

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICANT: Philadelphia Americans, LLC, DBA GOG
Paintball, USA
SERIAL NO.: 88356636
FILED: March 26, 2019
MARK: BATTLEZONE
EXAMINING ATTORNEY: Rebecca T. Caysido
TRADEMARK LAW OFFICE: 123

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RESPONSE TO OFFICE ACTION

This is in response to the Office Action dated June 11, 2019, rejecting Applicant's BATTLEZONE mark on the basis of two prior U.S. Registration Nos. 5353103 and 5694857.

Section 2(d) – Likelihood of Confusion Refusal

Applicant has applied for the mark BATTLEZONE for the following goods and services in the specified international class:

International Class 41: Providing facilities for playing ball shooting games and the like; Providing facilities for playing paintball or paintball-like games and the like; Providing facilities for playing dodgeball games and the like; Providing facilities for playing simulated castle defense games and the like; Entertainment services in the form of simulated castle defense games, ball shooting games, paintball or paintball-like games, dodgeball games, and the like.

The Examining Attorney has rejected the subject application based on prior U.S. Registration No. 5353103 for the mark BATTLEZONE, registered, in part, for "Entertainment, namely, computer game exhibitions; organizing community sporting and cultural activities; Electronic desktop publishing services; online electronic publishing of books, magazines, newspapers, newsletters, articles and periodicals; Multimedia publishing of electronic publications; entertainment services, namely, providing online computer or video games; providing online computer games; Digital video, audio or multimedia entertainment publishing services; Electronic game services or competitions provided by means of the internet; Electronic game services provided by means of the internet; Electronic games services provided via a global computer network; Electronic publishing services of books, magazines, newspapers, newsletters, articles, computer software, computer games, music, multimedia, songs and periodicals; Entertainment information; providing online game services via the internet; providing a website

featuring games; providing electronic games offered on-line on a computer network; providing computer and video games services provided on-line from a computer network; Magazine publishing; Multimedia publishing of magazines, journals or newspapers; Organization of games or competitions in the field of computer games; Providing a computer game that may be accessed network-wide by network users; Providing online electronic games; Providing information to game players about the ranking of their scores of games through web sites for entertainment purposes; Providing interactive multi-player computer games via the internet or electronic communication networks; Providing on-line computer games; Provision of an online magazine featuring information in the field of computer games; Provision of games by means of a computer based system; Provision of on-line computer games; Publication of electronic magazines; Publishing services, namely, books, magazines, newspapers, newsletters, articles and periodicals; Publishing of books, magazines, newspapers, newsletters, articles, computer software, computer games, music, multimedia, songs and periodicals; Rental of computer games; Rental of video games; Video game entertainment services, namely, production of video games and computer games” in International Class 41. Office Action (“OA”), p. 4.

The Examining Attorney further rejected the subject application based on prior U.S. Registration No. 5694857 for the stylized design mark ON TARGET BATTLEZONE for “Entertainment in the nature of battle field games, namely, providing facilities for playing battlefield games in the nature of water battles, dodge battles and battle games using foam based toy weapons” in International Class 41. Office Action (“OA”), p. 4.

Registration No. 5353103

With respect to Reg. No. 5353103 for the mark BATTLEZONE, the Examining Attorney concluded that “[t]hese marks are identical in appearance, sound, and meaning, ‘and have the potential to be used . . . in exactly the same manner.’ *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1411 (TTAB 2015), *aff’d*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017). Additionally, because they are identical, these marks are likely to engender the same connotation and overall commercial impression when considered in connection with applicant’s and registrant’s respective services. *Id.* Therefore, the marks are confusingly similar.” Rather than compare the services, the Examining Attorney simply concluded that “[w]here the marks of the respective parties are identical or virtually identical, as in this case with the registered mark in U.S. Registration No. 5353103, the degree of similarity or relatedness between the services needed to support a finding of likelihood of confusion declines. *See In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1411 (TTAB 2015) (citing *In re Shell Oil Co.*, 992 F.2d 1204, 1207, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993)), *aff’d*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017); TMEP §1207.01(a).” OA, p. 6.

Unlike the cited cases, however, the Examining Attorney here made no comparison at all between the respective goods and/or services of Applicant and those of U.S. Registration No. 5353103. Specifically, the Examining Attorney here failed to compare either the respective goods and services or the commercial impressions created by applicant’s and registrant’s marks when applied to those goods or services. Instead, the Examining Attorney improperly based the conclusion of a likelihood of confusion solely on the similarity of the marks in terms of their “appearance, sound, and meaning.” OA, p. 4.

