

2/18/2005

THIS OPINION IS NOT  
CITABLE  
AS PRECEDENT OF  
THE T.T.A.B.

UNITED STATES PATENT AND TRADEMARK OFFICE

---

Trademark Trial and Appeal Board

---

In re Gibson Piano Ventures, Inc.

---

Serial No. 76411172

---

Lucian Wayne Beavers of Waddey & Patterson for Gibson Piano Ventures, Inc.

Khanh M. Le, Trademark Examining Attorney, Law Office 113 (Odette Bonnet, Managing Attorney).

---

Before Hanak, Walters and Bucher, Administrative Trademark Judges.

Opinion by Hanak, Administrative Trademark Judge:

Gibson Piano Ventures, Inc. (applicant) seeks to register in typed drawing form HELLER & CO. for "pianos." The intent-to-use application was filed on May 20, 2002. Applicant disclaimed the exclusive right to use CO. apart from the mark in its entirety. In addition, applicant also claimed ownership of expired Trademark Registration No. 708,214.

Citing Trademark Act Section 2(e)(4), the Examining Attorney refused registration on the basis that applicant's mark is primarily merely a surname. When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request an oral hearing.

At the outset, we wish to clarify the issue before this Board. At page 1 of its brief, applicant argues that the only issue before this Board is whether "the mark HELLER & CO. is primarily merely a surname." On the other hand, the Examining Attorney, while acknowledging that the foregoing is one of the issues, also contends that there is a second issue before this Board, namely, "whether the applicant has established acquired distinctiveness [for the purported mark HELLER & CO.] under Section 2(f) of the Trademark Act." (Examining Attorney's brief page 2). After reviewing the record, we find that applicant has discontinued its claim that its mark has acquired distinctiveness pursuant to Section 2(f). In any event, even if such a claim of acquired distinctiveness were before this Board, we would find against applicant. Applicant has not used its mark HELLER & CO. Moreover, as the Examining Attorney notes, a claim of acquired distinctiveness pursuant to Section 2(f) cannot be based on

an expired registration. In re BankAmerica Corp., 229 USPQ 852, 853 (TTAB 1986).

Applicant raises two arguments as to why HELLER & CO. is purportedly not primarily merely a surname. First, applicant acknowledges at page 3 of its brief that "the term HELLER has some significance as a surname." (See also applicant's brief page 4 where applicant states that "HELLER obviously has some surname significance."). However, applicant contends that HELLER is a rare surname and hence is not primarily merely a surname. (Applicant's brief page 4). Second, applicant contends that HELLER "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." (Applicant's brief page 3).

Considering first applicant's argument that HELLER is a rare surname, we find this to be without merit. During the course of this proceeding, the Examining Attorney made of record a print out from PowerFinder (2002) showing that there are well over 12,000 residential telephone listings for individuals whose surname is Heller. In addition, the Examining Attorney also conducted a Nexis search which revealed that just for the one year period from January 27, 2003 to January 27, 2004 there were over 9,800 stories

appearing in various magazines and newspapers which mentioned individuals whose surname was Heller.

Based on this evidence, we find that HELLER is clearly not a rare surname, and that this factor favors a finding that HELLER would be perceived as primarily merely a surname. In re Benthin Management, 37 USPQ2d 1332, 1333 (TTAB 1995). Moreover, as noted in Benthin, the rarity of a surname is but one factor in determining whether a surname would be perceived as primarily merely a surname. Another key factor is whether HELLER has "the structure and pronunciation" of a surname, or stated somewhat differently, the "look and sound of a surname." Benthin, 37 USPQ at 1333 quoting In re Industrie Pirelli, 9 USPQ2d 1564, 1566 (TTAB 1988). We find that HELLER clearly has the look and sound of a surname.

As for applicant's argument that HELLER is not primarily merely a surname because "it identifies historical persons," we find this argument to be deficient. Applicant contends, without any evidentiary support, that in 1899 two brothers (William G. Heller and Henry R. Heller) founded a piano company known as Heller & Co. Because the Examining Attorney has not challenged the accuracy of applicant's statements, we will accept them as true.

However, such statements actually support the proposition that HELLER would be perceived as primarily merely a surname. To the extent that there are any remaining individuals who are familiar with William G. Heller and Henry R. Heller, then said individuals would recognize that HELLER & CO. originates from the common surname Heller.

In any event, applicant has certainly not established the Heller is a surname that is associated with but one extremely famous individual such that it is no longer primarily merely a surname. 2 J. McCarthy, McCarthy on Trademarks and Unfair Competition Section 13:25 at page 13-44 (4<sup>th</sup> ed. 2004). See also In re Pickett Hotel Co., 229 USPQ 760 (TTAB 1986).

Decision: The refusal to register is affirmed.