

THIS OPINION IS NOT A  
PRECEDENT OF THE T.T.A.B.

Mailed: September 16, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Fulltone Musical Products Inc.

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Serial Nos. 77052352 and 77052356<sup>1</sup>

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Todd Braverman of Bryan Cave LLP for Fulltone Musical Products Inc.

Sara Thomas, Trademark Examining Attorney, Law Office 110 (Chris A. F. Pedersen, Managing Attorney).

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Before Walters, Kuhlke and Walsh, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Fulltone Musical Products Inc. seeks registration on the Principal Register of the marks GT-350 and GT-500 (both in standard character format) for goods identified as "electronic effects pedals and stomp boxes for use with

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<sup>1</sup> Inasmuch as the issues raised by the two appeals are similar, the Board is addressing them in a single opinion. Citations to the briefs refer to the briefs filed in application Serial No. 77052352, unless otherwise noted; however, we have, of course, considered all arguments and evidence filed in each case.

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musical instruments and parts therefor and instructional manuals, sold as a unit," in International Class 9.<sup>2</sup>

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's marks, when used with its identified goods, so resemble the following registered marks, owned by the same registrant, as to be likely to cause confusion, mistake or deception:



for "microphones; amplifiers, preamplifiers, electronic sound compressors, audio signal processors, speakers, electrical power supplies, and electrical cables and electrical connectors; electronic equipment or components for audio signal instrumentation measuring or testing, namely microphones, amplifiers, preamplifiers, electronic sound compressors, audio signal processors, speakers, electrical power supplies, electrical cables and electrical connectors; excluding telephones and industrial telephone communications systems," in International Class 9, Registration No. 2753346, issued August 19, 2003;

**GT ELECTRONICS**

"ELECTRONICS" disclaimed for "microphones; amplifiers, preamplifiers, electronic sound compressors, audio signal processors, speakers, electrical power supplies, and electrical cables and electrical connectors; electronic equipment

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<sup>2</sup> Application Serial Nos. 77052352 and 77052356, filed November 28, 2006, alleging a bona fide intention to use the marks in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. §1051(b).

or components for audio signal instrumentation measuring or testing, namely microphones, amplifiers, preamplifiers, electronic sound compressors, audio signal processors, speakers, electrical power supplies, electrical cables and electrical connectors; excluding telephones and industrial telephone communications systems," in International Class 9, Registration No. 2727477, issued June 17, 2003, Section 8 and 15 affidavit accepted and acknowledged;



for "microphones," in International Class 9, Registration No. 3075054, issued June 4, 2008.

When the refusals were made final, applicant appealed and filed two successive requests for reconsideration in each application. The examining attorney denied the requests and the appeals were resumed and fully briefed. We affirm the refusals to register in each application.

As a preliminary matter, the examining attorney's objection to evidence submitted by the applicant for the first time with its brief, is sustained inasmuch as this evidence is untimely. Trademark Rule 2.142(d) ("The record in the application should be complete prior to the filing of an appeal.") To have the evidence considered, applicant should have filed, by separate paper, a request for remand. Id.

Although applicant, in its reply brief, requests that the Board take judicial notice of this matter, the

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submissions, applicant's other registrations and assertions regarding third-party manufacturers of guitar pedals and price ranges for guitar pedals, do not constitute matter of which the Board may take judicial notice. Cf., *In re Carolina Apparel*, 48 USPQ2d 1542, n.2 (TTAB 1998) (may not take judicial notice of third-party registrations); *Beech Aircraft Corp. v. Lightning Aircraft Co.*, 1 USPQ2d 1290 (TTAB 1986) (may not take judicial notice of files of applications not the subject of the proceeding).

