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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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| Proceeding             | 79156860   |
| Applicant              | Aulbach Lizenz AG  |
| Applied for Mark       | HECHTER  |
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Applicant Name: Aulbach Lizenz AG.

Mark: **HECHTER**

Serial No. 79/156860

Examining Attorney: Jonathan R. Falk

Law Office 111

**APPEAL BRIEF OF APPLICANT**

Pursuant to the Notice of Appeal filed on March 2, 2016, the Applicant has appealed the Trademark Examining Attorney's FINAL refusal to register the applied-for mark under Trademark Act Section 2(e)(4), 15 U.S.C. § 1052(e)(4), on the basis the applied-for mark is primarily merely a surname. This is the sole issue on appeal.

**TABLE OF AUTHORITIES**

**CASES**

*In re Benthin Mgmt. GmbH*, 37 USPQ2d 1332 (TTAB 1995)..... 7,8

*In re Etablissements Darty et Fils*, 225 USPQ 652 (Fed. Cir. 1985)..... 4

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**STATUTES**

15 U.S.C. § 1052(e)(4).....1,8

## FACTS

United States trademark application serial no. 79156860 (hereinafter “the ‘860 application”) is an extension of protection of International Registration no. 1227390. The filing date of the ‘860 application is August 12, 2014. The ‘860 application seeks the registration of the mark

**HECHTER**

for goods in International Classes 18 and 25.

On December 23, 2014, the ‘860 application was refused registration under Section 2(e)(4) of the Trademark Act. This refusal was made final in an Office Action dated September 9, 2015. Applicant timely filed a Notice of Appeal with the Board on March 2, 2016.

## EVIDENCE OF RECORD

The evidence of record consists of:

- a print-out from the Lexis Public Records database indicating that there are 174 results for a last name search for HECHTER. *See* December 24, 2014 Office Action. The print-out attached to the Office Action lists 10 of the results showing a name, an address and a telephone number for individuals with the surname HECHTER.
- A print-out from the Collins online English dictionary showing no entry for “hechter.” *See* September 9, 2015 Office Action.
- A print-out from Wikipedia of an entry for French fashion designer “Daniel Hechter.” *See* September 9, 2015 Office Action.
- A print-out from Applicant’s website identifying “Daniel Hechter” as a French fashion designer. *See* September 9, 2015 Office Action.

- A print-out of the results of a Google search for “Daniel Hechter.” *See* September 9, 2015 Office Action.
- An excerpt from what appears to be a web page that mentions a “Michael Hechter.” *See* September 9, 2015 Office Action.
- An excerpt from what appears to be a web page that mentions a fashion show held by “Daniel Hechter” in the 1960s. *See* September 9, 2015 Office Action.
- An excerpt from what appears to be a web page that lists “Daniel Hechter” as a “major brand.” *See* September 9, 2015 Office Action.
- An excerpt from what appears to be a web page that identifies “Daniel Hechter” as the name of a periodical in the same genre as Vogue, GQ and Mademoiselle. *See* September 9, 2015 Office Action.
- An excerpt from what appears to be a web page that mentions an “Israel Hechter.” *See* September 9, 2015 Office Action.
- An excerpt from what appears to be an online news article that reports on the death of an “Eliana Hechter.” *See* September 9, 2015 Office Action.

## **ARGUMENTS**

The sole issue in this case is whether the stylized mark HECHTER (depicted above) is primarily merely a surname within the meaning of Section 2(e)(4) of the Trademark Act. The test for determining whether a mark is primarily merely a surname is the primary significance of the mark as a whole to the purchasing public. *In re Hutchinson Tech. Inc.*, 7 USPQ2d 1490, 1492 (Fed. Cir. 1988). 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*, 225 USPQ 652, 653 (Fed. Cir. 1985). If the examining attorney makes that showing, then all of the evidence from the

examining attorney and the applicant must be weighed to make the determination as to whether Section 2(e)(4) of the Trademark Act is a bar to registration. *See In re Sava Research Corp.*, 32 USPQ2d 1380, 1381 (TTAB 1994).

Applicant avers that the Examining Attorney has failed to establish a *prima facie* case that HECHTER is primarily merely a surname. The print-out from the Lexis Public Records database identifies 10 individuals. Two of the ten individuals are identified only by an initial so that it is not clear whether these entries are duplicates of any of the other entries on the list with given names starting with the same letter. The web evidence identifies four more individuals—Eliana Hechter, Israel Hechter, Michael Hechter and Daniel Hechter. The web page about Eliana Hechter indicates that she died in 2014. The web pages about Daniel Hechter indicate that he is a French fashion designer currently residing in Switzerland. Thus, the evidence of record establishes that, at most, a total of **12** individuals currently living in the United States have the surname HECHTER.

Even if it were assumed that the 174 records identified in the Lexis Public Records database identified unique, living individuals with the surname HECHTER, such a fact would not alter the conclusion HECHTER is a very rare surname. 174 people out of a total population in excess of 315 million represents that only a miniscule fraction of population share the surname HECHTER and confirms that HECHTER is an exceedingly rare surname. For comparison, Applicant notes that the Board found the surname “Baik” to be an “extremely rare surname” where the evidence of record showed that 456 individuals shared the Baik surname. *In re Joint-Stock Co. “Baik”*, 84 USPQ2d 1921, 1922 (TTAB 2007). Likewise, in *In re United Distillers plc.*, 56 USPQ2d 1220, 1221 (TTAB 2000), the Board found “Hackler” to be a “rare surname” despite 1,295 listings in phone directories.

