

This Opinion is not a
Precedent of the TTAB

Mailed: November 7, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Aulbach Lizenz AG

Serial No. 79156860

James R. Menker of Holley & Menker PA for Aulbach Lizenz AG

Claudia Garcia, Trademark Examining Attorney, Law Office 111,¹
(Robert L. Lorenzo, Managing Attorney).

Before Cataldo, Wolfson, and Larkin,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Aulbach Lizenz AG (“Applicant”) seeks registration on the Principal Register of
the mark shown below

HECHTER

for

leather and imitation leather; moleskin being imitation leather;
goods made of leather and imitation leather, namely backpacks,

¹ The involved application was originally examined by a different Trademark Examining Attorney, and subsequently was reassigned to the Trademark Examining Attorney whose name appears above for preparation of the United States Patent and Trademark Office’s appeal brief. We will refer to them interchangeably as the “Examining Attorney.”

shopping bags, beach bags, traveling bags, garment bags for travel, sports bags, bags for campers, handbags, wheeled bags, school bags, traveling sets being luggage, suitcases; leather or leather-board boxes; trunks being luggage; leather straps; key cases being leather goods; wallets; suitcases, namely, carrying cases; card cases, namely credit card cases, calling card cases; handbags leather being goods; umbrellas; non-fitted vanity cases sold empty, in International Class 18, and

clothing, namely, tops, bottoms, pants, shirts, skirts, dresses, blouses, shorts, tights, pullovers, jackets, coats, vests, sweaters, gloves, socks, rainwear and neckwear; footwear; headgear, namely hats, caps; bandanas being neckerchiefs; headbands; stockings; hosiery; caps being bonnets; mufflers; hoods; belts; dressing gowns being robes; hats; socks; bedroom slippers; slips being underwear; suits; clothing of leather, namely, tops, bottoms, pants, shirts, skirts, dresses, blouses, shorts, tights, pullovers, jackets, coats, vests, sweaters, gloves, socks, rainwear and neckwear; headwear; clothing of imitation leather, namely, tops, bottoms, pants, shirts, skirts, dresses, blouses, shorts, tights, pullovers, jackets, coats, vests, sweaters, gloves, socks, rainwear and neckwear; outerclothing, namely jackets, coats; underclothing being underwear; scarves; women's lingerie; furs, namely hats, stoles, muffs, coats; girdles being underwear; vests; wearable garments, namely tops, bottoms, pants, shirts, skirts, dresses, blouses, shorts, tights, pullovers, jackets, coats, vests, sweaters, gloves, socks, rainwear and neckwear; raincoats; skirts; petticoats; teddies being undergarments; coats; mittens; trousers; parkas; pullovers; dresses; saris; cocktail dresses; aprons; knitwear clothing, namely sweaters; uniforms; jackets; veils; tee-shirts; shorts; bermuda shorts; blousons; gabardines; clothing, namely pants, raincoats; overcoats; trench coats; pelerines; cross-over tops; shirts; cardigans; sweaters; sashes for wear; gloves; tights; drawers, including bathing suits; pajamas; nightwear; nightgowns; dressing gowns; bathing suits and beach suits, sportswear not for diving, namely sports bras, sports jerseys, sports tops, sports leggings; clothing of fur, namely hats, stoles, muffs, coats; footwear other than for orthopedic purposes, namely beach shoes; sports and ski footwear; boots; half-boots; esparto shoes or sandals; sandals; slippers; caps; berets; caps, including bathing caps; turbans; neckties, in International Class 25.²

² Application Serial No. 79156860 was filed on August 12, 2014 and seeks extension of the protection of International Registration No. 1227390 to the United States under Section 66

The Examining Attorney refused registration of Applicant's mark on the ground that it is "primarily merely a surname" within the meaning of Section 2(e)(4) of the Trademark Act. After the Examining Attorney made the refusal final, Applicant timely appealed to the Board. The case is fully briefed. We affirm the refusal to register.

