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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85916478
Applicant	Tim Ennis
Applied for Mark	CYMBAL FOUNDRY
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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Mark: **CYMBAL FOUNDRY**

Applicant: **Tim Ennis**

Serial No.: **85/916,478**

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Applicant/Appellant's Brief

Applicant/Appellant, Tim Ennis, hereby appeals the Examining Attorney's final refusal to register Applicant's mark, CYMBAL FOUNDRY for *cymbals and gongs*.

The Examining Attorney's final refusal was based on the belief that Applicant's mark is likely to be confused with the mark DRUM FOUNDRY for *parts and accessories for music drums*, which is shown in U.S. Registration No. 3,188,753. Applicant respectfully disagrees with the Examining Attorney's conclusion and refusal to allow registration. During prosecution, Applicant presented evidence and arguments to show:

1. Cymbal manufacturers generally *only make cymbals*, and, they are highly unlikely to make anything else;
2. Percussionists are a *professional or niche* purchaser whose purchase of a cymbal directly impacts the musical performance; and

3. Percussionists are likely to be aware that cymbal manufactures only make cymbals;

which together with the other *Du Pont* factors, demonstrate that drummers would be unlikely to confuse a source of cymbals with a source of drum parts. Drums and cymbals are instrumental to a drummer’s performance. So, we can expect that drummers would be methodical in their selection of instruments.

What evidence shows that cymbal manufacturers are unlikely to make anything else?

Cymbal manufacturers, generally speaking, only make cymbals. They do not generally make anything else. While this is generally known to musicians, Applicant has provided evidence of this. Wikipedia (shown in Exhibit A of Applicant’s Response to Office Action dated February 13, 2014) lists 32 different manufacturers of cymbals. (For brevity, I’ll refer to Applicant’s good “cymbals and gongs” simply as “cymbals” throughout.) Applicant has surveyed all of the manufacturer’s websites from the Wikipedia article that could be located using Google and attached them as Exhibit B of Applicant’s Response to Office Action dated February 13, 2014. These 27 found websites show that most cymbal manufacturers produce exclusively cymbals. Only a single manufacturer was found that produces a wide variety of instruments, including cymbals and drum parts.

CHART OF *EVERY CYMBAL MANUFACTURE FOUND WITH WIKIPEDIA AND GOOGLE*

Manufacturer	Website	Makes Cymbals?	Makes Drum Parts?
UFIP	ufip.it	Y	N
LP	lpmusic.com	Y	N
Paiste	paiste.com	Y	N
MEINL Cymbals	meinlcymbals.com	Y	N
MURAT DIRIL	muratdiril.com	Y	N
Soultone	soultonecymbals.com	Y	N
Saluda Cymbals	saludacymbals.com	Y	N
Orion Cymbals	orioncymbals.com.br	Y	N
Sabian	sabion.com	Y	N

TRX Cymbals	trxcymbals.com	Y	N
Stagg	staggmusic.com	Y	Y
Istanbul	istanbulcymbals.com	Y	N
Istanbul Mehmet	istanbulmehmet.com	Y	N
Masterwork	masterworkeymbals.com	Y	N
Turkish	turkishcymbals.com	Y	N
Zildjian	zildjian.com	Y	N
Bosphorus	bosphoruscymbals.com.tr	Y	N
Crescent Cymbals	crescentcymbals.com	Y	N
Diril Cymbals USA	dirilcymbalsusa.com	Y	N
Imperial Cymbals	imperialcymbals.com	Y	N
Mall Nolan Custom	mattnolancustomcymbals.com	Y	N
Paiste	paiste.com	Y	N
Fandy's Cymbal	facebook.com	Y	N
Agean	ageancymbals.com	Y	N
Ameida Cymbals	amediacymbals-usa.com	Y	N
Anatolian	anatolianscymbals.org	Y	N

The evidence, as summarized in this chart, shows that cymbal manufactures only make cymbals (with one exception). The chart shows only one manufacturer that makes drum parts; this is also the only manufacturer that makes any other type of instrument. Further, these manufacturers of cymbals do not generally produce any type of drum accessory, including (interestingly enough) the various clamps that support and arrange the cymbals.

