

This Opinion is not a
Precedent of the TTAB

Oral Hearing: November 15, 2017

Mailed: September 28, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Kipling Apparel Corp.
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Serial Nos. 86356569 and 86356608
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Paul J. Kennedy, Sean P. McConnell and Brian S.S. Auerbach of Pepper Hamilton
LLP for Kipling Apparel Corp.

Deborah L. Meiners,¹ Trademark Examining Attorney, Law Office 110,
Chris A. F. Pedersen, Managing Attorney.

—
Before Taylor, Wellington and Hightower,
Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Kipling Apparel Corp. (“Applicant”) has filed applications to register on the
Principal Register the standard character mark KIPLING for, as amended:

“Cases for spectacles and sunglasses; Chains for spectacles
and for sunglasses; Eye glasses; Eyeglass cases; Eyeglass
chains and cords; Eyeglass frames; Eyeglass lenses;
Eyeglasses; Eyewear; Eyewear cases; Frames for
spectacles and sunglasses; Sunglasses and spectacles; bags

¹ The involved applications were handled by different Trademark Examining Attorneys during prosecution, and Deborah Meiners prepared the supplemental brief and represented the Office at oral hearing. We refer to them, collectively, as “Examining Attorney.”

for laptops; tablet sleeves; laptop sleeves; cases for cellphones; bicycle helmets” in International Class 9 [Serial No. 86356608]; and


“Picture frames” in International Class 20 and “Mugs, tumblers, drinking bottles; trays for domestic purposes; coasters not of paper and other than table linen; leather coasters, plastic coasters” in International Class 21 [Serial No. 86356569].

The Trademark Examining Attorney finally refused registration in each application under Section 2(e)(4) of the Trademark Act, 15 U.S.C. § 1052(e)(4), on the ground that Applicant’s mark is primarily merely a surname, and Applicant’s evidence of acquired distinctiveness is insufficient. Applicant filed an appeal in each case, and thereafter, application Serial Nos. 86356569 and 86356608 were consolidated for the remaining briefs and oral hearing. Applicant subsequently requested remand of the consolidated proceedings, which was granted. The refusals were maintained on remand and the appeal was resumed. Both Applicant and the Examining Attorney filed supplemental briefs and participated in an oral hearing.

For the reasons discussed below, we affirm.


I. Background

By way of background, Application Serial Nos. 86356569 and 86356608 were filed on August 4, 2014, and both are based upon Applicant’s allegation of a *bona fide* intention to use KIPLING in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). The applications also contain, as more fully discussed, *infra*, claims of prior ownership of various registrations that comprise (in whole or in part) the term “KIPLING.” These registrations include:

Registration No. 1952994 for the mark Kipling and design  for “traveling trunks and traveling bags, [net bags for shopping,] handbags, [garment bags for travel,] school bags, athletic sport bags, make-up bags sold empty, toilet cases sold empty, suitcases, attaché cases, book bags, rucksacks, backpacks, waist packs, [hunters’ game bags,] key cases, pocket wallets, purses, and umbrellas” in Class 18;²

Registration No. 2945417 for the typed (currently known as standard character³) mark KIPLING for “[Leather and imitation leather sold in bulk,] travel cases; suitcases; school bags; bags, namely, all purpose sport bags, [garment bags for travel,] bags for campers, bags for climbers, cosmetic bags sold empty, duffel bags, clutch bags, [net bags for shopping,] handbags, travel bags; backpacks [and umbrellas]” in Class 18, and with a claim of acquired distinctiveness;⁴

Registration No. 4537944 for the standard character mark KIPLING for “Jackets” in Class 25, and with a claim of acquired distinctiveness;⁵ and

Registration No. 3397799 for the mark Kipling and design  for “Retail store and wholesale store services in the field of handbags, luggage and related accessories; providing consumer product and dealer information via the Internet” in Class 35.⁶

The Examining Attorney initially refused registration of the mark in Applicant’s applications under Section 2(e)(4) of the Trademark Act, 15 U.S.C. § 1052(e)(4), on

² Issued January 30, 1996, renewed.

³ Prior to November 2, 2003, “standard character” drawings were known as “typed” drawings. A typed mark is the legal equivalent of a standard character mark. TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMEP”) Section 807.03(i) (October 2017).

⁴ Issued May 3, 2005; renewed. The registration originally included goods in Classes 9, 14, 16, 24, 25 and 28.

⁵ Issued May 27, 2014.

⁶ Issued March 18, 2008; renewed.

the ground that KIPLING is primarily merely a surname, and additionally required Applicant to clarify the identification of goods with respect to the Class 21 goods in Registration No. 86356569. Applicant responded with arguments against the Section 2(e)(4) refusals, satisfied the identification requirement, and indicated in each application that “even if KIPLING was primarily merely a surname, the mark has acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), due to Applicant’s prior registrations for the same and similar marks for related goods.”⁷ The Examining Attorney found the Section 2(f) evidence insufficient and made the 2(e)(4) refusals final on the ground that the mark is primarily merely a surname and Applicant’s Section 2(f) evidence is insufficient. Applicant then appealed and, at the request of the Examining Attorney, the two proceedings were consolidated for purposes of further briefing and oral hearing. Thereafter, Applicant requested remand which was granted and jurisdiction was restored to the Examining Attorney for consideration of new evidence. The Examining Attorney was unpersuaded by the new evidence and denied Applicant’s request for reconsideration. These consolidated proceedings were resumed.