I. Prosecution History and Record on Appeal

Prosecution History

On December 23, 2014, the Examining Attorney issued an Office Action refusing registration under Section 2(e)(4). On January 28, 2015, Applicant responded by making a claim of acquired distinctiveness under Section 2(f) of the Trademark Act on the basis of ownership of Registrations Nos. 3335525, 4016190, and 4033598. On February 18, 2015, the Examining Attorney issued a second Office Action rejecting Applicant's claim of acquired distinctiveness and continuing the Section 2(e)(4) refusal.³ On August 18, 2015, Applicant responded to the continued Section 2(e)(4) refusal on the merits. On September 10, 2015, the Examining Attorney made final the refusal of registration. Applicant appealed to the Board on March 2, 2016.

of the Trademark Act. The mark is described in the application as consisting of "the navy blue stylized wording 'HECHTER'." The color navy blue is claimed as a feature of the mark.

³ When Applicant made its Section 2(f) claim, Applicant did not expressly reserve the right to argue, in the alternative, that its mark was not primarily merely a surname. *See* TMEP Section 1202.02(c); *In re Thomas Nelson, Inc.*, 97 USPQ2d 1712 (TTAB 2011). In any event, the question of whether Applicant's mark has acquired distinctiveness under Section 2(f) is not before us on appeal.

Record on Appeal

The evidence of record consists of:

- A printout from a search of the Lexis Public Records database for persons in the United States with the last name “Hechter” indicating that there were 174 “hits” and listing the first 10 of the 174 names alphabetically, together with addresses and telephone numbers (attachment to Office Action dated December 23, 2014);
- A printout from the Collins American English Dictionary showing no entry for the word “hechter” (attachment to Office Action dated September 9, 2015);
- A printout of a Wikipedia entry about French fashion designer Daniel Hechter (attachment to Office Action dated September 9, 2015);
- A printout from Applicant’s website identifying Daniel Hechter as a fashion designer and the creator of the Daniel Hechter clothing line (attachment to Office Action dated September 9, 2015);
- A printout of Google search results for “Daniel Hechter,” including truncated excerpts of certain of the results, separately listed below (attachment to Office Action dated September 9, 2015);⁴

⁴ The truncated excerpts show the use of the names at issue and little else. Although both Applicant and the Examining Attorney discussed them, we find them to be of little assistance in the analysis of the issues on this appeal. *See In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007) (truncated results from search engines are entitled to little weight).

- A truncated excerpt from a Warontherocks.com article entitled Empire of Confusion found at <http://warontherocks.com/2015/09/empire-of-confusion/> that mentions a person named Michael Hechter (attachment to Office Action dated September 9, 2015);
- A truncated excerpt from an article in BlouinArtInfo entitled *Nicolas Cage's 101 is One of Two Bugattis Offered Bonhams*, found at <http://www.blouinartinfo.com/news/story/1228680/nicolas-cages-101-is-oneof-two-bugattis-offered-bonhams> that mentions the fashion designer Daniel Hechter (attachment to Office Action dated September 9, 2015);
- A truncated excerpt from an article in the Financial Express entitled *HiLITE Mall Enters Limelight*, found at <http://www.financialexpress.com/article/companies/hilitemall-enters-limelight/123215> that lists "Daniel Hechter" as a major brand associated with HiLITE Mall (attachment to Office Action dated September 9, 2015);
- A truncated excerpt from PRWeb found at <http://ww1.prweb.com/prfiles/2015/08/18/12904315/pr-8-18-15.pdf> referencing the pages of "Vogue, GQ, Mademoiselle, and Daniel Hechter" (attachment to Office Action dated September 9, 2015);
- An excerpt from an article in the Times of San Diego, found at <http://timesofsandiego.com/business/2015/09/08/banker-sentenced-to-3-years-for->

bribery-in-mortgage-scheme/, that mentions a person named Israel Hechter (attachment to Office Action dated September 9, 2015); and

- An excerpt from the Boston Globe found at <https://www.bostonglobe.com/metro/2014/04/19/mit-website-reports-deathmedical-student/zlhNLepFJ4twPMX168oI0O/story.html>, that mentions a person named Eliana Hechter.

II. Analysis

Section 2(e)(4) of the Trademark Act prohibits registration on the Principal Register of a mark that is “primarily merely a surname,” absent a showing of acquired distinctiveness under Section 2(f) of the Act. The Patent and Trademark Office bears the burden of establishing a *prima facie* case that a mark falls within this prohibition. *In re Etablissements Darty et Fils*, 759 F.2d 15, 225 USPQ 652, 653 (Fed. Cir. 1985). If the Patent and Trademark Office establishes a *prima facie* case, the burden shifts to the applicant to rebut that case. *Id.* On appeal, we must weigh all of the evidence to determine whether the record as a whole supports the refusal. *In re Sava Research Corp.*, 32 USPQ2d 1380, 1381 (TTAB 1994).