Why not? Because, cymbal manufacturing is an art-form. Cymbals are produced through the manipulation of metal, often times by hand, for example, by forging, casting, stamping or turning. (See Exhibit C of Applicant's Response to Office Action dated February 13, 2014.) Traditionally, cymbals are produced by a series of steps, including hand-hammering by a highly skilled or accomplished artisan. Modern times have introduced new techniques. No matter the technique, the evidence shows that cymbal manufacturers specialize in the production of

cymbals, and, likely, this is because they are focused on producing superior sounds with their cymbals.

The Examiner did not present any evidence to dispute that cymbal manufacturers (who are the ultimate source of the goods) only produce cymbals.

Who is the consumer?

The consumer is musicians, particularly percussionists. Many musicians, through their musical training, know something about how their instruments are made, because the make of the instrument impacts the performance that the musician gives. Nearly all musical instruments are built by dedicated craftsmen who make one variety of instrument. This is true, even when modern methods are used to mass manufacture. Musicians know this, and, they bring this expectation with them to the point of purchase. Musicians do not expect a single source (or any relationship between) the source for cymbals and the source for drum parts.

Who buys drum parts?

Drum parts are not purchased casually. A typical purchaser of drum parts would be a *drum manufacturer*. Applicant admits that drum parts may also be sold to a musician or percussionist directly, however, that musician or percussionist would necessarily have the skill to repair or modify a drum to make use of the drum parts. So, a percussionist who directly purchases drum parts likely has skill in drum repair in addition to musical talent and training. Perhaps, this is similar to auto parts being available to car owner, while not all car owners will purchase parts, at least a few car owners will also be mechanics; that implies a different level of skill or sophistication.

Who buy cymbals?

Cymbals would be purchased by percussionists and manufacturers. Manufacturers would incorporate cymbals into drum kits, for later sale to percussionists.

Who buys drum kits?

Examiner's evidence shows many, many "drum kits". A drum kit is a collection of drums and cymbals, suitable for a novice or beginner or to begin training as a drummer, such as, for a stage-performing band. A "drum kit" would necessarily include both cymbals and drum parts; much the way a car would include both tires and axles. Consumers might periodically purchase tires; but, rarely would a consumer purchase an axle directly. Similarly, percussionists may purchase

cymbals, but, they are much less likely to purchase “drum shells, lugs, strainers, butts, hoops, tension rods, mounting screws, air vents, brackets, clamps, mounts, claws, spurs, snare wires, drum wraps” in order to repair or make a new drum.

So, it is likely, that a musician who is purchasing cymbals or drum parts has both the desire and the ability to repair or modify drums or cymbals. As such, this percussionist is likely beyond the beginner or novice level, and has some additional skills in making or repairing.

Is a percussionist considered a sophisticated purchaser when purchasing the tools of their trade?

Percussionists, like all musicians, need a wide range of intangible qualities and tangible goods to perform their art. Rhythm is the practical outcome of the combination of the percussionist’s qualities and percussionist’s goods. Since the rhythmic outcome depends on the goods, it is plausible that a reasonable percussionist would exhibit a relatively high degree of care regarding the selection of the percussionist’s instruments. Since the sound is the most important quality, and, since the sound is established at the time of production or manufacture, a reasonable percussionist would desire to know who produced or manufactured a cymbal before purchase.

Circumstances suggesting care in purchasing may tend to minimize the likelihood of confusion. *See Hewlett-Packard Co. v. Human Performance Measurement Inc.*, 23 U.S.P.Q.2d 1390, 1991 WL 350751 (T.T.A.B. 1991) (sophisticated buyers of medical instruments are not likely to be confuse between "HP" and “HPM”). In some cases, the sophistication of the buyers was the “most critical factor”. *Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc.*, 718 F.2d 1201, 1206, 220 U.S.P.Q. 786 (1st Cir. 1983).

The board has previously found other examples of professional buyers purchasing instruments to perform their services, similar to musicians and percussionists. For example, electrical contractors purchasing electrical equipment. *GB Elec. v. Thomas & Betts Corp.*, 37 U.S.P.Q.2d 1177, 1995 WL 795660 (F.D. Wis. 1995) The relevant “cost” was not the price of the individual connectors, but the cost of each purchase. It could be said, the “cost” of the purchase of a musical instrument includes the cost of potentially unsound performance if the percussionist chooses poorly.

