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8 **United States District Court**  
9 **Central District of California**  
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11 AUDIO-TECHNICA CORP., et al.,

12 Plaintiffs,

13 v.

14 MUSIC TRIBE COMMERCIAL MY  
15 SDN. BHD.,

16 Defendant.  
17

Case № 2:21-cv-09009-ODW (ASx)

**ORDER DENYING PLAINTIFF'S  
MOTION FOR PRELIMINARY  
INJUNCTION [27]**

18 **I. INTRODUCTION**

19 This is a trademark infringement case. Plaintiffs Audio-Technica Corporation  
20 and Audio-Technica U.S., Inc. (together, "Audio-Technica") manufacture the AT2020  
21 microphone, an entry-level professional studio microphone. Defendant Music Tribe  
22 Commercial MY Sdn. Bhd. ("Music Tribe") introduced a competing microphone, the  
23 BX2020, into the United States consumer market. Audio-Technica alleges that Music  
24 Tribe's microphone is a knockoff and asserts claims for federal trademark and trade  
25 dress infringement along with state common-law and statutory claims for unfair  
26 competition. Audio-Technica now moves for a preliminary injunction prohibiting  
27 Music Tribe from distributing or selling any more units of its allegedly infringing  
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1 microphone pending trial. (Mot. Prelim. Inj. (“Motion” or “Mot.”), ECF Nos. 27–28;  
2 *see also* Opp’n, ECF No. 32; Reply, ECF No. 38.)

3 On March 14, 2022, the Court held a hearing on the Motion. Having carefully  
4 considered the arguments presented at the hearing and in the papers filed in connection  
5 with the Motion, the Court now **DENIES** Audio-Technica’s Motion.

## 6 II. BACKGROUND

7 Audio-Technica developed the AT2020 microphone and introduced it to  
8 consumers in 2004. (Decl. Gary Boss (“Boss Decl.”) ¶ 10, ECF No. 30.) Since then,  
9 Audio-Technica has marketed and sold the AT2020 continuously in the United States  
10 and elsewhere. (*Id.*) The AT2020’s design incorporates two vertical bars on either side  
11 of the microphone with two circular enclosures near the top and bottom, a small portion  
12 of the microphone’s mesh protruding above the top circular enclosure, and a threaded  
13 adapter with rounded hinges and a tapered bottom containing the microphone’s cord  
14 port.

15 The “AT” in the product name stands for Audio-Technica. (*See id.* ¶¶ 4–5.) The  
16 “2020” has no connection to the product’s functionality or release date. Instead, the  
17 first two numbers refer to the Audio-Technica series of which the model is a part (the  
18 50 Series, 40 Series, or 20 Series), and the next two digits are essentially arbitrary. (*See*  
19 *id.* ¶¶ 5–6.) The AT2020 is available from the standard retailers microphone consumers  
20 would expect, including big-box stores such as Best Buy and online retailers such as  
21 Sweetwater and Amazon.com. (Decl. Kristina S. Azlin (“Azlin Decl.”) ¶¶ 3, 25, ECF  
22 No. 29; *id.* Exs. 2, 21, ECF Nos. 29-2, 29-21; Boss Decl. ¶ 19.)

23 The AT2020 typically sells in the United States for \$99. (Boss Decl. ¶¶ 10–11.)  
24 It is widely used in the United States by entry-level and professional content creators,  
25 including musicians, video streamers, and podcasters. (*Id.* ¶ 13.) Sales of the AT2020  
26 have grown steadily since 2004 and have “skyrocketed” in recent years, due in part to  
27 its popularity among those creating content from their own homes or small studios. (*Id.*  
28 ¶¶ 13–14.) Online reviewers and commentators have variously remarked that the

1 AT2020 is “iconic,” is one of “The Top 10 Best Condenser Microphones on Earth,” and  
2 is “probably the most famous condenser microphone among home studios and creators  
3 in general.” (Mot. 5.)

