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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Gene Simmons Comics Group

Serial No. 78905279

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for Gene Simmons Comics Group.

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(J. Leslie Bishop, Managing Attorney).

Before Walters, Holtzman and Zervas, Administrative Trademark
Judges.

Opinion by Holtzman, Administrative Trademark Judge:

An application has been filed by Gene Simmons Comics Group
to register the mark SIMMONS COMICS GROUP (in standard character
form) for "comic books" in Class 16.¹ "COMICS GROUP" is
disclaimed.

The trademark examining attorney has refused registration
on the ground that the mark is primarily merely a surname under

¹ Application Serial No. 78905279, filed June 9, 2006, based on an
allegation of a bona fide intention to use the mark in commerce.
Applicant has claimed ownership of Registration Nos. 2738269, 2762627
and 2983582.

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Section 2(e)(4) of the Trademark Act. When the refusal was made final, applicant appealed.

Both applicant and the examining attorney have filed briefs.

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). 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 *United Distillers*, *supra* at 1221.

As to the first factor, the degree of rareness, the examining attorney has submitted printouts from the website, whitepages.com, indicating that there are 300 listings for the name "Simmons," along with several pages of individual listings. In addition, we take judicial notice of information from the United States Census Bureau, showing that "Simmons" ranks 92nd in

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frequency out of nearly 89,000 surnames.² The evidence shows that SIMMONS is not at all rare, but instead is a very common surname.

As to the second factor, applicant states that Gene Simmons is the name of the principal and sole shareholder of applicant. The fact that "Simmons" is the name of someone associated with applicant further indicates that the term will be perceived as a surname.

The third factor is whether the term has another recognized meaning. There is no evidence that the term has a meaning in ordinary language other than as a surname. Nonetheless, applicant maintains that the term has another recognized meaning. Applicant argues that Gene Simmons is "a very well known celebrity"; that he is "the world famous bass player for the musical group KISS"; and that he was one of the founders of the group and has been the bass player for the group since 1973. Applicant contends that the mark will not be perceived primarily merely as a surname "because of the mark's association with Gene Simmons, ...and the other SIMMONS trademarks owned by Applicant." Applicant states that it the owner of the following registrations, all of which are for comic books and other printed matter in Class 16: Registration No. 2983582 for the

² Census 1990 (www.census.gov/genealogy/names). The Board may take judicial notice of census data. See *In re Spirits International N.V.*, 86 USPQ2d 1078 (TTAB 2008).

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mark SIMMONS BOOKS (and design) ("Books" disclaimed);
Registration No. 2762627 for the mark GENE SIMMONS TONGUE (and
design); and Registration No. 2738269 for the mark GENE SIMMONS
TONGUE.³

To support its position, applicant has submitted TESS
printouts of its prior registrations and an entry for "Gene
Simmons" from the website, wikipedia.org. The entry includes
biographical information about Mr. Simmons and his association
with the band, Kiss; his roles in several movies; his television
background and exposure, including, as applicant points out, his
appearance in the A&E reality TV show, "Gene Simmons Family
Jewels"; a listing of several albums Mr. Simmons produced for
other bands; and listings of his five CD releases and three
DVDs.⁴

The Court in *In Lucien Piccard Watch Corp. v. Since 1868
Crescent Corp.*, 314 F.Supp. 329, 165 USPQ 459, 461 (SDNY 1970)
stated that "names of historical characters or noted persons are
registrable, provided the primary connotation of the mark is of

³ Applicant also states that it is the owner of several pending
applications for marks comprising SIMMONS or GENE SIMMONS. However,
pending applications are of no probative value other than as evidence
that they were filed on a certain date.

⁴ Applicant has relied on additional evidence which was submitted for
the first time with applicant's reply brief. With the exception of
the dictionary definition of "group," which is appropriate for
judicial notice, this evidence is untimely and has not been
considered. See Trademark Rule 2.142(d). Nor have we considered any
arguments relating to this late-filed evidence.

the historical character." As discussed in *In re Pickett Hotel Company*, 229 USPQ 760, 761 (TTAB 1986) "decisions concerning historical names draw a line between names which are so widely recognized that they are *almost exclusively* associated in terms of their commercial impressions with the historical figures, and names which are semihistorical in character." (Italics added.)