In two recent precedential decisions, *In re Integrated Embedded*, ___ USPQ2d ___, Serial No. 86140341 (TTAB September 27, 2016) and *In re Eximius Coffee, LLC*, 120 USPQ2d 1276 (TTAB 2016), the Board reiterated that 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.”

Eximius Coffee, 120 USPQ2d at 1277 (citing *In re United Distillers plc*, 56 USPQ2d 1220 (TTAB 2000) and *In re Hutchinson Tech. Inc.*, 852 F.2d 552, 7 USPQ2d 1490, 1492 (Fed. Cir. 1988)). “This expression of the test restates the rule set forth in *In re Kahan & Weisz Jewelry Mfg. Corp.*, 508 F.2d 831, 184 USPQ 421, 422 (CCPA 1975) . . . and *In re Etablissements Darty et Fils*, 759 F.2d 15, 225 USPQ 652, 653 (Fed. Cir. 1985).” *Eximius Coffee*, 120 USPQ2d at 1277-78 (internal quotation omitted). Whether the primary significance of an applied-for mark is merely that of a surname is a question of fact, see *Darty*, 225 USPQ at 653-54, and there is no rule as to the kind or amount of evidence necessary to show that a given mark would be perceived as primarily merely a surname. *Eximius Coffee*, 120 USPQ2d at 1278. “The entire record is examined to determine the primary significance of a term.” *Id.* If there is any doubt as to the surname significance of a mark, the Board is “inclined to resolve such doubts in favor of applicant.” *In re Benthin Mgmt. GmbH*, 37 USPQ2d 1332, 1334 (TTAB 1995).

In *Eximius Coffee*, the Board noted that in “*Darty*, the Federal Circuit considered several factors in determining whether the purchasing public would perceive a proposed mark as primarily merely a surname, including: whether the applicant adopted a principal’s name and used it in a way that revealed its surname significance; whether the term had a nonsurname ‘ordinary language’ meaning; and the extent to which the term was used by others as a surname.” *Eximius Coffee*, 120

USPQ2d at 1278.⁵ To the list of examples of inquiries or “factors” articulated in *Darty*, the Board added two additional examples of inquiry in *Benthin*, 37 USPQ2d at 1333-34: (iv) whether the term has the “structure and pronunciation” of a surname, and (v) whether the stylization of lettering is distinctive enough “to cause the mark not to be perceived as primarily merely a surname.” We stress that these inquiries or “factors” are not exclusive nor presented in order of importance. *Integrated Embedded*, Serial No. 86140341, 13 TTABVUE at 3, n.4.⁶ Any of these inquiries “and any other relevant circumstances may shape the analysis in a particular case.” *Id.*

We review the evidence of record that is directed to these matters being mindful of the admonitions in *Eximius Coffee* and *Integrated Embedded* not to apply any particular inquiry or factors mechanically or invariably give them equal weight, and we will consider the evidence against the backdrop of Applicant’s primary argument on appeal “that the Examining Attorney has failed to establish a *prima facie* case that HECHTER is primarily merely a surname.” 4 TTABVUE at 6 (Appeal Brief).