The record does not contain any evidence that the individuals identified with the surname HECHTER have received any notoriety in the United States. Neither the Eliana Hechter, the Israel Hechter nor the Michael Hechter identified in the web excerpts can be described as public figures based on the evidence of record. The web page evidence identifies Michael Hechter as a scholar studying the effects of imperial rule popular uprising, it identifies Israel Hechter as a San Diego businessman involved in a bribery scheme relating to mortgages and it identifies that Eliana Hechter as a former Rhodes Scholar and medical school student that died in 2014. Each mention is appears to be a minor one-off event and each event is reported in relatively obscure sources for news and information. Thus, the evidence of record does not alter the conclusion that HECHTER is an exceedingly rare surname. *Cf. In re Gregory*, 70 USPQ2d 1792, 1795 (TTAB 2004) (evidence of public figures with surname Rogan supported conclusion that public would perceive Rogan as a surname).

Lastly, the evidence of record contains several references to retired French fashion designer Daniel Hechter. Applicant 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, in fact, references to this same person.

The evidence of record consists of a Wikipedia page for Daniel Hechter, a print-out from Applicant's website announcing the 50<sup>th</sup> Anniversary of the brand DANIEL HECHTER, search engine summary results for a search for "daniel hechter," an article about an expensive car being sold in a French car show that was once owned by an individual who noteworthy because he had "help[ed] Daniel Hechter to finance his second fashion show in the 1960s," a list of "major brands associated with HiLITE mall" (in India) that includes "DANIEL HECHTER" and an

article about an author who appeared in the pages of the magazines “GQ, Mademoiselle and Daniel Hechter.” With respect to the search engine summary results, three are in French, three of the ten hits mentioning “HECHTER” are for the three articles mentioned above, one is for the previously-discussed article about the scholar Michael Hechter, one identifies “Daniel Hechter” as a brand, and the last two hits mention a “Daniel Hechter” in connection with the Australian rules football team “Freemantle Football Club.” None of these pieces of evidence are relevant to the United States and are unlikely to be encountered by an appreciable number of people in the United States. Thus, the evidence of record does not establish that there is routine or common usage of HECHTER by the general public in the United States. In fact, the evidence shows that DANIEL HECHTER is just as frequently identified as a brand as it is the name of a person.

In sum, the evidence of record, even taken as a whole, does not reflect the type of uses that would outweigh the extreme rareness that HECHTER is used as a surname.

Moreover, even if the evidence proffered by the Examining Attorney somehow establishes a *prima facie* case that the applied-for mark is primarily merely a surname, the evidence of record does not establish that the primary significance of the mark as a whole to the purchasing public is that of a surname. Applicant avers that the extreme rareness of HECHTER as a surname outweighs the other factors for evaluating whether a mark is primarily merely a surname within the meaning of Section 2(e)(4) of the Trademark Act. *See, e.g., In re Benthin Mgmt. GmbH*, 37 USPQ2d 1332, 1333 (TTAB 1995). There is no evidence of record that would support a finding that the applied-for mark has the “look and feel” of a surname. In addition, the print-out from a single online dictionary fails to establish that HECHTER has no recognized meaning other than that of a surname. Furthermore, the applied-for mark has been filed in a

stylized manner making the fifth *Benthin* factor relevant in this case. Thus, the final three factors discussed in *Benthin* are largely neutral in this case.

The only factor that tends to favor upholding the instant refusal is the fact that the retired French fashion designer, Daniel Hechter, is affiliated with Applicant. However, Applicant avers that the mere affiliation of Applicant to this individual does not outweigh the extreme rareness of Hechter as a surname in the United States. *See generally In re Nick Bovis*, Serial No. 77502609, pp. 9-12 (TTAB September 28, 2010) [not precedential] (explaining that “[b]oth the legislative history and the statutory language make it clear that the fact that a term may be someone’s surname, even applicant’s own surname, is not sufficient to bar its registration; it must be primarily merely a surname.”); *In re Hall Wines, LLC*, Serial No. 78926151 (TTAB February 10, 2009) [not precedential] (“In balancing the aforementioned factors, we make no secret that the first factor, rareness of the surname, has been given much more weight than the other three factors. And, in doing so, we find that any slight tilt toward finding the mark as being primarily a surname based on the other factors is outweighed by the fact that there are fewer than 300 persons with the surname “Bergfeld.” Ultimately, we conclude that applicant’s proposed mark, BERGFELD, is so rarely used as a surname, and that the remaining *Benthin* factors provide little additional support for a finding that it would be so perceived by consumers, that it is not primarily merely a surname.”).

Balancing the *Benthin* factors, and giving the first factor more weight than the others because of the extreme rareness of the surname, Applicant avers that the applied-for mark is not primarily merely a surname. To extent there is doubt, such doubt must be resolved in favor of Applicant. *United Distillers*, 56 USPQ2d at 1222. Therefore, Applicant requests that the refusal

to register the applied-for mark under Section 2(e)(4) of the Trademark Act, 15 U.S.C. § 1052(e)(4) be reversed and that the application be approved for publication.

Respectfully submitted,

Dated: April 27, 2016

/jmenker/  
James R. Menker, Attorney of Record

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