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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Weis Australia Pty Ltd

Serial No. 79047172

Gary D. Krugman of Sughrue Mion, PLLC for Weis Australia Pty Ltd.

Daniel S. Brody, Senior Attorney, Law Office 117 (Loretta C. Beck, Managing Attorney).

Before Hairston, Grendel and Wellington, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by Weis Australia Pty Ltd to register the mark WEIS' and design as shown below for goods ultimately identified as "frozen and ice confections and confectionery; frozen dairy products, namely, ice cream; flavored ices; sherbets; sorbets; sweetened frozen desserts or snacks consisting of fruit; sweetened frozen desserts or snacks consisting of fruit and cream; sweetened frozen snack foods consisting of fruit and

cream substitutes; frozen snack food, namely, frozen yogurt" in International Class 30.¹



The examining attorney has refused registration under Section 2(e)(4) of the Trademark Act, 15 U.S.C.

§1052(e)(4), on the ground that WEIS is primarily merely a surname.

Applicant has appealed. Both applicant and the examining attorney have filed briefs. We affirm the refusal to register.

Whether a term is primarily merely a surname depends on the primary significance of the term to the purchasing public. *In re Harris-Intertype Corp.*, 518 F.2d 629, 186 USPQ 238 (CCPA 1975); and *In re Champion International Corp.*, 229 USPQ 550 (TTAB 1985). The examining attorney bears the burden of establishing a prima facie case in support of the conclusion that the primary significance of

¹ Application Serial No. 79047172, filed on November 7, 2007. The application is a Section 66(a) application (15 U.S.C. 1141(f)(a)) based on International Registration No. 0945960, issued on November 7, 2007.

the term to the purchasing public would be that of a surname. *In re BDH Two Inc.*, 26 USPQ2d 1556 (TTAB 1993) and cases cited therein. If a prima facie case is presented, then the burden of rebutting that showing shifts to the applicant. *In re Etablissements Darty et Fils*, 759 F.2d 15, 225 USPQ 652 (Fed. Cir. 1985); and *In re Harris-Intertype Corp.*, *supra*.

"The question of whether a word sought to be registered is primarily merely a surname within the meaning of the statute can only be resolved on a case by case basis," taking into account various factual considerations. *Darty*, 225 USPQ at 653. There are five accepted factors to be considered in the analysis:

- (1) Is the word a common or rarely used surname?
- (2) Does anyone connected with the applicant have that surname?
- (3) Does the word have meaning other than as a surname?
- (4) Does the word look and sound like a surname?
- (5) Is the word presented in use in a stylized form distinctive enough to create a separate non-surname significance?

In re Benthin Management GmbH, 37 USPQ 1332, 1333-34 (TTAB 1995) [BENTHIN held not primarily merely a surname because it was a rare surname, did not look and sound like a surname, and was set forth in a highly stylized oval design].

As to the first factor, the rarity of WEIS as a surname, we find the record sufficient to establish that the surname is not a rare one. In this regard, the examining attorney submitted the results of a search of the "P-FIND" database which indicated that there were 4347 entries for the surname "Weis" and one-hundred of the entries were made of record. The entries show listings for households in at least twenty different states, including at least one listing in each of the following major population centers: Minneapolis, New York, Houston, Chicago, Pittsburgh, Dallas, New Orleans, and Boston. The examining attorney also made of record the results of a search of the NEXIS database for the period of November 15-December 15, 2008. The search retrieved 802 articles or entries containing references to "Weis." Excerpts from fifty of those articles (from newspapers around the country) have been printed out and made of record, the overwhelming majority of which refer to former Notre Dame head football coach, Charlie Weis. Other excerpts refer to a Chicago Police Superintendent; the manager of a fashion jewelry company; a high school football player; a high school basketball player; a high school swimmer; and a supermarket chain.

Based on the number of residential listings, including households in at least twenty different states and in many of the nation's population centers, we find that WEIS is not an especially rare surname. Moreover, we note that a mark may be found to be primarily merely a surname even though it is not a common surname. See *In re Giger*, 78 USPQ2d 1405 (TTAB 2006). See also *In re E. Martoni Co.*, 78 USPQ2d 589 (TTAB 1975); and *In re Industrie Pirelli Societa per Azoni*, 9 USPQ2d 1564 (TTAB 1988). Also, there is no minimum number of listings needed to prove that a mark is primarily merely a surname.