The Connection of a Person With the Surname Hechter to Applicant

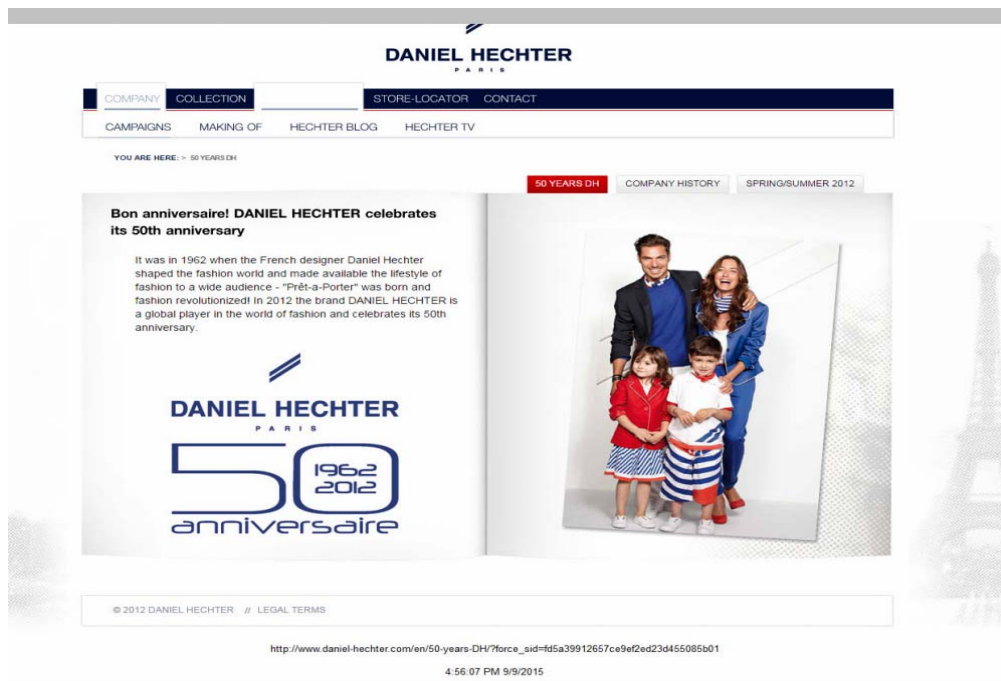
Applicant concedes that there is a person with the surname Hechter who is connected to Applicant and acknowledges that “the evidence of record contains

⁵ A *prima facie* case of surname significance was established in *Darty* “by evidence that: (i) DARTY [was] the surname of the president of appellant; (ii) DARTY appear[ed] as a surname in a number of telephone directories across the nation; and (iii) DARTY [did] not appear in dictionaries as a French or English word.” *Darty*, 225 USPQ at 653.

⁶ The Examining Attorney and Applicant confined their arguments to the so-called *Benthin* factors, which reflected the state of the law at the time of the briefing in this case prior to the Board’s decisions in *Eximius Coffee* and *Integrated Embedded*.

several references to retired French fashion designer Daniel Hechter.” 4 TTABVUE at 7. Applicant further states that it “has claimed ownership of several prior registrations for marks comprised in part of the name DANIEL HECHTER and in each case the consent of Daniel Hechter was made of record. The evidence of record referring to Daniel Hechter are (sic), in fact, references to this same person.” *Id.*⁷ Applicant concedes that the affiliation of Daniel Hechter with Applicant “tends to favor upholding the instant refusal.” 4 TTABVUE at 9.

A page from Applicant’s website made of record by the Examining Attorney substantiated Applicant’s concession that there is someone connected with Applicant with the surname Hechter. It is reproduced below:



⁷ We note that neither the registration certificates upon which Applicant’s claim of acquired distinctiveness under Section 2(f) was based, nor the consents of Mr. Hechter themselves, are of record.

Applicant described this page as “a print-out from Applicant’s website announcing the 50th Anniversary of the brand DANIEL HECHTER . . .” 4 TTABVUE at 7. Daniel Hechter is identified on this page as being the person behind Applicant’s business. The webpage is in English and has a link enabling viewers to locate stores. We infer from these facts that the page and the name “Daniel Hechter” were exposed to consumers of Applicant’s goods in the United States, which in turn exposed the surname Hechter to consumers of Applicant’s goods in the United States.

