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PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Lash's Lessons, LLC

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Serial No. 78857737

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Andrew D. Dorisio of King & Schickli, PLLC for Lash's Lessons, LLC.

Laurie R. Kaufman, Trademark Examining Attorney, Law Office 103 (Michael Hamilton, Managing Attorney).

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Before Hairston, Grendel and Cataldo, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Lash's Lessons, LLC seeks to register on the Principal Register the mark MERROW (in standard character form) for goods ultimately identified as "toys, namely playsets for toy figures and plastic character toys; toy action figures and accessories therefor; stuffed and plush toy animals" in International Class 28.<sup>1</sup>

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<sup>1</sup> Application Serial No. 78857737, filed April 10, 2006, which is based on an allegation of a bona fide intention to use the mark in commerce.

Registration has been finally refused pursuant to Section 2(e)(4) of the Trademark Act, 15 U.S.C. §1052(e)(4), on the ground that the mark is primarily merely a surname.

Applicant has appealed, and briefs have been filed.

Evidentiary Objection

Before turning to the merits of the examining attorney's refusal, we must first address an evidentiary objection of applicant. With her appeal brief, the examining attorney submitted pages from the online versions of The American Heritage Dictionary of the English Language and Merriam-Webster Dictionary to show the absence of entries for the term "merrow." The examining attorney requested that the Board take judicial notice of the pages, relying on In re Red Bull GmbH, 78 USPQ2d 1375 (TTAB 2006). Applicant has objected to the Board's taking judicial notice of these pages arguing that the submissions are untimely, and not proper subject matter for judicial notice. Applicant maintains that the examining attorney's reliance on Red Bull is misplaced because the Board therein "took judicial notice of a definition, not of a dictionary itself." Reply brief at 5.

We do not find applicant's objection to be well taken. In Red Bull, the Board granted an examining attorney's

request to take judicial notice of online dictionary definitions submitted with a brief because the sources of the definitions were clearly identified, and readily verifiable and reliable, widely-available print publications. In this case, the sources of the dictionary pages at issue are clearly identified. Moreover, there is no question that these dictionaries are readily verifiable and reliable, widely-available print publications. There is no reason, therefore, to exclude the dictionary pages simply because they show the absence of a definition, rather than a definition itself. In view of the foregoing, we find that the online dictionary pages submitted by the examining attorney with her appeal brief are acceptable material for judicial notice.

Surname Refusal

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 a surname are (1) the degree of the surname's rareness; (2) whether anyone connected with applicant has the 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.<sup>2</sup> See *In re Benthin Management GmbH*, 37 USPQ2d 1332, 1333 (TTAB 1995). See also *In re Gregory*, 70 USPQ2d 1792 (TTAB 2004).

The examining attorney submitted the results of a search conducted of the Lexis/Nexis ("P-FIND") database which revealed that there are 607 residential listings in the United States for persons with the surname "Merrow" (a printout of the first 100 of the retrieved listings was included); the results of a search conducted of the "Yahoo! People Search" database which revealed that there are "about 584" listings for persons with the surname "Merrow" (a printout of the first 10 of the retrieved listings was included); and a printout from the web site <http://www.namestatistics.com> which states that: "[m]errow is the #16823 most common last name. 0.001% of last names

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<sup>2</sup> Because applicant seeks to register MERROW in standard character form, the fifth factor, i.e., whether the mark is presented in a stylized form distinctive enough to create a separate non-surname impression, is not a factor in this case.

in the US are merrow. Around 2500 US last names are merrow."

In addition, the examining attorney submitted the results of a search of the "Lycos people search" database which revealed 586 listings in the United States for persons with the surname "Merrow" (a printout of the first 10 of the retrieved listings was included); a printout from the website <http://longlostpeople.com> which indicates that it located "3,295 matches" for persons with the surname "Merrow"; a printout from the website <http://onelook.com> which defines "merrow" as "**name:** A surname (rare: 1 in 100000 families, popularity rank in the U.S.: #16823;" and a printout from "Wikipedia" which states that:

Merrow may refer to:

- Merrow, a creature in Irish mythology
- Merrow, Surrey
- Charlie Merrow
- Merrow Sewing Machine Company, an American Manufacturer
- Merrow, an aquatic subrace of ogres in the Dungeons and Dragons game.

Applicant, in urging reversal of the refusal to register, submitted a printout from Lexis/Nexis which indicates that the "P-FIND" database contains 146 million persons. In addition, applicant submitted several types of evidence to show that "merrow" means a "mermaid." The

evidence includes an entry from The Oxford English Dictionary (2d ed. 2001) where "merrow" is defined as "A mermaid;" an entry from A Dictionary of Folklore (1999) where "merrow" is defined as "Irish equivalent of a MERMAID;" and an entry from Spirits, Fairies, Gnomes, and Goblins: An Encyclopedia of The Little People (1996) where "merrow" is defined, in relevant part, as:

This is the name of the Irish Mer-people, who may also be called the Murdhuacha, Moruadh, Moruach, Muir-Gheilt, Samhghubha, or Suire. The mermaids appear as beautiful young women above the waist with pale skin, dark eyes, and long hair, but as a fish below the waist. Their mermen are ugly, with green skin, teeth and hair, but a sharp red nose and tiny, narrow eyes.

