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Mailed: April 16, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Tim Ennis dba Cymbal & Gong

Serial No. 85916478

Andrew P. Lahser of Law Office of Andrew P Lahser PLC,
for Tim Ennis dba Cymbal & Gong

Tarah Hardy Ludlow, Trademark Examining Attorney, Law Office 110,
Chris A.F. Pedersen, Managing Attorney.

Before Bucher, Ritchie, and Greenbaum,
Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Tim Ennis, dba Cymbal & Gong, has filed an application to register on the Principal Register the mark CYMBAL FOUNDRY, in standard character form, for goods identified as "musical instruments, namely, cymbals and gongs; percussion instruments, namely, cymbals and gongs," in International Class 15.[1] The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that

[1] Application No. 85916478, filed April 26, 2013, under Section 1(a) of the Trademark Act, claiming dates of first use and first use in commerce on April 18, 2012, and disclaiming the word "Cymbal" apart from the mark as shown.

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Applicant's mark, when applied to the identified goods, so resembles the previously registered mark DRUM FOUNDRY 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, drum wraps," also in International Class 15,[2] as to be likely to cause confusion, mistake, or to deceive.

Applicant and the Examining Attorney filed briefs. We affirm the refusal to register.

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also In re Majestic Distilling Company, Inc.,* 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.,* 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). *See also In re Dixie Restaurants Inc.,* 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). We also consider such factors as the conditions under which and buyers to whom sales of the goods are made.

Applicant, in urging reversal of the refusal to register, argues that consumers will not believe that the goods offered by Registrant and Applicant under their

[2] Registration No. 3199753, issued January 16, 2007, and disclaiming "DRUM" apart from the mark as shown. Sections 8 and 15 affidavits accepted and acknowledged.

respective marks emanate from the same source because the goods are different, the consumers are sophisticated, the decision to purchase the goods is not made on impulse, and the normal trade channels do not overlap.[3]

We first consider the *du Pont* factor of similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont de Nemours & Co.,* 177 USPQ at 567. The mark in the cited registration is DRUM FOUNDRY while Applicant's mark is CYMBAL FOUNDRY. Although Registrant has disclaimed the word "Drum," and Applicant has disclaimed the word "Cymbal," this does not automatically render the marks confusingly similar. Given that the leading words are quite dissimilar, the marks in their entireties do not look or sound similar. While both marks share the term "Foundry," this word has somewhat different connotations as applied to cymbals, produced through the manipulation of metal (and often by forging) and drum parts, many of which are not made of metal..

Applicant has included in the record a Wikipedia entry for "Cymbal" which states, "Cymbals are a common percussion instrument. ... Drum kits usually incorporate at least a crash, ride or crash/ride, and a pair of hi hat cymbals." (February 13, 2014 Response to Office Action, at p.7). The Examining Attorney also included a dictionary definition of "cymbal" as "*noun,* a percussion instrument of indefinite pitch consisting of a thin circular piece of brass, which

[3] We note that in his February 13, 2014 Response to Office Action, Applicant stated that he "respectfully requests an interview with the Examiner to help clarify these matters and to move this Application toward allowance." There is no indication that the interview took place.

vibrates when clashed together with another cymbal or struck with a stick." (August 13, 2013 Office Action at p.57). It is clear from the record that there is a relationship between drums and cymbals in that both are percussion instruments. Hence, as to overall commercial impressions, both marks suggest the place where complementary percussion instruments or parts/accessories are made. Given this similarity, we find that the first *du Pont* factor weighs in favor of a likelihood of confusion.

We turn next to a consideration of the similarity or dissimilarity of the goods. It is well-settled that the question of likelihood of confusion must be determined based on an analysis of the goods identified in the application vis-à-vis those identified in the registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 76 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Applicant's goods include "musical instruments, namely, cymbals and gongs; percussion instruments, namely, cymbals and gongs," while the goods in the cited registration include "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, drum wraps." The Examining Attorney submitted numerous third-party registrations that include both "cymbals" on the one hand and "drums" on the other. Copies of use-based, third-party registrations may serve to suggest that the goods and services are of a type which may emanate from a single source. *See In re Albert Trostel & Sons*

Co., 29 USPQ2d 1783, 1785 (TTAB 1993). However, we note that the goods in the cited registration are not "drums," but rather are various drum parts and accessories.

Nonetheless, several of the third-party registrations of record reflect a closer relationship between the respective goods than Applicant concedes. Whether one focuses on inventors,[4] manufacturers,[5] wholesalers[6] or retailers,[7] we find a commercial relationship between cymbals and drum parts and accessories, especially those made of metal. Finally, one website reviewing a drum set that can be set up by the user mentions inclusion of both "cymbals" and "shells":

> Putting the heads on was fun! Never got a chance to do that ever, sure I will be doing a lot more in time. Shells are solid and thick and surely a cheap wood but they're wood-all we need. Very sturdy. Pedals aren't fancy but are about 3/8 - 1/2" thick and simple mechanics so that if you keeps [sic] tight with included drum wrench they should last. Cymbals nicer than expected.

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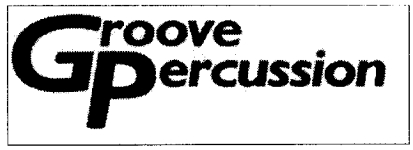
[4] John Stannard, owner of Registration No. 3338420, **MEANIE** for, *inter alia*, drums, gongs, cymbals, triangles, chimes, and parts and accessories therefor.

[5] Sabian, Ltd., owner of Registration No. 2711408, **B8PRO** for, *inter alia*, musical cymbals, gongs, triangles, drums, drumsticks, cymbal-strand nuts and drum keys, cymbal mountings for cymbal stands, gong and cymbal stands, and parts therefor, and Crush Drums and Percussion, owner of Registration No. 4242634, the mark shown at right for, *inter alia*, cymbals; percussion instruments, namely, snare drums, drum sets, hand drums; drum pedals; skins for drums; snare wires for use with snare drums.

[6] Universal Percussions, owner of Registration No. 3340730, **XIGSIR** for, *inter alia*, percussion instruments, namely, drums, cymbals, gongs, latin goods and percussion accessories.

[7] Sam Ash Music Corp., owner of Registration No. 2992541, the mark shown at right for, *inter alia*, percussion instruments, namely, drum sets, drums and cymbals and parts and accessories therefor.



We find this to be a sufficient showing that cymbals are related to, and offered through the same channels as, the various drum parts and accessories identified in the registration such that consumers would identify them as being from a single source. Accordingly, the second and third *du Pont* factors weigh in favor of our finding a likelihood of confusion.

We turn next to the *du Pont* factor considering the conditions of sale and the sophistication of the purchasers. Although Applicant has shown that many cymbals are meticulously handcrafted items that sell at higher price points, we must look to the standard of care of the least sophisticated consumers. Whether it is the beginning percussionist with a first drum set including hi hat cymbals or a more seasoned musician in need of a drum key, for example, some purchasers of these respective products will not be sophisticated, and hence may not exercise a higher level of care. At best for the position taken by Applicant, this is a neutral factor in our determination of likelihood of confusion.

In conclusion, we find that the evidence of record supports a finding that there is a likelihood of confusion. The marks have a similar commercial impression, there is evidence as to the relationship of the goods and that they would travel in the same or similar channels of trade. We further find that some consumers are not likely to exercise care in purchasing the identified drum parts and accessories. We therefore conclude that confusion is likely.

Decision: The refusal under Section 2(d) is affirmed.

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