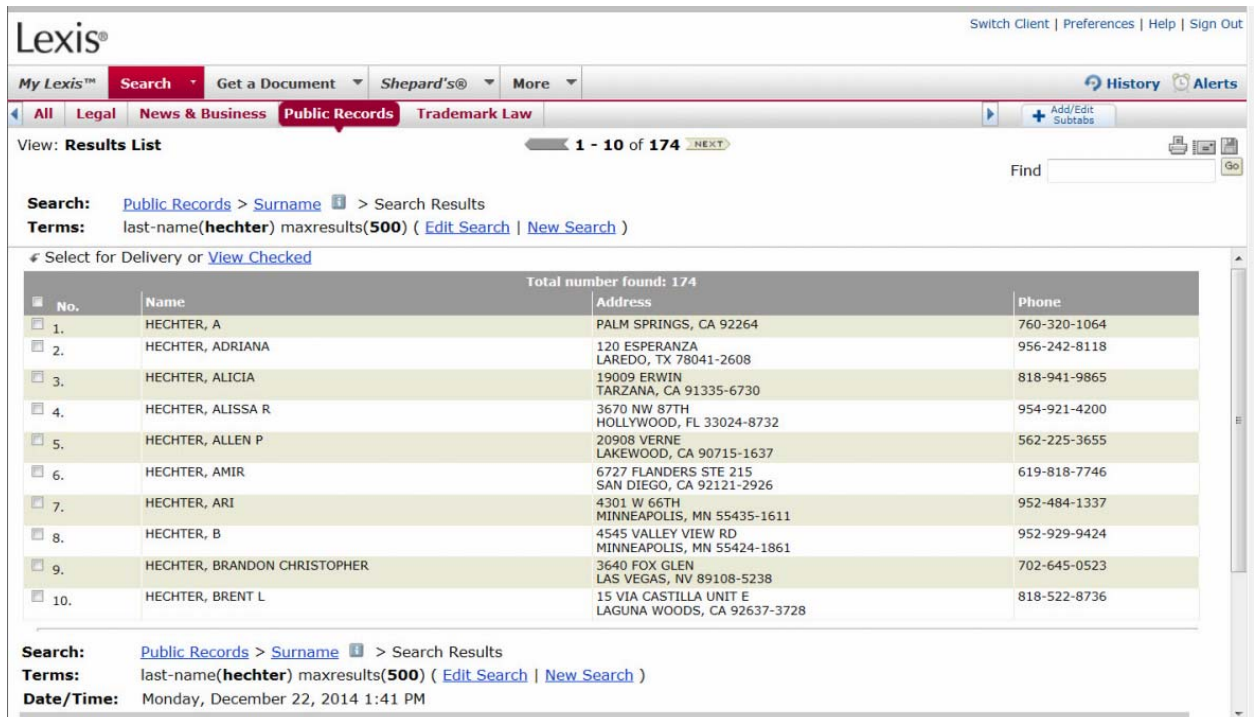
In *Eximius Coffee* and *Integrated Embedded*, the Board found that website evidence supported findings that the applicants’ respective marks ALDECOA and BARR GROUP consisted of or contained the surnames of persons associated with the applicants. *Eximius Coffee*, 120 USPQ2d at 1278-79 (pages from the applicant’s website discussing the historical and current involvement of members of the Aldecoa family in the applicant’s business); *Integrated Embedded*, Serial No. 86140341, 13 TTABVUE at 3-5 (pages from the applicant’s website showing, discussing the credentials of, and enabling visitors to contact, applicant’s “Namesake” and Chief Technical Officer Thomas Barr). The website evidence here is less detailed, extensive, and current than the website evidence in *Eximius Coffee* and *Integrated Embedded*,⁸ but “no precedential value can be given to the quantum of evidence apparently accepted in a prior case,” *Darty*, 225 USPQ at 653, and we find that the website

⁸ The page here seems to be from Applicant’s website in 2012, as it refers to a company anniversary that occurred in 2012, bears a 2012 copyright notice, and contains a link to a “SpringSummer 2012” page.

evidence here supports a finding that Hechter is a surname, and specifically the surname of a person connected to Applicant.

The Extent to Which Hechter Appears as a Surname in Telephone Directories and Other Materials, and Its Rareness as a Surname

The Examining Attorney made of record a portion of the results of a search of the Lexis Public Records database for persons in the United States with the surname Hechter. It is reproduced below:



Lexis® Switch Client | Preferences | Help | Sign Out

My Lexis™ Search Get a Document Shepard's® More History Alerts

All Legal News & Business Public Records Trademark Law Add/Edit Subtabs

View: Results List 1 - 10 of 174 NEXT

Search: Public Records > Surname > Search Results

Terms: last-name(hechter) maxresults(500) (Edit Search | New Search)

Select for Delivery or View Checked

No.	Name	Address	Phone
1.	HECHTER, A	PALM SPRINGS, CA 92264	760-320-1064
2.	HECHTER, ADRIANA	120 ESPERANZA LAREDO, TX 78041-2608	956-242-8118
3.	HECHTER, ALICIA	19009 ERWIN TARZANA, CA 91335-6730	818-941-9865
4.	HECHTER, ALISSA R	3670 NW 87TH HOLLYWOOD, FL 33024-8732	954-921-4200
5.	HECHTER, ALLEN P	20908 VERNE LAKEWOOD, CA 90715-1637	562-225-3655
6.	HECHTER, AMIR	6727 FLANDERS STE 215 SAN DIEGO, CA 92121-2926	619-818-7746
7.	HECHTER, ARI	4301 W 66TH MINNEAPOLIS, MN 55435-1611	952-484-1337
8.	HECHTER, B	4545 VALLEY VIEW RD MINNEAPOLIS, MN 55424-1861	952-929-9424
9.	HECHTER, BRANDON CHRISTOPHER	3640 FOX GLEN LAS VEGAS, NV 89108-5238	702-645-0523
10.	HECHTER, BRENT L	15 VIA CASTILLA UNIT E LAGUNA WOODS, CA 92637-3728	818-522-8736