The Examining Attorney has failed to meet the Office's burden in establishing a likelihood of consumer confusion as to source between Applicant's and Registrant's marks when applied to their respective goods and services. Although the marks are visually and phonetically identical, they differ in commercial impression and lack any overlap in their consuming public or trade channels. There is no likelihood of consumer confusion as to source with respect to the goods and services promoted using these marks.

In determining whether a likelihood of confusion exists under Section 2(d), each of the relevant *Du Pont* factors needs to be considered with respect to the facts of the specific case. *Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 1349 (Fed.Cir. 2011) (citation omitted). "Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered." *In re Mighty Leaf Tea*, 601 F.3d 1342, 1346 (Fed.Cir.2010). Relevant factors in this case include, for example, the similarity of the marks, the similarity and nature of the goods or services, and the similarity of the trade channels of the goods and services. See *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973).

Similarity of Marks

Even visually identical marks may differ from each other in connotation and commercial impression based on the way they are presented to the consuming public. See *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (finding COACH mark for educational services different in connotation and commercial impression than COACH mark for handbags). Here, although the marks are identical in sight and sound, they are not identical in connotation or commercial impression.

More specifically, the mark BATTLEZONE as applied to Applicant's goods and services ("Providing facilities for playing ball shooting games and the like") connotes **a physical location**, such as a place to actually **go** to participate in a live battle simulation, namely an arena or sports complex. However, as applied to Registrant's goods and services (primarily "providing online computer or video games"), the BATTLEZONE mark carries an entirely different connotation. As applied to Registrant's goods and services, the mark connotes **an online or virtual** computer or videogame platform without any physical location whatsoever. Accordingly, the "BATTLEZONE" videogame connoted by Registrant's mark is entirely an intangible, digital experience offered only through a computer or videogame console, while the "BATTLEZONE" arena experience connoted by Applicant's mark is entirely physical, offered only through a tangible, real-world interaction. These marks therefore present very different commercial impressions (in addition to very different trade channels) to the consuming public when connected with their actual goods and services.

"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. *Leading Jewelers Guild*, 82 U.S.P.Q.2d at 1905. ... Even where the marks at issue are identical, or nearly identical, the Board has found that differences in connotation can outweigh visual and phonetic similarity. See *Blue Man Prods. Inc. v. Tarmann*, 75 U.S.P.Q.2d 1811, 1820-21 (T.T.A.B.2005)

(finding that BLUE MAN GROUP ‘has the connotation of the appearance of the performers’ and that applicant’s BLUEMAN mark ‘has no such connotation for cigarettes or tobacco. Thus, the marks differ in their connotations and commercial impressions’); *see also In re Sears, Roebuck & Co.*, 2 U.S.P.Q.2d 1312, 1314 (T.T.A.B.1987) (considering CROSSOVER for brassieres and CROSSOVER for ladies’ sportswear and finding that, ‘[a]s a result of their different meanings when applied to the goods of applicant and registrant, the two marks create different commercial impressions, notwithstanding the fact that they are legally identical in sound and appearance’).” *Id.* at 1368.

Rather than view these marks as they would be encountered by the consuming public, the Examiner looks only at the visual appearance of the marks, concluding based on their visual appearance alone that “the marks are confusingly similar.” OA, p. 2. While the similarity of the marks is one consideration, similarity or even identicalness of the marks is not dispositive of the likelihood of confusion analysis. See TMEP 1207.01(a)(ii). The question is not whether the marks themselves are “confusingly similar” or even likely to be confused, but whether an ordinary consumer viewing the marks as used in connection with their respective goods and services is likely to be confused into thinking that they share a common source or origin. See, e.g., *Paula Payne Prods. Co. v. Johnson’s Publ’g Co.*, 473 F.2d 901, 902, 177 USPQ 76, 77 (C.C.P.A. 1973) (“[T]he question is not whether people will confuse the marks, but rather whether the marks will confuse people into believing that the goods they identify emanate from the same source.”). A proper analysis of this factor in this case shows there is no likelihood of confusion as to source, sponsorship, or origin with respect to Applicant’s and Registrant’s goods and services. It is entirely unlikely that consumers would confuse Applicant’s physical sports locations and services with Registrant’s online videogames and related services.

Similarity of Goods and Services

As suggested above, Applicant’s goods and services are completely unrelated to the goods listed in the registration. As identified in the application, Applicant’s goods and services provided under the BATTLEZONE mark include providing actual, tangible facilities for playing physical games. Registrant’s online videogame services are completely different than Applicant’s physical activity services, and there is not even a remote connection between them.

