Registration of the applied-for mark (PROTEGE for "musical instruments and accessories therefor" in class 015 as amended herein) ("Applicant's Mark") has been refused because of an alleged likelihood of confusion with the mark in U.S. Registration No. 4270175 (PROTEGE for "Downloadable musical sound recordings; Musical sound recordings; Musical video recordings; Audio recordings featuring music; Video recordings featuring music; Prerecorded audio cassettes featuring music; Prerecorded video cassettes featuring music; Prerecorded video tapes featuring music; DVDs featuring music; Phonograph records featuring music", in class 9 ("Cited Mark"). However, Applicant respectfully submits that there is no likelihood of confusion between Applicant's Mark and the Cited Mark because Applicant's goods are not related to and do not overlap with the goods of the Cited Mark and because Applicant's goods move in different channels of trade to different consumers.

With regard to the goods, it is asserted that Applicant's goods and the goods in the Cited Mark are commonly produced or provided by the same entity. But the proffered evidence fails to support this conclusion. In particular, while the cited Internet evidence may show that these goods are sometimes available in the same store, it fails to show that the goods are "related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the goods and/or services] emanate *from the same source*."

Merely because goods are commonly sold within one store does not automatically mean that buyers are likely to be confused by similar marks on disparate goods as to source, connection or sponsorship. As the Federal Circuit's predecessor court observed: "A wide variety of products, not only from different manufacturers within an industry but also from diverse industries, have been brought together in the modern supermarket for the convenience of the consumer. The mere existence of such an environment should not foreclose further inquiry into the likelihood of confusion." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 U.S.P.Q. 24, 29 (C.C.P.A. 1976); a*ccord, Recot, Inc. v. Becton*, 214 F.3d 1322, 1330, 54 U.S.P.Q.2d 1894 (Fed. Cir. 2000) on remand 56 U.S.P.Q.2d 1859 (T.T.A.B. 2000) ("[T]he law is that products should not be deemed related simply because they are sold in the same kind of establishments." (citing *Federated Foods*.); see e.g., *Lever Bros. Co. v. Winzer Co. of Dallas*, 51 C.C.P.A. 930, 326 F.2d 817, 140 U.S.P.Q. 247 (1964) (Applicant's VIE for dishwashing detergent was not likely to cause confusion with senior user's VIM for laundry detergent, even though they were both sold in supermarkets.); *Hot Shot Quality Products, Inc. v. Sifers Chemicals, Inc.*, 452 F.2d 1080, 172 U.S.P.Q. 350 (10th Cir. 1971) (both HOT SHOT insecticide and SPOT SHOT stain remover sold in aerosol cans in supermarkets: no likelihood of confusion); *Lever Bros. Co. v. American Bakeries Co.*, 693 F.2d 251, 258, 216 U.S.P.Q. 177 (2d Cir. 1982) (No likely confusion between defendant's AUTUMN GRAIN for bread and plaintiff's AUTUMN margarine. "Here … no side-by-side sales could possibly occur, since margarine must be placed in refrigerated compartments, and bread is not.").

Internet websites—like physical stores—include a wide variety of products, not only from different manufacturers within an industry but also from diverse industries. For this reason—like physical stores—the fact that the goods of both parties are sold on the same web site is not proof that the goods move in the same channels of trade or that if bearing the same mark, they would be seen by consumers as coming from the same or an affiliated source. *See, e.g., Standard Knitting, Ltd. v. Toyota Jidosha Kabushiki Kaisha*, 2006 WL 173463, 77 U.S.P.Q.2d 1917 (T.T.A.B. 2006), appeal dismissed, 2006 WL 1876836 (Fed. Cir. 2006) (the fact that clothing and vehicles can both be found on the eBay auction Web site does not prove that the goods are "related" in the sense that the use of the marks on such goods would be likely to cause confusion).

Thus, the fact that the proffered websites include both recorded music and musical instruments is not enough to demonstrate a likelihood of confusion.

For at least the foregoing reasons, it is respectfully submitted that the refusal should be withdrawn.