

TRADEMARK LAW OFFICE 117
Trademark Examining Attorney:
Rhoda Nkojo
Serial Number: 88/488,253
Mark: BRAVO

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE



Applicant: NLU Products, L.L.C.

Examining Attorney: Rhoda Nkojo

Commissioner of Trademarks
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RESPONSE TO OFFICE ACTION

On September 10, 2019, the Examining Attorney issued an Office Action refusing registration of BRAVO (“Applicant’s Mark”) “because of a likelihood of confusion” with the following “Registered Marks:

Mark	Reg. No.	Goods
	5211563 (“563”)	Acoustic couplers; Alarm installations and alarms; Computers; Earphones; Electric wires; Electrical plugs and sockets; Electron tubes; Eyeglass cords; Eyeglasses; Headphones; Portable media players; Sonar; Sound transmitting apparatus; Vacuum tubes for radios
BRAVO MAKER	5540172 (“172”)	Burglar alarms; Cabinets for loudspeakers; Cell phone battery chargers for use in vehicles; Computer keyboards; Computer mouse; Computer peripheral devices; Earphones; Protective cases for smartphones; Protective films adapted for smartphones; Rechargeable electric batteries; Sunglasses; USB cables for cellphones; Wireless chargers
	5058520 (“520”)	Audio speakers; Audio equipment for vehicles, namely, loud speakers for automotive audio systems; Audio equipment for vehicles, namely, stereos, speakers, amplifiers, equalizers, crossovers and speaker housings; Consumer electronic products, namely, audio amplifiers, audio speakers, audio receivers, electrical audio and speaker cables and connectors, audio decoders, video decoders, speakers, power conversion devices, power converters, and power inverters; Mounts and mounting brackets adapted for audio speakers with swiveling bases therefor; Portable vibration speakers

<i>Crazy bravo</i>	5333923 (“923”)	3D spectacles; Balances; Burglar alarms; Cabinets for loudspeakers; Cases for smartphones; Earphones and headphones; Eye glasses; Eyeglass cords; Eyeglass frames; Eyeglass cases; Global positioning system (GPS); Monopods for handheld digital electronic devices, namely, cell phones, MP3 players, personal digital assistants; Spectacle frames; Sunglasses; Protective films adapted for smartphones
TARGET BRAVO	5337748 (“748”)	Computer game programs; computer game software; video game software; video game programs; video game discs and cartridges; computer game software for use on mobile and cellular phones; mobile phone straps; protective cases for cell phones; downloadable graphics, images and moving images for computers, video game machines or mobile phones featuring scenes and characters based on computer and video games; downloadable computer and video game software; downloadable music files via a global computer network and wireless devices; sound recorded compact discs featuring music, video game sounds and dialogues; musical sound recordings; prerecorded video discs and tapes featuring music, comedy, drama, action, adventure and animation; electronic publications, namely, downloadable books and magazines in the field of computer games, video games, cartoons and music; phonograph records featuring music
<i>BRAVOEAR</i>	5722879 (“879”)	Audio headphones; Ear buds; Ear phones; Earphone accessories, namely, earphone cushions, earphone pads, cord management systems, earphone cases, and earphone extension cords; Earphones; Earphones and headphones; Electric audio playback units with lights and speakers; Headphones; Headphones including attached lanyard; Headsets for cellular or mobile phones; Headsets for mobile telephones; Headsets for telephones; Headsets for use with computers; Loudspeakers; Micro USB cables; Personal headphones for sound transmitting apparatuses; Personal headphones for use with sound transmitting systems; Stereo headphones; Telephone headsets; USB cables; Wireless cellular phone headsets; Wireless headsets for smartphones; Wireless indoor and outdoor speakers

Applicant respectfully disagrees with the Examining Attorney and contends that confusion is very unlikely given the important differences in appearance, sound, connotation, and commercial impression between Applicant’s Mark and the Registered Marks.

I. WHEN COMPARED IN THEIR ENTIRETIES, APPLICANT’S MARK AND THE REGISTERED MARKS ARE NOT CONFUSINGLY SIMILAR

The lack of confusing similarity between Applicant’s Mark and the Registered Marks is evident when the commercial impressions of the Registered Marks are considered in their entirety, with appropriate weight given to all of the terms in the mark, the order in which they are presented, the particular meaning that is created, and the other differences between Applicant’s Mark and the Registered Mark. The differences between Applicant’s mark and the Registered marks are sufficient to eliminate any likelihood of confusion in the mind of the consumer.