In support of its request, applicant mistakenly relies on those portions of the Trademark Rules and the Trademark Trial and Appeal Board Manual of Procedure (TBMP) that pertain to inter partes proceedings. See Trademark Rule 2.122(d)(2) and TBMP Section 704.03.(b)(1)(B) (2d ed. rev. 2004). These references pertain to the manner in which evidence may be presented at trial in an inter partes proceeding. To the extent there is any analogy, the trial phase would be the prosecution phase of ex parte examination. Just as evidence may not be submitted during the briefing stage of inter partes cases, evidence may not be submitted, absent a request for remand, during the appeal and briefing stage of an ex parte case. In view thereof, applicant's request that we take judicial notice of this matter is denied. We hasten to add that even were

we to consider this evidence it would not change our decision.

Our determination of the issue of likelihood of confusion is based on an analysis of all of 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 Co., 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 services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We turn first to a consideration of the goods identified in the applications and the cited registrations. It is well settled that goods need not be similar or competitive in nature to support a finding of likelihood of confusion. The question is not whether purchasers can differentiate the goods themselves, but rather whether purchasers are likely to confuse the source of the goods. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). Further, we must consider the cited registrant's goods as they are described in the registration and we cannot read limitations into those

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goods. See *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987). If the cited registration describes goods broadly, and there is no limitation as to the nature, type, channels of trade or class of purchasers, it is presumed that the registration encompasses all goods of the type described, that they move in all channels of trade normal for these goods, and that they are available to all classes of purchasers for the described goods. See *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992).

In support of her contention that the goods are related, the examining attorney submitted several third-party use-based registrations to show that numerous entities have adopted a single mark for electronic effect pedals, amplifiers and microphones. See, e.g., Reg. No. 2601489 (microphones, amplifiers, and electronic effects pedals for use with amplifiers); Reg. No. 2582827 (sound amplifiers and electronic effects pedals); Reg. No. 2431788 (microphones, electronic effects pedals for use with sound amplifiers); Reg. No. 2752033 (guitar amplifiers, electronic effects pedals for use with sound amplifiers, microphones); Reg. No. 3036482 (amplifiers, electronic

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effects pedals for use with sound amplifiers); Reg. No. 3017601 (amplifiers, electronic effect pedals for use with sound amplifiers); Reg. No. 3045746 (musical instrument amplifiers, electronic effect pedals for use with sound amplifiers); and Reg. No. 3068220 (electronic effects pedals for use with musical instruments, sound amplifiers for use with musical instruments). We find these registrations persuasive evidence as to the factor of the relatedness of the goods. See *In re Albert Trostel & Sons CO.*, 29 USPQ2d 1783 (TTAB 1993).

Applicant's argument that registrant does not manufacture or sell guitar effect pedals is not persuasive. As noted above, the goods need not be identical. Rather, the record must show that the goods are related in a manner which would cause confusion as to source. The fact that this particular registrant does not sell guitar effect pedals does not obviate the finding based on the third-party registrations that the relevant public may be accustomed to seeing these goods marketed by the same source.

As to channels of trade, there are no specific limitations in either the registrations or the subject applications, thus, we must presume that applicant's and registrant's goods will be sold in some of the same

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channels of trade and will be bought by the some of the same classes of purchasers. See *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Moreover, the examining attorney submitted printouts of web pages retrieved from the Internet which show effect pedals, amplifiers and microphones being offered for sale on the same website specializing in musical instruments and accessories. See, e.g., [www.bananas.com](http://www.bananas.com) and [www.musiciansfriend.com](http://www.musiciansfriend.com).

In view of the above, the du Pont factors of the relatedness of the goods and the channels of trade favor a finding of likelihood of confusion.

We turn now to the first du Pont factor, i.e., whether applicant's marks GT-350 and GT-500 and registrant's GT and design and GT ELECTRONICS marks are similar or dissimilar when compared in their entirety in terms of appearance, sound, connotation and commercial impression. The analysis is not whether the marks can be distinguished when compared side-by-side. Rather, we must determine whether the marks are sufficiently similar that there is a likelihood of confusion as to source and, in making this determination, we must consider the recollection of the average purchaser who normally retains a general, rather than specific,

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impression of trademarks. Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106, 108 (TTAB 1975).

