

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: September 28, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Weale Care, LLC
—

Serial No. 90756950
—

Jeffrey Petersen of Law Offices of Jeffrey T. Petersen
for Weale Care, LLC.

Christina Sobral, Trademark Examining Attorney, Law Office 109,
Michael Kazazian, Managing Attorney.

—
Before Cataldo, Pologeorgis, and Cohen,
Administrative Trademark Judges.

Opinion by Cohen, Administrative Trademark Judge:

Notice of Correction

On September 26, 2023, the Board issued a final decision in this ex parte appeal wherein the Board affirmed the Section 2(e)(4) refusal against the involved application. The text box appearing on the first page of the decision is hereby amended as follows: “THIS OPINION IS NOT A PRECEDENT OF THE TTAB.” This amendment does not affect the ultimate disposition of this ex parte appeal.

A copy of the amended decision is attached.

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Opinion by Cohen, Administrative Trademark Judge:

Applicant, Weale Care, LLC, seeks registration on the Principal Register of WEALE (in standard characters) as a mark for “non-medicated skin care preparations; non-medicated skin serums, milks, lotions, masks, and creams; body lotions; body moisturizers; cosmetics; make up; powder compacts containing makeup;

lipsticks; lip gloss; make-up powder and foundation; skin moisturizers; beauty care cosmetic preparations; body care cosmetic preparations” in International Class 3.¹

The Trademark Examining Attorney refused registration of Applicant’s proposed mark under Section 2(e)(4) of the Trademark Act, 15 U.S.C. § 1052(e)(4) on the ground that the proposed mark is primarily merely a surname.

After the refusal was made final, Applicant appealed. Applicant and the Examining Attorney have submitted briefs. We affirm the refusal to register.

I. Evidentiary Issues

Before we turn to the merits, we address some evidentiary issues. As required by Trademark Rule 2.142(d), the record must be complete prior to appeal. 37 C.F.R. § 2.142(d). “[T]o the extent that any of the evidence attached to the appeal brief was not previously submitted, it is not timely and we give it no consideration.” *In re Michalko*, 110 USPQ2d 1949, 1950 (TTAB 2014). We therefore do not consider Applicant’s new evidence consisting of information about Fork and Knife as surnames, attached as Exhibits E and F to Applicant’s Brief,². See TRADEMARK TRIAL

¹ Application Serial No. 90756950 was filed June 6, 2021 based upon Applicant’s allegation of a bona fide intent to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Citations in this opinion to the briefs refer to TTABVUE, the Board’s online docketing system. See *New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *2 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Citations to the application record are to the downloadable .pdf version of the United States Patent and Trademark Office’s Trademark Status & Document Retrieval (“TSDR”) system.

² 4 TTABVUE 80-89.

AND APPEAL BOARD MANUAL OF PROCEDURE §§ 1203.02(e), 1207.01 (2023);
TRADEMARK MANUAL OF EXAMINING PROCEDURE § 710.01(c) (2022).

As to Applicant's remaining exhibits which were previously made of record during the prosecution history, while Applicant may be "under the impression that attaching previously-filed evidence to a brief and citing to the attachments, rather than to the original submission is a courtesy or convenience to the Board. It is neither." *In re Michalko*, 110 USPQ2d at 1950. Attachments of material already in the record "requires examination of the attachment and then an attempt to locate the same evidence in the record developed during the prosecution of the application, requiring more time and effort than would have been necessary if citations directly to the prosecution history were provided." *Id.* at 1951.

