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Subject: U.S. TRADEMARK APPLICATION NO. 85916478 - CYMBAL FOUNDRY - 12#583 - EXAMINER BRIEF

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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

<p>U.S. APPLICATION SERIAL NO. 85916478</p> <p>MARK: CYMBAL FOUNDRY</p>	
<p>CORRESPONDENT ADDRESS: ANDREW LAHSER LAW OFFICE OF ANDREW P LAHSER PLC 16824 E AVENUE OF THE FOUNTAINS STE 14 FOUNTAIN HILLS, AZ 85268-8408</p>	<p>GENERAL TRADEMARK INFORMATION: http://www.uspto.gov/trademarks/index.jsp</p> <p>TTAB INFORMATION: http://www.uspto.gov/trademarks/process/appeal/index.jsp</p>
<p>APPLICANT: Tim Ennis</p>	
<p>CORRESPONDENT'S REFERENCE/DOCKET NO: 12#583</p> <p>CORRESPONDENT E-MAIL ADDRESS: docket@lahserpatent.com</p>	

EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant has appealed the examining attorney's refusal to register the trademark, CYMBAL FOUNDRY, on the ground that it is confusingly similar to the mark DRUM FOUNDRY, U.S. Reg. No. 3199753, under Section 2(d) of the Trademark Act.

FACTS

Tim Ennis filed an application to register the mark CYMBAL FOUNDRY for musical instruments, namely, cymbals and gongs; percussion instruments, namely, cymbals and gongs. The examining attorney refused registration under Section 2(d) based on one registration and required the applicant to disclaim the term CYMBAL in the initial office action.¹ The applicant argued against the Section 2(d) refusal and provided a disclaimer of the term CYMBAL.² After consideration of the applicant's arguments against the refusal, the examining attorney issued a final office action.³ In response the applicant filed an appeal.⁴

ARGUMENT

Section 2(d) – Likelihood of Confusion

A. The Marks Are Confusingly Similar

The applicant has applied to register CYMBAL FOUNDRY in standard characters for “musical instruments, namely, cymbals and gongs; percussion instruments, namely, cymbals and gongs.” The registered mark is DRUM FOUNDRY in standard characters for “parts and accessories for music drums, namely, drum shells, lugs, strainers, butts, hoops, tension rods, mounting screws, air vents, brackets, clamps, mounts, claws, spurs, snare wires, drums wraps.”

¹ August 13, 2013.

² February 13, 2014.

³ February 22, 2014.

⁴ August 22, 2014.

Marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F. 3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)); TMEP §1207.01(b)-(b)(v). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) (citing *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re 1st USA Realty Prof’ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007)); TMEP §1207.01(b).

When comparing marks, the test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods and/or services offered under the respective marks is likely to result. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 1053, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *In re Davia*, 110 USPQ2d 1810, 1813 (TTAB 2014); TMEP §1207.01(b). The proper focus is on the recollection of the average purchaser, who retains a general rather than specific impression of trademarks. *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049, (TTAB 2014); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); TMEP §1207.01(b).

In the present case the applicant’s mark is similar to the registered mark in sound, appearance and connotation. The dominant feature of the proposed mark is the term FOUNDRY which is also the dominant feature of the registered mark. Therefore the marks DRUM FOUNDRY and CYMBAL FOUNDRY create the same connotation and commercial impression.

Although marks are compared in their entireties, one feature of a mark may be more significant or dominant in creating a commercial impression. See *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751

(Fed. Cir. 1985); TMEP §1207.01(b)(viii), (c)(ii). Disclaimed matter that is descriptive of or generic for a party's goods and/or services is typically less significant or less dominant when comparing marks. *See In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Nat'l Data Corp.*, 753 F.2d at 1060, 224 USPQ at 752; TMEP §1207.01(b)(viii), (c)(ii). Thus the inclusion of the disclaimed terms DRUM and CYMBAL in the respective marks will not obviate this refusal.

B. The Goods Are Related

The goods and/or services of the parties need not be identical or even competitive to find a likelihood of confusion. *See On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods.”); TMEP §1207.01(a)(i).

