

This Opinion is Not
Citable as Precedent
of the TTAB

Mailed:
March 23, 2004

Paper No. 7
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Merillat Industries, Inc.

Serial No. 76357511

Edgar A. Zarins, Esq. for Merillat Industries, Inc.

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

Before Holtzman, Rogers and Drost,
Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

Merillat Industries, Inc. [applicant] has applied to register MARTEL as a mark for "cabinetry, namely, kitchen and bathroom cabinets and cabinet doors," in International Class 20. The application is based on applicant's statement that it has a bona fide intention to use the mark in commerce.

The examining attorney has refused registration under Section 2(e)(4) of the Lanham Act, 15 U.S.C. § 1052(e)(4),

on the ground that MARTEL is primarily merely a surname and would be perceived as such when used on or in connection with the identified goods. When the refusal was made final, applicant appealed. Applicant and the examining attorney have filed briefs, but applicant did not request an oral hearing. We affirm the refusal.

"[T]he PTO [has] the burden of establishing a prima facie case that [MARTEL] is 'primarily merely a surname.'" In re Etablissements Darty et Fils, 759 F.2d 15, 225 USPQ 652, 653 (Fed. Cir. 1985). Moreover, "the question of whether a [mark] sought to be registered is primarily merely a surname within the meaning of the statute can only be resolved on a case by case basis," taking into account a number of various factual considerations. Id.

This Board has identified at least five different factors that, depending on the facts of a particular case, will have a bearing on determining whether a particular mark is primarily merely a surname. See In re Benthin Management, 37 USPQ2d 1332, 1333 (TTAB 1995). In Benthin, the Board noted that one factor to be considered was "the degree of a surname's rareness." See also In re Sava Research Corp., 32 USPQ2d 1380, 1381 (TTAB 1994) and In re Garan Inc., 3 USPQ2d 1537, 1540 (TTAB 1987).

In this case, the examining attorney has shown that a search of the "PowerFinder" database of telephone listings retrieved more than 3500 listings of individuals with the name MARTEL. Moreover, excerpted listings from this search reveal that individuals with this surname live in states in every region of the country, i.e., the Northeast, Mid-Atlantic, South, Midwest, Southwest, and West. In addition to these telephone database listings, the examining attorney put in 28 excerpts from stories appearing in the NEXIS articles database, each of which includes reference to an individual with the surname MARTEL.¹

While the examining attorney argues that this evidence confirms that MARTEL is a common surname, applicant concedes only that this evidence shows the term can "operate as a surname." Applicant contends "almost any term can be found as a surname in an electronic phone list." We find the examining attorney's evidence manifestly sufficient to establish that MARTEL is a common surname.

The second factor we consider is whether there is "anyone connected with applicant" having the surname

¹ These excerpts were selected from among the first 200 excerpts of more than 13,000 retrieved in the search of the NEXIS database [the examining attorney viewed the first 200 of all returns from the search].

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MARTEL. Benthin, 37 USPQ2d at 1333; In re Monotype Corp., 14 USPQ2d 1070, 1071 (TTAB 1989). There is no evidence on this factor, as the examining attorney did not make any inquiry on the subject and applicant did not volunteer any information on the subject. Thus, this factor favors neither applicant nor the examining attorney and does not figure in our analysis.

The third factor is whether the term has any recognized meaning other than as a surname. The examining attorney has put in a photocopy of a page from a dictionary showing that there is no listing for MARTEL. Applicant has argued that MARTEL, when used by applicant, will be perceived as "nothing more than a fanciful identifier for applicant's cabinet collection," but applicant has not put in any evidence to show that the term would have any significance other than as a surname. This factor favors the examining attorney.

The fourth factor is whether MARTEL has the "structure and pronunciation" of a surname, or stated somewhat differently, the "look and sound" of a surname. In re Industrie Pirelli, 9 USPQ2d 1564, 1566 (TTAB 1988). See also, Benthin, 37 USPQ2d at 1333. On this factor, the examining attorney relies on the various NEXIS excerpts, arguing, in essence, that news stories about individuals

with the name "Martel" will lead those who perceive MARTEL used as a designation for cabinets, to conclude that it is a surname. Applicant merely argues that the term does not have the look and feel of a surname. As the evidence bearing on this factor is scant, we cannot say that it strongly favors either the applicant or the examining attorney. Nonetheless, since no other meaning has been established for the term, and it is in common use, we agree with the examining attorney that prospective purchasers of cabinets would be more likely to view the term as a surname than as a coined term. Thus, this factor also favors the examining attorney.

The last factor is whether the term is presented in such a stylized form as to imbue it with distinctiveness that it might otherwise not have. This is not a factor in this case, since applicant has applied to register MARTEL in typed form.

In conclusion, we find that the examining attorney has not only established a prima facie case for refusal under Section 2(e)(4), but a solid, un rebutted case.

Decision: The refusal to register on the ground that MARTEL will, when used, be perceived as primarily merely a surname is affirmed.