A. Dissection of the Relevant marks is Improper

The Examining Attorney found the marks confusingly similar because the “marks are similar in sound and appearance because they all feature the same term, namely, ‘BRAVO.’” Applicant respectfully submits that the Examining Attorney’s position violates the anti-dissection rule by focusing entirely on the single shared word “BRAVO.”

“The commercial impression of a trademark is derived from it as a whole, not from its elements separated and considered in detail.” *Juice Generation, Inc. v. GS Enterprises LLC*, 794 F.3d 1334, 1340 (Fed. Cir. 2015) (internal quotations omitted). “It follows from that principle that likelihood of confusion cannot be predicated on dissection of a mark, that is, on only part of a mark.” *In re National Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985). Consequently, while dissection of the component parts of a mark—such as use of the term “bravo” by both parties in this instance—may be appealing, it is not sufficient for purposes of determining whether consumers are likely to be confused. “Marks tend to be perceived in their entirety, and all components thereof must be given appropriate weight.” *In re Hearst Corp.*, 982 F.2d 493, 494 (Fed. Cir. 1992). This standard derives from “the common-sense fact that the message of a whole phrase may well not be adequately captured by a dissection and recombination.” *Juice Generation*, 794 F.3d at 1340–41.

“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.” *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 1007 (C.C.P.A. 1981). It is error to focus entirely on a “prominent” feature of a mark and find likelihood of confusion based solely on that feature. *See Massey Junior Coll., Inc. v. Fashion Inst. of Tech.*, 492 F.2d 1399, 1402 (C.C.P.A. 1974). Likewise, “it is improper to find that one portion of a composite mark has no trademark significance, leading to a direct comparison between only that which remains.” 4 McCarthy on Trademarks and Unfair Competition § 23:41 (5th ed.). Indeed, even generic and disclaimed portions of a mark must be taken into consideration when assessing the commercial impression of a mark. *See e.g., In re Detroit Athletic Co.*, 903 F.3d 1297, 1304 (Fed. Cir. 2018) (stating that “the mere fact that ‘Co.’ and ‘Club’ were disclaimed does not give one license to simply ignore those words in the likelihood of confusion analysis”); *Juice Generation, Inc. v. GS Enterprises LLC*, 794 F.3d 1334, 1341 (Fed. Cir. 2015) (concluding that the Board erred by giving no weight to generic term); *In re Hearst Corp.*, 982 F.2d 493, 494 (Fed. Cir. 1992).

The errors in analysis made by the Board in *In re Hearst Corp.* are instructive here. There, the Board found the marks VARGA GIRL and VARGAS (both for calendars)

confusingly similar. *In re Hearst Corp.*, 982 F.2d at 494. The Board concluded that “varga” was the dominant element of VARGA GIRL, and that “girl” was merely descriptive and thus could not be afforded substantial weight in comparing VARGA GIRL with VARGAS. *Id.* at 493. On appeal, the Federal Circuit reversed the Board’s decision. *Id.* at 494. Finding that the board had erred in its analytical approach, the court stated that “[t]he appearance, sound, sight, and commercial impression of VARGA GIRL derive significant contribution from the component ‘girl.’ By stressing the portion ‘varga’ and diminishing the portion ‘girl,’ the Board inappropriately changed the mark.” *Id.* When GIRL was given its fair weight, along with VARGA, the court concluded that confusion with VARGAS was less likely. *Id.*

Juice Generation is also instructive. 794 F.3d 1334 (Fed. Cir. 2015). There, the Board gave “inadequate consideration” to the applied for mark’s three-word combination (PEACE LOVE AND JUICE) in its entirety as distinct from the registered mark’s two-word combination (PEACE & LOVE) and “paid insufficient heed” to considering the message of the applicant’s entire mark. *Id.* at 1341. Instead, “[t]he Board declared that ‘PEACE LOVE’ is the ‘dominant’ portion of that combination, compared that portion to GS’s ‘PEACE & LOVE’ phrase, found that they are ‘virtually identical,’ and then simply added that ‘the additional disclaimed word ‘JUICE’ . . . do[es] not serve to sufficiently distinguish’ Juice Generation’s mark from GS’s [PEACE & LOVE] marks.” *Id.* The Federal Circuit held that the Board’s analysis was “inadequate” because it did “not display any consideration of how the three-word phrase in Juice Generation’s mark may convey a distinct meaning—including by having different connotations in consumers’ minds—from the two-word phrase used by GS.” *Id.*

Just like the Board in *Hearst Corp.* and *Juice Generation*, the Examining Attorney appears to have focused almost entirely on the single term in common between the Applicant’s Mark and the Registered Marks that also contain other different terms. The Examining Attorney focuses unduly on the term “BRAVO”—regardless of where it is located in each mark—and in doing so gives that term improper weight in the analysis.

