

REMARKS

Applicant believes that no likelihood of confusion exists with regard to Applicant's mark and the cited mark (U.S. Registration No. 5708040) for a number of reasons, namely: (1) the generic, or at least highly descriptive, and dilutive nature of the common word "recharge"; and (2) the differences between the two marks when considered in their entirety.

With regard to the generic and dilute nature of the word "recharge," a review of the Internet reveals third-party common law usage of several "recharge" related marks in the field of hearing assistance products, including the following:

- Concept Recharge – Iowa Hearing Aid Centers (<http://www.iowahearing.com/hearing-aids/concept-recharge-hearing-aids/>)
- Nano Model X2 Recharge – Nano Hearing Aids (<https://nanohearingaids.com/products/new-x2r>)
- Accutone iHear Advantage Recharge – EarMall.com (<https://earmall.com/products/accutone-ihear-advantage-recharge-hearing-aid>)

Given this substantial third-party use of "recharge" to identify providers of rechargeable hearing assistance products or to otherwise use the phrase generically to describe such products, the word "recharge" is, at a minimum, very weak as an asserted mark or portion thereof. See, e.g., *Homeowners Grp., Inc. v. Home Mktg. Specialists, Inc.*, 931 F.2d 1100, 1108 (6th Cir. 1991) ("courts have found extensive third-party uses of a trademark to substantially weaken the strength of a mark"). As a result, the public is conditioned to look to other criteria as a means of distinguishing the source of Applicant's and the registrant's goods in the marketplace. *In re Broadway Chicken, Inc.*, 38 U.S.P.Q.2d 1559, 1565-66 (T.T.A.B. 1996). That is, where the common element between two marks is weak due to widespread use by others, the likelihood of confusion is reduced. *In re Hamilton Bank*, 222 U.S.P.Q. 174 (T.T.A.B. 1984).

With regard to a comparison of Applicant's mark and the cited mark, Applicant's mark begins with the distinctive word "PLAID" before the descriptive term "recharge." Thus, the dominant portion of Applicant's mark would be considered the word "PLAID." See TMEP § 1213.05. ("Although there is no mechanical test to select a 'dominant' element of a compound word mark, consumers would be more likely to perceive a fanciful or arbitrary term, rather than a descriptive or generic term, as the source-indicating feature of the mark.")

On the other hand, the cited mark does not include any distinctive or fanciful words in combination with the descriptive term "recharge." Applicant submits that marks are to be considered in their entirety and all components thereof must be given appropriate weight in the likelihood of confusion analysis. See, e.g., *Leelanau Wine Cellars, Ltd. v. Black & Red, Inc.*, 502 F.3d 504, 517 (6th Cir. 2007) (finding it inappropriate to discard certain portions of accused infringer's mark because "[d]iscarding these elements in assessing similarity [] would run contrary to the rule that courts must 'view marks in their entirety and focus on their overall impressions, not individual features.'") (quoting *AutoZone, Inc. v. Tandy Corp.*, 373 F.3d 786, 795 (6th Cir.2004).

When properly considering the marks in their entirety, particularly Applicant's inclusion of the distinctive word "PLAID" as the first portion of its mark, and given that the only common portion of the respective marks is at least highly descriptive and dilute, Applicant submits that there is no likelihood of confusion between the Applicant's mark and the cited mark.