

This Opinion is not a
Precedent of the TTAB

Mailed: June 24, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Enumclaw Farms LLC
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Serial No. 85942195
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Frances M. Jagla of Lane Powell PC,
for Enumclaw Farms LLC.

John S. Yard, Trademark Examining Attorney, Law Office 115,
John T. Lincoski, Managing Attorney.

—
Before Mermelstein, Wellington, and Goodman,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Enumclaw Farms LLC (“Applicant”) seeks registration on the Principal Register of the mark DICKMAN’S (in standard characters) for “fruit-based spreads; jellies and jams; marmalade; pickled fruits; pickled vegetables; pickles; preserved fruit and vegetables; preserved fruits; processed fruits; processed vegetables and fruits” in International Class 29.¹

¹ Application Serial No. 85942195 was filed on May 24, 2013, under Section 1(b) of the Trademark Act, based on an intent to use the proposed mark in commerce.

The Trademark Examining Attorney 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 was made final, Applicant appealed to this Board and simultaneously filed a request for reconsideration. The Examining Attorney denied the request for reconsideration and this appeal proceeded. The case is fully briefed.

For the following reasons, we affirm the refusal.

Primarily Merely a Surname

Section 2(e)(4) of the Trademark Act precludes registration on the Principal Register of a mark which is "primarily merely a surname" without a showing of acquired distinctiveness under Section 2(f) of the Act, 15 U.S.C. §1052(f). *In re Etablissements Darty et Fils*, 759 F.2d 15, 225 USPQ 652, 653 (Fed. Cir. 1985) ("The statute ... reflects the common law that exclusive rights in a surname per se can not be established without evidence of long and exclusive use which changes its significance to the public from a surname of an individual to a mark for particular goods or services."). A mark is primarily merely a surname if "the primary significance of the mark to the purchasing public" is a surname. *In re Kahan & Weisz Jewelry Mfg. Corp.*, 508 F.2d 831, 184 USPQ 421, 422 (CCPA 1975), citing *Ex parte Rivera Watch Corp.*, 106 USPQ 145, 149 (Com'r Pat. 1955).

The Examining Attorney bears the initial burden of making a *prima facie* showing of surname significance. *In re Etablissements Darty*, 225 USPQ at 653. If the Examining Attorney makes that showing, then we must weigh all of the evidence

from the Examining Attorney and the Applicant, to determine ultimately whether the mark is primarily merely a surname. *See In re Sava Research Corp.*, 32 USPQ2d 1380, 1381 (TTAB 1994). If there is any doubt, we must resolve the doubt in favor of the applicant. *See In re Benthin Mgmt. GmbH*, 37 USPQ2d 1332, 1334 (TTAB 1995).

In *Benthin*, the Board identified five factors to consider in determining whether a mark is primarily merely a surname: (1) the frequency and exposure to the public of the mark being used as a surname; (2) whether anyone connected with the applicant has the mark as a surname; (3) whether the mark has any recognized meaning other than as a surname; (4) whether the mark has the structure and pronunciation of a surname; and (5) whether the manner in which the mark is displayed might negate any surname significance. *Id.* at 1332-33. The *Benthin* factors are not an exhaustive list of relevant considerations, nor set forth in order of importance, and each factor's relevance and probative weight may vary from case to case.

In the case before us, the fifth factor is not relevant to our analysis, because Applicant seeks to register its mark in standard characters. With respect to the second factor, Applicant has stated that "DICKMAN'S ... is not the proper surname of anyone connected with Applicant. Applicant chose this mark arbitrarily...."²

As to the third factor, the Examining Attorney and Applicant agree that there is no demonstrated alternative meaning for the term "dickman."³

² Applicant's response filed on December 26, 2013. While this factor is inapposite in this case, it can be a "highly persuasive" factor. *See In re Etablissements Darty*, 225 USPQ at 653.

³ The Examining Attorney submitted evidence, attached to the Office action issued on March 11, 2014, showing that the word "dickman" does not appear in several dictionaries, including

With regard to the factor involving the number of persons and prevalence of DICKMAN used as a surname, the Examining Attorney submitted the results of a search for persons with the surname DICKMAN in the LexisNexis Public Records database indicating “Total number found: 1729” and sets forth the first 100 names, addresses and telephone numbers.⁴ He also submitted over 100 news article excerpts, the results of a search for “dickman” from the LexisNexis “Major US Newspapers” database, that overwhelmingly show “Dickman” being used as a surname; and internet printouts showing the Google search results for the same term (again, in lower case), in an excerpted format, also reflecting “Dickman” being used as a surname.⁵

Applicant, for its part, submitted printouts from the U.S. Census Bureau website indicating 5,682 occurrences for people with this surname in the 2000 census and that it ranks 5,601st for most common surname.⁶ Applicant also submitted printouts from the Wikipedia online dictionary website regarding a list of most common surnames for sake of comparison.⁷

Collins English Dictionary, the Macmillan English Dictionary and the Merriam-Webster Online English Dictionary.