Another example is *Oreck Corp. V. U.S. Floor Systems, Inc.* 803 F.2d 166, 231 U.S.P.Q. 634 (5th Cir. 1986), cert. denied, 481 U.S. 1069, 95 L. Ed. 2d 871, 107 S. Ct. 2462 (1987). In *Oreck*, purchasers of steam carpet cleaners were considered sophisticated. Like musicians, the use of a steam carpet cleaner is instrumental in delivering the service of clean carpet.

A further example is *Welding Services, Inc. v. Forman.* 509 F.3d 1351, 85 U.S.P.Q. 2d 1233 (11th Cir. 2007). In *Welding Services*, the users of welding equipment were found to be sophisticated. Again, the use of the product was instrumental in providing welding services to industry.

Yet another example is *Iowa Paint Mfg. Co., Inc. v. Hirshfield's Paint Mfg., Inc.*, 296 F. Supp. 2d 983, 69 U.S.P.Q.2d 1016 (S.D. Iowa 2003). In *Iowa Paint Mfg. Co.*, Professional paint contractors would be expected to exert a relatively high degree of care in selecting their paint. Again, the paint is instrumental to the performance of the service of painting.

Musicians understand that the production of musical instruments is part science and part craft, which is undertaken by specialists that focus on a particular variety of instrument. Accordingly, musicians and percussionists should be considered sophisticated purchasers for the purposes of determining a likelihood of confusion because the percussionist, when selecting either a cymbal or a drum part, knows that the selection likely impacts the percussionist's rhythmic outcome.

In view of the evidence, and in consideration of the respective goods, how likely would a percussionist be to confuse these marks?

Word marks are compared with their respective appearance, sound, meaning, and commercial impression. See *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772*, 396 F.3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (citing *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973)). Similarity in one respect – sight, sound, or meaning – does not automatically result in a determination that confusion is likely even if the goods are identical or closely related; rather, all of the relevant facts of a particular case should be considered. See *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988).

Thus-far, I have presented these two facts: 1) cymbal manufacturers generally only make cymbals; and 2) percussionists likely care about the rhythmic outcome of the

cymbals they purchase and use. So, with these facts in mind, how does this impact the differences in appearance sound, meaning and overall commercial impression?

The mark DRUM FOUNDRY when used in connection with drum parts creates an impression of a place where the metallic parts of drums are made. The mark CYMBAL FOUNDRY when used in connection with cymbals creates an impression of a place where a cymbal is made. Since a musician or percussionist is likely to know that cymbal manufacturers only make cymbals, in the mind of a percussionist, these are different places, because cymbals are generally made in places where no other instrument is made. The percussionists knows this because the percussionist cares about the rhythmic performance of the instrument. Said another way, the appearance, sound and meaning all differ in a way that is particularly meaningful to the percussionist; and thereby, the marks make different commercial impressions.

Why does the Examiner error by considering only “drums” and not “drum parts”?

The Examiner has presented evidence of third-party registrations. The following chart shows which of these registrations actually include both “*cymbals or gongs*” (which is the Applicant’s goods description) and any of the *drum accessories or parts* (rather than just drums) that actually form part of the goods description of DRUM FOUNDRY. For hand reference these goods are: “drum shells, lugs, strainers, butts, hoops, tension rods, mounting screws, air vents, brackets, clamps, mounts, claws, spurs, snare wires, drum wraps.” Marks having an asterisk (*) indicate stylized marks.

