

This Opinion is not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Kezar Life Sciences Australia Pty Ltd

Serial No. 79256294

Richard M. LaBarge of Marshall, Gerstein & Borun LLP,
for Kezar Life Sciences Australia Pty Ltd.

Alain Lapter, Trademark Examining Attorney, Law Office 105,
Jennifer Williston, Managing Attorney.

Before Kuhlke, Wellington, and Dunn,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Kezar Life Sciences Australia Pty Ltd (“Applicant”) seeks registration on the Principal Register of the mark KEZAR (in standard characters) for the following goods and services:

“active chemical ingredients for use in the manufacture of pharmaceuticals for treating autoimmune diseases or cancer” in International Class 1;

“pharmaceutical preparations for preventing or treating immune system related diseases and disorders; pharmaceutical products for preventing or treating cancer; chemical preparations for pharmaceutical preparations for treating autoimmune diseases or cancer” in International Class 5; and

“medical research; biotechnology research; pharmaceutical research and development” in International Class 42.¹

The Trademark Examining Attorney refused registration on the ground that Applicant’s mark is primarily merely a surname under Section 2(e)(4) of the Trademark Act, 15 U.S.C. § 1052(e)(4). When the refusal was made final, Applicant requested reconsideration on four occasions, each request was denied by the Examining Attorney. After the last request for reconsideration was denied, Applicant filed an appeal of the refusal to this Board. The appeal has been briefed.

We reverse the refusal.

Primarily Merely a Surname

A mark that is “primarily merely a surname” may not be registered on the Principal Register unless it has acquired distinctiveness. 15 U.S.C. §§ 1052(e) and (f); *In re Etablissements Darty et Fils*, 759 F.2d 15, 225 USPQ 652, 653 (Fed. Cir. 1985). Applicant does not argue that its proposed mark has acquired distinctiveness, but argues only that its proposed mark is not primarily merely a surname.²

¹ Application Serial No. 79256294, filed February 8, 2019, is a request for an extension of Applicant’s International Registration No. 1460675, pursuant to the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (as amended on November 12, 2007) (the “Madrid Protocol”), implemented in the United States under Trademark Act Sections 60-74, 15 U.S.C. §§ 1141-1141n.

² To be clear, the application does not include a claim of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f), nor a request for registration on the Supplemental Register under Trademark Act Section 23, 15 U.S.C. § 1091. Accordingly, such issues are not before us in this appeal. *In re Weiss Watch Co., Inc.*, 123 USPQ2d 1200, 1201 n. 2 (TTAB 2017). In any event, there is no provision for registration of a mark on the Supplemental Register in a request for an extension of protection. TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) (October 2018) § 1904.02(a); *see also* 15 U.S.C. § 1141(h)(a)(1) (providing for application for registration on the Principal Register only).

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. *Earnhardt v. Kerry Earnhardt, Inc.*, 864 F.3d 1374, 123 USPQ2d 1411, 1413 (Fed. Cir. 2017); *In re Beds & Bars Ltd.*, 122 USPQ2d 1546, 1548 (TTAB 2017) (citing *Darty*, 225 USPQ at 653). Whether the primary significance of an applied-for mark is merely that of a surname is a question of fact that must be resolved on a case-by-case basis. *In re Olin Corp.*, 124 USPQ2d 1327, 1330 (TTAB 2017).

We examine the entire record to determine the primary significance of a term to the purchasing public. *Id.*; *Darty*, 225 USPQ at 653; *Beds & Bars*, 122 USPQ2d at 1548; *In re Benthin Mgmt. GmbH*, 37 USPQ2d 1332, 1333-34 (TTAB 1995). Over the years, the Board identified various factors we may consider in determining whether a mark is primarily merely a surname, including: (1) the rarity or frequency of exposure to the public of the mark being used as a surname; (2) whether anyone connected with the applicant has the mark as a surname; (3) whether the mark has any recognized meaning other than as a surname; (4) whether the mark has the structure and pronunciation of a surname; and (5) whether the manner in which the mark is displayed might negate any surname significance³. *Id.* at 1332-33; *see also In re Weiss Watch Co., Inc.*, 123 USPQ2d 1200, 1203 (TTAB 2017) (discussing initial