II. Section 2(e)4 Surname Refusal

1. Applicable Law

Section 2(e)(4) of the Trademark Act precludes registration of a mark on the Principal Register which is “primarily merely a surname” without a showing of

⁷ April 15, 2016 Response to Office Action; TSDR 6. Citations are to the record in Application No. 86356608 unless otherwise indicated, and all references to the Trademark Status & Document Retrieval database (“TSDR”) are to the downloadable .pdf version.

acquired distinctiveness under Section 2(f) of the Act, 15 U.S.C. § 1052(f). 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.*, 846 F.3d 1374, 123 USPQ2d 1411, 1413 (Fed. Cir. 2017); *In re Beds & Bars Ltd.*, 122 USPQ2d 1546, 1548 (TTAB 2017); *In re United Distillers plc*, 56 USPQ2d 1220 (TTAB 2000). *See also In re Hutchinson Tech. Inc.*, 852 F.2d 552, 7 USPQ2d 1490, 1492 (Fed. Cir. 1988). Whether the primary significance of an applied-for mark is merely that of a surname is a question of fact. *See In re Etablissements Darty et Fils*, 759 F.2d 15, 225 USPQ 652, 653-54 (Fed. Cir. 1985). There is no rule as to the kind or amount of evidence necessary to show that the applied-for mark would be perceived as primarily merely a surname. This question must be resolved on a case-by-case basis. *Id.* at 654. The entire record is examined to determine the primary significance of a term. If there is any doubt, we “are inclined to resolve such doubts in favor of applicant.” *In re Benthin Mgmt. GmbH*, 37 USPQ2d 1332, 1334 (TTAB 1995).

In *Darty*, the Federal Circuit considered several factors in determining whether the purchasing public would perceive a proposed mark as primarily merely a surname, including: whether the applicant adopted a principal’s name and used it in a way that revealed its surname significance; whether the term had a non-surname “ordinary language” meaning; and the extent to which the term was used by others as a surname. 225 USPQ at 653. The Board’s oft-cited “*Benthin* factors,” *see Benthin*, 37 USPQ2d at 1333-34, are also examples of inquiries that may lead to evidence

regarding the purchasing public's perception of a term's primary significance.⁸ These "factors" are not exclusive and any of these circumstances – singly or in combination – and any other relevant circumstances may shape the analysis in a particular case.

The Examining Attorney and Applicant primarily focused their arguments on the first four *Benthin* factors. While we review each in turn, we make our determination by weighing them together and according the appropriate weight to each one based on the evidence of record.

2. Arguments and Evidence

In support of her position that KIPLING is primarily merely a surname, the Examining Attorney made of record:

- Results from a search of Whitepages (www.whitepages.com/search/FindPerson?utf8=%E2%9C%93&who=KIPLING&where=) showing 100 exact matches for Kipling (10 listings made of record).⁹
- Search results from a search of the LexisNexis® Public Records: Surname database for the last name Kipling, indicating the total number found as 363, and with 100 listings made of record.¹⁰

⁸ In *Benthin*, the Board stated that "factors" to be considered in determining whether a term is primarily merely a surname include (1) the degree of a surname's rareness; (2) whether anyone connected with applicant has that surname; (3) whether the term has any recognized meaning other than that of a surname; (4) whether the term has the "structure and pronunciation" of a surname; and (5) whether the stylization of lettering is distinctive enough to create a separate commercial impression. Where, as here, the mark is in standard characters, it is unnecessary to consider the fifth factor. *In re Yeley*, 85 USPQ2d 1150, 1151 (TTAB 2007).

⁹ October 16, 2014 Office Action; TSDR 5-7.

¹⁰ June 1, 2015 Office Action; TSDR 4-8.

- Definitions of KIPLING from Your Dictionary (<http://www.yourdictionary.com/kipling>):¹¹

Kipling, (Joseph) Rudyard 1865-1936; Eng. Writer, born in India [citing Webster's New World College Dictionary];

Proper noun

- A surname.
- Wikipedia entry for "RUDYARD KIPLING" indicating that Joseph Rudyard Kipling ... was an English journalist, short-story writer, poet, and novelist";¹² and
- Copies of Registration Nos. 2945417, 4537944 and 4816387, all for the mark KIPLING.¹³

Applicant, for its part, argues that the purchasing public identifies the term KIPLING as the name of the famous, historical author, Rudyard Kipling, and not merely as a surname; and that even if KIPLING was primarily merely a surname, the mark has acquired distinctiveness due to Applicant's prior registrations for the same and similar marks for related goods.

Applicant has supported its position with the following:¹⁴

¹¹ October 16, 2014 Office Action; TSDR 8-11.

We have not considered the definition of "Kipling" from collinsdictionary.com because the search parameter was "British English" and not "American English." Given the two discrete databases, the definition does not necessarily reflect the meaning of "Kipling" in the United States. *See, e.g., In re Manwin/RK Collateral Trust*, 111 USPQ2d 1311, 1313 n.18 (TTAB 2014).

¹² *Id.* at TSDR 12-30.

¹³ December 17, 2015 Final Office Action; TSDR 5-13.

¹⁴ Applicant also included hyperlinks in its briefs. Not only should a record in the application be complete prior to the filing of an appeal, see Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), the Board has "made clear that providing hyperlinks to Internet materials is insufficient to make such materials of record." *In re Powermat Inc.*, 105 USPQ2d 1789, 1791 (TTAB 2013) (citing *In re HSB Solomon Assocs. LLC*, 102 USPQ2d 1269, 1274 (TTAB 2012) ("a reference

- Wikipedia articles featuring Rudyard Kipling and *The Jungle Book*;¹⁵
- Web pages from Applicant’s website featuring Applicant’s “Story,” stating that its brand was named “after the well-known and well-travelled author Rudyard Kipling”;¹⁶
- Definitions of the term “kiplingesque,” which is defined as “in the manner or style of Rudyard Kipling taken from www.wordnik.com; www.thefreedictionary.com; www.vocabulary.com; and www.webster-dictionary.net;¹⁷
- An excerpt from a world population statistic website (<http://www.worldpopulationstatistics.com/population-of-north-america-2014/>);¹⁸
- A listing of search results from a search of KIPLING on the Google search engine;¹⁹
- Plain copies of Applicant’s previously registered KIPLING marks, i.e., U.S. Registration Nos.

to a website’s internet address is not sufficient to make the content of that website or any pages from that website of record.”)). Accordingly, the materials at www.whitepages.com not made of record by the Examining Attorney and at <http://movies.disney.com/the-jungle-book-2016>, along with any attendant arguments, will not be further considered. As regards the hyperlink to a non-precedential Board decision, while applicants may cite to non-precedential decisions, such decisions are not binding on the Board and the Board does not encourage this practice. *In re Fiat Grp. Mktg. & Corporate Commc'ns S.p.A.*, 109 USPQ2d 1593, 1596 n.6 (TTAB 2014); *In re Procter & Gamble Co.*, 105 USPQ2d 1119, 1121 (TTAB 2012); *In re Luxuria s.r.o.*, 100 USPQ2d 1146, 1151 n.7 (TTAB 2011); *Corporacion Habanos SA v. Rodriguez*, 99 USPQ2d 1873, 1875 n.5 (TTAB 2011).