Registrant’s online videogame services are not the sort likely to ever be recreated in a physical world. And, even if a remote possibility exists that activities similar to those represented in Registrant’s online world might be used in a physical battle game service such as Applicant’s, the mere *possibility* of some overlap cannot satisfy the established test for determining a *likelihood* of confusion. See, e.g., *In re Hughes Aircraft Company*, 222 U.S.P.Q. 263, 264 (TTAB 1984) (“the Trademark Act does not preclude registration of a mark where there is a *possibility* of confusion as to source or origin, only where such confusion is *likely*.”) (emphasis added).

Apparently recognizing the lack of any direct or even proximate relationship between the online videogame services offered by Registrant and the real-world physical activity offered by Applicant, the office action contains no comparison between the goods and services of Applicant and Registration No. 5353103. Rather, the Examining Attorney simply cites *In re i.am.symbolic*

for the proposition that the degree of similarity or relatedness needed to support a finding of likelihood of confusion declines where the marks are identical or virtually identical. OA, p. 6. Even if this legal position is correct, however, it certainly does not suggest that the need to compare goods or services disappears entirely. The Examining Attorney's failure to make any comparison between the goods and services of Applicant and Registrant is fatal to the rejection.

In *Coach Servs.*, the Federal Circuit affirmed the TTAB's finding of no likelihood of confusion between two visually identical marks (COACH for educational materials and COACH for handbags), despite its determination that the prior COACH mark was famous. Although the Court noted that a likelihood of confusion determination does not require that "the products of the parties be similar or even competitive" and that a "likelihood of confusion can be found 'if the respective products 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 they emanate from the same source,'" the Court concluded that the clear and significant differences between the parties' goods negated any likelihood of confusion. *Id.* (emphasis added). The Court noted that "while Triumph's applications identify computer software and printed materials for use in preparing students for standardized exams, the various products identified in CSI's registrations include handbags, fashion accessories, luggage, and clothing." *Id.* at 1370. The Court further noted the Board's finding "that, although CSI uses its mark on many different types of goods, it does not use COACH on educational products." *Id.*

The differences between Applicant's and Registrant's goods and services in this case are at least as significant as those in *Coach Servs.* Not only does Registrant fail to identify any physical battle games among its goods and services, its listed goods and services are not the type that would be used in such services. The significant differences between Registrant's videogames and computer-related goods and services and the physical facilities provided by Applicant are self-evident.

Although there are certainly many cases in which a likelihood of confusion exists where identical marks are used on closely related goods and services, such a determination must be made on the specific facts of each case. A conclusion, or even a presumption, of a likelihood of confusion based on the use of similar or identical marks in connection with vastly different goods and services is inappropriate. In fact, TMEP § 1207.01(a)(ii) requires the opposite conclusion. Specifically, it states that "if the goods or services in question are not related or marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source, then, even if the marks are identical, confusion is not likely. See, e.g., *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1371, 101 USPQ2d 1713, 1723 (Fed. Cir. 2012) (affirming the Board's dismissal of opposer's likelihood-of-confusion claim, noting 'there is nothing in the record to suggest that a purchaser of test preparation materials who also purchases a luxury handbag would consider the goods to emanate from the same source' though both were offered under the COACH mark); *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1244-45, 73 USPQ2d 1350, 1356 (Fed. Cir. 2004) (reversing TTAB's holding that contemporaneous use of RITZ for cooking and wine selection classes and RITZ for kitchen textiles is likely to cause confusion, because the relatedness of the respective goods and services was not supported by substantial evidence); *In re Thor Tech, Inc.*, 113 USPQ2d 1546, 1551 (TTAB 2015) (finding use of identical marks for

towable trailers and trucks not likely to cause confusion given the difference in the nature of the goods and their channels of trade and the high degree of consumer care likely to be exercised by the relevant consumers); *Local Trademarks, Inc. v. Handy Boys Inc.*, 16 USPQ2d 1156, 1158 (TTAB 1990) (finding liquid drain opener and advertising services in the plumbing field to be such different goods and services that confusion as to their source is unlikely even if they are offered under the same marks); *Quartz Radiation Corp. v. Comm/Scope Co.*, 1 USPQ2d 1668, 1669 (TTAB 1986) (holding QR for coaxial cable and QR for various apparatus used in connection with photocopying, drafting, and blueprint machines not likely to cause confusion because of the differences between the parties' respective goods in terms of their nature and purpose, how they are promoted, and who they are purchased by)."