The sound and appearance of the marks is very similar in that applicant's marks begin with the dominant portion of registrant's marks, the letter combination GT. We do not find the stylization and design elements in registrant's two stylized marks to be sufficient to distinguish them from applicant's mark. In re Appetito Provisions Co. Inc., 3 USPQ2d 1553 (TTAB 1987). In particular, the design element in each mark consists merely of a circle that serves as a carrier or background element for the letters presented in a stylized manner where the G and T simply share the same cross bar. Similarly, the disclaimed merely descriptive term ELECTRONICS in registrant's standard character mark is of no source-indicating significance in relation to the identified electronic goods. Moreover, the numbering in applicant's marks does not serve to sufficiently distinguish the marks. Applicant's marks begin with the letters GT, the literal and more memorable portion of registrant's marks, and "it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered." Presto Prods., Inc. v. Nice-Pak Prods., Inc., 9 USPQ2d 1895, 1897 (TTAB 1988).

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Applicant centers its argument against likelihood of confusion on the element of connotation and its assertion that the letters GT in the relevant field are weak, which allows for minimal differences to distinguish the marks. With regard to connotation, applicant argues that its marks:

...recall the famous Ford Mustang model hotrod racing cars from the 1960's. The Applicant, in adopting the designation GT-350 wanted to create the commercial impression of a "hot-rod guitar pedal." The term "GT" is well-known as an abbreviation for Grand Touring...GT-350 refers to a specific hot-rod Grand Touring car from the 1960's...Just as "hot-rodding" is common place for cars, there is a large market for "hot-rodding" or customizing a guitar by changing electronics to get a hotter guitar signal, adding custom paint and changing guitar hardware.

Br. pp. 14-15.

In support of its position regarding connotation and consumer perception, applicant submitted an excerpt from one advertisement for a Gibson guitar which clearly evokes sports cars in relation to a guitar and guitar accessories. In support of its contention that GT-350 and GT-500 refer to specific cars, applicant submitted an article retrieved from Wikipedia attached to its July 6, 2007 response discussing cars. An excerpt is reproduced below:

The first 252 GT-350s for 1966 were "carry-over" cars... Shelby struck a deal with the Hertz Corporation to produce a special line of GT350s for rent which were subsequently sold to the

public after their rental-car lives were finished. These 'GT350H cars are quite rare and sought-after today, with some examples selling for more than \$120,000...The Guns N' Roses video "Don't Cry" features a Shelby GT-350H with guitarist Slash at the wheel... This year also saw the introduction of the GT500 alongside the continued GT350. The new GT500 featured a 428-in (7L) big block V8. This is also one of the most famous Shelby Mustangs. A modified GT500 clone, known as "Eleanor" was featured alongside Nicholas Cage in the 2000 remake of Gone in 60 Seconds. ... The 4.6 liter .319 hp Ford Shelby GT slots between the 300 hp Mustang GT and the 500 hp Ford Shelby GT500. It is essentially a retail sale version of the Hertz rental-only Ford Shelby GT-H... Like the GT-H the Shelby GT is modified at Shelby Automotive's factory in Las Vegas.

It is notable that the article also refers to a GT car without any numbering. Therefore, applicant's connotation argument could also apply to registrant's marks. In any event, applicant's evidence is not sufficient to find that the designations GT350 and GT500 are so identified with specific sports cars that when used on an electronic effects pedal they would connote only these cars in the minds of all potential purchasers. Moreover, the fact that one guitar manufacturer issued one advertisement equating "hot rodding" cars with "hot rodding" guitars, is not enough evidence for us to conclude that all potential purchasers make a connection between effects pedals and sports cars.

With regard to the weakness of the letters GT in the relevant field, applicant argues that:

Applicant attaches as Exhibit D extensive third party use of the term "GT" in connection with guitars, guitar pedals, guitar tuners and related musical instrument products, all previously made of record. Evidence of extensive third party use of a term is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection. Exhibit D demonstrates the extensive number of guitar and musical instrument products that incorporate the GT prefix with additional distinctive matter, including such terms that the Examining Attorney mistakenly believes are mere "model designations" and do not distinguish the marks. As evidenced by the vast number of marks using GT, it is obvious that these GT uses can peacefully co-exist without creating a likelihood of confusion in the relevant market.