The evidence in this case is insufficient to demonstrate that the term SIMMONS would be "almost exclusively" associated with Gene Simmons, rather than merely as a surname of any individual identified by that name. SIMMONS is a very common surname. It clearly does not point specifically to Gene Simmons. Furthermore, to the extent the evidence shows that Gene Simmons is well known, his renown is primarily in relation to the musical group, Kiss. There is no evidence that the surname SIMMONS would be recognized by purchasers as identifying Gene Simmons in the completely different and unrelated context of comic books. In this regard, we point out that applicant's registrations for comic books are not proof of any exposure of the registered marks to the purchasing public; nor do they demonstrate that anyone associates the name SIMMONS for comic books with Gene Simmons.⁵

⁵ Applicant's argument that the mark identifies the source of goods "in the same manner as the Applicant's other SIMMONS marks" is not well taken. Applicant's registrations for the full name, GENE SIMMONS, are not relevant to a determination of whether SIMMONS in itself is registrable. Furthermore, unlike the mark in the present case, the

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In any event, applicant's evidence is not sufficient to show that Gene Simmons is an historical or noted figure of such magnitude that like the designations DA VINCI, SOUSA, and M.C. ESCHER, the designation SIMMONS primarily would be viewed by purchasers as a reference to a particular, renowned historical figure, rather than for its significance as a surname. Thus, this case is distinguishable from the cases which involved the names of those famous historical figures. See *In re Pyro-Spectaculars, Inc.*, 63 USPQ2d 2022 (TTAB 2002) (SOUSA); *Michael S. Sachs Inc. v. Cordon Art B.V.*, 56 USPQ2d 1132 (TTAB 2000) (M.C. ESCHER); and *Lucien Piccard Watch*, supra (S.D.N.Y. 1970) (DA VINCI).

Finally, as to the fourth factor, we find that SIMMONS has the "look and feel" of a surname. We believe that by its nature, SIMMONS, as a common surname, with no other known significance, gives the impression of being a surname. See *Ex parte Rivera Watch Corp.*, 106 USPQ 145, 149 (Comm'r Pats. 1955) ("There are some names which by their very nature have only a surname significance.... 'Seidenberg'... would be in this class.")

When we view the term SIMMONS under the factors set out in *United Distillers*, we find that SIMMONS would be perceived

mark in applicant's prior registration for SIMMONS also includes significant design elements, which would of course overcome the perception of the mark as primarily merely a surname.

primarily as a surname. However, as applicant points out, the mark is not SIMMONS, alone, but SIMMONS COMICS GROUP and we must consider the mark SIMMONS COMICS GROUP as a whole. See *In re Hutchinson Technology Inc.*, 852 F.2d 552, 7 USPQ2d 1490, 1492 (Fed. Cir. 1988).

The examining attorney maintains that the term COMICS GROUP does not overcome the primary surname significance of the mark SIMMONS COMICS GROUP, but instead merely reinforces it. She argues that the term COMICS is generic for applicant's goods, comic books, and that the term GROUP is a generic term indicating the entity of the applicant. The examining attorney has submitted various dictionary definitions of "group" including the following:

noun 1. any collection or assemblage of persons or things; cluster; aggregation: *a group of protesters; a remarkable group of paintings.*
Dictionary.com Unabridged (v 1.01)

Applicant, on the other hand, argues that while COMICS is admittedly descriptive of applicant's goods, the term GROUP is descriptive "only of the Applicant and not of the goods."

(Brief, p. 3.) In its reply brief, applicant takes the position that the term GROUP "suggests but does not merely describe applicant." (Reply Brief, p. 1.) Applicant further argues that GROUP does not pertain to a collection of comics; that comics are published in a series; and that, furthermore,

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applicant is a company and not a "group." Applicant has attached a definition of "group" from *Merriam-Webster Online* dictionary defining "group" arguing that none of the definitions include a company or comics publisher.

