

This Opinion is not a
Precedent of the TTAB

Mailed: March 2, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Detroit Rivertown Brewing Company, LLC
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Serial No. 86669897
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Daniel Christopherson of Lehrman Beverage Law PLLC,
for Detroit Rivertown Brewing Company, LLC.

Zachery Bello, Trademark Examining Attorney, Law Office 111,
Robert Lorenzo, Managing Attorney.

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Before Kuhlke, Adlin and Pologeorgis,
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

Detroit Rivertown Brewing Company, LLC (“Applicant”) seeks registration on the Principal Register of the mark ATWATER SPIRITS (in standard characters; SPIRITS disclaimed) for “distilled spirits” in International Class 33.¹

¹ Application Serial No. 86669897, filed on June 22, 2015, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). Applicant claims ownership of Principal Register Registration No. 3928495 for the mark ATWATER BLOCK BREWERY (BREWERY disclaimed) for “beer.”

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(e)(4) of the Trademark Act, 15 U.S.C. § 1052(e)(4), on the ground that ATWATER SPIRITS, when viewed in its entirety, is primarily merely a surname.

When the refusal was made final, Applicant appealed. We affirm the refusal to register.

I. Applicable Law – Primarily Merely a Surname

Section 2(e)(4) of the Trademark Act precludes registration of a mark on the Principal Register 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).² 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 also 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) (“[A] correct resolution of the issue can be made only after the primary significance of the mark to the purchasing public is determined ...”) and *In re Etablissements Darty et Fils*, 759 F.2d 15, 225 USPQ 652, 653 (Fed. Cir. 1985) (“*Darty*”). 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

² As is normally the case with § 1(b) applications, Applicant has not claimed acquired distinctiveness under § 2(f) of the Trademark Act. *See generally* TMEP § 1212.09 (January 2017).

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. 225 USPQ at 653. The Board's oft-cited “*Benthin* factors,” see *In re Benthin Mgmt. GmbH*, 37 USPQ2d 1332, 1333-34 (TTAB 1995), are also examples of inquiries that may lead to evidence regarding the purchasing public’s perception of a term’s primary significance.³ These inquiries or “factors” are not exclusive and any of these circumstances -- singly or in combination -- and any other relevant circumstances may shape the analysis in a particular case.³ *In re Eximius Coffee, LLC*, 120 USPQ2d 1276, 1278 (TTAB 2016).

When we are faced with a Section 2(e)(4) refusal of a term in standard character form, with no other literal or design elements, we consider the impact the applied-for term has or would have on the purchasing public because “it is that impact or impression which should be evaluated in determining whether or not the primary significance of a word when applied to a product is a surname significance. If it is, *and it is only that*, then it is primarily merely a surname.” *In re Harris-Intertype Corp.*, 518 F.2d 629, 186 USPQ 238, 239 (CCPA 1975) (quoting *Ex parte Rivera Watch Corp.*, 106 USPQ 145, 149 (Comm'r Pat. 1955)) (emphasis in original).

³ In *Benthin*, the Board stated that “factors” to be considered in determining whether a term is primarily merely a surname include (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; (4) whether the term has the “structure and pronunciation” of a surname; and (5) whether the stylization of lettering is distinctive enough to create a separate commercial impression. Where, as here, the mark is in standard characters, it is unnecessary to consider the fifth factor. *In re Yeley*, 85 USPQ2d 1150, 1151 (TTAB 2007).

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. There is no rule as to the kind or amount of evidence necessary to show that the applied-for mark would be perceived as primarily merely a surname. This question must be resolved on a case-by-case basis. *Id.* at 654; *see also, e.g., In re Pohang Iron & Steel Co.*, 230 USPQ 79, 79 (TTAB 1986). The entire record is examined to determine the primary significance of a term.

We consider the evidence to determine whether the primary significance of ATWATER SPIRITS to the purchasing public is that of a surname.

Whether ATWATER is Rarely Encountered as a Surname

We first consider the frequency with which ATWATER is encountered or recognized by the public as a surname. In order to show that the primary significance of the term ATWATER is that of a surname, the Examining Attorney has submitted the following evidence:⁴

1. A representative listing generated from a search conducted of an online telephone directory (www.whitepages.com) indicating “5,009 profiles found for ‘ATWATER,’ and 734 possible profiles;”
2. Copies of two use-based third-party registrations: one for the mark ATWATER POTTERY (POTTERY disclaimed), registered under § 2(f) of the Trademark Act and the second for ATWATER SIGNAL for “newspapers for general circulation,” with a § 2(f) statement as to ATWATER;

⁴ *See* September 12, 2015 and March 18, 2016, Office Actions.

