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Bottorff

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Merillat Industries, Inc.

Serial No. 76357510

Edgar A. Zarins of Masco Corporation for Merillat Industries, Inc.

Wendy B. Goodman, Trademark Examining Attorney, Law Office 103 (Michael Hamilton, Managing Attorney).

Before Seeherman, Hohein and Bottorff, Administrative Trademark Judges.

Opinion by Bottorff, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register of the mark TOWNLEY (in typed form) for goods identified in the application, as amended, as "cabinetry, namely, kitchen and bathroom cabinets and cabinet doors."[1]

The Trademark Examining Attorney has refused registration of applicant's mark on the ground that it is

primarily merely a surname. *See* Trademark Act Section 2(e)(4), 15 U.S.C. §1052(e)(4).

When the refusal was made final, applicant filed this appeal. Applicant and the Trademark Examining Attorney have filed main appeal briefs. Applicant did not file a reply brief, and did not request an oral hearing. We affirm the refusal to register.

In deciding whether or not a term is primarily merely a surname and thus is unregistrable under Section 2(e)(4), we must determine the primary significance of the term to the purchasing public. *See In re Harris-Intertype Corp.,* 518 F.2d 629, 186 USPQ 238 (CCPA 1975). The Office bears the initial burden of establishing, *prima facie*, that the primary significance of the term to the purchasing public is merely that of a surname. If that *prima facie* showing is made, then the burden of rebutting that showing, i.e., the burden of showing that the primary significance of the term to the purchasing public is other than that of a surname, shifts to applicant. *See In re Etablissements Darty et Fils,* 759 F.2d 15, 225 USPQ 652 (Fed. Cir. 1985); *In re Harris-Intertype Corp., supra*; *In re Kahan & Weisz Jewelry Mfg. Corp.,* 508 F.2d 831, 184 USPQ 421 (CCPA 1975);

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[1] Serial No. 76357510, filed January 11, 2002. The application is based on intent-to-use, under 15 U.S.C. §1051(b).

In re Rebo High Definition Studio Inc., 15 USPQ2d 1314 (TTAB 1990); *In re Luis Caballero, S.A.,* 223 USPQ 355 (TTAB 1984).

The determination as to whether the mark's primary significance to the purchasing public is that of a surname takes into account various factors, such as: (i) the degree of a surname's rareness; (ii) whether anyone connected with applicant has the surname in question; (iii) whether the term in question has any recognized meaning other than that of a surname; (iv) whether the term has the "look and sound" of a surname; and (v) if the mark sought to be registered is depicted in special form, whether the degree of stylization of the mark is so great as to create a separate commercial impression which renders the mark, as a whole, not "primarily merely a surname." *See In re Benthin Management GmbH,* 37 USPQ2d 1332 (TTAB 1995).

Considering these factors in the present case, there is no evidence that TOWNLEY is the surname of any person connected with applicant, and that factor weighs in applicant's favor. However, all of the other four *Benthin* factors support a finding that TOWNLEY is primarily merely a surname.

First, we find that TOWNLEY is in fact a surname, and that it is not an especially rare surname. The Trademark

Examining Attorney has submitted evidence from the PowerFinder (formerly known as PhoneDisc) electronic database which shows that there are 1,741 U.S. residential listings for the surname TOWNLEY. She also has submitted the results of a search for TOWNLEY in the NEXIS database (REGNWS library, ALLNWS file), which retrieved 4,653 stories in which the term appears. Excerpts from thirty-seven of these stories were printed out and submitted, and they refer to numerous different persons throughout the country with the surname TOWNLEY.

Second, we also find that TOWNLEY has no recognized non-surname significance. The Trademark Examining Attorney has submitted a page from the Merriam-Webster Collegiate Dictionary (10th ed. 1998) which shows that there is no entry for "townley." Applicant has presented no evidence which would support a finding that there is any recognized non-surname significance for the term.

Third, we find that TOWNLEY has the "look and sound" of a surname. This is especially so given the fact that many other common and/or famous surnames end in "LEY," such as Beardsley, Bentley, Greeley, Harley, Henley, Huxley, Ripley, and McKinley.

Finally, because applicant seeks to register the mark in typed form, the fifth *Benthin* factor ("the degree of

stylization of the mark" is inapplicable in this case and does not weigh in applicant's favor.

For the reasons discussed above, we find that the Trademark Examining Attorney has established, *prima facie*, that the primary significance of TOWNLEY to the purchasing public is that of a surname. We further find that applicant has failed to rebut that prima facie showing by demonstrating that the primary significance of the term is other than that of a surname.

Decision: The refusal to register is affirmed.