¹⁵ April 16, 2015 Response to Office Action; TSDR 14-33.

¹⁶ *Id.* at TSDR 35-36.

¹⁷ *Id.* at TSDR 45-50.

¹⁸ *Id.* at TSDR 38-43. Applicant asserts that the population statistic shows that the 100 Whitepages matches submitted by the Examining Attorney represent approximately .000000012 million people in North America or, put another way, about 9 out of every 50 million people, in an effort to support its position that KIPLING is an extremely rare surname. As discussed, *infra*, despite any shortcomings inherent in this evidence, the record reflects that KIPLING is a rare surname.

¹⁹ *Id.* at TSDR 52-57.

2945417, 4537944, 1952944, 2159124, 3397799 and 1889981;²⁰ and

- Copies from the TSDR database of the following applications for marks containing the term KIPLING (in whole or in part and with or without design elements): Serial Nos. 86325743, 86356662, 86356650, 863565580, 85035536, 86356589 and 86486427.²¹

3. Analysis

(A) *The Extent to Which Kipling is Encountered as a Surname*

We consider first the frequency of, and public exposure to, KIPLING as a surname.

Citing various published and unpublished Board opinions,²² Applicant contends that

²⁰ April 16, 2015 Response to Office Action; TSDR 59-66. The copy of Registration No. 1889981 is purportedly for the mark KIPLING and a circle and star design. However, the registration number apparently contains a typographical error because the mark in that registration is MINIBLASTER ARROW and the copy of the registration made of record is for that mark. Because that mark is unrelated to this proceeding, that registration will not be further considered.

²¹ November 25, 2015 Response to Office Action; TSDR 15-40.

²² Applicant particularly cites the following in its brief:

In re Okamoto Corp., 2015 LEXIS 301 (TTAB 2015) (reversing a refusal to register OKAMOTO, the Examining Attorney's submission of 739 Lexis listings for the surname "OKAMOTO" and 33 Internet excerpts referencing others with that surname was deemed insufficient in showing that the surname is not rare); *In re GR Lane Health Products Limited*, Serial No. 85/115,445 (July 10, 2013) [not precedential] (JAKEMANS for throat lozenges and candies not primarily merely a surname despite evidence of 2,365 Jakemans in nationwide directory); *In re Joint-Stock Company "Baik"*, 84 USPQ2d 1921 (TTAB 2007) (holding that BAIK is an extremely rare surname based on the fact that only 465 listings of the surname found); and *In re United Distillers plc*, 56 USPQ2d 1220 (TTAB 2000) (HACKLER rare surname despite 1,295 telephone directory listings).

Applicant's Brief, p. 6-7; 4 TTABVUE 7-8.

KIPLING is an extremely rare surname, particularly arguing that the Board will objectively evaluate the quantity of evidence supporting the rarity of a surname, and that the Examining Attorney's evidence of 363 listings is insufficient to show that KIPLING is not a rare surname.

Considering the Examining Attorney's evidence on this factor, the LexisNexis® evidence shows that there are 363 people in the United States with the surname KIPLING; however, of the 100 records submitted, 14 appear to be duplicates. Also of record are results from a search of Whitepages.com potentially showing an additional 100 persons with the KIPLING surname in the United States. It is more likely than not that the two lists are cumulative and, while this duplication lessens its probative value, the evidence nonetheless shows that KIPLING is a surname and that persons with it are located in a number of cities throughout the United States. Indeed, we take judicial notice of data from the 2010 U.S. Census, which counted 356 people with the name Kipling in the United States, and corroborates the evidence from the LexisNexis® Surname database and Whitepages.com made of record by the Examining Attorney.²³

The number of individuals with the surname KIPLING, especially in view of the duplication, leads us to conclude that KIPLING is rare when viewed strictly in terms of frequency of use as a surname in the United States. "Even [so,] a rare surname may be held primarily merely a surname if its primary significance to purchasers is that of a surname. ... The relevant question is not simply how frequently a surname

²³ "File B: Surnames Occuring 100 or more times," at the web page "Frequently Occurring Surnames from the 2010 Census" (https://www.census.gov/topics/population/geneology/data/2010_surnames.html) (last accessed September 17, 2018). The Board may take judicial notice of census data. See *In re Olin Corporation*, 124 USPQ2d 1327, 1331 n.12 (TTAB 2017) (citing *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1127 n.6 (TTAB 2015)).

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 (citing *In re Gregory*, 70 USPQ2d 1792, 1795 (TTAB 2004)). See also *In re Eximius Coffee*, 120 USPQ2d 1276, 1281 (TTAB 2016) ("Section 2(e)(4) makes no distinction between rare and commonplace surnames ... and even a rare surname is unregistrable if its primary significance to purchasers is a surname.") (Citations omitted).