³ With respect to this factor, because Applicant's proposed mark is in standard character format, it cannot be argued that the mark is being displayed in any particular manner that may negate surname significance. *See In re Yeley*, 85 USPQ2d 1150, 1151 (TTAB 2007). Accordingly, this factor is not relevant to our decision.

factor in terms of “whether and to what extent [term] is encountered as a surname.”). These factors, however, are not exhaustive or enumerated in any particular order of importance; the Board may consider other types of evidence that may be probative as to the public’s perception of the proposed mark.

The Examining Attorney bears the initial burden of making a prima facie showing of surname significance. *Darty*, 225 USPQ at 653. If the Examining Attorney makes that showing, then we must weigh all of the evidence from the Examining Attorney and the Applicant, to determine ultimately whether the mark is primarily merely a surname. See *In re Sava Research Corp.*, 32 USPQ2d 1380, 1381 (TTAB 1994). If there is any doubt, we must resolve the doubt in favor of the applicant. See *Benthin*, 37 USPQ2d at 1334.

Connection of Surname to Applicant

There is no evidence of anyone associated with Applicant having the surname “Kezar.” Applicant expressly states “there are no Kezars in the Applicant’s organization,” and the Examining Attorney concedes that “it does not appear as if the surname is directly connected to Applicant.”⁴ We keep in mind, however, that the fact that the proposed mark is not the surname of someone associated with Applicant does not tend to establish one way or the other whether the proposed mark would be perceived as a surname. *In re Piano Factory Grp. Inc.*, 85 USPQ2d 1522, 1524 (TTAB 2006); *In re Gregory*, 70 USPQ2d 1792, 1795 (TTAB 2004).

⁴ 4 TTABVUE 3 and 6 TTABVUE 10, respectively.

Any Other Recognized Meaning

To show that the term KEZAR has no recognized meaning, other than as a surname, the Examining Attorney submitted printouts from various reference websites, such as Wordnik, The American Heritage Dictionary and Placesnamed.com, showing that KEZAR does not appear in their databases.⁵ This type of evidence, often called “negative dictionary” evidence, is frequently relied upon to demonstrate that there is no recognized meaning to a term. *See, e.g., Darty*, 225 USPQ at 653; *In re Eximius Coffee, LLC*, 120 USPQ2d 1276, 1278 (TTAB 2016) (citing *Darty*).

Applicant, on the other hand, contends that KEZAR has “geographic significance” because it is the name of a stadium in San Francisco. Applicant refers to “Kezar Stadium, . . . an outdoor athletics stadium in San Francisco, California, located adjacent to Kezar Pavilion in the southeastern corner of Golden Gate Park.”⁶ Applicant further asserts that it chose the mark because it is “headquartered in an area of San Francisco near Kezar Stadium, which served as the home of the San Francisco 49ers from 1946 until 1970.”⁷ Applicant does not point to any evidence showing the term used to denote a geographic area. Rather, the only evidence of record appearing to show “Kezar” being used in a geographic manner is a 1989 news article, submitted by the Examining Attorney, discussing a San Francisco renovation

⁵ Attached, respectively, to Office Actions issued on: May 16, 2019 at TSDR pp. 5-8; November 25, 2019 at TSDR pp. 8-9; and September 23, 2019 at TSDR pp. 35-36.

⁶ See, e.g., Wikipedia website (www.wikipedia.org) entries for “Kezar Stadium” and “Kezar Pavilion,” attached to Office Action issued on September 23, 2019, TSDR pp. 37-44. As discussed more, *infra*, the Examining Attorney submitted this evidence in further support of the showing surname significance and exposure to such surname usage of “Kezar.”

⁷ 4 TTABVUE 2-3.

project “for ‘Kezar Corner’ directly opposite Parkview Commons, including the demolition of the stadium’s 20-foot walls.”⁸ This single article from 1989 is insufficient for purposes of demonstrating that “Kezar” has geographical significance.