CHART OF THIRD-PARTY REGISTRATIONS *SHOWING LITTLE OVERLAP OF GOODS*

Mark	Registration No.	Includes Cymbals?	Includes Overlapping Drum Parts?
B8PRO	2,711,408	Y	N
G	3,265,729	Y	N
KHS*	3,175,356	Y	N
PERCO*	3,158,658	Y	N
AXIS PERCUSSION	3,301,952	N	Y
GOLDFISH*	3,208,252	Y	N

BLACK EIGHT 8*	4,046,700	Y	N
GP FOR MUSICIAONS - BY MUSICIANS PERCUSSION MADE IN CHINA*	4,031,237	Y	Y
CRUSH DRUMS & PERCUSSION*	4,242,634	Y	Y
APOLLO	4,080,161	Y	N
[DESIGN]	4,198,366	Y	N
E.M. WINSTON	4,271,397	Y	N
XINGSIR	3,340,730	Y	N
ASHBURY	3,534,761	Y	N
MEANIE	3,338,420	Y	N
KCC*	3,757,280	Y	N
GALANE	3,872,631	Y	N
REEF PERCUSSION	3,898,113	Y	Y
LEFIMA*	2,794,644	Y	Y
BADASS	3,056,366	Y	N
FORGEXL*	2,923,276	Y	N
GROOVE PERCUSSION*	2,992,541	Y	Y
DRUM PARTS DEPOT	3,703,560	N	N
LONG BOARDS	3,236,556	N	N
TORPEDO BAGS	3,287,981	N	N
JOYLINK*	3,314,862	Y	N
STUPOROUS	4,046,699	Y	N
JUPITER	4,209,217	Y	N
AB DRUMS*	4,437,425	Y	N
R.O.C.K. CUSTOM DRUMS BY RICH KOZI	4,367,460	N	Y

The chart shows that the Examiner presented 30 third-party registrations. Only 7 of these registrations actually have drum parts that overlap with DRUM FOUNDRY. And, only 5 of these registrations actually have *both* cymbals *and* drum parts; that is not much overlap given the large number of registrations presented

by the Examiner. Why did this happen? Because the Examiner has erroneously presented “drum parts” as synonymic with “drums” or “percussion instruments”.

The failure of overlap likely reflects the marketplace: most percussionists are not purchasing parts, but rather, they are purchasing instruments. Manufacture and repair of drums is a separate activity where drum parts are likely to be consumed; that activity is unlikely to be taken up by the percussionist.

Why does the Examiner’s Internet evidence fail to relate cymbals and drum parts?

While I could create a further chart for showing how many of the websites offered by the Examiner present cymbal manufacturers and drum-part manufacturers, instead, I’ll just present this number:

zero (0).

Each and every of the Examiner’s websites shows only retail music shops, both virtual and real. Largely, these examples of *retailers* that provide the service of selling cymbals and *complete drum assemblies*. None of these retailers are manufacturers of musical instruments. The retailers resell musical instruments made by others. They provide the service of helping customers select products for purchase. With a sophisticated purchaser, such as a musician buying an instrument, they are not likely to confuse the retailer as the source of the instrument, in part, because the retailer’s service does not ultimately impact the musical performance or the rhythmic outcome.

Further, none of the websites, as presented by the Examiner, clearly shows “drum parts” that *actually overlap* with the registration cited in the refusal. Presumably, “drum parts” are items that are not typically purchased by musicians who play drums, but rather, drum manufacturers, for use in the production of musical drums.

Finally, between these two facts:

1. Almost all cymbal manufacturers produce *only* cymbals; and
2. Musical retailers carry cymbals and complete drum assemblies;

the *first* fact is more relevant to the inquiry of likelihood of confusion because the cymbal manufacturer’s high degree of specialization has a direct bearing on the rhythmic outcome of the percussionist.

In Conclusion

Cymbal manufacturers only make cymbals. So, Cymbals are very unlikely to originate from the same source as drum parts and accessories. A fact that would be important to a perspective percussionist purchaser. Why? Because the decision to purchase an instrument impacts the percussionist's rhythmic performance.

Figuratively, if all these statements ring true; please allow Applicant's mark for CYMBAL FOUNDRY to register by overturning the Examiner's rejection.

Yours truly,

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ALPHABETICAL INDEX OF CITED CASES

Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc., 718 F.2d 1201, 1206, 220 U.S.P.Q. 786 (1st Cir. 1983).

GB Elec. v. Thomas & Betts Corp., 37 U.S.P.Q.2d 1177, 1995 WL 795660 (F.D. Wis. 1995).

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