4 In the summer of 2021, Music Tribe, through its brand Behringer, began  
5 advertising its BX2020 microphone. The BX2020 is similar in design and appearance  
6 to the AT2020, as follows:



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17 Both the AT2020 and BX2020 are packaged in boxes with minimalist packaging design,  
18 containing a photograph of the microphone against a stark white background.

19 Audio-Technica now asserts the following trademark rights: (1) product design  
20 and packaging trade dress rights in the design and packaging of the AT2020; and  
21 (2) trademark rights in the name “AT2020.” Nothing in the record indicates that either  
22 party has a USPTO trademark registration for any of their respective marks used in  
23 connection with these microphones.

24 After this dispute arose, Music Tribe agreed to rename the BX2020 to the BM1.  
25 (Azlin Decl. ¶ 29.) It sold only thirty units of the BX2020 in the United States before  
26 changing the product name. (Decl. Uli Behringer (“Behringer Decl.”) ¶ 5, ECF No. 35.)  
27 Moreover, although at some point the BM1 page of Behringer’s website displayed a  
28 link to a promotional video identifying its microphone as the “BX2020,” Music Tribe

1 has since removed that link from Behringer’s website. (Opp’n 22.) Music Tribe now  
2 sells its microphone under the “BM1” designation exclusively, and it has no intention,  
3 regardless of the outcome of this litigation, of using the name “BX2020” in the United  
4 States any time in the future. (Behringer Decl. ¶ 6.)

5 On November 17, 2021, Audio-Technica brought suit against Music Tribe,  
6 setting forth claims for (1) federal trademark infringement, trade dress infringement,  
7 and unfair competition (15 U.S.C. § 1125(a)); (2) common law unfair competition; and  
8 (3) unfair competition under California law (Cal. Bus. & Prof. Code § 17200). Audio-  
9 Technica moved for a preliminary injunction shortly thereafter.

### 10 III. LEGAL STANDARD

11 A preliminary injunction is an “extraordinary remedy” courts may grant to  
12 preserve the status quo pending trial in order to prevent immediate and irreparable  
13 injury. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); Fed. R. Civ.  
14 P. 65(a). To obtain a preliminary injunction, the plaintiff must clearly establish: (1) a  
15 likelihood of success on the merits; (2) a likelihood that he will suffer irreparable harm  
16 if the preliminary relief is not granted; (3) that the balance of equities tips in his favor;  
17 and (4) that the injunction is in the public interest. *See Winter*, 555 U.S. at 20. Under  
18 15 U.S.C. § 1116(a) as modified by the Trademark Modernization Act of 2020, a  
19 plaintiff seeking an injunction to prevent trademark infringement is entitled to a  
20 rebuttable presumption of irreparable harm upon a finding of likelihood of success on  
21 the merits. *Cisco Sys. v. Wuhan Wolon Commc’n Tech. Co.*, No. 5:21-cv-04272-EJD,  
22 2021 WL 4962661, at \*7 (N.D. Cal. July 23, 2021) (quoting Pub. L. No. 116-260  
23 (2020)); *cf. Vision Sports, Inc. v. Melville Corp.*, 888 F.2d 609, 612 n.3 (9th Cir. 1989)  
24 (“In trademark infringement or unfair competition actions, once the plaintiff establishes  
25 a likelihood of confusion, it is ordinarily presumed that the plaintiff will suffer  
26 irreparable harm if injunctive relief is not granted.”).

27 “The purpose of a preliminary injunction is merely to preserve the relative  
28 positions of the parties until a trial on the merits can be held.” *Univ. of Tex. v.*

1 *Camenisch*, 451 U.S. 390, 395 (1981). The party moving for the preliminary injunction  
2 bears the burden of establishing its need. *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1326  
3 (9th Cir. 1994). The moving party must meet this burden with a “clear showing” that  
4 the preliminary injunction is warranted. *Conn. Gen. Life Ins. Co. v. New Images of*  
5 *Beverly Hills*, 321 F.3d 878, 881 (9th Cir. 2003). In ruling on an application for  
6 preliminary injunction, the Court may consider evidence that would not be admissible  
7 at trial. *See, e.g., Johnson v. Couturier*, 572 F.3d 1067, 1083 (9th Cir. 2009) (“A district  
8 court may . . . consider hearsay in deciding whether to issue a preliminary injunction.”).