(B) *Whether KIPLING is the Surname of Anyone Connected with Applicant*

Applicant indicates that no one connected with the design, development, manufacture or production of Applicant's products (including any officer or other employee of Applicant) bears the name Kipling. However, the fact that no one named KIPLING is associated with Applicant is not controlling. See *In re Gregory*, 70 USPQ2d at 1995 (The Board stated that the fact that "a proposed mark is not the 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) *Whether KIPLING has any Recognized Meaning Other Than as a Surname*

The Examining Attorney has demonstrated that KIPLING has no recognized meaning in English other than as a surname by showing that searches for KIPLING in the online dictionary, Yourdictionary.com, returned no results of a non-surname meaning, but rather corroborated the surname meaning of the term. This "negative" dictionary evidence (i.e., listings showing nothing except surname/biographical

meanings) supports a finding that the primary significance of KIPLING is as a surname. *See, e.g., In re Eximius Coffee LLC*, 120 USPQ2d 1276, 1280 (TTAB 2016) (citing *In re Isabella Fiore LLC*, 75 USPQ2d 1564, 1566 (TTAB 2005)). *See also Darty*, 225 USPQ at 653-54.

Applicant has countered this position, arguing that similar to the findings in *Lucien Picard Watch Corp. v. Since 1868 Crescent Corp.*, 314 F. Supp. 329, 165 USPQ 459 (S.D.N.Y. 1979) (finding that DA VINCI is not primarily merely a surname); *In re Pyro-Spectaculars, Inc.*, 63 USPQ2d 2022, 2024 (TTAB 2002) (finding SOUSA not primarily merely a surname); and *Michael S. Sachs Inc. v. Cordon Art B.V.*, 56 USPQ2d 1132 (TTAB 2000) (finding the primary significance of M.C. Escher is that of a famous deceased Dutch artist), KIPLING would be recognized as a historical name and not primarily merely a surname. Applicant particularly asserts that “Kipling identifies the historical British author, Rudyard Kipling, who was one of the most popular English-language writers throughout the late 19th and 20th centuries and whose classic, celebrated children’s book *The Jungle Book* is still popular among children around the world today.” Applicant’s brief, p. 8 citing to Applicant’s First Response, p. 2.²⁴

By contrast, the Examining Attorney citing *Frances Rothschild, Inc. v. U.S. Cosmetic Fragrance Marketing Corp.*, 223 USPQ 817 (N.D. Tex. 1983) (ROTHSCHILD held primarily merely a surname despite being the surname of a historical banking family) and *In re Champion International Corp.*, 229 USPQ 550

²⁴ 4 TTABVUE 8.

(TTAB 1985) (MCKINLEY held primarily merely a surname despite being the surname of a deceased president), asserts that the surname KIPLING is only “semi-historical” in character and thus can be perceived as primarily merely a surname since it is not exclusively associated with Rudyard Kipling.

As highlighted by the opposing positions noted above, “in cases involving historical names, the Board has drawn a line between those names considered so widely recognized as to be ‘almost exclusively associated in terms of commercial impressions with the historical figures’ and those names ‘semihistorical in character.’ ... But even when such a line was drawn, the ultimate issue to be determined was still that of the primary significance of the mark in question to the purchasing public.” *Pyro-Spectaculars*, 63 USPQ2d at 2024 (quoting *In re Pickett Hotel Co.*, 229 USPQ 760, 761 (TTAB 1986)).

As exemplified in the cases relied upon by Applicant, a historical name, which is widely recognized as such by the public, is protectable as a trademark due to its inherently distinctive character. However, the facts in this case differ significantly from the facts in those cases. In *Lucien Watch v. 1868 Crescent*, the Court, while noting only two telephone directory listings in the record for the surname Da Vinci, determined that “the name Da Vinci, even without the given name Leonardo, comes very near having as its exclusive connotation the world-renowned [sic] 15th century artist, sculptor, architect, musician, engineer and philosopher . . . and hardly suggests that he personally had something to do with the designing of plaintiff’s luggage.” The same exclusivity of connotation cannot be said for Kipling.

In *Pyro-Spectaculars*, evidence showing a nexus between present-day recognition and continuing fame of the band leader and composer John Philip Sousa, well known in United States history for his patriotic music, and the applicant's identified fireworks and shows featuring pyrotechnics, being types of goods and services that potential purchasers would associate with patriotic events, figures, and music, resulted in the primary significance of "Sousa" to the purchasing public as the name of John Philip Sousa. While Rudyard Kipling may have some present-day recognition, absent from this case, however, is a significant nexus between any present day recognition of Rudyard Kipling and the term Kipling when used in connection with the goods identified in Applicant's applications.

In *Sachs v. Cordon Art*, the mark at issue involved the full name M. C. ECSHER, which the Board found to identify "a specific individual of particular renown" such that ESCHER "would be no more perceived as primarily merely a surname than the personal names P.T. Barnum, T.S. Eliot, O.J. Simpson, I.M. Pei and Y.A. Tittle." *Sachs v. Cordon Art*, 56 USPQ2d at 1136. This is because the presence, notably lacking here, of two or more initials preceding a surname will typically convey the commercial impression of a personal name and thus generally will not be primarily merely a surname. See *In re P.J. Fitzpatrick*, 95 USPQ2d 1412, 1414 (TTAB 2010) (finding that the initials P.J. coupled with surname Fitzpatrick would be perceived as a given name and thus comprises an entire personal name, not merely a surname); *In re Yeley*, 85 USPQ2d at 1153 (finding that the proposed mark J.J. YELEY was recognized as the full name of the well-known NASCAR race driver and

as such was perceived as a reference to a particular person and not primarily merely a surname).

We instead find the facts in this case more akin to those in the cases relied upon by the Examining Attorney. For example, in *Champion*, the Board found that although McKinley was the historical name of a United States president whose legacy included several geographical locales and many institutions, e.g., 19 cities and towns, 149 schools and one hospital, bearing his name, there was insufficient evidence to demonstrate that the term McKINLEY primarily would be perceived by the public as identifying the historical figure and not as merely a surname.