Br. p. 12.

Applicant's evidence consists substantially of pages from eBay where various guitar products are being offered for sale and GT is either on the article for sale or used somewhere on the page in connection with the listing. These excerpts are not particularly useful for determining whether the relevant public has been so exposed to a term that it should be accorded minimal protection. The other examples are simply pictures of products which also provide no information as to the extent to which the public has been exposed to these terms. Moreover, the evidence

represents approximately 39 third parties and a variety of goods that span guitars and guitar accessories.

This evidence is far short of the "more than 575 entities whose names contain the term BROADWAY and which offer restaurant services and/or related services or goods." In re Broadway Chicken Inc., 38 USPQ2d 1559, 1562 (TTAB 1996).

In addition, applicant submitted excerpts from acronym and abbreviation dictionaries that show GT as an abbreviation for a variety of guitar-related terms, guitar, guitar tuner, guitar technique, guitar technology, and car-related terms, grand turismo and grand touring. We do not find these excerpts particularly persuasive inasmuch as they point to various possible meanings rather than one particular meaning in relation to these goods. We add that applicant's identification of goods is not limited to guitar products and the entries are meaningless in relation to other "musical instruments."

Finally, applicant argues that consumers will only associate registrant's marks with registrant's former corporate name Groove Tubes. Whether or not that occurs is not before us. We must make our determination based on the marks in the registrations and the wording Groove Tubes is not included; therefore, we must presume these marks are used without the presence of that wording. This is so

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because the issue before the Board in this proceeding is registrability and not use. It is therefore irrelevant whether registrant uses its trade name in conjunction with its registered marks on its products. Moreover, where marks are otherwise virtually the same, the addition of a house mark is more likely to add to the likelihood of confusion than to distinguish the marks. Key West Fragrance & Cosmetic Factory, Inc. v. Mennen Co., 216 USPQ 168 (TTAB 1982). We add that the derivations of letter marks and acronyms are generally of no particular significance. See Aerojet-General Corp. v. Computer Learning and Systems Corp., 170 USPQ 358, 362 (TTAB 1971). See also Edison Brothers Stores, Inc. v. Brutting E. B. Sport-International GmbH, 230 USPQ530, 533 (TTAB 1986).

Trademarks may be confusingly similar in appearance despite the addition, deletion or substitution of numbers. Cf. Weiss Associates Inc. v. HRL Associates, Inc., 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (TMM held confusingly similar to TMS, both for software); Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 81 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987) (COMMCASH held confusingly similar to COMMUNICASH, both for banking services). We are not persuaded, as applicant argues, that "the evidence clearly demonstrates that musical instruments consumers

view the marks taken as a whole and understand that GT-OD is different than GT-8 and GT-2 and GT-350 such that consumers would not view GT-350 as merely an extension of Registrant's products." Br. p. 17. The evidence of record simply does not establish that all potential purchasers would not view the numbering attached to the end of applicant's GT marks as an extension of registrant's GT marks or some type of numbering system denoting different styles of features of the products.

Thus, based on the record applicant submitted and within the context of the goods, the connotation of the letters GT in the marks would be the same, regardless of whether it is a reference to guitar goods or to well-known muscle cars, or whether it is completely arbitrary.

Overall we find that applicant's marks GT-350 and GT-500 and registrant's GT marks have very similar commercial impressions. Therefore, the factor of the similarity of the marks weighs in favor of likelihood of confusion.

To the extent that we may have any doubt, this record is not sufficient to overcome the examining attorney's prima facie case, in particular in view of the close relationship of the goods and similarity of the marks, and we resolve doubt in favor of the registrant. *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265 62

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USPQ2d 1001, 1003 (Fed. Cir. 2002); In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988).

In conclusion, we find that because the marks are similar, the goods are related, and the channels of trade overlap, confusion is likely between applicant's marks and the marks in the cited registrations.

**Decision:** The refusal to register under Section 2(d) of the Trademark Act is affirmed in both applications.