#### 9 IV. DISCUSSION

10 “In the trademark context, ‘state common law claims of unfair competition and  
11 actions pursuant to the California Business and Professions Code § 17200 are  
12 substantially congruent to claims made under the Lanham Act.’” *Alixir Co. v. Qué Onda*  
13 *Beverage, Inc.*, No. 2:20-cv-08368-RGK-RAO, 2021 WL 971057, at \*6 (C.D. Cal.  
14 Jan. 6, 2021) (quoting *Cleary v. News Corp.*, 30 F.3d 1255, 1262–63 (9th Cir. 1994)).  
15 Neither party disputes this principle, and their briefs are accordingly focused on the  
16 Lanham Act claim. The Court takes its cue from the parties and similarly focuses its  
17 analysis on the Lanham Act claim.

18 Audio-Technica brings its trademark claim against Music Tribe under  
19 section 43(a) of the Lanham Act (15 U.S.C. § 1125(a)) for trade dress infringement,  
20 trademark infringement, and false designation of origin. Although both marks are  
21 unregistered, section 43(a) “protects against infringement of unregistered marks and  
22 trade dress as well as registered marks.” *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d  
23 1199, 1204–05 (9th Cir. 2000).

24 Audio-Technica attempts to meet its burden on this motion by showing a  
25 likelihood of success on its trade dress claim and its trademark claim. For the following  
26 reasons, Audio-Technica fails in this burden.

1 **A. Trade Dress Infringement**

2 Trade dress refers to “the total image of a product and may include features such  
3 as size, shape, color or color combination, texture, graphics, or even particular sales  
4 techniques.” *Nova Wines, Inc. v. Adler Fels Winery LLC*, 467 F. Supp. 2d 965, 975  
5 (N.D. Cal. 2006) (quoting *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 808  
6 n.13 (9th Cir. 2003)). Here, Audio-Technica asserts trade dress rights in the AT2020’s  
7 design, which incorporates (1) two vertical bars on either side of the microphone with  
8 two circular enclosures near the top and bottom, (2) a small portion of the microphone’s  
9 mesh protruding above the top circular enclosure, and (3) a threaded adapter with  
10 rounded hinges and a tapered bottom containing the microphone’s cord port.

11 Audio-Technica’s unregistered trade dress claim requires it to show that its trade  
12 dress is (1) nonfunctional, (2) distinctive, and that (3) Music Tribe’s use of the trade  
13 dress creates a likelihood of consumer confusion. *Moroccanoil, Inc. v. Zotos Int’l, Inc.*,  
14 230 F. Supp. 3d 1161, 1171 (C.D. Cal. 2017) (citing *Int’l Jensen, Inc. v. Metrosound*  
15 *U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir. 1993)). Audio-Technica makes a weak showing  
16 of both distinctiveness and likelihood of confusion.

17 *I. Distinctiveness*

18 Trade dress rights can be established in either the product’s packaging or the  
19 product’s design. Product packaging trade dress can be “distinctive” in one of two  
20 ways: (1) by being inherently distinctive, or (2) by acquiring secondary meaning. *Wal-*  
21 *Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 210–11 (2000). However,  
22 product design trade dress can never be inherently distinctive and therefore always  
23 requires a showing of secondary meaning. *See id.*

24 Audio-Technica’s primary argument is that it has trade dress rights in the  
25 AT2020’s distinctive design. Audio-Technica does not argue that the AT2020’s design  
26 is inherently distinctive; instead, Audio-Technica argues that the AT2020 trade dress  
27 has acquired distinctiveness by developing secondary meaning. (Mot. 14). A product  
28 design has secondary meaning when “consumers associate the design features with a