The term “bravo” is not particularly novel. Notably, each of the Registered Marks are owned by different entities. Four of the Registered Marks—the ’563, ’172, ’520, and ’879 registrations—are registered, in part, for headphones, earphones, and/or speakers. And several of the Registered Marks cover alarms. Moreover, there are other marks that were not cited by the Examining Attorney that significantly overlap with the goods offered under the Registered Marks. For example, US Reg. No. 5956034 for BRAVO TEAM for “video game software” overlaps with the cited ’748 registration TARGET BRAVO for, in relevant part, “computer game programs.” The common use of BRAVO indicates that the other terms distinguish the marks and should not be ignored.

The Examining Attorney’s conclusion appears to be based on an inappropriate dissection of Applicant’s Mark that gives insufficient weight to the additional terms—AUDIO, MAKER, VIEW, EAR, CRAZY, and TARGET—in the Registered Marks. The Examining Attorney has also improperly discounted the design element of four of the six Registered Marks. The additional terms and/or designs and their arrangement in the marks distinguish the marks in appearance, sound, connotation, and commercial impression and prevent any likelihood of confusion.

B. The Relevant Marks Differ in Appearance, Sound, and Commercial Impression

The only similarity in the appearance and sound of the marks is the word “BRAVO.” The marks are otherwise completely different in appearance, sound, and commercial impression. While similarities in one word of each mark may, at most, lead to the possibility of confusion, such “possibility” is not enough to satisfy the governing test: whether there is a likelihood of confusion. *See In re Massey-Ferguson Inc.*, 222 USPQ 367, 368 (TTAB 1983) (“[w]e are not concerned with mere theoretical possibilities of confusion, deception or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal”) (citing *Witco Chem. Co. v. Whitfield Chem. Co., Inc.*, 57 C.C.P.A. 804, 418 F.2d 1403, 164 USPQ 43, 44 (CCPA 1969)).

Each of the Registered Marks contains an additional term that distinguishes that mark from Applicant’s Mark. When properly viewed as a whole, these additional terms create unique commercial impressions. *See e.g., In re Hearst Corp.*, 982 F.2d 493, 494 (Fed. Cir. 1992) (concluding that inclusion of term GIRL in VARGA GIRL mark prevented confusion with registered VARGAS mark); *Juice Generation, Inc. v. GS Enterprises LLC*, 794 F.3d 1334, 1340–41 (Fed. Cir. 2015) (concluding that inclusion of JUICE in PEACE LOVE AND JUICE mark prevented confusion with PEACE & LOVE mark); *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1245, 73 USPQ2d 1350, 1356-57 (Fed. Cir. 2004) (reversing TTAB’s holding that contemporaneous use of THE RITZ KIDS for clothing items (including gloves) and RITZ for various kitchen textiles (including barbeque mitts) is likely to cause confusion, because, inter alia, THE RITZ KIDS creates a different commercial impression).

The anti-dissection rule, as explained above, prohibits the Examining Attorney from entirely disregarding the other elements of the Registered Marks. The anti-dissection rule is not limited to literal elements. It also precludes the Examining Attorney from ignoring design elements. “While it is often true that the words in a composite word and design mark are considered to be dominant, that is not always the case.” *In Re Hy-Vee, Inc.*, No. 86105555, 2015 WL 1734919, at *4 (Mar. 25, 2015) (non-precedential). Indeed, a prominent design element can be sufficient to distinguish two otherwise similar marks. *See In re White Rock Distilleries, Inc.*, 92 USPQ2d 1282, 1284 (TTAB 2009), (finding no likelihood of confusion between applicant’s standard character mark VOLTA for caffeine-infused vodka and the cited composite design mark with the literal element TERZA VOLTA for wines, due to the prominent design in the registered mark).

Here, the additional terms AUDIO, MAKER, VIEW, EAR, CRAZY, and TARGET in the Registered Marks distinguish the Registered Marks in sound and appearance. These additional terms also present strikingly different commercial impressions overall for each mark. For example, the word AUDIO in the ’563 Registration and EAR in the ’879 Registration convey a connotation of auditory sound. When combined with the term BRAVO, the words convey an expression of approval such as might be shouted at performer at a concert. This commercial impression is further confirmed by the fact that the goods offered under the mark include headphones and earphones. The word TARGET in the ’748 Registration conveys a significant commercial impression because the video games offered under the mark put players

in the shoes of highly trained special force agents that must use precision shooting and quick reactions to complete their missions. See Ex. A, attached hereto.