We similarly find on this record that the purchasing public would not view Rudyard Kipling as a historical figure such that the primary connotation of the term KIPLING would be to him. Indeed, as the Board has previously noted, “[t]here is a difference between being an individual that has made an historically significant contribution ... [and] an individual that has achieved such renown as to become an historical figure.” *In re Thermo LabSystems Inc.*, 85 USPQ2d 1285, 1289 (TTAB 2007). Here, while the evidence shows that Mr. Kipling has made a significant literary contribution with his short stories and poems, and that he was a popular writer during the late 19th and 20th centuries, there is insufficient evidence of his current popularity. That is to say, the record fails to show that Mr. Kipling presently has sufficient notoriety that KIPLING would be understood by the relevant purchasing public as referring solely to Rudyard Kipling, or that Rudyard Kipling is a historical figure. Instead, we find that KIPLING has no non-surname meaning, and

it has received exposure as a surname given the geographic diversity of individuals with that surname and as demonstrated by the discussion of the author Rudyard Kipling (and his father, as explained below) on Wikipedia.

Applicant's evidence and arguments to the contrary are unpersuasive. First, as regards the Wikipedia excerpts discussing both Rudyard Kipling and his seminal work, *The Jungle Book*, made of record by it and the Examining Attorney, while we consider these excerpts in our decision, we are aware of the limitations inherent in the reference work due to the public's ability to modify the information. *See In re Swatch Grp. Mgmt. Servs. AG*, 110 USPQ2d 1751, 754 n.4 (TTAB 2014) ("The Board gives consideration to evidence taken from Wikipedia, bearing in mind the limitation inherent in this reference work, so long as the non-offering party has an opportunity to rebut the evidence by submitting other evidence that may call its accuracy in question.") (Citations omitted). *See also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") Section § 1208.03 (2018). In the present case, both Applicant and the Examining Attorney relied on Wikipedia excerpts, and each had ample opportunity to rebut the other's evidence, but did not. With regard to the Wikipedia references to Rudyard Kipling's writings, while much of the discussion focuses on Rudyard as the author of *The Jungle Book*, it also references Rudyard's Kipling's father, John Lockwood Kipling, as an illustrator associated with the original publications.²⁵ Moreover, although Applicant argues that *The Jungle Book* is still popular among children around the world today, presumably based on various

²⁵ April 16, 2015 Response to Office Action; TSDR p. 24.

adaptations of the source material, there is nothing in the record to gage the level of popularity. As to film and other adaptations, it is unclear whether the public equates the movies, and other derivative works, with the studios or other entities that produce them, as opposed to Rudyard Kipling, the author of the underlying source material.

The evidence submitted from a Google search of the term “Kipling” also fails to persuade us that Rudyard Kipling is a historical figure. While again, as pointed out by the Examining Attorney, there are some limitations to the probative value due to the truncated nature of the results, *see In re Fitch IBCA, Inc.*, 65 USPQ2d 1058 (TTAB 2002), we acknowledge that most of the references to individuals appear to be to Rudyard Kipling or societies featuring his work. However, the listings also reference Will (Kip) Kipling, who is associated with the University of California at Berkley, and Kipling & Clark Travel Agency. Markedly, the first two listings are to Applicant’s Kipling brand.

In addition, although, as Applicant pointed out, some dictionaries define the word “kiplingesque” as “in the manner or style of Rudyard Kipling,” that is not the mark Applicant seeks to register. Even if it were, there is no evidence that “kiplingesque” is a widely used term or that it would impart such a meaning unless used in connection with writing and/or other literary goods and services for which Rudyard Kipling is known.

Applicant also maintains that its KIPLING brand is inspired by Rudyard Kipling, expounding that its website explains that the brand was named “after the well-known and well-travelled author Rudyard Kipling.” Notably, the fact that Applicant

apparently finds it necessary to educate the public of an intended connection between its KIPLING branded merchandise and the author Rudyard Kipling undercuts its position that the primary significance of the term KIPLING is that of the 19th and 20th century British author.

(D) *Whether KIPLING has the Structure and Pronunciation of a Surname*

We last consider whether KIPLING has the structure and pronunciation of a surname, recognizing that this assessment is a “decidedly subjective” inquiry. *In re Eximius Coffee*, 120 USPQ2d at 1280 (TTAB 2016) (quoting *Benthin*, 37 USPQ2d at 1333). Under this factor, a party may submit evidence that, due to a term’s structure and pronunciation, the public would or would not perceive it to have surname significance. *See Eximius Coffee*, 120 USPQ2d at 1280. Simply referring to purported surnames without providing some other objective evidence of how members of the public perceive the structure and sound, however, is not sufficient to enable us to determine whether a particular term has surname structure and pronunciation. *Id.* (“The Examining Attorney’s reference to two purported surnames – without proving that they are surnames, ... and without providing some other objective evidence of how members of the public perceive the structure and sound of ALDECOA – is not sufficient to enable us to determine that ALDECOA has a structure and pronunciation of a surname.”). Here, without evidentiary support, the Examining Attorney argues that KIPLING “has the look, feel and sound of a surname.” Applicant, in turn, merely points out the evidentiary deficiencies in the Examining Attorney’s position. In the absence of objective evidence on this point, we are not able

to determine whether KIPLING has a structure and pronunciation similar to other surnames.

(E) Other Factors

As a final argument, Applicant contends in its Supplemental Brief that the disposition by the Office of pending third-party application Serial No. 87173381 (filed on an intent-to-use basis), for the standard character mark KIPLING for “distilled spirits; spirits and liqueurs,” owned by Sovereign Brands, LLC, bears directly on this case. Particularly, Applicant asserts that the issues, arguments and evidence in that case are very similar to those in this case, but that case initially was approved for publication on the Principal Register with no Section 2(f) claim of acquired distinctiveness. By this, Applicant presumably is arguing that its application has received inconsistent treatment by the United States Patent and Trademark Office (“Office”).

We note, first, that third-party applications have no probative value other than as evidence that they were filed. *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1270 n.8 (TTAB 2009); *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1366 n.7 (TTAB 2007). More importantly, although the Office strives for consistency, we must decide each case on its own merits. Neither the examining attorney nor the Board are bound by the allowance of prior registrations, even if they have some characteristics similar to the application. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). “The fact that, whether because of administrative error or otherwise, some marks have been registered [or allowed for registration] even though

they may be in violation of the governing statutory standard does not mean that the agency must forgo applying that standard in all other cases.” *In re Boulevard Entm’t, Inc.*, 334 F.3d 1336, 67 USPQ2d 1475, 1480 (Fed. Cir. 2003). In any event, the Office has since recognized the possible violation of statutory standard in application Serial No. 87173381 and it has been suspended pending disposition of this case.