Based on the “negative dictionary” evidence, we find the term KEZAR has no recognized alternative meaning.

Structure and Pronunciation

Whether a term has the structure and pronunciation of a surname is a “decidedly subjective” inquiry. *Eximius*, 120 USPQ2d at 1280 (quoting *Benthin*, 37 USPQ2d at 1333). As the Board noted in *Olin*, 124 USPQ at 1332, “applicants and examining attorneys may submit evidence that, due to a term’s structure or pronunciation, the public would or would not perceive it to have surname significance.”

The Examining Attorney’s that Applicant’s mark will be perceived as a surname because “the structure [of KEZAR] is similar to other surnames combining the letter ‘K’ with ‘ZAR’ and with one vowel between those two elements, most notably Kazar, Kozar and Kyzar.”⁹ The Examining Attorney relies on evidence from the LexisNexis surname database showing the “total number [of persons] found” with the last name “Kazar” is 373, “Kozar” is 1586, and “Kyzar” is 673.¹⁰

⁸ “Agnos to announce plans for Kezar Corner at Poly High-Site Groundbreaking,” from Business Wire, Inc. (Dateline San Francisco, February 24, 1989). Attached to Office Action issued on September 23, 2019 at TSDR pp. 37-38.

⁹ 6 TTABVUE 13.

¹⁰ Attached to Office Action issued on November 25, 2019, at TSDR pp. 51-139.

We are not persuaded by the evidence the Examining Attorney relies upon; the numbers of persons with similar surnames are not impressive and do very little, if anything, to convince us that KEZAR has the structure and pronunciation of what the public will perceive as a surname. As discussed, *infra*, KEZAR appears in the same database as showing 404 persons having this surname. Thus, as Applicant points out and is evident on its face, “Kazar” and “Kyzar” are less common or approximately the same.

We thus do not find that KEZAR has a structure and pronunciation similar to that of other common surnames.

Extent of Exposure to KEZAR as a Surname

We turn now to consider the degree of possible exposure the purchasing public has to KEZAR as a surname. In doing so, we consider the prevalence or notoriety of any surname usage. In terms of the number of individuals with the surname KEZAR in the U.S., the Examining Attorney submitted printouts from two separate searches with results showing 404 persons in the LexisNexis Public Records surname database.¹¹

The number of persons with the surname indicates it is not a common surname; however, we point out that even rare surnames may be held primarily merely

¹¹ Attached to Office Action issued on September 23, 2019, at TSDR pp. 14-34. The Examining Attorney also submitted search results from the same database showing 299 persons with the surname with Office action issued on May 16, 2019, TSDR pp. 9-24. We also note that the Examining Attorney submitted printouts from the Whitepages website (www.whitepages.com) showing “153,682 records for Kezar” with the Office Action issued on September 23, 2019; however, there are only a few pages attached from this search and the Examining Attorney does not rely on this evidence in the brief.

surnames if the primary significance conveyed to purchasers is that of surname. “The relevant question is not simply how frequently a surname appears, however, but whether the purchasing public for Applicant’s services is more likely to perceive Applicant’s proposed mark as a surname rather than as anything else.” *Beds & Bars*, 122 USPQ2d at 1551 (finding BELUSHI’S to be primarily merely a surname).

The Examining Attorney concedes that KEZAR thus “appears to be an uncommon surname,” but pursues the contention “even a rare surname is unregistrable if its primary significance to purchasers is that of a surname,” citing *Eximius*, 120 USPQ2d at 1281. In addition to *Eximius* (where the evidence showed 233 people with surname ALDECOA), the Examining Attorney also cites to *In re Adlon Brand GmbH & Co. KG*, 120 USPQ2d 1717, 1722 (TTAB 2016) (75 individuals with surname ADLON), in arguing that the Board has previously found marks to be primarily merely a surname despite showings of even fewer individuals having the name.