Other evidence includes an entry from Bartleby.com relying on the Dictionary of Phrase and Fable (1898) where "merrow" is defined as "[a] mermaid, believed by Irish fisherman to forebode a coming storm;" the same "Wikipedia" entry submitted by the examining attorney which shows that "merrow" may refer to, inter alia, "a creature in Irish mythology;" and a revision to the "Wikipedia" entry dated June 11, 2007 which states that "merrow" is "the Scottish and Irish Gaelic equivalent of the mermaid and mermen of other cultures."

As to the first factor, the degree of rareness of MERROW, the examining attorney argues that it is a fairly strong surname. Applicant, however, argues that, at best, the record shows that MERROW is a rare surname. Applicant maintains that based on the evidence of record, only 0.0004% and 0.001% of the people in the Lexis/Nexis ("P-Find") and the "Long Lost People" databases, respectively, have 'merrow' as a surname.

While we agree with applicant that the record shows that MERROW is indeed a rare surname, a mark may be found to be primarily merely a surname even though it is not a common surname. See *In re Giger*, 78 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). Moreover, there is no minimum number of listings to prove that a mark is primarily merely a surname. With respect to applicant's argument regarding the small percentage of people living in the United States with the surname "Morrow," "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, 72 USPQ2d at 1795. Furthermore, a review of the submitted evidence from the databases reveals that the listings are spread

throughout the United States and include households in at least twenty different states and ten major cities. In this case, we find that the evidence submitted by the examining attorney is sufficient to establish the surname significance of the mark MERROW to the relevant purchasing public.

As to the second factor, i.e., whether anyone associated with applicant has the surname MERROW, applicant maintains that no one connected with it has MERROW as a surname, and therefore, this factor should be resolved in applicant's favor. However, "that a proposed mark is not the applicant's surname, or the surname of an officer or employee, does not tend to establish one way or the other whether the mark would be perceived as a surname." In re Gregory, supra, 72 USPQ2d at 1795. In other words, the fact that no one connected with applicant has MERROW as a surname does not aid applicant and only means that the factor is neutral. It certainly does not lead to the conclusion that purchasers will perceive the term as a non-surname.

As to the third factor, applicant contends that its mark has meaning other than as a surname because "merrow" means "mermaid." However, both the Benthin decision and our primary reviewing court clearly require that the other

meaning be "recognized" by a significant number of people. See *In re Harris-Intertype Corp.*, 518 F.2d 629, 186 USPQ 238 (CCPA 1975); and *In re Benthin Management GmbH*, supra. We do not believe that a significant number of people would recognize this non-surname meaning because it is obscure. Applicant's own evidence shows that this meaning is associated with Irish folklore or mythology. Also, the examining attorney has submitted evidence which shows the absence of entries for "merrow" in two unabridged English language dictionaries commonly used in the United States. This suggests to us that this meaning of "merrow" is nonexistent in the United States. Thus, this other meaning of "merrow" does not rebut the examining attorney's prima facie surname case. Applicant certainly has not demonstrated that consumers in the United States would recognize that "merrow" is another name for a mermaid.

As to the fourth factor, applicant argues that MERROW does not have the look and sound of a surname. Applicant maintains that the purchasing public "would be more apt to consider MERROW as the phonetic equivalent of the dictionary word 'marrow' due to their identical pronunciations, than to liken it to a surname." Brief at 8. The examining attorney, on the other hand, contends that the term has the look and sound of a surname because

consumers are accustomed to seeing and hearing the term as a surname. Admittedly, this is a somewhat subjective factor, but we agree with the examining attorney that the term has the look and sound of a surname, especially since the record shows that there are numerous individuals with the surname "Merrow;" that such term has no readily recognized meaning other than its surname significance; and that nothing in the record indicates that MERROW would be perceived as an initialism or acronym, or a coined term. Rather the term MERROW "appears to be a cohesive term with no meaning other than as a surname." In re Gregory, supra, 72 USPQ2d at 1796.

Balancing the various factors, we find that three of the four factors bearing upon the issue herein favor a determination that the primary significance of the mark MERROW to the purchasing public for applicant's toys is that of a surname, while the other factor is neutral. We find, therefore, that the examining attorney has presented evidence sufficient to establish that applicant's mark is primarily merely a surname and that applicant has failed to rebut the showing.

**Decision:** The refusal to register applicant's mark under Section 2(e)(4) is affirmed.