The Examining Attorney maintains that an additional consideration for treating KIPPLING as primarily merely a surname are Applicant’s claimed prior registrations, which are probative to show that Applicant’s applied-for mark is not inherently distinctive in this case. She further explains in her supplemental brief that:

In Applicant’s prior registrations [Registration Nos. 2945417, 4537944, and 4816387, all for KIPPLING in standard character or typed form], Applicant claimed acquired distinctiveness under Trademark Act Section 2(f) unconditionally and not in the alternative for “KIPPLING” in the initial application or a subsequent amendment. Thus, Applicant conceded that this wording was not inherently distinctive but was rather primarily merely a surname. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1479 (TTAB 2016) (citing *Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 1358, 92 USPQ2d 1626, 1629 (Fed. Cir. 2009)); TMEP § 1212.02(b)-(c).

...

Accordingly, Applicant’s prior registrations are probative to show that Applicant’s applied-for mark is not inherently distinctive in this case. *See In re Thomas Nelson, Inc.* 97 USPQ2d 1712, 1713 (TTAB 2011); TBMP § 1212.02(c).²⁶

First, the Examining Attorney’s reliance on *Mini Melts, Inc. v. Reckitt Benckiser* and, by extension, *Cold War Museum v. Cold War Air Museum* is misplaced. We

²⁶ 24 TTABVUE 5.

recognize and follow the proposition articulated by those cases; that is, that an unconditional claim of distinctiveness under Section 2(f) of the Trademark Act, whether made in an application as filed, or as a subsequent amendment, may be construed as a concession that the mark, for purposes of that application, is not inherently distinctive. However, an applicant's unconditional claim of acquired distinctiveness in one application does not transfer to another application, even for the same mark.²⁷

In fact, our primary reviewing court addressed a very similar issue in *In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681 (Fed. Cir. 2010), namely, “whether the granting of a Section 2(f) registration for a mark of acquired distinctiveness moots the request for an inherent distinctiveness registration.” *Id.* at 1685.²⁸ The court held that inherent distinctiveness is decided at the time of

²⁷ The Examining Attorney's reliance on *In re Thomas Nelson Inc.*, 97 USPQ2d 1712 (TTAB 2011), to support its assertion that Applicant has conceded that its mark is not inherently distinctive also is misplaced. Under *Thomas Nelson*, the records of a claimed prior registration under Section 2(f) for a different depiction of the same mark (e.g., stylized vs. standard character) or a portion of the proposed mark, for the same goods or services, may have some probative value in assisting the examining attorney in resolving whether the mark in question had acquired distinctiveness, thereby obviating the need for an appeal. None of the goods in the application at issue in this case are the same as those in Applicant's claimed prior registrations, as more fully discussed *infra*. More importantly, *Thomas Nelson* neither alleviates an applicant's burden to prove that its mark has acquired distinctiveness by submitting proof thereof in each application where such a claim has been asserted, *see In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262, 1264 (Fed. Cir. 2015); *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1006 (Fed. Cir. 1988), nor even mandates examining attorney review of the records of any claimed prior registrations.

²⁸ The court, while noting that the parties are in agreement that a grant of a Section 2(f) registration did not moot a subsequent request for an inherently distinctive one, nonetheless agreed that the issue presented a viable controversy given “potential collateral consequences resulting from the form of registration under the Lanham Act,” notwithstanding the USPTO's then newly instituted procedure requiring that the examining attorney explicitly notify an applicant as to the basis for its decision. That is, the then newly adopted procedure requires the examining attorney to give the applicant the option to either appeal the underlying

registration. It thus follows that even if a mark was previously registered pursuant to Section 2(f) of the Trademark Act as having acquired distinctiveness, an applicant is not foreclosed from filing a later application seeking an inherently distinctive registration of the same mark. Accordingly, we find that Applicant's concessions in its prior registrations that its mark is not inherently distinctive as a result of its unconditional Section 2(f) claims during the prosecution of those applications are not binding on future applications.

In point of fact, Applicant originally filed its applications as ones seeking inherently distinctive registrations for the term KIPLING. Although during prosecution Applicant amended the filing basis in each application to alternatively seek registration pursuant to Section 2(f), these claims in the alternative do not amount to a concession that the applied-for mark is not inherently distinctive.²⁹

4. Conclusion

For the reasons discussed, we find that the record, taken as a whole, establishes that the primary significance of KIPLING to the purchasing public is that of a surname. While Applicant is correct that doubt about whether a term is a surname is resolved in the applicant's favor, here we have no doubt.

refusal of inherent distinctiveness, or waive the appeal and accept the section 2(f) registration. *Chippendales*, 96 USPQ2d at 1685 (citations omitted). By its very nature the procedure requires such an option for each application.

²⁹ Although Applicant did not specifically state that its Section 2(f) claims are in the alternative, the claims were expressed in terms that make Applicant's intended position clear. As stated earlier, Applicant, in each proceeding, stated "[e]ven if KIPLING was primarily merely a surname, Applicant's mark is still entitled to registration because it has acquired distinctiveness under Sections 2(f) of the Lanham Act." Applicant's April 16, 2016 Responses to Office Actions; TSDR 11 ('569) and TSDR 10 ('608).