Since the Examining Attorney has provided no comparison between Applicants goods and services and those listed in Registration No. 5353103, there is no support for a conclusion of a likelihood of confusion between these marks. Furthermore, even a casual examination of the goods and services of the respective parties shows that there is no likelihood of confusion between the marks as applied in commerce.

Similarity of Trade Channels

The similarity of trade channels is another highly relevant factor in the likelihood of confusion analysis in this case. Again, however, the Examining Attorney has provided no evidence regarding any similarity between the trade channels for the goods and services of Registration No. 5353103 and the goods and services of Applicant.

Registrant's goods and services appear to be offered almost entirely online through computer or gaming consoles. Applicant's services, on the other hand, because they require a physical presence in an actual, physical location, are available only in person. A consumer wanting to buy Registrant's videogames would not mistakenly believe they could be purchased from Applicant at their sports complex (or even through Applicant's advertising website). Likewise, a consumer desiring to participate in Applicant's physical games would not mistakenly believe he could get them online from Registrant. Even if reservations for Applicant's sports facility could be made online, there is no chance that a consumer would believe that submitting a reservation form would purchase Registrant's videogame or that purchasing Registrant's videogame would somehow reserve Applicant's sports facility. As with the similarity of goods and services, there is no similarity at all between the trade channels for Registrant's goods and services and those for Applicant's goods and services. Accordingly, this factor also weighs strongly against a finding of a likelihood of confusion.

Registration No. 5694857

With respect to Registration No. 5694857 for the stylized design mark ON TARGET BATTLEZONE, the Examining Attorney suggests that because Applicant's mark is for a standard word mark, it is likely to be confused with the stylized design mark owned by Registrant. Specifically, the Examining Attorney argues that "[a]lthough the registered mark contains stylization and a design, the applied-for mark is in standard characters and has the ability to appear in the same manner as the registered mark. A mark in typed or standard

characters may be displayed in any lettering style; the rights reside in the wording or other literal element and not in any particular display or rendition. *See In re Viterra Inc.*, 671 F.3d 1358, 1363, 101 USPQ2d 1905, 1909 (Fed. Cir. 2012); *In re Mighty Leaf Tea*, 601 F.3d 1342, 1348, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); 37 C.F.R. §2.52(a); TMEP §1207.01(c)(iii). Thus, a mark presented in stylized characters and/or with a design element generally will not avoid likelihood of confusion with a mark in typed or standard characters because the word portion could be presented in the same manner of display. *See, e.g., In re Viterra Inc.*, 671 F.3d at 1363, 101 USPQ2d at 1909; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 1041, 216 USPQ 937, 939 (Fed. Cir. 1983) (stating that “the argument concerning a difference in type style is not viable where one party asserts rights in no particular display”).” OA, pp. 5-6.”

Unlike the present case, *In re Viterra* dealt with two substantially identically-sounding marks (XCEED and X-SEED) for identical goods (Agricultural seeds) with overlapping trade channels. In that case, a likelihood of confusion was found “based on the identical nature of the goods involved, overlapping trade channels and potential consumers, and the similarity of the marks.” *In re Viterra Inc.*, 101 U.S.P.Q.2d 1905, 671 F.3d 1358 (Fed. Cir., 2012) In this case, a proper comparison of the marks in their entireties clearly shows the absence of any likelihood of confusion.

Similarity of Marks

With respect to Registration No. 5694857 for the ON TARGET BATTLEZONE stylized design mark, the Examining Attorney places undue emphasis on the minor overlapping feature between it and Applicant’s marks, while ignoring the significance of the rest of Registrant’s mark in terms of sound, meaning, and commercial impression. Specifically, the Examining Attorney asserts that “[i]ncorporating the entirety of one mark within another does not obviate the similarity between the compared marks, as in the present case, nor does it overcome a likelihood of confusion under Section 2(d). ... In the present case, the marks are identical in part.” OA, p. 6.

While it is true that both marks include the word “BATTLEZONE,” the Examining Attorney failed to make a proper comparison of the marks as a whole. A determination of a likelihood of confusion requires consideration of the marks as a whole, and does not permit dissection of the marks to determine similarity. *See, e.g., Packard Press, Inc v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351 (Fed. Cir. 2000) (“The similarity or dissimilarity of the marks ***in their entirety*** is to be considered. ... ***All relevant facts*** pertaining to appearance, sound, and connotation must be considered...”)(emphasis added).