The respective goods and/or services need only be “related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); TMEP §1207.01(a)(i).

Applicant's goods are “musical instruments, namely, cymbals and gongs; percussion instruments, namely, cymbals and gongs”. The registrant's goods are “parts and accessories for music drums, namely, drum shells, lugs, strainers, butts, hoops, tension rods, mounting screws, air vents, brackets, clamps, mounts, claws, spurts, snare wires, drum wraps”. Although the goods are not identical, they are likely to be encountered by the same group of consumers because they are sold and

provided through the same channels of trade. Both the applicant and registrant are providing products in the percussion instrument industry.

The trademark examining attorney refers to the attached evidence in the previous office actions⁵ from the USPTO's X-Search database consisting of a number of third-party marks registered for use in connection with the same or similar goods as those of both applicant and registrant in this case. This evidence shows that the goods listed therein, namely cymbals and related drum parts and accessories are of a kind that may emanate from a single source under a single mark. *See In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988); TMEP §1207.01(d)(iii).

The examining attorney also refers to the attached Internet evidence in the previous office actions⁶ which consist of printouts from third party vendors. This evidence establishes that the relevant goods are sold or provided through the same trade channels and used by the same classes of consumers in the same field of use. Therefore, applicant's and registrant's goods are considered related for likelihood of confusion purposes. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009).

Such evidence demonstrates that cymbals and drum parts are both products used in the percussion instrument industry. Therefore, consumers could mistakenly believe that the goods originate from the same source.

C. Applicant's Arguments

⁵ August 13, 2013 and February 22, 2014.

⁶ August 13, 2013 and February 22, 2014.

The applicant argues that 1) cymbal manufacturers generally only make cymbals; 2) percussionists are a professional or niche purchaser; 3) percussionists are not likely to confuse the marks; and 4) the evidence is insufficient.

1. Cymbal Manufacturers

The applicant argues that cymbal manufacturers generally only make cymbals. The applicant further stated that the examiner did not present any evidence to dispute this. As stated previously, the goods of the parties need not be identical or even competitive to find a likelihood of confusion. See *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods.”); TMEP §1207.01(a)(i).

It is sufficient that the goods of the applicant and the registrant are related in some manner or that the conditions surrounding their marketing are such that they are likely to be encountered by the same persons under circumstances that, because of the marks used in connection therewith, would lead to the mistaken belief that they originate from the same source. See, e.g., *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984) (holding MARTIN’S for wheat bran and honey bread, and MARTIN’S for cheese, likely to cause confusion); *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1433 (TTAB 2013) (holding GOTT LIGHT for various water beverages likely to cause confusion with GOTT and JOEL GOTT for wine); *Gen. Mills, Inc. v. Fage Dairy Processing Indus. S.A.*, 100 USPQ2d 1584, 1597 (TTAB 2011) (holding composite marks containing the word TOTAL for yogurt and other products likely to cause confusion with the mark TOTAL for ready-to-eat breakfast cereal); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266 (TTAB 2009) (holding VANTAGE TITAN for MRI diagnostic apparatus, and TITAN for medical ultrasound device, likely to cause confusion);

L.C. Licensing, Inc. v. Berman, 86 USPQ2d 1883 (TTAB 2008) (holding ENYCE for custom automotive accessories, and ENYCE for various urban lifestyle clothing items and accessories, likely to cause confusion). TMEP §1207.01(a)(i).

Thus the examining attorney need not demonstrate that cymbal manufacturers produce drum parts. However, the examining attorney did present evidence that the goods are likely to be encountered by the same purchasers within the same stream of commerce. Please refer to the attached third party registrations and internet evidence of third party vendors contained in the previous office actions.⁷

2. Percussionists Are a Professional or Niche Customer

The applicant argues that the consumers of the goods are musical percussionists who are professional or niche customers. The fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. TMEP §1207.01(d)(vii); *see, e.g., Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d. 1317, 1325, 110 USPQ2d 1157, 1163-64 (Fed. Cir. 2014); *Top Tobacco LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011).

