

**This Opinion is Not a
Precedent of the TTAB**

Mailed: May 10, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Falcon
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Serial No. 86673659
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Steve Zemanick of Four Reasons Legal, LLC
for Jacqueline Falcon.

Parker Howard, Trademark Examining Attorney, Law Office 117,
Hellen Bryan Johnson, Managing Attorney.

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Before Kuhlke, Lykos and Adlin,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

Jacqueline Falcon (“Applicant”) seeks registration on the Principal Register of the mark HUSMAN in standard characters for “Hats; Long-sleeved shirts; Shirts; Sweat shirts; T-shirts” in International Class 25.¹

¹ Application Serial No. 86673659, filed June 24, 2015, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging a bona fide intent to use the mark in commerce.

The Trademark Examining Attorney has refused registration of Applicant's mark pursuant to Section 2(e)(4) of the Trademark Act, 15 U.S.C. § 1052(e)(4), on the ground that the applied-for mark is primarily merely a surname.

When the refusal was made final, Applicant appealed and requested reconsideration. The Trademark Examining Attorney maintained the refusal to register and denied the request for reconsideration. Thereafter, the appeal resumed and is now fully briefed. For the reasons set forth below, we affirm the refusal to register.

Section 2(e)(4) of the Trademark Act of 1946 provides that absent a showing of acquired distinctiveness under Section 2(f), 15 U.S.C. § 1052(f), registration on the Principal Register must be refused if the proposed mark is "primarily merely a surname."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. *In re Beds & Bars Ltd.*, __ USPQ2d __ (Ser. No. 85597669; TTAB May 5, 2017); *In re Eximius Coffee, LLC*, 120 USPQ2d 1276, 1277 (TTAB 2016); *In re United Distillers plc*, 56 USPQ2d 1220, 1221 (TTAB 2000). 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

² "No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it ... (e) Consists of a mark which ... (4) is primarily merely a surname." 15 U.S.C. § 1052.

purchasing public is determined ...”) and *In re Etablissements Darty et Fils*, 759 F.2d 15, 225 USPQ 652, 653 (Fed. Cir. 1985). In *Darty*, the U.S. Court of Appeals for 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. 225 USPQ at 653. In contemplating Section 2(e)(4) as a bar to registration of a term, we also consider the impact the 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)). In *In re Benthin Mgmt. GmbH*, 37 USPQ2d 1332, 1333-34 (TTAB 1995) (“*Benthin*”), the Board identified several examples of inquiries or “factors” that may lead to evidence regarding whether the primary significance of a term to the purchasing public is merely as a surname.³ “However, rather than using these factors as guidelines,

³ Applicant and the Examining Attorney both cite this opinion which is entirely consistent with the Court of Appeals for the Federal Circuit and its predecessor court and Board cases discussed herein. 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

practitioners and examining attorneys have often interpreted them with a rigidity that is not warranted.” *In re Adlon Brand GmbH & Co. KG*, 120 USPQ2d 1717, 1719 (TTAB 2016). “These [Benthin] factors are not exclusive nor presented in order of importance. We make our determination on a case-by-case basis, and any of the *Benthin* factors – singly or in combination – and any other relevant circumstances may shape the analysis in a particular case.” *In re Integrated Embedded*, 120 USPQ2d 1504, 1506 n.4 (TTAB 2016). For example, there may be “contextual clues” regarding use of a proposed mark as a surname. *See, e.g., Azeka Bldg. Corp. v. Azeka*, __ USPQ2d __ (Opp. No. 91218679; TTAB May 3, 2017) (use of possessive form indicative of surname).

Whether the primary significance of an applied-for mark is merely that of a surname is a question of fact. *Darty*, 225 USPQ at 653-54. This question must be resolved on a case-by-case basis. *Id.* at 654.