1 particular producer.” *Tee Turtle, LLC v. ABmask*, No. CV 21-3572-CBM E(x),  
2 2021 WL 3598747, at \*3 (C.D. Cal. Apr. 29, 2021); *see also Samara Bros.*, 529 U.S.  
3 at 211 (describing secondary meaning as existing when, “in the minds of the public, the  
4 primary significance” of a trade dress “is to identify the source of the product rather  
5 than the product itself”). To determine whether a mark has acquired a secondary  
6 meaning, the trier of fact considers: “(1) whether actual purchasers of the product  
7 bearing the claimed trademark associate the trademark with the producer, (2) the degree  
8 and manner of advertising under the claimed trademark, (3) the length and manner of  
9 use of the claimed trademark, and (4) whether use of the claimed trademark has been  
10 exclusive.” *Yellow Cab Co. of Sacramento v. Yellow Cab of Elk Grove, Inc.*, 419 F.3d  
11 925, 930 (9th Cir. 2005) (quoting *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352,  
12 1358 (9th Cir. 1985) (en banc)).

13 Here, Audio-Technica’s showing that its AT2020 trade dress has a secondary  
14 meaning is weak. The canonic way of demonstrating secondary meaning is by  
15 conducting a survey. *Levi Strauss & Co.*, 778 F.2d at 1358 (“An expert survey of  
16 purchasers can provide the most persuasive evidence on secondary meaning.”). To  
17 conduct the survey, an expert shows consumers the trade dress in question and asks  
18 them if they associate that trade dress with a particular producer. *See id.* The results of  
19 the survey can demonstrate that the product has taken on a secondary meaning. Here,  
20 Audio-Technica presents no such survey, or anything like it. When, as here, the plaintiff  
21 is financially capable of conducting a survey, the failure to do so may allow “an  
22 inference that the results of such a survey would be unfavorable.” *Cairns v. Franklin*  
23 *Mint Co.*, 24 F. Supp. 2d 1013, 1041 (C.D. Cal. 1998); *Allstate Ins. Co. v. Kia Motors*  
24 *Am., Inc.*, No. CV 16–6108 SJO (AGRx), 2017 WL 6550669, at \*15 (C.D. Cal.  
25 Dec. 22, 2017).

26 Instead, Audio-Technica relies on the vague declaration of one of its principals  
27 regarding the high volume of AT2020 advertising and sales in the United States since  
28 2004. (Boss Decl. ¶¶ 14–15.) Boss’s Supplemental Declaration provides further details

1 about the volume of sales and advertising for the AT2020. (Suppl. Decl. Gary Boss  
2 (“Suppl. Boss Decl.”) ¶¶ 3–5, ECF No. 41.) But sales and advertising volume are only  
3 two of the factors courts consider, and such data, without more, fails to clearly  
4 demonstrate a secondary meaning. Indeed, high sales volume, on its own, means little  
5 in the distinctiveness analysis; a manufacturer might generate \$100 million in annual  
6 revenue selling plain white t-shirts, but selling a large number of plain white t-shirts  
7 does nothing to make them any more distinctive. Beyond mere volume, Plaintiff makes  
8 no showing of any concrete association in the minds of consumers between the shape  
9 and design of the AT2020, on one hand, and Audio-Technica as its manufacturer, on  
10 the other hand.

11 Music Tribe, for its part, presents evidence that casts further doubt on whether  
12 Audio-Technica has made the required “clear” showing. Music Tribe presents evidence  
13 indicating that there are several microphones on the market that look similar to the  
14 AT2020. (Behringer Decl. ¶ 7, Ex. 3.) The design elements of several of these  
15 microphones include vertical bars and mesh protruding over the top of the frame, as  
16 does the AT2020. Music Tribe’s showing that the market is crowded with similar  
17 models further confirms that, without direct survey-type evidence establishing a  
18 connection in the consumer’s mind between the trade dress and the producer, it is  
19 unlikely that the AT2020 trade dress has acquired a secondary meaning. *Yellow Cab*  
20 *Co.*, 419 F.3d at 930.

