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Mailed:
June 27, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Masco Corporation of Indiana

Serial No. 78594568

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Eli J. Hellman, Trademark Examining Attorney, Law Office
112.

Before Walters, Mermelstein and Wellington, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Masco Corporation of Indiana seeks registration on the
Principal Register of the mark COVINGTON (in standard
character form) for goods identified in the application, as
amended, as "plumbing products, namely faucets."¹

At issue in this appeal is the Trademark Examining
Attorney's final refusal to register applicant's mark on

¹ Serial No. 78594568, filed March 24, 2005. The application was
filed on the basis of intent-to-use under Trademark Act Section
1(b), 15 U.S.C. §1051(b).

the ground that it is primarily merely a surname. See Trademark Act Section 2(e)(4), 15 U.S.C. §1052(e)(4). The appeal is fully briefed. After careful consideration of the evidence of record and the arguments of counsel, we affirm the refusal.

The evidence of record includes the following. The examining attorney conducted a search of the LEXIS/NEXIS database, USFIND file, a national name and address directory, and the search returned 9750 entries for COVINGTON, of which the examining attorney submitted the first 100. The 100 entries are individuals with the surname COVINGTON located in various states throughout the United States. The examining attorney submitted during examination an excerpt from the Wikipedia website (www.wikipedia.org, October 20, 2005) that lists thirteen towns named COVINGTON throughout the United States, and four "notable persons" with the surname COVINGTON.

The examining attorney also submitted a dictionary definition of COVINGTON from *The Encarta World English Dictionary*, North American Ed. 2005, (www.encarta.msn.com, October 20, 2005) as a "city in northern Kentucky, directly north of Lexington, across the Kentucky-Ohio border from Cincinnati, Ohio[;] [p]opulation: 42,983 (2002 estimate)" and from *The American Heritage Dictionary of the English*

Language, 4th ed. 2000, (www.bartleby.com, October 20, 2005) as "a city of extreme northern Kentucky on the Ohio River opposite Cincinnati[;] [s]ettled in 1812 on the site of an earlier tavern and ferry landing, it is a manufacturing center[;] [p]opulation: 43,264."

Applicant submitted with its brief evidence to which the examining attorney objected on the ground that it is untimely. The examining attorney is correct that applicant did not comply with the established rule that the evidentiary record in an application must be complete prior to the filing of the notice of appeal or with a request for reconsideration filed during the period for filing an appeal. *See*, 37 CFR 2.142(d); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994). Therefore, we have not considered the evidence submitted with applicant's brief.

The issue in this case is whether COVINGTON is primarily merely a surname. Applicant does not dispute that COVINGTON is a surname. Rather, applicant states in its brief that "the purchasing public would not immediately view the mark as a surname because it does not have the look and feel of a name[;] [rather] the purchasing public would view the term merely as a fanciful identifier of the product line" (p. 1); and that "COVINGTON does have

significant alternative connotations, including as a well-known geographic location" (p. 2).

Whether a term is primarily merely a surname depends on the primary significance of the term to the purchasing public. *In re Harris-Intertype Corp.*, 518 F.2d 629, 186 USPQ 238 (CCPA 1975); and *In re Champion International Corp.*, 229 USPQ 550 (TTAB 1985). The Examining Attorney bears the burden of establishing a *prima facie* case in support of the conclusion that the primary significance of the term to the purchasing public would be that of a surname. *In re BDH Two Inc.*, 26 USPQ2d 1556 (TTAB 1993) and cases cited therein. If a *prima facie* case is presented, then the burden of rebutting that showing shifts to the applicant. *In re Etablissements Darty et Fils*, 759 F.2d 15, 225 USPQ 652 (Fed. Cir. 1985); *In re Harris-Intertype Corp.*, *supra*; *In re Pyro-Spectaculars, Inc.*, 62 USPQ2d 355 (TTAB 2002); and *In re Rebo High Definition Studio Inc.*, 15 USPQ2d 1314 (TTAB 1990).

"The question of whether a word 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 various factual considerations. *Darty*, 225 USPQ at 653. There are five accepted factors to be considered in the analysis:

- (1) Is the word a common or rarely used surname?
- (2) Does anyone connected with the applicant have that surname?
- (3) Does the word have meaning other than as a surname?
- (4) Does the word look and sound like a surname?
- (5) Is the word presented in use in a stylized form distinctive enough to create a separate non-surname impression?

In re Benthin Management GmbH, 37 USPQ2d 1332, 1333-34 (TTAB 1995) (Examining attorney's refusal to register BENTHIN reversed, because it was a rare surname, did not look and sound like a surname, and was set forth in a highly stylized oval design).

Because applicant seeks to register COVINGTON in standard character form, the fifth factor is not a factor in this case and we examine the record in light of the first four factors.

As to the first factor, i.e., the rarity of COVINGTON as a surname, we find the record sufficient to establish that the surname is not a rare one, even if it is not as common as, say, Smith or Jones or Brown. Moreover, even if we accept for the sake of argument that the number of listings of COVINGTON is relatively low, the Board has

previously explained that many terms that are primarily merely surnames may nonetheless constitute only a small percentage of individuals in the population of the United States, and that rarity is not determined solely on such percentages. See *In re Gregory*, 70 USPQ2d 1792 (TTAB 2004) ("We conclude that the question whether a surname is or is not rare is not to be determined solely by comparing the number of listings of the name to the total number of listings in a vast computerized database. Given the large number of different surnames in the United States, even the most common surnames would represent but small fractions of such a database.").

As for the second factor, i.e., whether any individual connected with applicant has the surname in question, there is nothing in the record either way on this factor and we can assume that no individual connected with applicant is named COVINGTON. As explained in *Gregory, supra*, however, this does not aid applicant and only means that the factor is neutral. *Gregory*, 70 USPQ2d at 1795.

As to the third factor, we find that the term COVINGTON has no non-surname significance. We are not persuaded otherwise by the existence of several localities that are named "Covington." Cities, counties, streets,

lakes and other things often may derive their names from an individual's name. *Harris-Intertype*, 186 USPQ at 239.

We come, then, to the last factor to be discussed, i.e., whether COVINGTON has the look and sound of a surname. When a term does not have the look and sound of a surname, it clearly aids the applicant. On the other hand, when it does look and sound like a surname, such a finding merely tends to reinforce a conclusion that the term's primary significance is as a surname. COVINGTON does not have the look or sound of an initialism or acronym; nor does it appear to be cobbled together from terms or parts of terms with separate meanings. The term appears to be a cohesive whole with its principal meaning being that of a surname. Further, the existence of individuals with the name COVINGTON tends to reinforce the conclusion that COVINGTON has the look and feel of a surname.

Balancing the various factors, we find that COVINGTON will not be perceived by consumers as a rare surname, has the look and sound of a surname, and its primary significance as a surname is not outweighed by other meanings, i.e., as a town or city name, which may be ascribed to the term. See *Harris-Intertype, supra*, and *In re Hamilton Pharmaceuticals Ltd.*, 27 USPQ2d 1939 (TTAB 1993).

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Decision: The refusal to register is affirmed.