II. Primarily Merely a Surname - Applicable Law

Section 2(e)(4) of the Trademark Act 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." 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 as a whole to the purchasing public is that of a surname. *Earnhardt v. Kerry Earnhardt, Inc.*, 864 F.3d 1374, 123 USPQ2d 1411 (Fed. Cir. 2017); *see also In re Beds & Bars Ltd.*, 122 USPQ2d 1546, 1548 (TTAB 2017); *In re Eximius Coffee, LLC*, 120 USPQ2d 1276, 1277 (TTAB 2016); *In re Integrated Embedded*, 120 USPQ2d 1504 (TTAB 2016). Whether the primary significance of a mark is primarily merely that of a surname is a question

of fact that must be resolved on a case-by-case basis, considering the record as a whole. *In re Olin Corp.*, 124 USPQ2d 1327, 1330 (TTAB 2017); *Azeka Bldg. Corp. v. Azeka*, 122 USPQ2d 1477, 1480 (TTAB 2017). Various inquiries may be considered in the factual determination of whether the purchasing public would perceive a proposed mark as primarily merely a surname, including the following which are pertinent to this case:³

- Whether the surname is rare;
- Whether anyone connected with the applicant has that surname;
- Whether the term has any recognized meaning other than as a surname e.g., an “ordinary language” meaning; and
- Whether the term has the structure and pronunciation of a surname.

In re Colors in Optics, Ltd., 2020 USPQ2d 53784, at *1-2 (TTAB 2020) (citing *In re Benthin Mgmt. GmbH*, 37 USPQ2d 1332, 1333-34 (TTAB 1995) for the *Benthin* inquiries/factors)); *see also In re Etablissements Darty et Fils*, 759 F.2d 15, 16-18, 225 USPQ 652, 653-54 (Fed. Cir. 1985); *Eximius Coffee*, 120 USPQ2d at 1278 n.4 (reviewing factors from *Darty and In re Benthin Mgmt. GmbH*, 37 USPQ2d 1332, 1333-34 (TTAB 1995) and noting there is no need to discuss other inquiries for which the record lacks relevant evidence); *In re Adlon Brand GmbH & Co.*, 120 USPQ2d 1717, 1719 & 1721 (TTAB 2016) (noting the consideration, if there is relevant supporting evidence of record, “of an alternative perceived meaning (which may

³ Because the proposed mark in this case is displayed in standard characters, it is unnecessary to consider whether any stylization of the lettering is distinctive enough to create a separate commercial impression. *In re Yeley*, 85 USPQ2d 1150, 1151 (TTAB 2007); *Integrated Embedded*, 120 USPQ2d at 1506 n.4.

include the perception of the mark as a coined term”). These inquiries or factors are not exclusive, and any of these circumstances – singly or in combination – and any other relevant circumstances may be considered when making this determination. *In re Colors in Optics, Ltd.*, 2020 USPQ2d 53784, at *2 (citing *Azeka Bldg. Corp. v. Azeka*, 122 USPQ2d 1477, 1480 (TTAB 2017)).

We conduct our analysis from the perspective of 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.” *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)).

III. Evidence and Analysis

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

- Search results from the LexisNexis Public Records: Surname Database showing 178 entries for “Weale”;⁴
- Search results from various webpages for individuals with the surname WEALE:
 - BUSINESSLIVE.CO.ZA and RANDBURGSUN.CO.ZA articles which mention Gavin Weale, founder and CEO of Digify Africa;⁵
 - HEREFORDTIMES.COM article about a boy named Sam Weale who received medical treatment in London, England;⁶
 - BLOOMBERG.COM new article entitled “BOE Could Offer Targeted

⁴ February 23, 2023 Office Action at TSDR 2-11.

⁵ *Id.* at 13, 15.

⁶ *Id.* at 14.