3. a Wikipedia biographical article about Lee Atwater, an American political consultant and strategist for the Reagan and George H.W. Bush administrations;
4. an article from the online version of The Nation (www.thenation.com) also concerning Lee Atwater, including a screenshot of a video clip regarding his 1981 comments on the Southern Strategy, that touts Mr. Atwater as the “late, legendary brutal campaign consultant;” and
5. Google search results for the term “ATWATER,” that includes a listing of an article about Lee Atwater, as well as Alexis Atwater, MD.

Applicant argues that the probative value of the Examining Attorney’s Whitepages evidence is limited because it is unclear: (1) what it means to be listed in a profile on Whitepages.com, or what it means to be listed as a “possible match;” (2) whether there are multiple or duplicate profiles for the same individuals, or even fabricated profiles; (3) whether the individuals are alive or deceased; and (4) whether the individuals are American or foreigners.⁵ To this last point, Applicant has submitted evidence indicating that at least 38 profiles of “Atwater” from the whitepages.com listing refer to individuals in Canada.⁶ Applicant also maintains that the number of Whitepages.com listings for “ATWATER,” when compared to the total

⁵ See Applicant’s Appeal Brief, p. 5, 4 TTABVUE 6.

⁶ See Exhibit B of Applicant’s March 14, 2016, Response to Office Action.

population of the United States, demonstrates that the term “ATWATER” is rare and would not be perceived by the purchasing public as primarily a surname.⁷

Applicant’s arguments are unpersuasive. The fact that some of the listings may refer to deceased individuals does not detract from the surname significance of the term ATWATER. Similarly, while some of the listings may refer to individuals residing in Canada, the vast majority of the listings refer to individuals in 30 different U.S. states, as well as the District of Columbia. Furthermore, “the question whether a surname is or is not rare is not to be determined solely by comparing the number of listings of the name to the total number of listings in a vast computerized database.” *In re Gregory*, 70 USPQ2d 1792, 1795 (TTAB 2004). “Given the large number of different surnames in the United States, even the most common surnames would represent but small fractions of such a database.” *Id.*

Moreover, even if “ATWATER” is a relatively rare surname in the United States, that would not *per se* preclude a finding that a term is primarily merely a surname inasmuch as even a rare surname may be held primarily merely a surname if its primary significance to purchasers is that of a surname. *See In re Adlon Brand GmbH & Co. KG C10 Fundus Fonds-Verwal Tungen GmbH*, 120 USPQ2d 1717, 1721 (TTAB 2016) (“The issue to be determined under the statute is whether the public would perceive the surname significance as the proposed mark’s primary significance, not whether the surname is rarely encountered.”); *Eximius Coffee*, 120 USPQ2d at 1281

⁷ See Applicant’s Appeal Brief, p. 6, 4 TTABVUE 7.

(“even a rare surname is unregistrable if its primary significance to purchasers is a surname.”).

Applicant contends that a deceased political strategist for former Presidents that served over 25 years ago (Mr. Atwater) is not a prominent person to the American purchasing public. The fact that Lee Atwater died more than 25 years ago does not diminish the fact that his surname was Atwater, however. In fact, the evidence submitted by the Examining Attorney suggests that he was known to many, in that, not only was he a political strategist for both the Reagan and George H. W. Bush administrations, but he also served as the Chairman of the Republican National Committee and “clearly approved” the “Willie Horton” political advertisement credited with helping to turn the tide during the 1988 Presidential election.⁸

In view of the foregoing, we find that the phone directory listings, census, third-party registrations, Google search results, and online articles collectively show that ATWATER is not rarely used or encountered as a surname, and they collectively demonstrate that the public has been exposed to and will perceive ATWATER as a surname.

Whether ATWATER is the Surname of Anyone Connected with Applicant

There is no evidence to indicate that anyone connected with Applicant has the surname ATWATER; indeed, Applicant states that “ATWATER’ is not the surname of anyone connected with Applicant.”⁹ Even though no one connected with Applicant

⁸ See March 18, 2016, Office Action (Wikipedia article).

⁹ See Applicant’s March 14, 2016, Response to Office Action.

is named Atwater, that says nothing about the primary significance of the term to the purchasing public. *See Adlon*, 120 USPQ2d at 1724 (“[t]he apparent absence of a person named ADLON in Applicant’s current management does not, in itself, reduce the likelihood that the public would perceive the mark as a surname.”).