III. Acquired Distinctiveness under Section 2(f)

Having found KIPLING to be primarily merely a surname, we turn to Applicant's Section 2(f) claims, and consider whether Applicant has met its burden to prove that KIPLING has acquired distinctiveness. *See La. Fish Fry Prods., Ltd.*, 116 USPQ2d at 1264; *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 6 USPQ2d at 1006. We begin our inquiry by reiterating that this is an "intent-to-use" application filed under Section 1(b) of the Trademark Act. Typically, a claim of distinctiveness under Section 2(f) is not raised in Section 1(b) cases before the applicant files an amendment to allege use or statement of use, since a claim of acquired distinction requires use. However, an intent-to-use applicant who has used the same mark on related goods or services may file a claim of acquired distinctiveness under §2(f) before filing an allegation of use, if the applicant can establish that, as a result of the applicant's use of the mark on other goods or services, the mark has become distinctive of the goods or services in the intent-to-use application, and that this previously created distinctiveness will transfer to the goods and services in the intent-to-use application when use in commerce begins. *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1812 (Fed. Cir. 2001).

The Board has set forth the following requirements for showing that a mark in an intent-to-use application has acquired distinctiveness: First, applicant must establish, through the appropriate submission, the acquired distinctiveness of the same mark in connection with specified other goods and/or services in connection with which the mark is in use in commerce. To satisfy the first element, the applicant

must establish acquired distinctiveness as to the other goods and/or services by appropriate evidence, such as ownership of a prior registration for the same mark for related goods and/or services, a prima facie showing of acquired distinctiveness based on five years use of the same mark with related goods and/or services, or actual evidence of acquired distinctiveness for the same mark with respect to the other goods and/or services. Second, applicant must establish, through submission of relevant evidence rather than mere conjecture, a sufficient relationship between the goods and/or services in connection with which the mark has acquired distinctiveness and the goods and/or services recited in the intent-to-use application to warrant the conclusion that the previously created distinctiveness will transfer to the goods and/or services in the application upon use. To satisfy this element, applicant must show the extent to which the goods and/or services in the intent-to-use application are related to the goods and/or services in connection with which the mark is distinctive, and that there is a strong likelihood that the mark's established trademark function will transfer to the related goods and/or services when use in commerce occurs. *Olin Corp.*, 124 USPQ2d at 1333-34; *In re Highlights for Children, Inc.*, 118 USPQ2d 1268, 1273-75 (TTAB 2016); *In re Rogers*, 53 USPQ2d 1741, 1744 (TTAB 1999). See generally TMEP § 1212.09(a) and the authorities cited therein.

Applicant has based its claim of acquired distinctiveness on its ownership of prior registrations.³⁰ Applicant’s claimed prior registrations are as follows:³¹




Reg. No.	Mark	Goods/Services
2945417 ³²	KIPLING	Travel cases; suitcases; school bags; bags, namely, all purpose sportbags,

³⁰ Applicant, in its brief, also appears to rely on its assertion that its KIPLING mark has acquired distinctiveness due to “Applicant’s well-known brand that has been in operation in the United States and globally for over 30 years,” but references only prior registrations to support this claim. 4 TTABVUE 6-7.

³¹ Applicant also appears to rely on several of its applications pending before the Office, *i.e.*, Serial Nos. 86325743, 86356662, 86356650, 86356580, 850335535, 86356589 and 86486427, for the mark KIPLING (alone or in connection with other matter) that it asserts have already been approved for registration. As noted, an application is only evidence that it has been filed, *see Toshiba Med. Sys.* 91 USPQ2d at 1270 n.8, and therefore has no probative value to Applicant’s Section 2(f) claim based on its ownership of prior registrations. Of those applications, the only one that includes goods of the type that on their face are identical or related to the eyewear at issue here, namely, application Serial No. 85035536, is for the mark KIPLING with a design element, and has abandoned for Applicant’s failure to file a Statement of Use. None of the others have matured to registration and thus are not probative in our acquired distinctiveness determination.

We note, too, that the Board is not bound by prior decisions of Trademark Examining Attorneys, and that each case must be decided on its own merits and on the basis of its own record, in accordance with relevant statutory authority. *See, e.g., In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790, 1793 n.10 (TTAB 2017) (“The issuance of Applicant’s first registration does not require the approval of a second registration if, on the facts of the case, it would be improper to do so under the governing legal standard” (citations omitted)); *In re International Flavors & Fragrances Inc.*, 183 F.3d 1361, 51 USPQ2d 1513 (Fed. Cir. 1999); *In re Cooper*, 117 USPQ 396 (CCPA 1958) (“... the decision of this case in accordance with sound law is not governed by possibly erroneous past decisions by the Patent Office”); *In re BankAmerica Corporation*, 231 USPQ 873, 876 (TTAB 1986) (“Section 20 of the Trademark Act, 15 USC §1070, gives the Board the authority and duty to decide an appeal from an adverse final decision of the Examining Attorney. This duty may not and should not be delegated by the adoption of conclusions reached by Examining Attorneys on different records”).

³² Registration No. 2945417 originally identified additional goods, including *inter alia*, “spectacles, spectacle frames, [and] spectacle cases” in Class 9, which are legally identical to some of the Class 9 goods at issue here. However, that registration has been cancelled except as to the goods noted above. In that regard, a claim of acquired distinctiveness may not be based on a cancelled registration. *See* Trademark Rule 2.41(a)(1); 37 C.F.R. § 2.41(a)(1); *see also In re BankAmerica Corp.*, 229 USPQ 852, 853 (TTAB 1986).

		bags for campers, cosmetic bags sold empty, duffel bags, clutch bags, handbags, travel bags; backpacks (Class 18)
4537944	KIPLING	Jackets (Class 25)
4816387 ³³	KIPLING	Metal locks for luggage (Class 6); Passport cases; Pen or pencil holders (Class 16); and Towels (Class 24)
1952994		Traveling trunks and traveling bags, handbags, school bags, athletic sport bags, make-up bags sold empty, toilet cases sold empty, suitcases, attaché cases, book bags, rucksacks, backpacks, waist packs, key cases, pocket wallets, purses and umbrellas (Class 18)
2159124		Clothing, namely, T-shirts (Class 25)
3397799		Retail store and wholesale store services in the field of handbags, luggage and related accessories; providing consumer product and dealer information via the internet (Class 35)

³³ Although Applicant listed the associated goods as those for which it had previously registered the KIPLING mark, Applicant neither referenced Registration No. 4816387 in the list specifying its ownership of prior registrations in either application, nor made it of record with any of its responsive filings during prosecution of either application presumably due to a typographical error. Nonetheless, the Examining Attorney made it of record with its Office Action issued December 17, 2015, and Applicant apparently relied on it when it set forth the goods and services for which it had already registered the standard character KIPLING mark. While the Examining Attorney did not address this registration when countering Applicant's argument in that regard, she did acknowledge Applicant's prior ownership thereof by arguing that Applicant's claim of acquired distinctiveness made in the application that matured into Registration No. 4816387 transferred to its current application. 21 TTABVUE 5. Because the Examining Attorney addressed this prior registration in her brief, we consider it of record for all purposes, including Applicant's demonstration of acquired distinctiveness in this case.