Support for Pension Funds, Weale Says” about the Bank of England;⁷

- THEWORLDFOLIO.COM article which includes a quote from Nigel Weale about the healthcare system in Oman;⁸
 - ADSADVANCE.CO.UK article which reads that “JFD has welcomed Retired Rear Admiral John Weale, CB, OBE, as Senior Defence Advisor to support the company’s continued growth within both the UK and International defence markets”;⁹
 - VNEWS.COM article which includes reference to a local resident Bill Weale;¹⁰
 - THEGUARDIAN.COM article written by Sally Weale about an indoor play center in Europe;¹¹
 - CREDOREFERENCE.COM search results for “weale” listing three individuals with the surname Weale;¹²
 - Google.com search results for “weale,” the first page of which is provided listing 10 results which mention individuals with the surname Weale;¹³ and
- Definition:
 - MERRIAM-WEBSTER.COM dictionary search results indicating that “weale” is not in the dictionary.¹⁴

A. Rarity of WEALE

Applicant argues that of the 178 LexisNexis references cited by the Examining

⁷ December 29, 2022 Final Office Action at TSDR 2.

⁸ *Id.* at 3.

⁹ *Id.* at 4.

¹⁰ *Id.* at 5.

¹¹ *Id.* at 6.

¹² *Id.* at 8.

¹³ February 23, 2023 Office Action at TSDR 16.

¹⁴ *Id.* at 7.

Attorney, 37 are duplicative, leaving 141;¹⁵ and that based on a NAMECENSUS.COM search result, WEALE is “exceedingly rare” with only “134 instances of the surname in the entire United States as of 2010.”¹⁶ Applicant also argues that “given latest census population in 2020 census of 329,500,000 people, results in one in every 2,336,879 people in the country having such surname.”¹⁷

Review of the Examining Attorney’s internet search results reveals that some do indeed appear to be duplicative. For example, the Examining Attorney’s GOOGLE.COM search results list 10 references to individuals with the surname WEALE. However, some of those references appear to be articles already included by the Examining Attorney such that there is only one new reference. Likewise, while the CREDOREFERENCE.COM search results purport to add three new references of individuals with the surname WEALE they instead appear to be duplicate references already submitted by the Examining Attorney with only one new reference included.

Even though the Examining Attorney argues that “[a]lthough there may appear to be some minor duplication, it is possible that two different individuals with the same name may reside in a different residence and have a different phone number,”¹⁸ the results listed by the Examining Attorney amount to less than 200 and if the

¹⁵ *Id.* at 4.

¹⁶ 4 TTABVUE 4; October 24, 2022 Petition to Revive at TSDR 2.

¹⁷ 4 TTABVUE 4. In support of its assertion of the United States population, however, Applicant provides a WORLDPOPULATIONREVIEW.COM webpage listing only 15 states’ population rather than the whole United States. October 24, 2022 Petition to Revive at TSDR 3.

¹⁸ 6 TTABVUE 5.

potentially duplicative results are disregarded, the results amount to less than 150. We also note that some of the Examining Attorney's references to individuals with the surname WEALE are in Europe, not the United States which would reduce the number of results even more. The question of whether a proposed mark is primarily merely a surname involves consideration of the proposed mark's significance in the United States, not worldwide. *In re Wickuler-Kupper-Brauerei KGaA*, 221 USPQ 469, 470 n.2 (TTAB 1983) ("It is the surname significance in the United States which is determinative of the registrability issue").

While we avoid a strictly numerical approach to the present surname analysis, *In re tapio*, 2020 USPQ2d 11387, at *11, upon our review of the evidence as a whole, the evidence shows that WEALE is a rare surname in the United States. See *In re Giger*, 78 USPQ2d 1405, 1407-08 (TTAB 2006) (Giger is not a common surname since there were only 545 listings for the name); *In re Joint-Stock Co. "Baik"*, 84 USPQ2d 1921, 1922 (TTAB 2007) (Baik appears to be an extremely rare surname with only 456 listings of individuals with the surname).

B. Connection with Applicant

Applicant contends, and there is no evidence to the contrary, that "no one associated with Applicant uses the term Weale as a surname." 4 TTABVUE 5. We thus give no further consideration to this inquiry. *In re Thermo LabSystems Inc.*, 85 USPQ2d 1285, 1287 (TTAB 2007) (quoting *In re Gregory*, 70 USPQ2d 1792, 1795 (TTAB 2001) ("[T]hat 'a proposed mark is not applicant's surname, or the surname of an officer or employee, does not tend to establish one way or the other whether the

proposed mark would be perceived as a surname.”)).

