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THE TTAB

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PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Maxilon Laboratories, Inc.

Serial No. 78248647

Norman P. Soloway of Hayes Soloway P.C. for Maxilon
Laboratories, Inc.

Steven W. Jackson, Trademark Examining Attorney, Law Office
112 (Janice O'Lear, Managing Attorney).

Before Seeherman, Hairston and Bucher, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

An intent-to-use application has been filed by Maxilon
Laboratories, Inc. to register the mark shown below,

ebner

for surgical instruments for removing and collecting hard
tissue, namely, curettes."¹

¹ Application Serial No. 78248647, filed May 12, 2003.

The trademark 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 applicant's mark is primarily merely a surname.

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

We affirm the refusal to register.

In support of the surname refusal, the examining attorney has made of record the results of his search of the LEXIS-NEXIS USFIND database, finding 1825 "Ebner" surname listings. In addition, the examining attorney made of record six Internet printouts showing usage of "Ebner" as a surname. These printouts refer to a Scientology author; a German mystic; an artist; a physician; a professor; and a musician, all of whom bear the "Ebner" surname.

Finally, the examining attorney made of record pages from Webster's New World Dictionary and Merriam-Webster's Geographical Dictionary showing no listings for "ebner." It is the examining attorney's position that the foregoing evidence makes out a prima facie showing that EBNER is primarily merely a surname.

Applicant, in urging that the refusal be reversed, maintains that the examining attorney's evidence is not sufficient to establish a prima facie surname case. Applicant argues that "Ebner" is an extremely rare surname since the USFIND database contains over 123 million listings and the 1825 "Ebner" listings constitute a mere 0.000014%. Further, applicant argues that "ebner" has non-surname significance, that is, "ebner" has significance in the medical field as a component of the medical terms "Ebner's glands" and "Ebner's reticulum." In this regard, applicant submitted the following definitions from an online medical dictionary:

Ebner's Glands: Serous glands of the tongue opening in the bottom of the trough surrounding the circumvallate papillae.

Ebner's Reticulum: A network of nucleated cells in the seminiferous tubules.

Also, applicant argues that "'ebner' is a coined term related to a German class of words with the root 'eben' meaning 'planar'" and that "'ebner' is commonly used in the German language to mean the same." (Brief, p. 7). In this regard, applicant has submitted an excerpt from a German/English online translation service which shows that the German word "ebener" translates to "level surface" in English; and copies of various Internet printouts of

articles written in German. Applicant has provided an English translation of the German phrases wherein the word "ebner" appears. For example, "aus ebner Ferne" translates to "from a level distance"; "ebner Erde" translates to "level earth"; "ein ebner Spiegel" translates to "a planar mirror." Finally, applicant argues that its mark is not simply EBNER, but rather EBNER in a highly stylized form and that the PTO has registered other marks that are also surnames for goods in the medical and dental fields. Applicant submitted copies of such registrations.

It is well settled that whether a mark is primarily merely a surname depends upon whether its primary significance to the purchasing public is that of a surname. In *re Hutchinson Technology Inc.*, 852 F.2d 552, 554, 7 USPQ2d 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 burden is upon the examining attorney, in the first instance, to present evidence sufficient to make out a prima facie showing in support of the contention that the mark is primarily merely a surname. In *re Etablissements Darty et Fils*, 759 F.2d 15, 16, 225 USPQ 652, 653 (Fed. Cir. 1985). Provided that the examining attorney establishes a prima facie case, the

burden shifts to the applicant to rebut the showing made by the examining attorney. Whether a term sought to be registered is primarily merely a surname within the meaning of Section 2(e)(4) of the Trademark Act must necessarily be resolved on a case by case basis, taking into account a number of factual considerations. In re Sava Research Corp., 33 USPQ2d 1380 (TTAB 1984).

There is no doubt that the examining attorney has met his initial burden of establishing that EBNER would be perceived by purchasers as primarily merely a surname. In particular, the examining attorney has referenced 1825 EBNER surname entries from the USFIND database. These listings are spread throughout the United States. 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.

