customer, the US government, are in 1999, when it was retained by to remanufacture both, a Hughes /McDonald Douglas Helicopters for aerialphotography capacity. These bid, specification, and bid acceptance documents establish Registrant's seniority, as they are dated well prior to Petitioner's entry into the United States with an "*aerial camera craft.*" Senior use of the CAMERA COPTERS mark to do business with the U.S. government, including as a U.S. military contractor, was not that of Petitioner.

CCI-3a, b, &c 2 invoices and letter to Florida Department of Transportation, establish that the CAMERA COPTERS brand, being a division of HELICOPTER AVIATION SERVICES AND LEASING, INC., was an indication of source for camera-mounted helicopters for aerial geomapping services in the United States, and had unquestionably had sales as early as 2001, continuing through 2003 and 2007. These documents prove that the senior use of CAMERA COPTERS in the parties shared industry was not Petitioner, and that the mark was continuing to be used interstate commerce by CAMERA COPTERS INC, operating in Florida, New York, and Los Angeles.

CCI-2 CAMERACOPTERS.com website archive taken from the wayback machine, from 2010 demonstrates that use of the CAMERA COPTERS brand remained in use in interstate commerce with its "*CAMERA SHIPS*", continuing to target, New York, Florida, California, and adding USA, as a "one-stop source for complete aerial packages" for "Helicopters and Airplanes, Camera Mounts And Systems, Aerial Coordiantion And Stunts..." and that the company was equipped with the FAA Motion Picture Safety Manual. The website even contained descriptions

regarding CAMERA COPTERS custom designed camera mounts for aerial filming, rigging for nose or side mounts, even the capacity to capture vertical shots. The date of this marketing, reflective of capacity already in the marketplace, was during a time when Petitioner was still developing. Even if Petitioner could be said to have been in the marketplace, it most certainly cannot be found to have exclusive use, or to be dominate, or even relevant in the commercial marketplace.

CCI-27 (tech specs bid), CCI-38 Also in 2010, CAMERA COPTERS responded to NASA's Robotic Luner Lander Development program's request for proposal, this time to deliver a Hughes helicopter mounted with camera system proprietary to Camera Copters Inc., power and interface, and to provide engineering services, transport services, testing, and flight services, all prior to, or at minimum, concurrent with Petitioner's introduction of its *aerial camera craft* into the U.S. market. This work demonstrates that Registrant was not just the senior user, but continued to operate in the U.S. Defense industry through the time when Petitioner alleges its first entry. In fact, Paul's membership in the Airborne Public Safety Association since 2016 as *Officer* Paul Barth, came about because he was commissioned to train tactical pilots in safe maneuvering of airships.

CCI-3a, 6, 8, and 9 all demonstrate that CAMERA COPTERS continued to be used to advertise, lease branded goods, and provide aerial cinematography services utilizing camera mounted helicopters, such that introduction of Petitioner's camera enabled helicopter, was neither as a senior user, a dominant user in the commercial marketplace, nor a sole source provider in any marketplace.

CCI-6 As is established from internet archives, the metadata of which indicates that the submitted screenshot was downloaded on November 10, 2021, the CAMERA COPTERS red, black, and white film strip motif was in use at least as early as 2010.

EVIDENCE OF PRIORITY AND CONTINUING USE OF
CAMERA COPTERS COMPOSITE MARK

CCI-8 Note the CAMERA COPTERS hauler, bearing the brand as registered. The support rig is referenced on the CAMERA COPTERS invoice for a project that took place in January of 2007.

CCI 003a - The CAMERA COPTERS hauler or Rig, enlarged in this photograph, is the same photograph as that in CCI 012, a full page advertisement that was routinely placed in a magazine that targeted the film industry.

CCI-37a, b, c During the development of CAMERA COPTERS INC branding, and prior to Registrant's alleged date of first use, the mark the subject of this Petition was adopted, and utilized in marketing efforts. One such placement well in advance of Petitioner's first purported U.S. sales, was in Markee Magazine,⁴ in 2008. In the same issue, dedicated to producing in Florida, Paul Barth was featured on the cover. CAMERA COPTERS placed an article inside titled CAMERA COPTERS, detailing and promoting the premier aerial cinematography experience that is brought to a production when CAMERA COPTERS is retained, referencing the bases of operation that CAMERA COPTERS maintains in various states, revealing that by

⁴ Markee was published from 1985 through 2011.

