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Paper No. 11
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Anheuser-Busch, Inc.

Serial No. 75/670,355

Scott D. Miller of Anheuser-Busch, Inc. and Douglas N. Masters of Pattishall McAuliffe Newbury Hilliard & Geraldson for Anheuser-Busch, Inc.

Danielle I. Mattessich, Trademark Examining Attorney, Law Office 101 (Jerry Price, Managing Attorney).

Before Hairston, Bucher and Bottorff, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

An intent-to-use application has been filed by Anheuser-Busch, Inc. to register the term HARRINGTON'S for "beer" in International Class 32.¹

The Trademark Examining Attorney has refused registration under Section 2(e)(4) of the Trademark Act, 15

¹ Application Serial No. 75/670,355, filed March 26, 1999, based upon a *bona fide* intention to use the mark in commerce under Section 1(b), 15 U.S.C. §1051(b).

U.S.C. §1052(e)(4), on the ground that applicant's mark is primarily merely a surname.

When the refusal to register was made final, applicant appealed. Applicant and the Trademark Examining Attorney have filed briefs. An oral hearing was not requested.

We affirm the refusal to register.

In support of the surname refusal, the Trademark Examining Attorney has made of record the following: the results of a search of a database containing eighty million names, finding 28,091 listings of the "Harrington" surname from PHONEDISC POWERFINDER USA ONE 1998 (4th ed.); a page from Merriam-Webster's Geographical Dictionary (3rd ed.) listing no place named "Harrington" alone; a page from The Random House College Dictionary (Rev. ed.) showing no entry for the word "Harrington"; as well as an excerpt from a Web site returning no hits for "Harrington," as a baby's name.

Applicant argues that the Trademark Examining Attorney has failed to establish a *prima facie* surname case.

Applicant challenges the Trademark Examining Attorney's PHONEDISC evidence on the ground that the quantum of evidence submitted by the Trademark Examining Attorney is indeterminate of the primary significance of the term to purchasers. Applicant asserts that "Harrington" is also the name of small villages in Canada and in England. In

support of its position, applicant has submitted a page from a Web site maintained by Bryce W. Harrington and John R. Harrington on behalf of the Harrington Family Genealogy Association. Finally, applicant has also provided a copy of a small portion of a larger Web site from Agriculture Western Australia on "Harrington barley in Western Australia: Grain dormancy and harvesting."²

The test for determining whether a mark is primarily merely a surname is the primary significance of the mark to the purchasing public. See In re Hutchinson Technology Inc., 852 F.2d 552, 554, 7 UPQ2d 1490, 1492 (Fed. Cir. 1988), citing In re Kahan & Weisz Jewelry Mfg. Corp., 508 F.2d 831, 184 USPQ 421 (CCPA 1975) and In re Harris-Intertype Corp., 518 F.2d 629, 186 USPQ 238 (CCPA 1975). The initial burden is on the Trademark Examining Attorney to establish a *prima facie* case that a mark is primarily merely a surname. See In re Etablissements Darty et Fils, 759 F.2d 15, 16, 225 USPQ 652, 653 (Fed. Cir. 1985). After the Trademark Examining Attorney establishes a *prima facie* case, the burden shifts to the applicant to rebut this finding.

² <http://www.agric.wa.gov.au/agency/Pubns/farmnote/1996/F03696.htm>

The Board, in the past, has considered several different factors in making a surname determination under Section 2(e)(4): (i) the degree of surname rareness; (ii) whether anyone connected with applicant has the surname; (iii) whether the term has any recognized meaning other than that of a surname; and (iv) the structure and pronunciation or "look and sound" of the surname. In re Benthin Management GmbH, 37 USPQ2d 1332 (TTAB 1995).

There is no doubt that the Trademark Examining Attorney has met her initial burden of establishing that HARRINGTON'S would be perceived by consumers as primarily merely a surname. In particular, the Trademark Examining Attorney has presented evidence of more than twenty-eight thousand HARRINGTON surname references from the PHONEDISC database, along with proof that the word "Harrington" does not appear in an unabridged, English-language dictionary or a geographical dictionary. The Court of Appeals for the Federal Circuit has held that this type of evidence is sufficient to establish a *prima facie* surname case. See Hutchinson Technology, 852 F.2d at 554, 7 USPQ2d at 1492; Darty, 759 F.2d at 16, 225 USPQ at 653; see also 2 J. Thomas McCarthy, *McCARTHY ON TRADEMARKS AND UNFAIR COMPETITION*, §13.30, p. 13-50 (4th ed. 1999).