In support of the refusal, the Examining Attorney has introduced the following evidence:

- Search results from the surname database in Lexis.com showing 779 entries for the surname “Husman.” (September 30, 2015 Office Action).
- Search results from the Whitepages website (www.whitepages.com) showing 940 exact matches and 26,037 possible matches for the surname “Husman” and also referencing the surname “Husman” in 2,254 birth records, 412 death records, 371 marriage records, and 66 divorce records. (October 28, 2016 Denial of Request for Reconsideration).

in standard characters, it is unnecessary to consider the fifth factor. *In re Yeley*, 85 USPQ2d 1150, 1151 (TTAB 2007).


- Search results from the Mongabay.Com web site (http://names.mongabay.com/data/surnames_Bh.htm) stating that “Husman is identified by the U.S. Bureau of the Census as a surname with more than 100 occurrences in the United States for the year-2000 Census” and showing “Husman” appearing 938 times as a surname based on data derived from David. L. Word, Charles D. Coleman, Robert Nunziata and Robert Kominski (2008) “Demographic Aspects of Surnames from Census 2000” U.S. Census Bureau. (April 15, 2016 Office Action).
- Entries entitled “A.E. Houseman” and “Huisman” from *Wikipedia*⁴ purportedly to show that Applicant’s mark “Husman” is similar in structure and pronunciation to other surnames. (September 29, 2014 Office Action).
- Search results from *The Collins American English Dictionary* and *The American Heritage Dictionary* showing no dictionary definitions for “husman.”
- Search results from *Wikipedia* showing no recognized meaning for “husman” and showing entries regarding various individuals bearing the surname “Husman” (Gary Husman, John Husman, and Perry Husman).

The record does not show that Applicant or anyone associated with Applicant bears the surname “Husman.” Nonetheless, the Examining Attorney has demonstrated that HUSMAN is an actual surname, and that because it ends with the suffix “-man”, it has a structure and sound similar to other surnames. The negative dictionary evidence noted above also shows that it has no other “ordinary language meaning.” *See Darty*, 225 USPQ at 653 (in evaluating whether a proposed mark is “primarily merely a surname,” we consider whether “it is also a word having


⁴ In accordance with our practice, we have considered evidence obtained from *Wikipedia* submitted with the Examining Attorney’s first office action since Applicant was afforded the opportunity to rebut that evidence. *See In re Swatch Group Management Services AG*, 110 USPQ2d 1751, 1754 n.4 (TTAB 2014) (Board considered *Wikipedia* evidence submitted with examining attorney’s first office action which applicant had an opportunity to rebut). *See also* Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) § 1208.03 (Jan. 2017).

ordinary language meaning” since “[t]he language meaning is likely to be the primary meaning to the public.”) (citing *Fisher Radio Corp. v. Bird Electronic Corp.*, 162 USPQ 265, 266-67 (TTAB 1969) (BIRD not primarily merely a surname)). In cases such as this where there is “no common word meaning,” we must decide the “more difficult question” of whether the mark “would be perceived as a surname or as an arbitrary term.” *Darty*, 225 USPQ at 653. In other words, “[w]e also consider—if there is evidence to so indicate—whether the public may perceive the mark to be primarily a meaningless, coined term.” *Adlon*, 120 USPQ2d at 1719. In this regard, Applicant contends that her proposed mark HUSMAN is a coined term representing a play on the words “husband” and “man” to refer to an unmarried man in a committed relationship. Applicant argues that her clothing items are “being offered precisely to spread this meaning and celebrate it, as a celebration of males who are committed to their partners outside of marriage.” Brief, p. 6; 7 TTABVUE 11. In support thereof, Applicant points to a single screenshot from her e-commerce website displaying the mark and tag line “HUSMAN: No Band, Just the Man” and her promotion of this marketing concept:⁵

⁵ Applicant’s website excerpt does not include the full address (url) for the web page or the date it was downloaded (either by the information printed on the web page itself, or by providing this information in Applicant’s response). Nonetheless, because the Examining Attorney failed to object, we have considered this evidence. *See In re White*, 73 USPQ2d 1713, 1716 n.5 (TTAB 2004).

