

THE DEVIL MADE ME DO IT

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by Jeffrey R. Cadwell and Evan Everist



On June 9, 2017, Gene Simmons of Kiss rock band fame applied with the United States Patent and Trademark Office (“PTO”) to register the following mark for “Entertainment, namely, live performances by a musical artist; personal appearances by a musical artist” in Class 41:



Simmons describes the mark thusly: “The mark consists of a hand gesture with the index and small fingers extended upward and the thumb extended perpendicular.”

Simmons claims to have first used the mark anywhere and in interstate commerce at least as early as November 14, 1974, which, according to [Wikipedia](#), was the year of Kiss’ first major tour. As his evidence of use, he submitted a photo of himself displaying the sign while standing next to Dave Grohl of Nirvana and Foo Fighters fame.

This hand gesture, often referred to as some variation of “devil horns,” has become synonymous with rock and roll, although people certainly disagree about whether the thumb should be extended (authors’ opinion: it shouldn’t be). Unsurprisingly, a quick internet search will reveal dozens of musicians using this hand gesture, with or without

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the thumb extended, including Metallica, Dave Navarro, and even John Lennon on the cover of the Beatles 1966 single for “Yellow Submarine,” which predates Simmons’ claimed first use. Even politicians have been seen using the symbol, including Bill Clinton, Barrack Obama, and Sarah Palin.

The PTO is unlikely to allow this application to Rock and Roll All Nite. When Simmons filed the application, he had to make a declaration that “To the best of [his] knowledge and belief, no other persons, except, if applicable, concurrent users, have the right to use the mark in commerce.” The examining attorney will likely take note of the widespread use of the symbol to refuse the application on grounds that Simmons does not control or own exclusive rights to it. The examining attorney may also refuse to accept the specimen, which does not appear to show the mark in use with entertainment services. Although Dave Grohl does look pretty entertained...

Even if the PTO were to allow registration of the mark, it seems Simmons would have an incredibly difficult time enforcing any rights he might claim in the mark. He would need to show that consumers are likely to be confused about the source of services when others use the hand gesture. Essentially, his argument would be that concertgoers would be confused as to whether a musician performing at a concert they are attending is, in fact, Simmons because the musician used the hand gesture. Outside of a very good Kiss cover band, this seems unlikely. Perhaps Simmons will employ some of his signature makeup to help him keep a straight face...