⁴ Submitted with Office action issued on September 11, 2013.

⁵ Submitted with Office action issued on August 13, 2014. The vast majority of the Google search result excerpts clearly show “Dickman” being used as a surname. In a very few instances, *e.g.*, “Dickman’s Meat & Deli,” “Dickman & Associates,” and “Dickman Supply,” we cannot conclude with absolute certainty whether “Dickman” represents the surname of persons affiliated with these businesses or if it has no surname significance at all.

⁶ Submitted with Applicant’s response filed on December 26, 2013.

⁷ Submitted with Applicant’s response filed on May 19, 2014.

Finally, as to the fourth factor involving the structure of DICKMAN and whether it is likely to be perceived as surname or some arbitrary term, the Examining Attorney contends that the suffix –MAN is “extremely common in surnames” and points to certain names, such as “Bachman, Goodman, Herman ...”⁸ He also asserts that the presentation of a surname in possessive form does not diminish its surname significance, but actually serves to reinforce a surname significance (“here DICKMAN’S would generally convey to consumers that the goods come from the Dickman company or family or the like.”)⁹ In support, he cites to TMEP §1211.01(b)(v); and cases involving similar circumstances, e.g., *In re Binion*, 93 USPQ2d 1531, 1537 (TTAB 2009) (BINION’S) and *In re Woolley’s Petite Suites*, 18 USPQ2d 1810, 1812 (TTAB 1991) (WOOLLEY’S). Applicant, on the other hand, argues the evidence is “insufficient” and a prima facie case cannot be made based solely on the facts that DICKMAN’S may end with common surname suffix and that it bears a resemblance to more common names.

We agree with Applicant to the extent that the Examining Attorney has not presented evidence of other names having similar structure or pronunciation and this factor is therefore inapposite in this case. Nevertheless, Applicant’s suggestion that the refusal to register DICKMAN’S is being based solely on the question of whether “dickman” possesses a common surname structure and pronunciation is without

⁸ 8 TTABVUE 11 (Examining Attorney’s Brief). We note that the Examining Attorney did not submit any evidence to support his the proposition that the suffix –MAN is common or that the mentioned surnames are common ones. Moreover, the suggestion of “Herman” as an example of a common surname is not well-taken inasmuch as it may also be a given name.

merit. As discussed below, there are other factors to support the surname refusal and they are supported by evidence.

Upon consideration of the entire record, including evidence not specifically mentioned above, and weighing the aforementioned factors, we find that DICKMAN'S will be perceived by consumers as primarily merely a surname. Even allowing for some duplicate entries, namely, the same persons being listed in either the news article excerpts or in the LexisNexis Public Records evidence, there remains a significant number of persons with this surname, so that there can be little question of public exposure to the significance of the term as a surname. The fact that the number of persons with the surname represents a small percentage of the total U.S. population is inconsequential so long as the evidence sufficiently demonstrates that consumers are likely to primarily understand DICKMAN'S as a surname. In this case, the Examining Attorney has made such a prima facie showing. The evidence shows that the primary and almost exclusive manner in which the public is exposed to the term "dickman" is in the context of it being a surname. We find it particularly persuasive that the Examining Attorney did not, in his words, "cherry-pick" the results for searches of the term "dickman"¹⁰ and that the first non-duplicative articles or entries were provided and they reflected surname usage. Indeed, on the record before us, we find no other plausible manner in which consumers would perceive the proposed mark other than as a surname. We further agree with the Examining

¹⁰ Again, we note that the searches (from the Google search engine and the LexisNexis database) were made for the term "dickman" without the use of any capital letters.

Attorney's assertion that the 'S possessive ending of the mark reinforces the surname significance of the mark because consumers, viewing the mark on the goods, will interpret this as suggesting that the goods, *e.g.*, fruit-based spreads, jelly, marmalade, pickled fruits, etc., are prepared and sold by someone with the surname "Dickman."

In sum, we considered the record evidence in its entirety and all relevant factors and have no doubt that consumers are likely to view and understand the mark DICKMAN'S on the identified goods to be a surname. Particularly important are the many examples of use of Dickman as a surname and virtually no uses as a term with clear non-surname significance.

Decision: The refusal to register is affirmed. The application will be abandoned in due course.