Although applicant argues that the number of listings is extremely small, 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). Also, as previously noted, the examining

attorney has made of record six Internet printouts referencing individuals with the EBNER surname. We find that the examining attorney has presented sufficient evidence to make out a prima facie showing that EBNER is primarily merely a surname.

We have carefully considered applicant's arguments and evidence but are not persuaded that applicant has rebutted the examining attorney's prima facie showing that EBNER is primarily merely a surname. With respect to applicant's contention that "Ebner" has significance in the medical field, it is apparent from the dictionary excerpt below that "Ebner's gland" and "Ebner's reticulum" are named after an individual with the Ebner surname (emphasis in original):

Ebner's gland, line, reticulum [Victor *Ebner* von Rofenstein, Austrian histologist, 1842-1925].
Dorland's Medical Dictionary (2002)²

Further, a review of the entries in this medical dictionary reveals that it is quite common in the medical field for human anatomical parts, diseases, vaccines, etc. to be named after people, e.g., Hensing's ligament; Herbst's corpuscles; Lenz's syndrome; and Salk vaccine. In view

² The Board may take judicial notice of dictionary definitions. *B.V.D. Licensing Corp. v. Body Action Design Inc.*, 846 F.2d 727, 6 USPQ2d 1719 (Fed. Cir. 1988).

thereof, purchasers who are familiar with Ebner's gland and Ebner's reticulum will immediately understand that EBNER is a surname, such that when it is used with curettes its primary significance will be as a surname. Purchasers will still see that the human anatomical parts were named after the person with the "Ebner" surname. See e.g., *In re Harris-Intertype Corporation*, 186 USPQ at 239 [The various uses of "Harris" as the name of a place or item is insufficient to rebut the examining attorney's prima facie showing that HARRIS is primarily merely a surname; such uses may represent the normal naming of a place or other item after an individual]. In short, the fact that "Ebner" is used in these medical terms does not dissipate its primary significance as a surname.

With respect to applicant's contention that "Ebner" is a "coined" German term (which we regard as an argument that EBNER would be viewed as a variation of the German word "ebener"), there is simply no indication that a significant number of purchasers of applicant's type of goods would have sufficient familiarity with the German language that "Ebner" would be perceived as a German term or variation of a German word.

In addition, we are not persuaded that the style of lettering in this case is so distinctive that EBNER would

not be perceived as primarily merely a surname. The use of stylized letters in trademarks is quite common and the presentation of a surname in lower case letters is not particularly unusual. The letters are readily discernible and the style of lettering is not so distinctive as to create a separate commercial impression in the minds of the purchasers of applicant's goods. The term, although in stylized letters, would still be perceived as a surname. See *In re Pickett Hotel Company*, 229 USPQ 760, 763 (TTAB 1986) ["The style of lettering ... is clearly not so distinctive as to create any separate commercial impression in the minds of purchasers."]

An additional factor which weighs in favor of finding that EBNER would be perceived as primarily merely a surname is that one of applicant's founders is named Peter Ebner. When someone associated with an applicant has the surname, this tends to indicate the public's recognition of the term as a surname. See *In re Benthin Management*, 37 USPQ2d 1332 (TTAB 1995) and *In re Monotype Corp. PLC*, 14 USPQ2d 1070 (TTAB 1989).

As previously noted, applicant submitted copies of third-party registrations of marks that it maintains are surnames for goods in the medical and dental fields. According to applicant, the marks that appear in these

registrations appear more frequently as surnames in the USFIND database than "Ebner." We would again point out that no magic number of directory listings is required to establish a prima facie surname case. Moreover, we note that several of the marks in these registrations are not primarily merely surnames because they are also given names, e.g., "Felix", "Lucy"; "Caesar"; and "Oscar." In any event, it is well settled that each case must be decided on its own merits. We are not privy to the records in the files of the cited registrations, and more importantly, the Board is not bound by prior actions of the Office. See *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 ["Even if some prior registrations had some characteristics similar to [applicant's] application, the PTO's allowance of such prior registrations does not bind the Board or this court."].

Decision: The refusal to register under Section 2(e)(4) is affirmed.