Furthermore, with respect to Charlie Weis, we believe it is reasonable to conclude that large numbers of individuals in the United States would be exposed to the name of the Notre Dame head football coach in sports programming and news. In other words, WEIS is not rare when also viewed as a name repeated in the media in terms of public perception. See *In re Gregory*, 70 USPQ2d 1792, 1795 [The existence of two elected officials with the surname ROGAN lead the Board to conclude that "the name may be rare when viewed in terms of frequency of use as a surname in the general population, but not at all rare when viewed as a name repeated in the media in terms of public

perception."]. In view of the foregoing, we conclude that WEIS is not a rare surname.

As to the second factor, i.e., whether anyone connected with applicant has the surname in question, applicant has indicated that no one connected with it is named WEIS. As explained in *Gregory, supra*, however, this does not aid applicant and only means that the factor is neutral. *Gregory*, 70 USPQ2d at 1795.

The third factor we consider is whether the term WEIS has non-surname significance. In connection with this factor, the examining attorney has submitted excerpts from the "Encarta," "Cambridge," and "Bartleby.com" on-line dictionaries which show that there are no listings or entries for "Weis" in these dictionaries.

Applicant, however, argues that WEIS has other recognized meanings because it is used by third parties as an acronym in different contexts. Applicant submitted the results of a search of the "Acronym Attic" website which shows one "verified definition" for WEIS, namely, "World Event Interaction Survey;" and six "unverified meanings" for WEIS, namely, "Workshop on the Economics of Information Security," "Workshop on Economics of Information Security," "World Economics Information Services," "World Environment Impact Scale," "Workforce Executive Information Systems,"

and "Wood Energy Information System." Applicant also submitted Internet printouts which reference the "Work Environment Impact Scale (WEIS) Version 2.0;" "Workshop on the Economics of Information Security WEIS;" and "WEIS 990 AM Radio."

We are not persuaded by applicant's evidence that WEIS has another primary meaning. As noted, the search results from the "Acronym Attic" website show only one "verified definition" and six "unverified meanings" of "WEIS." Apart from the fact that only one of the meanings of WEIS is "verified," we cannot say from the mere search results that even the verified meaning of WEIS, namely, the "World Event Interaction Survey," is well recognized to potential consumers of applicant's goods. In terms of the Internet printouts, the "Work Environment Impact Scale (WEIS) Version 2.0" refers to a program used by therapists to identify environmental characteristics that facilitate successful employment experiences; the "Workshop on the Economics of Information Security (WEIS)" refers to a workshop on information security issues; and WEIS 990 AM obviously refers to a radio station. These printouts, however, are not sufficient to show another meaning of WEIS in the consumers' minds. The WEIS program and workshop are obviously highly specialized in nature; and there is no

information about the number of listeners of the WEIS radio station. Thus, we are not persuaded that WEIS primarily will be viewed or understood by purchasers as an acronym or radio station call letters rather than for its surname significance. See *In re Hamilton Pharmaceuticals*, 27 USPQ2d at 1942 ("unless there is a readily recognized meaning for a term apart from its surname significance, the fact that other meanings for the term exist does not necessarily indicate that the term would have a primary meaning to the purchasing public other than that of its ordinary surname significance").

We turn next to the fourth factor, i.e., whether WEIS has the look and sound of a surname. When a term does not have the look and sound of a surname, it clearly favors applicant. On the other hand, when it does look and sound like a surname, such a finding merely tends to reinforce a conclusion that the term's primary significance is as a surname. In this case, there are numerous individuals with the surname WEIS throughout the United States, including that of the former Notre Dame football coach, who has received more attention than the average individual named WEIS. Furthermore, it has no other known significance sufficient to obviate its primary significance as a

surname. In view thereof, we find that WEIS has the look and sound of a surname.

We add that the addition of an apostrophe to the surname WEIS does not detract from the surname significance of the term. The apostrophe serves only to indicate the possessive form of "Weis."

The fifth and final factor to be discussed concerns whether WEIS is set forth in a stylized form distinctive enough to create a separate non-surname significance. In this case, the term WEIS is depicted in a straightforward block letter style font within a quadrilateral carrier or background design. The font is certainly not fancy, and unlike *In re Benthin, supra* [highly stylized oval design], the carrier or background design is not so unusual or distinctive to create a non-surname significance.

In conclusion, we find that WEIS is not a rarely used surname, has the look and sound of a surname, and the record points to no other definitive recognized meaning of the term. Furthermore, WEIS is not set forth in a stylized form distinctive enough to create a separate non-surname significance. Thus, when we view the term WEIS under the factors set forth in *Benthin*, we conclude that the examining attorney has met her initial burden of showing

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that the term WEIS would primarily be viewed as a surname and applicant has not rebutted this prima facie case.

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