Search: Public Records > Surname > Search Results

Terms: last-name(hechter) maxresults(500) (Edit Search | New Search)

Date/Time: Monday, December 22, 2014 1:41 PM

The Lexis evidence shows that there are 174 people in the United States with the surname Hechter. The Examining Attorney also made of record three stories from online publications about specific persons in the United States with the surname Hechter, the results of a Google search about Daniel Hechter, two media articles

referencing Daniel Hechter, a Wikipedia page about Daniel Hechter, and pages identifying “Daniel Hechter” as a clothing brand and as a publication together with other publications, namely Vogue, GQ, and Mademoiselle. We find that the evidence from Applicant’s website, as well as the Internet evidence discussed below, supports a finding that Hechter is a surname, and specifically the surname of a person connected to Applicant.

Applicant attacks this evidence on two alternative grounds. First, Applicant challenges the probative value of the evidence *per se*. Second, Applicant argues that if the Lexis evidence, media articles, and other Internet evidence show that there are only 174 people in the United States with the surname Hechter, the Board must give this fact “more weight than the others because of the extreme rareness of the surname,” 4 TTABVUE at 9, and that “the rarity of a surname is of particular importance in the weighing of the *Benthin* factors.” 7 TTABVUE at 7. We address these grounds in turn.

With respect to the probative value of the Lexis results, Applicant first notes that while the Examining Attorney claimed that the Lexis search identified 174 people in the United States with the surname Hechter, only the first 10, in alphabetical order, were identified in the page made of record, preventing Applicant from examining the accuracy of the Examining Attorney’s claim or sorting out possible duplicates. 4 TTABVUE at 6; 7 TTABVUE at 4-5. The Examining Attorney responds that “it is common practice for examining attorney’s (sic) to attach as evidence only the first page of the Lexis Public Records Database” due to the limited resources available to

the Patent and Trademark Office when examining applications. 6 TTABVUE at 10 (Examiner Brief).

Examining attorneys appear to routinely submit only small portions of the results of database searches in surname cases. *See, e.g., Eximius Coffee*, 120 USPQ2d at 1280 (last page of search containing approximately 950 total listings made of record); *Integrated Embedded*, Serial No. 86140341, 13 TTABVUE at 6 (first 100 out of more than 13,000 listings made of record). Particularly in the case of an uncommon or rare surname, this practice may affect the usefulness of search evidence depending upon the specific facts of a case. *Compare Eximius Coffee*, 120 USPQ2d at 1280 (last page of search, which included two sets of duplicative entries, had limited probative value, but still tended to show that Aldecoa was a rare surname) *with Integrated Embedded*, Serial No. 86140341, 13 TTABVUE at 6 (first 100 listings accepted as sufficient sampling of search results showing that more than 13,000 Americans had the surname Barr). We find here that while the better practice would be to submit more of the results, or all of them if practicable, in a search that reveals such small numbers, the single page from the search, which lists 10 people with the surname Hechter with addresses in California, Texas, Florida, Minnesota, and Nevada, is a sufficient sampling of the overall search results to show that individuals with the surname reside throughout the United States.⁹ *See Integrated Embedded*, Serial No.

⁹ Applicant argues that the fact that two of the persons listed on the page are identified only by their first initials made it unclear “whether these entries are duplicates of any other entries on the list with given names starting with the same letter.” 4 TTABVUE at 6. Because addresses and telephone numbers are also listed, it is highly unlikely that the person identified as “Hechter, A.” in Palm Springs, California is the same person as the others on

86140341, 13 TTABVUE at 6 (listing of 100 persons with the surname Barr included addresses in 28 states and the District of Columbia). As in *Eximius Coffee*, the Lexis search evidence here “tends to show that [HECHTER] is a surname, but one that is rarely encountered by the consuming public.” *Eximius Coffee*, 120 USPQ2d at 1280. *See also Benthin*, 37 USPQ2d at 1333 (slightly over 100 listings of surname Benthin in PHONEDISC U.S.A. database probative of finding that Benthin was a surname in United States).