Whether ATWATER has any Recognized Meaning other than a Surname

In arguing that ATWATER has another, non-surname significance, Applicant points out that “the word ‘ATWATER’ is a combination of the preposition ‘at’ and the noun ‘water,’ which combine to form a phrase connoting being ‘at the water,’” and maintains that “consumers will take a leap of the imagination to anticipate that a business using the phrase ‘Atwater’ is, like Applicant, located ‘at’ or near the ‘water.’” Applicant specifically relies on the “Atwater Family History” entry from “ancestry.com” which includes this definition of “ATWATER” from the ***Dictionary of American Family Names***: “topographic name for someone whose dwelling was by a river or lake, Middle English atte water ‘at the water.’”¹⁰ A topographic name is one that is “derived from general descriptive references to a feature of the landscape such as a stream, a ford, a tree, or a hill.”¹¹ This evidence serves to undercut Applicant’s argument in that it acknowledges ATWATER is a surname and simply provides the derivation of the surname. Applicant also maintains that the Examining Attorney’s own evidence shows that the term “Atwater” is the name of a town in

¹⁰ See Exhibit E of Applicant’s March 14, 2016, Response to Office Action.

¹¹ ***Dictionary of American Family Names*** vol. 1 p. xvi. The Board may take judicial notice of standard reference works. *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1087 n.3 (TTAB 2016) (judicial notice taken from encyclopedia).

California, and thus that the term has a well-known geographical meaning which is just as significant as any surname meaning of the term.¹² Applicant, however, has not established that the town identified in the Examining Attorney's submitted evidence is well known to the purchasing public, just as it has not established that the purchasing public perceives the term as meaning "at the water."

The mere existence of non-surname meanings of the mark does not preclude a finding that the mark is primarily merely a surname. "To be considered primarily merely a surname, a term does not have to be devoid of any non-surname significance." *In re Isabella Fiore LLC*, 75 USPQ2d 1564, 1567 (TTAB 2005). As this Board has previously stated:

The question is not whether a mark having surname significance might also have a non-surname significance, but whether, in the context of the goods or services at issue, that non-surname significance is the mark's primary significance to the purchasing public, thus eclipsing and relegating the mark's surname significance to secondary rather than primary status.

Miller v. Miller, 105 USPQ2d 1615, 1621 (TTAB 2013) (citations omitted). "Thus the determining factor is the primary (not secondary) significance to the public..." *Harris-Intertype*, 186 USPQ at 239. *See also Darty*, 225 USPQ at 653 ("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

¹² *See* Applicant's Appeal Brief, p. 15, 4 TTABVUE16.

services.”). Here, the evidence reveals that ATWATER’s primary significance to spirits consumers is a surname.

Whether ATWATER has the Structure and Pronunciation of a Surname

Applicant argues that “ATWATER” does not have the structure and pronunciation of a surname, relying on a list of the 450 most common surnames according to the 2000 U.S. census data which reveal none beginning with the letters “AT,” containing the combination “TW,” or concluding with the letters “ATER.”¹³ This evidence does not establish whether or not ATWATER as a whole has the structure or pronunciation of a surname, though we do not require evidence to know that many surnames end with the suffix “ter,” such as Baxter, Foster, Hunter, Webster, etc.

Whether Contextual Use by Applicant Reveals Surname Significance

Inasmuch as there is no evidence showing the mark in actual use by Applicant, the record does not reveal any contextual clues that might identify the term as a surname to consumers.

Upon consideration of the record as a whole, and taking into consideration all relevant evidence of the public’s perception, we find that the primary significance of “ATWATER” to the purchasing public is that of a surname.

¹³ See Applicant’s Appeal Brief, p. 16, 4 TTABVUE 17; Applicant’s March 14, 2016, Response to Office Action.

Additional Wording

As for whether ATWATER SPIRITS, as a whole, is primarily merely a surname, we find that the inclusion of the generic term “SPIRITS” does not diminish the applied-for mark’s primary significance as a surname. In this case, Applicant disclaimed “SPIRITS.” The Examining Attorney has made of record a Wikipedia article which demonstrates that the term “spirits” is the common commercial name for Applicant’s identified goods.¹⁴ “Combining the surname with the generic name for the [goods or] services does not overcome a mark’s surname significance.” *Miller*, 105 USPQ2d at 1622.

II. Conclusion.

Given our findings that “ATWATER” would be perceived primarily as a surname and its combination with the term “SPIRITS” does not detract from or change the surname significance conveyed by the mark as a whole, we find that consumers would perceive ATWATER SPIRITS as primarily merely a surname. In reaching this conclusion, we have carefully considered all of Applicant’s arguments and evidence, even if not specifically discussed herein, but have not found them persuasive.

Decision: The refusal to register Applicant’s ATWATER SPIRITS mark under Section 2(e)(4) of the Trademark Act is affirmed.

¹⁴ See September 12, 2015, Office Action.