Furthermore, when the relevant consumer includes both professionals and the general public, the standard of care for purchasing the goods is that of the least sophisticated potential purchaser. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d. 1317, 1325, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014); *Alfacell Corp. v. Anticancer, Inc.*, 71 USPQ2d 1301, 1306 (TTAB 2004).

While arguing that percussionists who purchase drum parts would have to be skilled in drum repair, the applicant conceded the following in their appeal brief:

⁷ August 13, 2013 and February 22, 2014.

“Drums 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...*”⁸ Emphasis added.

The applicant goes on to further state:

“Cymbals would be purchased by percussionists and manufacturers. Manufacturers would incorporate cymbals into drums kits for later sale to percussionists.”⁹

Thus through the applicant’s own admission cymbals and drum parts are related and likely to be encountered by the same consumers in the same stream of commerce.

3. Percussionists Are Not Likely To Confuse The Marks

The applicant argues that percussionists are likely to confuse the marks because the mark CYMBAL FOUNDRY creates the image of a place where cymbals are made and the mark DRUM FOUNDRY creates the image where drum parts are made. Marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F. 3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)); TMEP §1207.01(b)-(b)(v). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) (citing *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re 1st USA Realty Prof’ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007)); TMEP §1207.01(b).

Marks must be compared in their entireties and should not be dissected; however, a trademark examining attorney may weigh the individual components of a mark to determine its overall

⁸ Applicant Appeal Brief, Page 4.

⁹ Applicant Appeal Brief, Page 4.

commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1322, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014) (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985) (“[I]n articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety.”)).

In this instance both marks contain the term FOUNDRY which is unique and leaves a distinct impression on the minds of consumers. Less weight should be given to the generic terms DRUM or CYMBAL respectively. Thus the marks connote the same commercial impression.

4. Sufficiency Of The Evidence

The applicant argues that the attached third party evidence is insufficient because not all cited registrations cover cymbals and drum parts. The applicant includes a chart with an analysis of the provided third party registrations. The trademark examining attorney, however, believes that the registrations were mischaracterized in the chart and are relevant. While some listed goods are not identical to that of the registrant it should be noted that the goods contained in the registrations are similar to those of the registrant. The third party registrations contained goods which included cymbals, cymbal accessories or gongs as well as drums, drum parts, and similar drum accessories (*e.g. drum pedals, drum skins, and drum kits*). Also provided was a registration where a retail store sold both cymbals and drum parts. Thus the evidence shows that the goods are of a kind that may emanate from a single source under a single mark. *See In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988); TMEP §1207.01(d)(iii).

The applicant also argues that the attached third party websites are not relevant because they relate only to retailers of musical instruments and not manufacturers. As stated previously the examining attorney need not show that cymbal manufacturers also produce drum parts. Rather the examining attorney need only show that the respective goods are “related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); TMEP §1207.01(a)(i).

The Internet evidence consists of printouts from third party retailers who sell both cymbals, drum parts (including hardware) and/or accessories. This evidence establishes that the relevant goods are sold or provided through the same trade channels and used by the same classes of consumers in the same fields of use and the goods are similar or complementary in terms of purpose or function. Therefore, applicant’s and registrant’s goods are considered related for likelihood of confusion purposes. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009).

Evidence obtained from the Internet may be used to support a determination under Trademark Act Section 2(d) that goods and/or services are related. *See, e.g., In re G.B.I. Tile & Stone, Inc.*, 92 USPQ2d 1366, 1371 (TTAB 2009); *In re Paper Doll Promotions, Inc.*, 84 USPQ2d 1660, 1668 (TTAB 2007).

CONCLUSION

The applicant’s proposed mark CYMBAL FOUNDRY creates the same commercial impression as the registered mark DRUM FOUNDRY. The evidence shows that the goods are commercially related and

likely to be encountered together in the marketplace by consumers. Therefore, consumers are likely to be confused and mistakenly believe that the products originate from a common source. Therefore, a likelihood of confusion exists between the marks.

The examining attorney respectfully submits that the refusal of registration be affirmed.

Respectfully submitted,

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