Applicant’s attack on the probative value of the media articles is that there is no evidence that the three persons named Eliana Hechter, Israel Hechter, and Michael Hechter who are mentioned in the media articles “have received any notoriety in the United States.” 4 TTABVUE at 6. The possible lack of notoriety of these people goes primarily to the issue of the extent to which United States consumers may have been exposed to Hechter as a surname, not to whether Hechter is a surname at all.¹⁰ We reject the Examining Attorney’s claim that the persons discussed in the media stories “have received notoriety in the United States” because of the nature of the stories and the publications in which they appeared, 6 TTABVUE at 12, but the stories “are the type of evidence that can be probative and aid analysis because they show public

the list whose first names also begin with the letter “A” and who have different addresses and telephone numbers. *Cf. Eximius Coffee*, 120 USPQ2d at 1280 (two sets of duplicative entries on single page made of record).

¹⁰ In *In re Gregory*, 70 USPQ2d 1792, 1794-95 (TTAB 2004), the case cited by Applicant in support of this argument, the Board found that “Rogan” was not a rare surname, even though it was the surname of only 1,100 people in the United States, because those people included James Rogan, who had achieved a measure of notoriety.

exposure to [HECHTER] used as a surname.” *Eximius Coffee*, 120 USPQ2d at 1281. While they “do not reflect the broad exposure that would place a rarely encountered surname more frequently in the public eye,” *id.*, they do corroborate the Lexis search results in showing that Hechter is a surname in the United States.

With respect to the other Internet evidence, Applicant argues that this evidence is not relevant to the United States and is “unlikely to be encountered by an appreciable number of people in the United States.” 4 TTABVUE at 8. We agree with Applicant that the Wikipedia page about Daniel Hechter and the Internet materials, other than Applicant’s website and the media stories about Americans named Hechter, have little probative value on the issue of the primary significance of HECHTER to consumers in the United States in the absence of evidence of the extent of their exposure to Americans.

Turning next to Applicant’s alternative argument regarding rareness, the Examining Attorney properly concedes that the record shows that HECHTER is a “relatively rare surname.” 6 TTABVUE at 11. Applicant cites four non-precedential decisions, *In re Bovis*, Serial No. 77502609 (TTAB September 28, 2010), *In re Hall Wines, LLC*, Serial No. 78926151 (TTAB February 10, 2009), *In re Okamoto Corp.*, Serial No. 857394429 (February 6, 2015), and *In re SieMatic Schweiz GmbH*, Serial No. 79033882 (August 14, 2009), 4 TTABVUE at 9; 7 TTABVUE at 6, n.9, in support of its claim that Hechter is such a rare surname in the United States that its rareness should be the dispositive factor on the issue of whether it is primarily merely a surname.

In *Eximius Coffee*, the Board held that “[w]hile the fact that ALDECOA appears to be a relatively rare surname weighs in Applicant’s favor, it does not end the inquiry. Section 2(e)(4) makes no distinction between rare and commonplace surnames . . . and even a rare surname is unregistrable if its primary significance to purchasers is a surname.” *Eximius Coffee*, 120 USPQ2d at 1281 (citations omitted). “The statute does not exempt wholesale from this prohibition those surnames shared only by a few, or provide that the purpose of the prohibition is to protect others’ rights to use their surnames except from those with uncommon surnames.” *Id.* at 1282. In other words, the degree of rareness of a surname alone can never make a surname eligible for registration on the Principal Register if the record, as a whole, shows that the relevant purchasing public “is more likely to perceive [the mark] as only a surname than as something else.” *Id.* at 1283. Although we agree that Hechter is a rare surname, we find, on the basis of the Lexis search results and the media articles in the record and Applicant’s related statements, that the extent to which the purchasing public in the United States has been exposed to “Hechter” as a surname is not insignificant.

Non-Surname Meanings for “Hechter”

“Even though a mark may have been adopted because it is the surname of one connected with the business, it may not be primarily merely a surname under the statute because it is also a word having ordinary language meaning. The language meaning is likely to be the primary meaning to the public . . . On the other hand, where no common word meaning can be shown, a more difficult question must be

answered concerning whether the mark presented for registration would be perceived as a surname or as an arbitrary term.” *Darty*, 225 USPQ at 654.