When viewed in their entireties, these two marks differ significantly in their overall appearance, sound, connotation, and commercial impressions. As can be seen from a side-by-side comparison of the two marks (*see below*), even adopting the same font style, there is very little overlap in appearance, sound, connotation, or commercial impression between Registration No. 5694857 and Applicant’s mark.



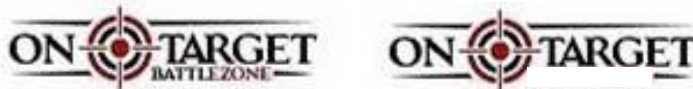
BATTLEZONE

As illustrated above, even a casual glance at Registrant’s stylized design mark reveals that the words “ON TARGET” with a target and sight design are the dominant portions of that mark. Not only does the phrase “ON TARGET” appear in a font that is more than double the size of the word “BATTLEZONE,” the design also includes a large image of a target between the words “ON” and “TARGET,” with a sight centered on the bullseye, that further emphasizes the “ON TARGET” portion of the mark. These two marks are therefore significantly different in visual appearance (and sound) regardless of the manner in which Applicant’s “BATTLEZONE” mark is portrayed.

Rather than consider and evaluate these dominating features, however, the Examining Attorney “improperly dissected the marks. In this case, the [Examining Attorney] only considered the similar commercial impression of part of the marks--the shared word [BATTLEZONE]--before concluding that the marks were similar.” *Packard*, 227 F.3d at 1358. For a proper analysis, the Examining Attorney must instead “make the relevant findings as to the similarity or dissimilarity of the appearance, sound and connotation of the marks as a whole.” *Id.* In addition, although “[o]nce all of the features of the mark are considered, ... it is not improper to state that, for rational reasons, more or less weight has been given to a particular feature of the mark, [] the ultimate conclusion [must rest] on consideration of the marks in their entireties.” *Id.* at 1358.

In *Packard*, “the Board correctly noted that it is proper to give greater weight to the PACKARD portion of the PACKARD TECHNOLOGIES mark on the ground that the word ‘technology’ is highly suggestive/merely descriptive with respect to the services at issue.” *Id.* at 1358. However, that is not the case here with respect to the “ON TARGET” portion of Registrant’s mark. In this case, there is no logical reason for discounting the “ON TARGET” portion of the mark and elevating the “BATTLEZONE” portion to dominance. Contrary to the Examining Attorney’s apparent position, the stylization of Registrant’s mark downplays the significance of the word “BATTLEZONE” and instead emphasizes the “ON TARGET” portion of the mark.

The Examining Attorney appears to assert that the BATTLEZONE portion should be considered dominant, stating that “the stylization in the registered mark shows that the wording ‘BATTLEZONE’ in the registered mark is separate and stands alone, separate from the phrase.” OA, p. 6. Rather than provide significance or importance, however, the size, stylization, and separation of the word “BATTLEZONE” in Registrant’s mark makes it appear as little more than an afterthought. In fact, as illustrated below, even the complete removal of the word “BATTLEZONE” does little to alter the overall sight, sound, and commercial impression created by Registrant’s mark.



Despite the registered trademark’s clear emphasis on the “ON TARGET” portion of the mark, the Examining Attorney concludes that “[a]lthough applicant’s mark does not contain the entirety of the registered mark in U.S. Registration No. 5694857, applicant’s mark is likely to appear to prospective purchasers as a shortened form of registrant’s mark. ... Thus, merely omitting some of the wording from a registered mark may not overcome a likelihood of

confusion. ... In this case, applicant's mark does not create a distinct commercial impression from the registered mark because it contains some of the wording in the registered mark and does not add any wording that would distinguish it from that mark." OA, p. 6.

This conclusion completely disregards the way Registrant's mark is presented to and encountered by the consuming public. Contrary to the Examining Attorney's position, given the prominence of the "ON TARGET" portion of the mark in comparison to the "BATTLEZONE" portion, it is extremely unlikely that anyone viewing Registrant's mark would consider shortening it to its least significant feature. Rather, while it is quite conceivable that those referring to Registrant's services would drop the minimized word "BATTLEZONE" altogether, and refer to the source as "ON TARGET," it would be very surprising indeed for consumers to drop the dominating "ON TARGET" features of the source identifier and refer to it simply as "BATTLEZONE." In fact, the Registrant itself dropped the mark's wording altogether from its storefront and instead uses only the on target symbol to identify its business to potential consumers.