C. Recognized Meaning

While the fact that WEALE appears to be a rare surname weighs somewhat in Applicant’s favor, it does not end the inquiry. The statutory provision makes no distinction between rare and commonplace surnames. *Adlon*, 120 USPQ2d at 1721; *Eximius Coffee*, 120 USPQ2d at 1282. “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.” *In re Adlon*, 120 USPQ2d at 1721. “[T]he degree of a surname’s rareness is not dispositive of the amount or kind of evidence the entire record must contain to establish that a mark’s primary significance to the purchasing public is that of a surname; the amount or kind of evidence necessary to demonstrate that the term is ‘primarily merely’ a surname will vary on a case-by-case basis.” *Id.* There is no minimum number of persons who must have, or be aware of, a surname in the United States for a mark consisting of that surname to be found to be primarily merely a surname under Section 2(e)(4) if the record shows that the mark is a surname in the United States, that there is some recognition of the mark as such in the United States, and that there is no other demonstrated meaning of the mark. *In re Adlon*, 120 USPQ2d at 1724. Moreover, “even a rare surname is unregistrable if its primary significance to purchasers is a surname.” *Darty*, 225 USPQ at 1281; *see also In re Industrie Pirelli Societa per Azioni*, 9 USPQ2d 1564, 1566 (TTAB 1988), *aff’d*, 883 F.2d 1026 (Fed. Cir. 1989) (holding that despite the rarity of “Pirelli” as a surname, the relevant public

still would view it primarily as a surname).

Applicant's argument that "weal" is the phonetic equivalent of "weale"¹⁹ and has a recognized meaning of "happy or prosperous state that is aligned with [Applicant's] branding"²⁰ is unavailing. There is no evidence of record that indicates these meanings are readily recognized by the average consumer. It is not enough for Applicant to uncover a dictionary reference for the term in question. *In re Nelson Souto Major Piquet*, 5 USPQ2d 1367, 1367-68 (TTAB 1987). Applicant's references are insufficient to call into question the primary significance of WEALE as a surname.

D. Structure and Pronunciation

The question we must answer is whether WEALE looks or sounds like a surname and would be perceived as such by the consuming public. *See In re Industrie Pirelli*, 9 USPQ2d at 1566 ("certain rare surnames look like surnames, and certain rare surnames do not ...'Pirelli' falls into the former category, while 'Kodak' falls into the latter."). The determination of whether a mark has the structure and pronunciation, earlier analyzed as "look and feel," of a surname is a subjective one. *See In re Adlon*, 120 USPQ2d at 1724; *Miller v. Miller*, 105 USPQ2d 1615, 1621 (TTAB 2013).

Applicant argues that WEALE does not have the "structure and sound of a surname,"²¹ but submits no evidence on this factor. The Examining Attorney offered

¹⁹ October 24, 2022 Petition to Revive at TSDR 6.

²⁰ 4 TTABVUE 6; October 24, 2022 Petition to Revive at TSDR 4-6.

²¹ 4 TTABVUE 6.

no evidence or argument on this point.

Nonetheless, we find that WEALE has the structure and pronunciation of a surname as it “would not be perceived as an initialism or acronym . . . and does not have the appearance of having been coined by combining a root element that has a readily understood meaning in its own right with either a prefix or a suffix.” *In re Gregory*, 70 USPQ2d 1792, 1796 (TTAB 2004). In short, WEALE sounds like a surname with the structure or format of a surname.

IV. Conclusion

While WEALE may be rarely encountered as a surname it possesses the structure and pronunciation of one, and there is insufficient evidence on this record of a recognized non-surname significance of the term. Thus, we cannot find, based on this record, that its rarity removes WEALE from being primarily merely a surname.

Decision: The refusal to register under Section 2(e)(4) is affirmed.