The Examining Attorney introduced evidence from the Collins American English Dictionary that the term “hechter” has no “ordinary language” or “common word” meaning in American English. Applicant argues that “the print-out from a single online dictionary fails to establish that HECHTER has no recognized meaning other than that of a surname,” 4 TTABVUE at 8, but Applicant provided no evidence of any such recognized meaning and no evidence that HECHTER would be perceived “as an arbitrary term,” *Darty*, 225 USPQ at 654, or otherwise would be perceived as having any significance other than as a surname.

Instead, Applicant argues that the Examining Attorney’s “evidence shows that DANIEL HECHTER is just as frequently identified as a brand as it is the name of a person.” 4 TTABVUE at 7. The Examining Attorney responds that evidence of the distinctiveness of DANIEL HECHTER is “not pertinent to a determination of surname significance” for HECHTER alone, 6 TTABVUE at 13, citing *In re Cazes*, 21 USPQ2d 1796, 1797 (TTAB 1991) and *In re McDonald’s Corp.*, 230 USPQ 304, 307 (TTAB 1986). We find that regardless of the distinctiveness of DANIEL HECHTER as a mark, the absence of evidence of any non-surname meaning for the term “hechter” supports a finding that HECHTER has no meaning in the United States other than as a surname.

The Structure and Pronunciation of HECHTER

A consideration noted in *Benthin* is whether a mark has the “structure and pronunciation” of a surname. *Benthin*, 37 USPQ2d at 1333. “Applicants and examining attorneys may submit evidence that due to a term’s structure or pronunciation, the public would or would not perceive it to have surname significance.” *Eximius Coffee*, 120 USPQ2d at 1280. Only the Examining Attorney addressed this issue here in arguing that HECHTER on its face would not be perceived as an initialism, acronym, or coined term. 7 TTABVUE at 12. This is a “decidedly subjective” inquiry, *Benthin*, 37 USPQ2d at 1333, and in the absence of evidence going to this factor, we find the “structure and pronunciation” consideration to be neutral in our determination of surname significance on this record.

Stylization of HECHTER Mark

Another consideration noted in *Benthin* is whether the stylization of lettering of a mark is distinctive enough to create a separate commercial impression beyond the mark’s significance as a surname. *Benthin*, 37 USPQ2d at 1333-34. Applicant described its mark in the application as consisting of “the navy blue stylized wording ‘HECHTER,’” but Applicant does not argue that HECHTER is not primarily merely a surname on the basis of these features. We agree with the Examining Attorney that the coloration and presentation of the HECHTER mark do “not rise to the level of being sufficiently stylized to remove the primary significance from that of a surname.” 6 TTABVUE at 15. Accordingly, we find this factor to be neutral. *Cf. Benthin*, 37

USPQ2d at 1333-34 (panel majority stated that it would have found Benthin to be primarily merely a surname because “[w]hile Benthin is indeed a rare surname, by the same token, it has no meanings other than that of a surname, and . . . Benthin is the name of applicant’s Managing Director,” but that the highly stylized presentation of the mark tipped the balance in favor of a finding that the mark was not primarily merely a surname).

Conclusion

The record as a whole established that HECHTER is the surname of Applicant’s founder, that it is the surname of other people in the United States, albeit a very rare one, that there is no other demonstrated meaning of “hechter” than as a surname, and that the modest stylization of the mark does not affect its status as a surname. The Examining Attorney thus established a *prima facie* case that HECHTER is primarily merely a surname on the basis of evidence similar in nature to the evidence that established a *prima facie* case in *Darty*. As in *Darty*, Applicant “submitted no evidence that the [HECHTER] has any non-surname significance” and relied primarily on the argument that HECHTER “is so unusual a surname that the public would be likely to perceive it as a coined term . . . rather than as a surname.” *Darty*, 225 USPQ at 653. As a result, “there is no persuasive evidence in the record that [HECHTER] would be perceived as anything other than as a surname in the United States.” *Eximius Coffee*, 120 USPQ2d at 1283. Because Applicant failed to rebut the Examining Attorney’s *prima facie* case, and the record as a whole supports a finding

that HECHTER is primarily merely a surname in the United States, we affirm the refusal to register.

Decision: The refusal to register is affirmed.