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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Retriever Brands LLC

Serial No. 78538396

Theodore R. Remaklus of Wood, Herron & Evans, L.L.P. for
Retriever Brands LLC.

Barbara Brown, Trademark Examining Attorney, Law Office 116
(Michael W. Baird, Managing Attorney).

Before Hairston, Drost and Kuhlke, Administrative Trademark
Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

An application has been filed by Retriever Brands LLC to register the mark LITTON (in standard character form) on the Principal Register for goods ultimately identified as "household appliances, namely, microwave ovens for cooking, electric toasters, electric coffee makers" in International Class 11.¹

¹ Application Serial No. 78538396 was originally filed on December 26, 2004, based on a bona fide intention to use the mark in commerce, but subsequently amended to contain an allegation of first use anywhere and in commerce on November 29, 2006.

The examining attorney has refused registration under Section 2(e)(4) of the Trademark Act (15 U.S.C. §1052(e)(4)) on the ground that LITTON is primarily merely a surname. In response to the final refusal, applicant filed a request for reconsideration. Within that request, applicant also sought, in the alternative, to amend its application to seek registration on the Supplemental Register. See TMEP §§816.04 and 1212.02(c) (5th ed. 2007).

Applicant has appealed. Both applicant and the examining attorney have filed briefs. We affirm the refusal to register on the Principal Register.

A term is primarily merely a surname if, when viewed in relation to the goods or services for which registration is sought, its primary significance to the purchasing public is that of a surname. See *In re United Distillers plc*, 56 USPQ2d 1220 (TTAB 2000). The burden is on the examining attorney to establish a prima facie case that a term is primarily merely a surname. *In re Etablissements Darty et Fils*, 759 F.2d 15, 225 USPQ 652 (Fed. Cir. 1985). Among the factors to be considered in determining whether a term is primarily merely a surname are (1) the degree of a surname's rareness; (2) whether anyone connected with applicant has that surname; (3) whether the term has any recognized meaning other than that of a surname; and (4) whether the term has the "look and sound" of a surname. See *In re*

Benthin Management GmbH, 37 USPQ2d 1332, 1333 (TTAB 1995). See also In re Gregory, 70 USPQ2d 1792 (TTAB 2004). Because LITTON is in standard character form, we need not consider the fifth Benthin factor here, that is, whether the manner in which the mark is displayed might negate any surname significance. In re Joint-Stock Co. "Baik", 84 USPQ2d 1921 (TTAB 2007). With regard to the second factor, applicant has indicated that no one associated with it has the surname LITTON and there is nothing in the record to contradict this statement.

In the present case, we agree with the examining attorney that the record contains sufficient evidence to make a prima facie case that the primary significance of the term LITTON to the purchasing public for applicant's goods is that of a surname and that such a showing has not been rebutted by applicant.

In support of her contention that the primary significance of LITTON is a surname, the examining attorney provided the following search results from several online directories: 1000 entries and sample listings for individuals with the surname LITTON retrieved from the Verizon online directory, www.superpages.com;² 300 results matching LITTON as a surname and several sample listings from those result from the webpages 411.com and whitepages.com; 100 plus people with the surname

² The printout indicates that there are more than 1000 matching listings and only 1000 have been retrieved.

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LITTON retrieved from switchboard.com; 2120 entries with the surname LITTON retrieved from the Lexis/Nexis P-Find database; and 1520 hits for the last name LITTON retrieved from the Social Security Death Index available at rootsweb.com.

The examining attorney also submitted printouts from online sources defining LITTON as a surname. See www.rhymezone.com (noting the definition for LITTON as "name: A surname (rare: 1 in 50000 families; popularity rank in the U.S. #6394)); and lookwayup.com (LITTON listed as a last name with a frequency rank of 5394). She also submitted printouts from Merriam-Webster Online, Bartleby.com and encarta.msn.com/dictionary all indicating that there are no document matches for the query LITTON.

In addition, she submitted Lexis/Nexis printouts of excerpted articles from various publications showing widespread public exposure to LITTON used as a surname throughout the United States. See, e.g., *Charleston Gazette* (West Virginia), *Press Journal* (Vero Beach, Florida), *Deseret Morning News* (Salt Lake City), *Orlando Sentinel* (Florida), *The News & Observer* (Raleigh, North Carolina), *South Bend Tribune* (Indiana), *Fort Collins Coloradan*, *Arkansas Democrat-Gazette* (Little Rock, Arkansas), *The Virginian-Pilot* (Norfolk, Virginia), *The Arizona Republic* (Phoenix), *The San Francisco Chronicle* (California), *Austin*

American-Statesman (Texas), St. Louis Post-Dispatch (Missouri), Tulsa World (Oklahoma), and Orange County Register (California).