21 Additionally or alternatively, Audio-Technica argues that the AT2020’s product  
22 packaging is protected trade dress, but this argument is also unavailing. The foregoing  
23 analysis applies in even greater measure to Audio-Technica’s contentions regarding the  
24 AT2020’s packaging. Audio-Technica makes no concrete showing that any  
25 microphone consumer associates minimalist packaging with white backgrounds and  
26 clean product photos with Audio-Technica in particular. And Music Tribe demonstrates  
27 that the electronics market is crowded with products packaged in minimalist packaging  
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1 using white backgrounds and clean product photos. (Opp’n 13; Decl. Brian K. Brookey  
2 Ex. 2 (“Minimalist Packaging Compendium”), ECF No. 33-2.)

3 For these reasons, it is unlikely that Audio-Technica will be able to establish that  
4 the AT2020’s product design or product packaging is distinctive.

5 2. *Likelihood of Confusion*

6 The Court now turns to whether Audio-Technica clearly demonstrates a  
7 likelihood of confusion arising from Music Tribe’s use of its trade dress. In the Ninth  
8 Circuit, courts apply the eight factors from *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341  
9 (9th Cir. 1979), when determining whether an infringer’s product is likely to confuse.  
10 These factors are (1) strength of the mark; (2) proximity of the goods; (3) similarity of  
11 the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) the degree  
12 of care likely to be exercised by the purchaser; (7) defendant’s intent in selecting the  
13 mark; and (8) likelihood of expansion of the product lines. *Id.* at 348–49. Depending  
14 on the nature of the case, certain of these *Sleekcraft* factors may be more or less  
15 important, with evidence of actual confusion often being the most important factor. *See,*  
16 *e.g., Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1147  
17 (9th Cir. 2011).

18 Applying these factors to Audio-Technica’s asserted right in the product design  
19 of the AT2020, these factors rather securely indicate a low likelihood of confusion.  
20 First, and most importantly, Audio-Technica presents no evidence of actual confusion.  
21 Audio-Technica had the ability to submit confusion surveys demonstrating that  
22 consumers were confused about the origin of the two products, but it did not. Moreover,  
23 Audio-Technica does not present any other direct evidence of confusion, such as  
24 evidence that purchasers of the BX2020 contacted Audio-Technica believing they had  
25 purchased an Audio-Technica product.

26 Instead, Audio-Technica repeatedly and emphatically points to writings by online  
27 reviewers and commentators that Audio-Technica argues demonstrate a likelihood of  
28 confusion. However, these writings support the opposite conclusion at least as much as

1 they support Audio-Technica’s desired conclusion, if not more so. The online reviewers  
2 and commentators variously observe that the BX2020 is a “knockoff” or a “clone” of  
3 the AT2020 and that it was an “absolutely shameless” copy. (Mot. 8–11.) These  
4 reviews indicate that writers and readers understand very well that the AT2020 and the  
5 BX2020 are manufactured by different producers, supporting the absence of confusion.  
6 *See JL Beverage Co. v. Beam, Inc.*, 899 F. Supp. 2d 991, 1005 (D. Nev. 2012) (finding  
7 evidence of consumers noting the goods look alike showed a lack of confusion, as  
8 consumers understood the goods were distinct products). No reviewer was under the  
9 impression that the two microphones came from the same manufacturer; instead, they  
10 were all well aware that the microphones were made by two different manufacturers,  
11 and one of the purposes of the reviews was to describe the differences between the two  
12 microphones. For these reasons, the online reviews do not demonstrate a likelihood of  
13 confusion.