The Trademark Examining Attorney's PHONEDISC evidence is collected from telephone directories and address books across the country. There is no magic number of directory listings required to establish a *prima facie* surname case. In re Cazes, 21 USPQ2d 1796, 1797 (TTAB 1991); In re Industrie Pirelli Societa per Azioni, 9 USPQ2d 1564, 1566 (TTAB 1988), *aff'd unpublished decision*, No. 89-1231 (Fed. Cir. 1989). It is reasonable to conclude from these submissions that HARRINGTON has had measurable public exposure.³ Even if "Harrington" were to be found to be an uncommon surname, it is by no means a decidedly rare surname.⁴ From more than twenty-eight thousand HARRINGTON surname references in the PHONEDISC database, we conclude

³ To the extent applicant contends that "Harrington" is an uncommon surname (a conclusion with which we disagree), we would point out that even uncommon surnames may not be registrable on the Principal Register. See Industrie Pirelli, 9 USPQ2d at 1566.

⁴ This evidence is far more significant than the number of listings presented in other cases where the surname has been categorized as "rare." See e.g. Kahan & Weisz, 508 F.2d at 832, 184 USPQ at 422 (six DUCHARME surname telephone directory listings); In re Sava Research Corp., 32 USPQ2d 1380 (TTAB 1994)(one hundred SAVA surname telephone directory listings); Benthin Management, 37 USPQ2d at 1333 (one hundred BENTHIN surname telephone directory listings); In re Garan, Inc., 3 USPQ2d 1537 (TTAB 1987)(six GARAN telephone directory listings and one NEXIS listing). This is one of four factors. Hence, the quantum of PHONEDISC evidence which may be persuasive for finding surname significance in one case may be insufficient in another because of differences in the surnames themselves and/or consideration of the other relevant surname factors. Darty, *supra*.

that "Harrington" is a relatively common surname in the United States.

Applicant dismisses the tens of thousands of listings from the PHONEDISC database as representing "... .0351% of the total number of listings... ." However, we find this "percentage-of-the-entire-population" argument to be a hollow reed. The rich diversity of surnames in this country is amply reflected in the PHONEDISC computer database evidence. If one were to take a statistical measurement of this database for common names like "Smith" or "Jones," each would constitute a relatively small fraction of the total database content.

As to the second Benthin factor, we recognize that no one connected to Anheuser-Busch has been shown to have the "Harrington" surname. If a Harrington were associated in some way with applicant, it could well corroborate the public's recognition of the term as a surname. However, logic tells us that the converse is not necessarily true, i.e., the mere fact that this query comes up negative herein cannot compel the conclusion that consumers will perceive the term as a non-surname.

In weighing the third Benthin factor, we have considered applicant's contention that "Harrington" has recognized meanings other than that of a surname. However,

both the Benthin decision and our primary reviewing court clearly require that the other meanings be "recognized" by a significant number of people. See Harris-Intertype, *supra*; Benthin Management, *supra*. We do not believe that a significant number of people would recognize the other meanings proffered in this case because they are remote or obscure. Thus, they do not rebut the Trademark Examining Attorney's *prima facie* surname case. The mere fact that the word "Harrington" has other obscure or remote meanings is insufficient to show that it will not be perceived as "primarily merely a surname." See Harris-Intertype, *supra*; In re Hamilton Pharmaceuticals Ltd., 27 USPQ2d 1939, 1942 (TTAB 1993). Even applicant's own submission of a web page is drawn from a Harrington family genealogy site, and as to its significance, does nothing to bolster applicant's case. One of the entries says: "Harrington, Canada" VERY small town in southern Ontario. It is so small that it would not even show up in the index of most maps... ." See Harris-Intertype, 518 F.2d at 631 n.4, 186 USPQ at 239 n.4 (Harris, Missouri, population 174, and Harris, Minnesota, population 559 held obscure). This same Web page suggests there may be as many as three small towns in Great Britain (on the west coast, close to Whitehaven, centrally located close to Northampton, and in the east, close to Alford).

Applicant certainly has not demonstrated that consumers in the United States would recognize that "Harrington" is the name of a place (or places) in Canada or in England.⁵ Similarly, we have to presume that if Harrington, Delaware were more than a small village, applicant would have fleshed out the record to support an alternative conclusion that the geographical significance of this place name is strong enough in the United States to create such recognition on the part of consumers. Finally, as to the "person locator" information submitted by applicant, four hits were for "Harrington Johnson" (with multiple references to the same individual) and seven were for various individuals, all named "Harrington Smith." There is no other usage of "Harrington" as a given name anywhere in the record. We agree with the Trademark Examining Attorney that compared with more than twenty-eight thousand surname references, this handful of uses of "Harrington" as a given name is totally insignificant.⁶

⁵ Surnames are routinely used as key parts of the names of streets, neighborhoods, towns, mountains and so forth. See *Harris-Intertype, supra; In re Champion International Corp.*, 229 USPQ 550, 551 (TTAB 1985). Given that it is a common practice to name places after individuals, it is likely that one could trace the historical origins of the three small towns called "Harrington" that are situated in England, as well as the village of "Harrington" near Stratford, Canada, to the "Harrington" surname of English families that once lived in those localities.