In traversing the refusal, applicant primarily argues that LITTON is a rare surname and has another recognized meaning.

In support of its contention that LITTON is a rare surname, applicant submitted printouts of search results from the Verizon online directory superpages.com based on its own search for LITTON in specific cities showing only 6 listings in Washington, D.C., 4 listings in New York City, 3 listings in Los Angeles and 1 listing in Boston. Applicant argues that LITTON is "too rare a surname to support the 'primarily merely' requirement of the statute." Br. p. 8. Applicant points to the online directory evidence submitted by the examining attorney stating that "'more than 1000' residential listings for the surname LITTON, [is] a meager number" and the search results from the various online directories represent an "infinitesimally small percentage" of those directories. Further, applicant points to the "absence of any significant listings for LITTON in major metropolitan areas." Applicant also contends that the newspaper articles submitted by the examining attorney are "inconclusive of the significance of the term LITTON as primarily merely a surname," arguing that the only type of news articles that would be of significance are those that concern public personalities. Br. p. 10. Finally,

applicant notes that in the Rhymezone.com excerpt LITTON is defined as a 'rare' surname.

Contrary to applicant's contention, the data retrieved from the superpages.com and P-find databases, and the Lexis/Nexis articles, while not indicative of a very common surname, does not support a finding that the surname is so rare that this factor, the degree of the surname's rareness, should weigh in applicant's favor, or weigh only slightly in support of the USPTO's position. The evidence shows that thousands of people in the United States have the surname LITTON and are spread throughout the United States, including Los Angeles, California; Woodhull, Illinois; Barnhart, Missouri; Hurricane, West Virginia; Smyrna, Georgia; Laurel, Montana; Lyles, Indiana; Memphis, Tennessee; Des Moines, Iowa; Rocky Mount, North Carolina; Shreveport, Louisiana; and Lubbock, Texas among other places. Thus, we find that the evidence is sufficient for us to conclude that LITTON is not a rare surname. With regard to the entry from rhymezone.com which characterizes LITTON as a rare surname, this characterization appears to be based solely on the frequency of use of LITTON as a surname in the general U.S. population. However, the fact that the authors of a web site consider a name rare in terms of its frequency of use as a surname does not necessarily mean that such surname will be considered rare under Board case law. See *In re Gregory*, supra at 1795 ("name may be rare when viewed in terms of

frequency of use as a surname in the general population, but not at all rare when viewed as a name repeated in the media and in terms of public perception"). Moreover, a mark may be found to be primarily merely a surname even though it is not a common surname. See *In re Giger*, 48 USPQ2d 1405 (TTAB 2006). See also *In re E. Martoni Co.*, 78 USPQ2d 589 (TTAB 1975); and *In re Industrie Pirelli Societa per Azioni*, 9 USPQ2d 1564 (TTAB 1988).

Applicant's reliance on *In re United Distillers plc*, supra is not persuasive of a different result. In that case, while the Board did find that HACKLER is a rare surname, the Board also found that HACKLER had another significant meaning, detracting from its significance as a surname.

With respect to applicant's argument regarding the small percentage of people living in the United States with the surname LITTON, there is no minimum number of listings needed to prove that a mark is primarily merely a surname and "given the large number of different surnames in the United States, even the most common surnames would represent but small fractions of the total population." *In re Gregory*, supra at 1795.

Finally, with regard to the newspaper articles, although public personalities may present strong evidence of wide public exposure, that does not negate the impact of the occurrence of a surname in widely circulated publications.

In support of its contention that LITTON has other meanings, applicant submitted excerpts of articles retrieved from the Lexis/Nexis database referring to Litton Systems (or Litton Industries), a prior user of the name LITTON in connection with microwave ovens, and an excerpt from Wikipedia mentioning LITTON Industries under the entry for microwave ovens. Applicant also submitted prior expired or cancelled registrations owned by Litton Industries for various LITTON marks.

Applicant argues that "the LITTON brand was well recognized as a result of the sale in the 1970s and 1980s of millions of units and millions of dollars worth of LITTON brand microwave ovens" and "[a]s a result, the primary significance to consumers of the goods of the present application would not be a surname, but rather, would be of the well known LITTON brand - that is, consumers of electric cooking appliances would immediately associate the LITTON name as reminiscent of the LITTON brand they knew that made microwave ovens, not as a surname." Reply Br. p. 4. Further, applicant argues that the evidence of Litton Industries' use and applicant's specimen of use displaying the term LITTON is evidence that "relates to whether consumers will perceive the LITTON mark as primarily merely a surname [and i]t is irrelevant, for purposes of the present refusal, as to who or what consumers perceive LITTON refers so long as it is not primarily merely a surname." Reply br. p. 5.