14 Music Tribe makes an additional point regarding housemarks that further  
15 weakens Audio-Technica’s showing of a likelihood of confusion. The few copies of  
16 BX2020s sold in the United States all bore the word “Behringer” as a housemark on the  
17 side of the microphone. “The consistent use of a housemark can reduce the likelihood  
18 of confusion . . . when the housemark is . . . conspicuous . . . and serves to indicate the  
19 source of origin to the public.” *Charles Schwab & Co. v. Hibernia Bank*, 665 F. Supp.  
20 800, 808 (N.D. Cal. 1987). Although the presence of a housemark alone does not  
21 “negate the likelihood of confusion,” its presence contributes to a finding that confusion  
22 is unlikely. *New Flyer Indus. Canada ULC v. Rugby Aviation, LLC*, 405 F. Supp. 3d  
23 886, 901 (W.D. Wash. 2019).

24 Audio-Technica argues that the consumers of AT2020s are often entry-level  
25 purchasers who are more likely than more experienced purchasers to confuse the  
26 AT2020 with the BX2020. (Mot. 17–18.) This argument, however, is grounded in  
27 Audio-Technica’s unsupported assertion about the types of consumers who purchase  
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1 AT2020s and the experiences they may have had. Ultimately, Audio-Technica’s  
2 argument on this issue is little more than speculation.

3 Finally, although Audio-Technica makes a relatively strong showing that Music  
4 Tribe intended to copy the design of the AT2020, the defendant’s intent is ultimately  
5 only one factor in the analysis, and here, the overall balance of the factors indicates a  
6 very low likelihood of confusion with respect to product design trade dress.

7 For these reasons, it is rather unlikely that Audio-Technica will successfully  
8 establish a likelihood of confusion arising from Music Tribe’s use of Audio-Technica’s  
9 alleged product design trade dress.

10 For many of these same reasons, Audio-Technica’s demonstration of a likelihood  
11 of confusion about its product packaging trade dress is even weaker. As stated above,  
12 Audio-Technica’s product packaging trade dress is a weak mark at best and may not  
13 exist at all. And Audio-Technica presents no evidence of consumer confusion based on  
14 the similarity of its product packaging to that of the BX2020.

15 In summary, as to trade dress, it is unlikely Audio-Technica will be able to  
16 establish distinctiveness, and it is also unlikely it will be able to establish a likelihood  
17 of confusion. These two elements are independent, and a failure of either of them would  
18 be a complete bar to recovery for trade dress infringement. The low chances of success  
19 on each of these points compounds, such that it is clear that Audio-Technica fails to  
20 demonstrate a likelihood of success on the merits. Thus, an injunction directed toward  
21 trade dress infringement based on either the AT2020’s design or packaging is not  
22 appropriate.

### 23 **B. Trademark Infringement**

24 The second component of Audio-Technica’s trademark claim concerns its  
25 asserted rights in the unregistered “AT2020” mark. As a preliminary point of  
26 clarification, much of the trademark aspect of Audio-Technica’s Motion is moot. Music  
27 Tribe has stopped marketing and selling its microphone under the “BX2020”  
28 designation, now designating it as “BM1.” (Behringer Decl. ¶ 6.) And Audio-Technica

1 presents no evidence that refutes Music Tribe’s principal’s assertion that it has no plans  
2 whatsoever to reintroduce its microphone under the BX2020 designation any time in  
3 the future. Audio-Technica therefore lacks standing to pursue an injunction preventing  
4 Music Tribe from manufacturing or distributing its microphone under the BX2020  
5 designation, or, alternatively, Audio Technica’s request for this injunction in particular  
6 is now moot.