⁶ This conclusion is also corroborated by the fact that no names were found which matched the Trademark Examining Attorney's

Similarly, applicant points to yet another alleged non-surname meaning (i.e., a variety of barley). We note that according to the abbreviated portion of a larger Web site about "Harrington barley" (submitted by applicant),⁷ this particular strain of barley is used in Australia, Canada, northern New South Wales and Tasmania. However, there is no evidence in the file that this variety of malting barley is even sold in the United States. Moreover, the absence of entries in several unabridged English language dictionaries commonly used in the United States suggests to us that this alleged non-surname significance is nonexistent in the United States.⁸

Both the applicant and the Trademark Examining Attorney have pointed to the federal registry to support their respective positions. However, we find that the Trademark Examining Attorney has correctly and succinctly reviewed all the registrations of record as set forth below, and we conclude that contrary to applicant's assertions, the U.S. Patent and Trademark Office has been remarkably consistent on its treatment of this term:

search criteria for Harrington as a given name for a baby on the Web site, http://www.parenthood.com/parent_cfmfiles/babynames.cfm

⁷ See footnote 2.

⁸ On the other hand, if the evidence of record showed that this usage for malting barley were widespread in the United

Furthermore, the PTO has consistently treated the term HARRINGTON as a surname. The registrations made of record by the Applicant are all consistent with the PTO's practice and policy regarding the treatment of surnames under the Trademark Act. Generally, a surname combined with additional distinctive matter, such as a merely descriptive term, another surname, a given name, and/or a design element, is *not* considered to be primarily merely a surname under §2(e)(4). See TMEP §1211.01(b). Thus, the marks HARRINGTON'S HOT IRISH (Reg. No. 1,907,901), HARRINGTON'S HODGSON MILL (Reg. No. 1,225,266), ADAM HARRINGTON (Reg. No. 2,020,384), ADAM HARRINGTON EXCLUSIVES & DESIGN (Reg. No. 2,146,343), HARRINGTON PARK PRESS (Reg. No. 2,271,880), THEODORE HARRINGTON CO. (Reg. No. 505,788), HARRINGTON & RICHARDSON (U.S. Registration No. 1,749,367), WESSON & HARRINGTON (Reg. No. 1,896,918), and HARRINGTON GAY MEN'S FICTION QUARTERLY (Reg. No. 2,388,368) are registered on the Principal Register because the term HARRINGTON appears in the respective marks with additional *distinctive matter*. [FN 2: *The examiner has italicized and underlined the distinctive matter in these registrations for informational purposes.*] Furthermore, the marks HARRINGTON (U.S. Reg. No. 1,235,605), HARRINGTON (Reg. No. 1,664,693), and HARRINGTON INSTITUTE OF INTERIOR DESIGN (Reg. No. 2,328,788) are registered on the Principal Register because the registrants in these cases have proven that the respective marks have acquired distinctiveness under §2(f) of the Trademark Act. Finally, HARRINGTON WEALTH MANAGEMENT (Reg. No. 2,384,362) is registered on the Supplemental Register, also evidencing the primary surname significance of the term HARRINGTON. Thus, the PTO has consistently treated the term HARRINGTON as a surname.

States, then as applied to beer, presumably the refusal would have been more correctly made under Section 2(e)(1) of the Act.

Finally, as to the fourth Benthin factor, contrary to applicant's contention, it is the view of the Board that "HARRINGTON'S" has the structure and pronunciation of a surname, not of an arbitrary designation. See Garan, 3 USPQ2d at 1538; Industrie Pirelli, 9 USPQ2d at 1566. In fact, judging this matter simply by its look and feel, "HARRINGTON" seems to fit the archetype of a Scottish or British surnames, differing only in a single vowel, for example, from a similar American surname, Herrington. Furthermore, contrary to applicant's contentions, we find that the possessive form of the term serves only to excentuate, not to diminish, the surname look and feel of the applied for matter.

Decision: The refusal to register the term HARRINGTON'S under Section 2(e)(4) is affirmed.