The Examining Attorney also argues that “[t]he public’s perception of Kezar as a surname is further established since Kezar is routinely presented to the general public as a surname, and regularly referenced as a surname in news articles from San Francisco where Applicant’s U.S. operations are located.”¹² In particular, the Examining Attorney relies on a Wikipedia entry describing “Kezar Stadium [as] an outdoor athletics stadium located near Golden Gate Park in San Francisco, along with its adjacent Kezar Pavilion,” and an article from the San Francisco Chronicle

¹² 6 TTABVUE 6.

newspaper website discussing the “Kezar Stadium.”¹³ Both Wikipedia and the article mention that the stadium received its name from “prominent San Franciscan Mary Kezar,” who in 1922 left \$100,000 to the city to build a memorial in honor of her mother and uncles “who were pioneers in the area.”¹⁴ To further show that the public would associate “Kezar Stadium” with an individual having the surname “Kezar,” the Examining Attorney submitted a Wikipedia entry for “List of sports venues named after individuals,” by either full name or surname only.¹⁵ Notably, however, “Kezar Stadium” is not one of the listed sports venues.

The Examining Attorney also submitted printouts of publications, comprising news articles, obituaries, a wedding announcement, etc., obtained from the LexisNexis database, which either mention or identify approximately 11 different individuals with the surname “Kezar.”¹⁶ All are dated between the years 1979-1991, and, based on their context, do not describe any individuals having any notoriety or popularity. We further point out that, although the Examining Attorney contends that KEZAR is “regularly referenced as a surname in news articles from San Francisco,” none of these Lexis/Nexis articles has a San Francisco connection except

¹³ *Id.*, printouts from the Wikipedia website (www.wikipedia.org) entries for “Kezar Stadium” and “Kezar Pavilion,” attached to Office Action issued on September 23, 2019, TSDR pp. 37-44. Printouts from the San Francisco Chronicle online newspaper (www.sfchronicle.com) regarding Kezar Stadium are attached at TSDR pp. 49-58.

¹⁴ *Id.*, TSDR at pp. 38 and 51, respectively.

¹⁵ Attached to Office Action issued on November 25, 2019, at TSDR pp. 165-171.

¹⁶ Attached to Office Action issued on September 23, 2019, TSDR pp. 10-50. One of the articles is from a Canadian publication and has not been considered relevant for purposes of the exposure “Kezar” to the U.S. public. Moreover, two articles appear to identify the same individual, Mitch Kezar, and attribute photographs in the articles taken by him.

for the previously-discussed “Business Wire, Inc. . . Dateline: San Francisco,” article which does not identify an individual with the surname “Kezar” but discusses a renovation project at a location identified as “Kezar Corner.”¹⁷

Taking all of the evidence as a whole, we cannot conclude that there has been or currently is an appreciable amount of public exposure to KEZAR being used as a surname. The demonstrated number of individuals having this surname in the U.S., 404 persons, is extremely low.¹⁸ With regard to the evidence concerning “Kezar Stadium,” this consists only of the Wikipedia entry and a single San Francisco Chronicle online article. The entry and article only briefly mention the original benefactor and do not persuade us that the existence of this stadium and any notoriety it may have has significantly enhanced the public’s perception of KEZAR as a surname. There is no other evidence showing that the public is aware of the origin of the stadium’s name. Moreover, as Applicant pointed out, there are many stadiums not named after individuals and Applicant contends that its use of KEZAR must be viewed in the context of its goods and services, namely, pharmaceuticals and preparations for the treatment of diseases like cancer or medical research services.¹⁹ Applicant cites the TMEP § 1211.01, which provides surname determinations should be made based on “the impact the applied-for term has or would have on the purchasing public.” Because KEZAR has no other recognized meaning and the record

¹⁷ *Id.* at TSDR 37-38.

¹⁸ *See, e.g.*, Request for reconsideration filed November 6, 2019, at TSDR p. 3, citing U.S. Census evidence attached to its response filed September 13, 2019, TSDR pp. 1 and 6, showing KEZAR is “used by only 1 in 1.2 million Americans.”