The addition of a generic or merely descriptive term to a surname does not preclude its surname significance if, when considered as a whole, the primary significance of the mark to the purchasing public is that of a surname. See *Hutchinson Technology, supra*; *In re Hamilton Pharmaceuticals Ltd.*, 27 USPQ2d 1939, 1940 (TTAB 1993); and *In re E. Martinoni Company*, 189 USPQ 589, 590 (TTAB 1975) citing *In re Louis De Markus Corporation*, 136 USPQ 677, 677 (TTAB 1963) (DUFFEY PROCESS is primarily merely a surname; "the descriptive word 'process' adds nothing to registrability of 'Duffey Process'").

In addition to the definitions supplied by the examining attorney, we take judicial notice that "group" is also defined as follows: "a commercial organization consisting of several companies under common ownership."⁶ *The New Oxford American Dictionary* (Second Edition 2005). We also take judicial notice of the definition of "comic" as meaning, "noun "[1b.] A comic

⁶ The Board may take judicial notice of dictionaries and other standard reference works. See *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983);

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book." *The American Heritage Dictionary of the English Language* (Fourth Edition 2000).

It is clear the term COMICS in applicant's mark is generic for applicant's goods, "comic books." The dictionary evidence also shows that GROUP, in the context of the phrase COMICS GROUP, refers to either a comic book collection or the type of entity from which the comic books originate, that is, the entity that publishes or sells the comic books. Either way, the phrase is of little source indicating significance. See, e.g., *In re I. Lewis Cigar Mfg. Co.*, 205 F.2d 204, 98 USPQ 265, 267 (CCPA 1953) (S. SEIDENBERG & CO'S. primarily merely a surname; "the addition of the expression '& Co's.', '...cannot be held to distinguish or relate to anything except the surname 'Seidenberg.'"); and *In re The Paint Products Co.*, 8 USPQ2d 1863, 1865-66 (TTAB 1988) (PAINT PRODUCTS CO. unregistrable "for goods emanating from a company that sells paint products"; noting that marks consisting of generic or highly descriptive terms coupled with entity designations such as "Inc." and "company" have been held unregistrable.)

We find that the addition of the highly descriptive, if not generic, term COMICS GROUP to SIMMONS, does nothing to overcome the surname meaning of the mark SIMMONS COMICS GROUP as a whole. There is nothing in the record to show, as applicant claims, that the meaning of the word GROUP as a "collection" would not

pertain to comic books. Further, the fact that the true nature of applicant's entity may be a "company" rather than a "group" is not significant. The question is how the mark will be perceived by the public, and the public would expect, upon encountering SIMMONS COMICS GROUP on comic books, that the phrase COMICS GROUP would have its ordinary dictionary meanings.

In view of the foregoing, we find that SIMMONS COMICS GROUP, as a whole, would be viewed as primarily merely a surname.⁷

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

⁷ We note applicant's comment on the last page of its reply brief:

The consuming public has come to associate goods emanating under the SIMMONS name, ... with Applicant Gene Simmons. It is clear that due to the Applicant's long and extensive use and promotion of the term SIMMONS in connection with his various activities, products and services the term has acquired distinctiveness with respect to the Applicant and his goods. Such acquired distinctiveness is transferred to the instant mark. ... The mark considered in its entirety including the term GROUP combined with the secondary meaning of the term SIMMONS and its association with the celebrity, Gene Simmons, is sufficient to overcome any purported surname significance of the term SIMMONS"

Applicant has never requested registration of the mark under Section 2(f) and to the extent that applicant is attempting, in the alternative, to do so for the first time in its reply brief, the request is untimely. See Trademark Rule 2.142(d); and TBMP §1215 (2d ed. rev. 2004). After an appeal is filed, the proper procedure, if an applicant wishes to assert a claim of acquired distinctiveness in the alternative, is to file a request for remand in a separate document, rather than as a statement in its reply brief. See TBMP §1215.