

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

In re Trademark Application of:)
Baldwin Piano, Inc.)
Serial No. 76/411,172)
Filed: May 20, 2002)
Mark: HELLER & CO.)

Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3514



08-26-2004

U.S. Patent & TMO/TM Mail Ropt Dt. #11

**BRIEF OF APPELLANT UNDER
SECTION 2.142(b) OF THE U.S. TRADEMARK ACT**

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I. Introduction

Appellant hereby appeals the Examiner's final refusal to register the above-identified mark and respectfully requests that the Trademark Trial and Appeal Board reverse the Examiner's decision.

Appellant's Notice of Appeal was timely filed on July 21, 2004. Therefore, this brief, filed within sixty (60) days of the Notice of Appeal, has been timely filed.

By change of name, which was recorded in the USPTO Assignment Division at Reel/Frame 002610/0594, Applicant/Appellant is now known as Baldwin Piano, Inc. This appeal is proper, since Appellant merely misidentified itself on its notice of appeal.

II. Description of the Record

Appellant seeks registration on the Principal Register of its mark HELLER & CO. for "pianos" in International Class 15.

The Examining Attorney has refused registration of Appellant's mark under Section 2(e)(4) of the U.S. Trademark Act, asserting that the mark is primarily merely a surname.

III. Statement of the Issues

The issue is whether the Examiner has provided sufficient proof to establish a *prima facie case* that the mark HELLER & CO. is primarily merely a surname, particularly given the historical significance of the term "Heller."

IV. Recitation of Facts

Throughout the prosecution period, the Examining Attorney asserted that, when considering the primary significance of the mark to the purchasing public, the mark HELLER & CO. is primarily merely a surname. In support of that position, in the office action mailed on January 28, 2004, the Examining Attorney attached as evidence a printout of a search conducted in the NEWS library/ US file. The search query asked for all references to "Heller" with a date between January 27, 2003 and January 28, 2004. The computerized search indicated that 9804 stories satisfied that query. Of those results, the Examiner elected to printout only 10 stories (story numbers 1, 4-9, 11, 13, 16). Appellant contends that, as shown below, the Examiner has not provided enough proof to establish a *prima facie* case that the mark is primarily merely a surname.

Further, Appellant provided proof that the mark HELLER & CO. has historical significance in the industry, i.e., it identifies historical persons in the vintage piano industry. William G. Heller and Henry R. Heller, who were fine piano craftsmen, founded Heller & Co. in 1899. HELLER & CO. pianos are well-known and listed in the "Blue Book of Pianos," which is available over the Internet at www.bluebookofpianos.com. According to the Bluebook of Pianos, the piano makers of Aeolin Piano Company and its predecessors in interest, including Heller & Co., were

excellent craftsmen under the direction of people who had been associated with these fine makes for many years, thus preserving

unimpaired the Individual and distinctive quality of each piano. The affiliation of the various houses . . . insures for each a wider scope for musical activity [and] that each of its units was of the highest quality in its grade

Appellant contends that the lack of evidence provided by the Examiner in establishing that the mark is primarily merely a surname, when combined with the historical significance of the mark, calls for a reversal of the refusal to register the mark, as discussed in more detail below.

V. Argument

Appellant maintains that the mark HELLER & CO. should not be deemed primarily merely a surname for two reasons. First, there is insufficient evidence that the term is “primarily” merely a surname. Second, the term has some historical significance, i.e., it identifies historical persons in the vintage piano industry, such that the surname is not primarily merely a surname.

A. The Examiner Has Not Provided Enough Proof to Establish a *Prima Facie* Case that the Mark is Primarily Merely a Surname

In the Official Action, mailed on January 28, 2004, the Examining Attorney provided a printout indicating that the term "Heller" appeared as a surname in the NEWS/US file 9804 times between January 27, 2003 and January 28, 2004. Of the 9804 “hits,” the Examiner only printed out excerpts from ten (10) of the stories. Appellant admits that the term “heller” has *some* significance as a surname but contends that the ten printouts are insufficient to prove that the mark is “primarily” merely a surname.

It is presumed that the Examiner has provided the best evidence to support the refusal to register the mark. *See In re Federated Department Stores, Inc.*, 3 U.S.P.Q.2d 1541, 1542 n.2 (TTAB 1987). Therefore, Appellant is led to believe that the 9794 stories *not* made of record do not support the position that HELLER is a surname and, indeed may even show that HELLER has non-surname meanings. *See In re Monotype Corp.*, 14 U.S.P.Q.2d 1070, 1071 (TTAB 1989) ("We must conclude that, because the Examining Attorney is presumed to have made the best case possible, the 46 stories not made of record [the search yielded 48 stories] do not support the position that CALISTO is a surname and, indeed, show that CALISTO has non-surname meanings.").

Appellant concedes that "heller" obviously has some surname significance; however, Appellant contends that the term's use as a surname is rare and that the evidence submitted by the Examiner does not prove that the mark is "primarily" merely a surname.

B. The Term "Heller" Signifies Historical Persons

Appellant further contends that the term "Heller" identifies historical persons and that the refusal to register the mark under Section 2(e)(4) should be withdrawn on this ground also.

As discussed above, Aeolin Piano Company, one of Appellant's predecessor's in interest, was founded as Heller & Co. in 1899 by William G. Heller and Henry R. Heller. HELLER & CO. pianos are listed in the "Blue

Book of Pianos. According to the Bluebook of Pianos, the piano makers of Aeolin and its predecessors in interest were excellent piano craftsmen.

Because the mark HELLER & CO. identifies historical persons, i.e., William G. Heller and Henry R. Heller, the founders of Heller & Co., the term is not primarily merely a surname. *See Lucien Piccard Watch Corp. v. Since 1868 Crescent Corp.*, 314 F.Supp. 329, 165 U.S.P.Q. 459 (S.D.N.Y. 1970) (DA VINCI found not primarily merely a surname because it primarily connotes Leonardo DaVinci); *In re Pyro-Spectaculars, Inc.*, 63 U.S.P.Q.2d 2022, 2024 (T.T.A.B. 2002) (SOUSA for fireworks and production of events and shows featuring pyrotechnics held not primarily merely a surname, where the evidence showed present day recognition and continuing fame of John Philip Sousa as a composer of patriotic music, and the applicant's goods and services were of such a nature that "would be associated by potential purchasers with patriotic events such as the Fourth of July, patriotic figures, and patriotic music"); *Michael S. Sachs Inc. v. Cordon Art B.V.*, 56 U.S.P.Q.2d 1132 (T.T.A.B. 2000) (primary significance of M.C. Escher is that of famous deceased Dutch artist). Thus, Appellant contends that because the term "HELLER & CO." primarily connotes William G. Heller and Henry R. Heller and associates, founders and piano craftsman of Heller & Co., the term should not be deemed primarily merely a surname.

CONCLUSION

For the reasons set forth above, Appellant respectfully submits that its mark should not be deemed primarily merely a surname. The Board is therefore respectfully requested to reverse the Examiner's decision refusing registration of Appellant's mark.

Although Appellant does not believe that a fee is due, please charge any deficiency or credit any overpayment to our Deposit Account 23-0035.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that the foregoing BRIEF OF APPELLANT UNDER SECTION 2.142(b) OF THE U.S. TRADEMARK ACT is being deposited with the United States Postal Service with sufficient postage as First Class mail on 23rd day of August 2004 in an envelope addressed to:

Commissioner for Trademarks
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Ruth Cropper