We agree with the examining attorney that this evidence goes to whether a third-party has acquired distinctiveness, not to whether the term LITTON is primarily merely a surname. See *In re McDonald's Corp.*, 230 USPQ 304, 307 (TTAB 1986) ("In short, we have here a situation where a noninherently distinctive term, having no ordinary meaning other than that of a surname is sought to be registered. While applicant has demonstrated a strong public association between the mark sought to be registered and applicant's restaurant services, the Board concludes that this evidence is evidence of secondary meaning and that in the absence of a claim of secondary meaning pursuant to Section 2(f), registration must be refused under Section 2(e)(3).")

Applicant's argument basically contends that because the prior registrant Litton Industries acquired trademark rights in the surname LITTON, LITTON is no longer primarily a surname. In essence, applicant is arguing it should benefit from the prior registrant's acquisition of secondary meaning. This argument has no merit. Acquired distinctiveness refers to the word acquiring a meaning that points to a particular source. See *In re Cazes*, 21 USPQ2d 1796 (TTAB 1991) (Applicant argued that LIPP or BRASSERIE LIPP is no longer primarily merely a surname because the significance of the term is now that of a mark for her restaurant; argument rejected because applicant did not seek registration under Section 2(f)). The fact that the term LITTON

may have been identified as a commercial enterprise does not demonstrate that the term is not primarily a surname. See *In re Harris-Intertype Corp.*, 518 F.2d 629, 186 USPQ 238, 239 (CCPA 1975) (Cities, towns and other things may be named after an individual).

Finally, the expired and cancelled third-party registrations are of no probative value; however, we note that the registrations for the word LITTON in typed form were registered under Section 2(f).

Thus, as to the third factor, whether there is another recognized meaning of the term LITTON, the evidence of record clearly establishes that there is no other meaning.

As to the factor of the "look and feel" of the term, applicant argues that "the Board has rejected the argument that, merely because a mark may not have a recognized meaning other than as a surname the mark has the 'look and feel' of a surname. Rather, 'in a case such as this involving a very rare surname, we cannot assume that the purchasing public will view the mark as a surname based on exposure to the surname use.'" Reply br. p. 5, citing *In re Joint-Stock Company "Baik,"* 84 USPQ2d at 1923. First, we have not found that LITTON is a rare surname let alone a very rare surname. However, even under such circumstances we would not have automatically found that the term was registrable based only on its frequency. Rather, we still would balance the

fact that the surname was very rare with the other surname factors to determine whether the Office had made out a prima facie case. While it may be unusual to deny registration of a very rare surname, decisions of registrability should be made in light of all probative evidence. See *In re Joint-Stock "Baik,"* supra at 1924 ("It is in the case of a rare surname that we need to weigh 'look and feel' carefully.")

In analyzing the "look and feel" factor, we first note that there are numerous individuals with the surname LITTON throughout the United States. Second, it has no other known significance sufficient to obviate its primary significance as a surname. "It would not be perceived as an initialism or acronym, and does not have the appearance of having been coined by combining a root element that has a readily understood meaning in its own right with either a prefix or a suffix." Gregory, 70 USPQ2d at 1796. The facts of this case are distinguished from *In re Sava Research Corp.*, 32 USPQ2d 1380 (TTAB 1994) where the Board found the word SAVA "to have the look and sound of an acronym, and that applicant's explanation as to the meaning of SAVA [was] quite plausible." In this case, applicant has not argued nor is it plausible that LITTON would be perceived as an acronym or abbreviation. Applicant's argument that observers would parse apart the word and come up with LITE and TON, is not supported by evidence or plausible.

In conclusion, while LITTON is not a common surname it is not a rare surname and the record points to no other definitive recognized meaning for this term. Thus, when we view the term LITTON under the factors set out in Benthin, we conclude that the examining attorney has met her initial burden of showing that the term LITTON when it is used on applicant's microwave ovens, electric toasters and electric coffee makers would primarily be viewed as a surname and applicant has not rebutted this prima facie case.

Decision: The refusal to register under Section 2(e)(4) of the Trademark Act on the ground that it is primarily merely a surname is affirmed. In view of applicant's alternative amendment to the Supplemental Register, the application will be forwarded to the examining attorney for further processing to accommodate applicant's request.