2009, CAMERA COPTERS's business was so expanded, that the company had to provision a second rig, and making mention of highly notable consumers of broad scope that retain CAMERA COPTERS, including producers of GET SMART, PGA, THE AMAZING RACE, and the DISCOVERY CHANNEL.

CCI-11 The CAMERA COPTERS mark remained in use through and into 2020, including but not exclusively for the express purpose of servicing the Motion Picture Film, TV, and other commercial clients with “flying machines” capable of “capturing the shot.”

(cameracopters.com)

CCI-12 CAMERA COPTERS as styled in the registration at issue, began and continued to be utilized in full page advertisements placed monthly in film trade magazines, offering “...aerial production services, Helicopters & Airplanes, Camera Mounts & Systems...” containing photographs of camera mounted helicopters, a pictures of the CAMERA COPTERS rig, wrapped with a picture of one of the CAMERA COPTERS aerial photography helicopters, containing pictures of an aerial camera , stabilizing gyroscope, mount, and containing a picture of Paul Barth, the Camera Copters company and brand owner , identifying him as a SAG pilot and Aerial Coordinator.” The ad identified the marketplace for CAMERA COPTERS as “CALIFORNIA FLORIDA, LOUISIANA, NEW YORK, USA” copy of ad in directories and magazines.

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EVIDENCE OF SENIOR USE

The Testimonial declaration of Paul Barth establishes his priority ownership of the CAMERA COPTERS mark selling, renting, servicing, and operating helicopters, extensive media coverage about his use of the mark, and extensive recognition of the mark as synonymous with him. It also attests to

his extensive use of CAMERA COPTERS horizontal film strip mark in the aircraft industry;

his prior use of CAMERA COPTERS in the defense industry;

his extensive media coverage of CAMERA COPTERS.

Not only does CAMERA COPTERS have priority for the sale of helicopters, the use of helicopter suitable for aerial photography, and goods and services commonly understood by the general public to be drones.

Not until 2016 did the commercial industry for drones in the United States get a toehold, restrained in part by FAA regulations. When those regulations were finally in place, the instant application had already been filed. These facts and circumstances are proven by the testimony of Mr. Morris and the Declaration of Mr. Barth, both experts in their fields, and the FAA regulations themselves.

Neither Messers. Barth or Morris, experts in their field with each having over three decades of experience within the US, have been able to detected any US use of the S-100 CAMCOPTER product in the US marketplace, although alerted to the existence of the competing use outside of the US, in or around 2010. This, even though Petitioner received a prior a US trademark registration for CAMCOPTERS for *cinematography and video cameras, helicopters, film production, and aerial photography* in 2006, and tried to enter the US

marketplace (CCI-040, USPTO Registration No. 3174370) and usurp the CAMERA COPTERS brand.⁵ During CAMERA COPTERS' policing of its mark (CCI-030 and CCI-031), there was no detectable commercial footprint reflecting that Petitioner was or had been in the marketplace

EVIDENCE OF CAMERA COPTERS

NATURAL ZONE OF EXPANSION

CAMERA COPTERS, famous in the film industry by 2015 and well before that date, for aerial cinematography photography services, developed a commercial drone, as such was within its natural zone of expansion. Worldwide, drones were rapidly replacing manned aerial photography flights. [Declaration of Paul Morris ___ pg, paragraph, and line, CCI-022, and CCI-039] Drones were a natural, in fact the only next step from CAMERA COPTER'S previous business activity within the United States, where it was and continues to be the sole source of these goods and services, utilizing the CAMERA COPTERS brand.

CCI-p25, a copy of Part 107 of U.S. Fed Aviation Regs (FAR). As is clear from Section FAR 107.3, the anticipated regulation, (81 FR 42209 - resumption of authorization to place drones in commercial use) was not released until June 28, 2016, 10 months after the September 30, 2015 filing of Registrant's CAMERA COPTERS USPTO application. That regulation, applicable to Registrant's drone, is for a class of aircraft also known as *Small unmanned aircraft* or SUA for craft weighing under 55 pounds. Following the industry curve, Registrant's drone was in the marketplace less than 2 months after FFA authorization was issued. Petitioner's fuel-

⁵ This 2006 CAMCOPTER USPTO registration stands in quite stark contrast to the allegations of Petitioner's witness Mr. _____, that the CAMCOPTER mark developed quite innocently and organically during the development phase of the S-100 in a Boeing facility.

powered helicopter, requiring a remote pilot's license, is not within this class. Petitioner has never made aircraft commercially known as drones. Even on its S-100 CAMCOPTER webpage, Petitioner makes no use of the word *drone* in relationship to the product, instead referring to the "missions" of the Unmanned Air System (UAS).