Several of the Registered Marks (pictured below) are further distinguished by dominant design elements that provide distinct commercial impressions.



The design of the BRAVO AUDIO mark further emphasizes the connotation of sound, which is not present in Applicant's Mark. The strong emphasis of the "A" in the BRAVO VIEW mark emphasizes that the goods offered under the mark are associated with amplification of sound. And the design of the BRAVOEAR mark further emphasizes the EAR portion of the mark and furthers the association with sounds and hearing (the primary goods offered under the mark are earphones and headphones). When viewed in their entities, with appropriate weight given to all terms and design elements, the Registered Marks are distinct and not likely to be confused with Applicant's Mark.

II. FOR MANY OF THE REGISTERED MARKS, CONFUSION IS UNLIKELY FOR THE ADDITIONAL REASON THAT THE GOODS OFFERED UNDER THE RELEVANT MARK ARE DISTINCT

Applicant's Mark is unlikely to be confused with the '879, '520, '563 Registrations for the additional reason that the goods offered under those marks are distinct from the goods offered under applicant's marks.

There is no *per se* rule holding that certain goods or services are related because they may be provided in the same field. TMEP § 1207.01(a)(iv); *In Re British Bulldog, Ltd.*, 224 U.S.P.Q. (BNA) ¶ 854 (T.T.A.B. Nov. 1, 1984) (no likelihood of confusion between PLAYERS for men's underwear and PLAYERS for shoes because the goods "are distinctly different"; even when sold in the same stores they are ordinarily displayed in different sections and are not complementary or companion items); *M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 1383, 78 USPQ2d 1944, 1947–48 (Fed. Cir. 2006) (noting that relatedness between software-related goods may not be presumed merely because the goods are delivered in the same media format and that, instead, a subject-matter-based mode of analysis is appropriate).

While goods need not be identical or even competitive to find a likelihood of confusion between to marks, when goods are not "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." TMEP § 1207.01(a)(i).

Applicant's Goods are unrelated to the goods offered under the '879, '520, '563 Registrations in purpose, function and application. They ordinarily are displayed in different sections of stores and/or websites and are not complementary or companion items. Under these circumstances, consumers are unlikely to confuse the parties' respective goods in the

marketplace. There is no evidence that Applicant's Goods and Registrant's Goods are 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.

Applicant respectfully submits that the Examining Attorney's "evidence" of the relatedness of the parties' offerings is unpersuasive. Where, as here, the evidence of third-party use includes use on varied, numerous, and obviously unrelated goods in addition to Applicant's and Registrant's goods, the third-party uses are entitled to little probative value on the issue of whether Registrant's and Applicant's goods are related. *See In Re Mucky Duck Mustard Co. Inc.*, 6 U.S.P.Q.2d 1467 n.6 (T.T.A.B. 1988) (finding little probative value in registrations issued to "Saks & Company and to Knott's Berry Farm, owners of a large department store and an amusement or theme center, respectively, where a wide variety of goods and services are sold").

The Examining Attorney cites to only top-level brands LG, Samsung, and Apple. These manufactures sell a vast array of goods including everything from common household appliances, like refrigerators, stoves, and washing machines to common consumer electronics, such as televisions, DVD players, computers, and printers. The fact that Samsung and LG both might sell refrigerators and cell phones does not mean that those goods are related in the minds of consumers. There are very few companies in the world that manufacture such a broad array of goods.

Further, even if some manufacturers make and sell both smart phone cases and headphones or speakers, this alone does not establish that the goods are related in such a way that confusion is likely. There must be something more to establish that the products are such that a consumer would expect that they emanate from a single source *under a single mark*. Here, there is no such evidence. The evidence presented, which shows websites hosted by large manufacturers that sell a wide variety of goods on different webpages, is not evidence consumers find those products to be related.

CONCLUSION

Like the VARGA GIRL mark in *In re Hearst Corp.*, Applicant's BRAVO mark creates a distinct commercial impression and is highly unlikely to be confused with the Registered Marks. For this reason, and the other reasons set out above, Applicant respectfully requests the Examining Attorney allow the application to proceed to publication in the Principal Register.