7       Because Music Tribe no longer distributes microphones under the BX2020 mark,  
8 the only remaining issue is whether the Court should issue a preliminary injunction  
9 compelling Music Tribe to make efforts to recall the already-distributed BX2020  
10 microphones. Preliminarily, the Court notes that Audio-Technica presents no language  
11 in its Proposed Order that might achieve this narrower effect. (Proposed Order, ECF  
12 No. 27-1.) Substantively, such an injunction would be a mandatory injunction because  
13 it would require Music Tribe to take affirmative action to recall any remaining BX2020  
14 units from its downstream retailers. *See Garcia v. Google, Inc.*, 786 F.3d 733, 740  
15 (9th Cir. 2015) (defining mandatory injunction as one that “orders a responsible party  
16 to take action” (internal quotation marks removed)). District courts should deny  
17 mandatory injunctions “unless the facts and law clearly favor the moving party.”  
18 *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979). “In plain terms,  
19 mandatory injunctions should not issue in doubtful cases.” *Garcia*, 786 F.3d at 740  
20 (internal quotation marks removed). This is a very doubtful case.

21       “To establish common law rights in an unregistered mark, a plaintiff must show  
22 either (1) that its mark is inherently distinctive, or (2) that the mark has acquired a  
23 secondary meaning.” *Alixir*, 2021 WL 971057, at \*4 (cleaned up). As with its trade  
24 dress claim, Audio-Technica does not argue that its AT2020 mark is inherently  
25 distinctive. Instead, Audio-Technica argues that the mark has a secondary meaning.  
26 (Mot. 20.) The secondary meaning analysis for a trademark is the same as for a trade  
27 dress. *Alixir*, 2021 WL 971057, at \*4. Here, Audio-Technica fails in its burden of  
28 showing its “AT2020” word mark has secondary meaning; it submits no survey

1 suggesting the existence of secondary meaning for “AT2020” and relies on general  
2 assertions about sales volume and consumer demographics.

3 Applying the *Sleekcraft* factors to determine whether there is a likelihood of  
4 confusion arising from Music Tribe’s use of the BX2020 mark, the Court finds Audio-  
5 Technica fails in its burden, for the same reasons discussed above in connection with  
6 the trade dress claim. There is no evidence of actual confusion, and the evidence  
7 submitted suggests that, if anything, consumers understand that the two products are  
8 different products made by different manufacturers. The presence of the Behringer  
9 housemark on the microphone housing further erodes the possibility that consumers will  
10 be confused.

11 Moreover, the two word marks themselves are not particularly similar. Audio-  
12 Technica ultimately concedes that it is asserting a trademark in “AT2020” and not  
13 “2020.” (Reply 10 (“Audio-Technica is obviously claiming ‘AT2020’ as its trademark.”  
14 (capitalization modified).) Thus, the question is not whether “2020” and “2020” are  
15 confusingly similar; the question is whether “AT2020” and “BX2020” are confusingly  
16 similar, and the answer is “likely not.” The distinguishing letters come at the beginning  
17 of each mark and are naturally interpreted as referring to the respective manufacturers,  
18 Audio-Technica and Behringer. These differences make consumer confusion even less  
19 likely. Audio-Technica bears the burden of making a showing sufficient to dispel the  
20 Court’s doubts regarding the appropriateness of a mandatory injunction. Audio-  
21 Technica’s showing leaves the Court with substantial doubts regarding the mark itself  
22 and the likelihood of confusion.

23 To summarize, a mandatory injunction relating to trademark infringement is not  
24 appropriate because Audio-Technica fails to meet the applicable burden, and a  
25 prohibitory injunction relating to trademark infringement is not appropriate because  
26 Music Tribe is no longer using the mark in question. Thus, the Court will not issue an  
27 injunction relating to trademark infringement.

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**V. CONCLUSION**

For the reasons discussed above, Audio-Technica fails in its burden of showing entitlement to a preliminary injunction of any type. The Court therefore **DENIES** Audio-Technica’s Motion. (ECF No. 27.)

**IT IS SO ORDERED.**

May 5, 2022

  
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**OTIS D. WRIGHT, II**  
**UNITED STATES DISTRICT JUDGE**