**HUSMAN™**
No Band, Just The Man

ABOUT ORDER CONTACT



His **BOND**
Friendship
LOVE
IS **ALL** I ASK FOR
ALL *I need*

WHAT IS HUSMAN™

HUSMAN™ is a new brand of t-shirts for men. The name was inspired by the man who is not my Husband but my Husman. Not everyone marks their commitment by a ring, a ceremony or title. Some of us mark our commitment solely by our loving relationship to another person. It may not be traditional, kosher or spotlighted in society, but it is just as meaningful and just as valid.

This is for every man who is a HUSMAN.

*The ring isn't the thing
The heart, the mind, his commitment
My Husman, without the band
No fluff, no un-kept promises, no hollow words
His bond, friendship, love
Is all I ask for, all I need*

Buy Your Husman™ Merchandise Here

Husman™ is now offering Mens t-shirts from TonyV with a very subtly written HUSMAN logo across chest. Show your Husman how much he means to you!

The HUSMAN™ t-shirts come in regular fit and fitted and sizes small through extra large. Fitted shirts are 100% cotton, regular fit shirts are preshrunk ringspun 100% cotton.

HUSMAN™ t-shirts come in 4 colors: White, Black, Dark Gray (fitted only) and Denim Blue (regular fit only)

Regular Fit
Size

Color


[Add to Cart](#)

Fitted
Size

Color

[Add to Cart](#)

[View Cart](#)



Fitted

Applicant emphasizes that the only manner in which consumers can purchase Applicant's clothing is via her own direct-to-consumer e-commerce website.

An applicant's promotion of a coined term constitutes "legitimate evidence as to perceptions of nonsurname significance." *In re Petrin Corp.*, 231 USPQ 902, 904 (TTAB 1986) (holding PETRIN primarily merely a surname despite applicant's argument that the mark represents an abbreviated contraction of "petroleum" and "insulation" where "the specimen brochure makes no attempt to establish or promote such a connection or to clarify or even hint at the shorthand contraction.").⁶ However, a single piece of advertising material from the Internet, within the context of an intent-to-use application, cannot, standing alone, establish the extent of public exposure to Applicant's promotional campaign. For example, we have no declaration or affidavit from Applicant attesting to how long her website has been operational and/or approximately how many "hits" or views the website has garnered. Furthermore, we have no sales or advertising data for items sold under her mark, if any. While we acknowledge Applicant's creativity, we cannot conclude on the record before us that consumers will perceive HUSMAN as a clever play on words and not primarily merely a surname.

Applicant also argues that "Husman" is such a rare surname that the public is unlikely to view it as primarily merely a surname. The statute, however, makes no distinction between rare and commonplace surnames. *Kahan & Weisz Jewelry, Mfg.*

⁶ To be clear, this argument is distinct from a claim of acquired distinctiveness under Trademark Act Section 2(f).

Corp., 184 USPQ at 422. *See also Eximius Coffee*, 120 USPQ2d at 1282 (“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 for those with uncommon surnames.”). Even a rare surname may be unregistrable under Trademark Act Section 2(e)(4) if its primary significance to purchasers is that of a surname. *See e.g., In re Industrie Pirelli Societa per Azioni*, 9 USPQ2d 1564, 1566 (TTAB 1988), *aff’d*, 883 F.2d 1026 (Fed. Cir. 1989) (although the record proves that “Pirelli” is a rare surname, the evidence shows that mark PIRELLI would be viewed primarily as a surname by the relevant public.). *See also Petrin*, 231 USPQ at 904.

In sum, the Examining Attorney has made of record multiple sources showing that HUSMAN is an actual surname, that there are no other commonly recognized meanings, and that its structure and pronunciation resembles other surnames. Applicant’s arguments and evidence that her applied-for mark represents a coined term fall short for the reasons explained above. Thus, on this record, the “primary significance of the mark as a whole to the purchasing public” is that of a surname.

Accordingly, we find that that the evidence establishes that the mark HUSMAN for “Hats; Long-sleeved shirts; Shirts; Sweat shirts; T-shirts” would be perceived by the purchasing public as primarily merely a surname within the meaning of Section 2(e)(4) of the Trademark Act, and it is thus unregistrable in the absence of acquired distinctiveness.

Decision: The refusal to register is affirmed.