¹⁹ *Id.* at TSDR p. 5-6.

does not show sufficient exposure to KEZAR as a surname, we consider the possibility that consumers will view Applicant's use of KEZAR as an arbitrary term in the context of the applied-for goods and services, pharmaceuticals and medical research.

The Examining Attorney's LexisNexis news evidence also does little, if anything, for purposes of demonstrating that the purchasing public's familiarity with KEZAR as a surname. The articles are approximately 30-40 years old and only mention 11 different individuals with the surname in passing.

Applicant's Survey

Finally, we address a "double-blind" survey that Applicant argues is "direct evidence" that the public would not perceive KEZAR as primarily merely a surname.²⁰ According to Applicant, the survey essentially involved multiple-choice questionnaires taken by 48 "randomly picked" individuals at the Willis Tower (f/k/a the Sears Tower) in Chicago "during the lunch hour on a workday."²¹ Only 36 of these individuals were asked about the significance of KEZAR, while the 6 others were asked about PIRELLI and 6 asked about BENTHIN. The following is an example of a completed questionnaire:

²⁰ Applicant first references this survey and attaches materials with its request for reconsideration filed on December 13, 2019. An affidavit signed by two paralegals from Applicant's counsel's law firm, along with printouts concerning statistical information were attached to Applicant's request for reconsideration filed on January 13, 2020, TSDR pp. 7-14, and with the request for reconsideration filed on February 13, 2020, TSDR pp. 4-12.

²¹ Reconsideration filed on December 13, 2019, TSDR p. 4.

Which of these do you think "KEZAR" is most likely to be (check one):

-a geographic term (like "SoHo")?

-a surname (like "Kozar")?

-a dictionary term (like "radar")?

-something else/don't know?

Sign or initial: _____



The Examining Attorney characterizes the survey as "haphazard" and identifies several shortcomings with the manner it was conducted:²²

. . . 12 out of the 48 questionnaires did not even seek comment on the mark at issue – KEZAR – but instead used the surnames Pirelli and Benthin. Moreover, virtually nothing is known about the respondent pool or the ability of individuals in the pool even to understand the survey. The seemingly unscientific approach to formulating survey questions and selecting respondents, as well as the limited number of participants and the severely restricted geographic scope of the survey, immediately calls into question the value of the survey results. Applicant provides insufficient documentation to allow the examining attorney or the Board to evaluate whether this particular survey was handled in a manner that guaranteed accuracy.

For the same reasons identified by the Examining Attorney, we agree that the survey does not have sufficient reliability to be probative on the question of whether the purchasing public would perceive KEZAR as primarily merely a surname or not. Particularly, we note the relatively small scale of the survey -- only 36 persons were asked about the term -- and the lack of an adequate explanation regarding the

²² 6 TTABVUE 15-16.

methodology of the survey. The persons conducting the survey were paralegals at Applicant's counsel's law firm (see Note 19) with no asserted experience in surveys.

Accordingly, we have given very little weight to the survey. *See, e.g., Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC*, 124 USPQ2d 1184, 1198-99 (TTAB 2017), (quoting *Sheetz of Del., Inc. v. Doctor's Assocs. Inc.*, 108 USPQ2d 1341, 1361-62 (TTAB 2013)), (citing *Jacob Zimmerman v. Nat'l Ass'n of Realtors*, 70 USPQ2d 1425, 1436-36 n. 15 (TTAB 2004)), regarding flaws in the design and administration of surveys resulting in the surveys having limited probative value.

Conclusion

Upon consideration of all of the evidence before us, and all relevant factors, we ultimately find that a prima facie showing has not been made that consumers are likely to view and understand the mark KEZAR in connection with the identified goods and services to be primarily merely a surname. *Benthin*, 37 USPQ2d at 1334 (doubt resolved in favor of applicant). Because the term KEZAR is so rarely used as a surname and there is very limited use of it in other contexts with surname significance, we are not persuaded that consumers encountering Applicant's use of KEZAR on pharmaceuticals and medical preparations for treating diseases like cancer, or in connection with medical and other research services, will perceive it primarily as a surname.

Decision: The refusal to register is reversed.