(See <https://www.ontargetbattlezonellc.com/>)

As in *Packard*, the Examining Attorney here "completely failed to consider the appearance and sound of the mark as a whole." 227 F.3d at 1358. And, even if it were "proper to indicate that more weight is given to a particular component of the mark--the meaning of [BATTLEZONE] in this case--that does not excuse consideration of the other components of the mark as a whole." *Id.* "The ultimate conclusion of similarity or dissimilarity of the marks must rest on consideration of the marks in their entirety." *Id.*

Here, the Examining Attorney improperly failed to compare the marks as a whole, and gave undue weight to the least significant portion of Registrant's mark. A proper comparison of the marks as a whole shows there is no likelihood of confusion because Applicant's mark lacks the most significant features of the registered mark and the marks carry distinctly different connotations and commercial impressions in addition to their very different visual appearance and sound.

In addition to their very different sound and visual appearance, when viewed in their entirety, the two marks carry distinctly different connotations and commercial impressions. Registrant's stylized "ON TARGET BATTLEZONE" mark specifically connotes accuracy and precision in its facilities and/or the weaponry used in its mock battles. When viewed as presented to the consuming public, the most dominating features of its mark are "ON TARGET" and the target image, emphasizing the importance of targeting and accuracy with perhaps a secondary implication that its services are on point or relevant. Although the minimized word

“BATTLEZONE” further suggests a place to come play battle sports, that word as used in Registrant’s mark could easily be replaced by “WARZONE,” “BATTLEFIELD,” “ARENA,” “COLLOSEUM,” “SPORTS COMPLEX,” “SPORTS FACILITY,” or any other similar word or phrase, without changing the overall connotation or commercial impression of the mark. In other words, in Registrant’s mark, “BATTLEZONE” is used simply as a noun that is modified by the “ON TARGET” trademark adjectives, rather than as a trademark adjective that source identifies some other good or service.

Applicant’s BATTLEZONE trademark on the other hand lacks any of the sight, sound, connotations, or commercial impressions provided by registrant’s “ON TARGET” words and symbols. There is no connotation of precision, accuracy, or relevance and, unlike Registrant’s mark, replacement of the word “BATTLEZONE” in Applicant’s mark would completely change the connotation and commercial impression of the mark. Applicant’s use of “BATTLEZONE” is as the sole source identifying adjective to designate its sports facility goods and services. Consideration of the marks as a whole therefore requires a finding that there is no likelihood of confusion between these two marks.

Similarity of Goods and Services and Similarity of Trade Channels

Although, as properly identified by the Examining Attorney, there is possible overlap between the goods and services in U.S. Registration No. 5694857 and those provided under Applicant’s mark, as well as in the trade channels for those goods and services, those factors do not outweigh the significant differences in sight, sound, connotation, and commercial impression between the two marks identified above. More specifically, despite similarities in services and trade channels, because of the significant differences in the marks themselves, there is no likelihood that consumers encountering these two marks would be confused into thinking the respective services originate from the same source.

Coexisting Similar Marks

In addition to the differences identified above, it also does not make sense in this case to reject Applicant’s mark on the basis of two, coexisting registrations. Here, the Examining Attorney rejected Applicant’s mark based on both the mark BATTLEZONE for online videogame services and the stylized ON TARGET BATTLEZONE mark for providing facilities for playing battlefield games. The coexistence of these two prior marks, however, indicates that there is no likelihood of confusion between those two registered marks, and therefore also no likelihood of confusion with respect to Applicant’s mark.

More particularly, either the prior registrations are so different in sight, sound, and commercial impression that there is no likelihood of confusion between them, or the prior registrations differ so much between their respective goods and services and trade channels that there is no likelihood of confusion between them, or both. In either event, the differences between the prior registrations that precluded a likelihood of confusion between them also preclude a likelihood of confusion with Applicant’s mark.

Specifically, if there is no likelihood of confusion between the prior BATTLEZONE registration and the stylized ON TARGET BATTLEZONE registration because of the differences in the marks themselves, then those same differences between the stylized ON TARGET BATTLEZONE and Applicant's BATTLEZONE mark would also preclude a likelihood of confusion in this case. If, however, the significant differences in the goods and services and/or trade channels between the two prior registrations are the reason no likelihood of confusion exists between them, then those same differences between the prior BATTLEZONE registration and Applicant's mark would preclude a likelihood of confusion.

Conclusion

For at least the foregoing reasons, a finding of a likelihood of confusion is inappropriate in this case, and Applicant respectfully requests that the Examining Attorney's rejections be withdrawn, and that the subject application be allowed to proceed promptly to registration.