EVIDENCE OF CAMERA COPTERS GOOD WILL

The below documents will be relied upon to establish that Registrant and senior user CAMERA COPTERS INC will be damaged by loss of protection from its trademark registration, as Applicant's use of CAMCOPTER in Registrant's industry will cause confusion in the marketplace, and erode the value of over 25 years of good will in the CAMERA COPTERS' mark as stylized and preserved in the instance registration.

CCI-21. Survey results and expert opinion from Laverne Daley of L Global. Testimony of Ms. Daley is not just that there would be confusion. She also opines that there is no confusion as yet, because Petitioner is not in the US commercial marketplace. Opinion backs up the conclusion, that the marks can be said to be identical. As such, Petitioner, a quiet and remote concurrent user for more than a decade, and cannot jump from its narrow scope of distribution into the marketplace that Plaintiff has developed.

Mr. Morris will testify also that there will be confusion between CAMCOPTER and CAMERA COPTERS if the former is allowed to provide commercial drone services in the U.S., beyond its military purposes.

The Markee Magazine article on UAV's for film, 2014 will also be relied upon as evidence that CAMCOPTERS had not acquired any distinctiveness in the U.S. prior to

Registrant's September 30, 2015 filing date for the registration at issue, whereas Mr. Barth and CAMERA COPTERS were recognized as authoritative.

Even if Petitioner could be said to have entered the US market as a senior user for UAV's sold to the military, it "cannot preclude [CAMERA COPTER'S INC's] good faith use of the mark in [the channels of trade it developed, as Schiebel's] mark is not known to consumers in the [CAMER COPTER'S INC's] market. *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403 (1916), and *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90 (1918). Petitioner's use is remote, in terms of market segment, if it exists at all. A presumption can easily be reached, that Petitioner's registration was not in good faith in 2006, and is not now in good faith; and instead, it favored Petitioner's mark, attempted to take it then, has been quietly trading with it ever since, and is now attempting bolding to extract the good will therefrom. *Sabhani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *49 (TTAB 2021) (reverse confusion found where respondent's presence in the marketplace is considerably greater than that of petitioner).

SUMMARY

Registrant is the senior user for all purposes, the senior user for helicopters, helicopter parts, and related services, the senior user of the mark for aerial photography sales, leasing, and services, the senior user with a U.S. defense contractor, the senior user in the U.S. film industry, the senior user for commercial drones, and the first to obtain a use based federal trademark registration for the mark for drones. As such, Petitioner's subsisting common law trademark rights in CAMCOPTERS, concurrent, if at all, only in the narrow market for fuel-powered UAV's helicopter for the military/defense industry, are "frozen", as a result of CAMERA COPTER'S very broad common law recognition in aerial photography (survey), coupled with its

registration for its commercial drones. Even if Registrant was the junior user, the registration remains valid, and operates as a restraint on Petitioner's expansion.

There being insufficient evidence of an arms-length sale of the S-100 until after the date of the instant registration within the US commercial marketplace, Petitioner to breach the rightfully granted statutory exclusivity for the use of CAMERA COPTERS for drones, would allow a company proven to be predatory toward CAMERA COPTERS (CCI-040) to expand create confusion in the marketplace as to source by trading upon and usurping the goods will in a brand that Mr. Barth spent his entire career developing,⁶ violate the very purpose of registration.

Given the extraordinary weight of evidence in favor of a finding that Registrant has seniority over the CAMERA COPTERS mark in the US and that if there was concurrent use, Scheibel's US use was likely limited to serving only the Defense industry, fundamental fairness requires the dismissal of the instant Petition with prejudice. If CAMCOPTERS is allowed to be registered, Petitioner will be emboldened in its continuing quest to capitalize upon, diminish the value of, and ultimately damage Registrant's long and hard fought recognition for aerial services provided within and for a variety of industries, including the defense industry.

September 28, 2022

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⁶ Even since the filing of this matter, Petitioner has introduced a toy, or "hobbyist" drone.