Applying the requirements set forth above, we first look to see if the applied-for mark is the same as the ones in the prior registrations. A proposed mark is the “same mark as a previously registered mark” if it is the “legal equivalent” of such a mark. A mark is the legal equivalent of another if it creates the same, continuing commercial impression such that the consumer would consider them both the same mark. *In re Dial-A-Mattress Operating Corp.*, 57 USPQ2d at 1812. Applicant’s standard character KIPLING mark is identical to and the legal equivalent of the standard character KIPLING mark in Registration Nos. 2945417, 4537944 and 4816387; however, it is clearly not the legal equivalent of the mark in Registration Nos. 1952994, 2459124 and 3397799, which includes a prominent monkey design element, and thus, does not create the same, continuing commercial impression. As such, while Applicant has satisfied the first requirement with regard to Registration Nos. 2945417, 4537944 and 4816387, because the marks in Registration Nos. 1952994, 2459124 and 3397799 are not the same as the KIPLING mark Applicant now seeks to register, they do not establish acquired distinctiveness and we give them no further consideration. *See* TMEP § 1212.04.

We next consider the extent to which the goods identified in Applicant’s applications are related to the goods identified in prior Registration Nos. 2945417, 4537944 and 4816387. *See* TMEP § 1212.04(c). The Examining Attorney maintains that similarity or relatedness of the goods and services identified in the prior registrations, consisting primarily of clothing, bags and luggage, is not self-evident to the goods in the involved applications, which are identified as “cases for spectacles

and sunglasses; chains for spectacles, sunglasses; eye glasses; eyeglass cases; eyeglass chains and cords; eyeglass frames; eyeglass lenses; eyeglasses; eyewear; eyewear cases; frames for spectacles and sunglasses; sunglasses and spectacles; bags for laptops; tablet sleeves; laptop sleeves; cases for cellphones; bicycle helmets” (Serial No. 86356608) and “picture frames; mugs, tumblers, drinking bottles; trays for domestic purposes; coasters not of paper and other than table linen; leather coasters, plastic coasters” (Serial No. 86356569), and that Applicant has not provided any evidence and/or explanation to show how they are related. Therefore, she maintains that Applicant’s Section 2(f) claim is not acceptable.

Applicant conversely maintains that it has provided “overwhelming” evidence to support a finding of acquired distinctiveness and, based on the prior registrations listed above, it has demonstrated that KIPLING has acquired distinctiveness for the goods identified in its involved applications. Applicant particularly asserts with regard to the goods identified in Application Serial No. 86356569 that: “[i]t is common for trademark owners to own registrations of many types of products, including similar types of goods, and consumers can expect that in this vein, mugs and coasters can surely be regarded to be collateral merchandise emanating from the same course [sic].” Relying on *In re Shark Eyes, Inc.*, Serial No. 77965144 (January 5, 2012) [non-precedential], Applicant makes a similar assertion with regard to the eyewear and related accessories in its application Serial No. 86356608 vis-à-vis apparel goods, particularly noting that the “examining attorney’s record of twenty use-based third

party [sic] registrations demonstrates eyeglasses emanate from same source that produces clothing.”

Contrary to Applicant’s assertion of “overwhelming” supporting evidence, the only evidence it made of record to support its claim of acquired distinctiveness are copies of its prior registrations. Because the goods as identified in those registrations are neither intuitively related nor complementary on the face of their identifications to the goods for which Applicant now seeks to register the mark KIPLING, there is little likelihood that the previously acquired distinctiveness of the KIPLING mark with respect to the travel bags, clothing items, metal locks for luggage, passport cases, pen or pencil holders and towels will transfer to the goods identified in Applicant’s involved applications.

Applicant’s reliance on the *Shark Eyes* decision is also unavailing. While in *Shark Eyes*, the Board found that clothing items and eyewear and related accessories were related for purposes of a likelihood of confusion determination, due to the inclusion in the record of various third-party registrations and uses demonstrating that clothing items and eyewear and accessories often emanate from a common source under the same mark, Applicant failed to make the proceeding history, or the third-party evidence, of record. To the extent that Applicant intended the Board take judicial notice of that application file, the Board historically has not taken judicial notice of third-party registrations or USPTO records. *See, e.g., In re Thomas Nelson* 97 USPQ2d at 1717 n.18 (“[T]he Board's well-established practice is not to take judicial notice of third-party registrations, and we do not take judicial notice of third-

party registrations here. Thus, to make a third-party registration of record, a copy of the registration, either a copy of the paper USPTO record, or a copy taken from the electronic records of the Office, should be submitted during prosecution/examination of the application.” (citations omitted)); *Beech Aircraft Corp. v. Lightning Aircraft Co.*, 1 USPQ2d 1290, 1293 (TTAB 1986) (“[W]e [the Board] do[es] not take judicial notice of application and registration files that reside in the Patent and Trademark Office on the basis of their mere identification in briefs, pleadings and evidentiary submissions.”). See also TBMP §§ 704.12 and 1208.04. Applicant’s unsupported assertion that trademark owners commonly own registrations for many types of goods simply does not suffice as evidence.

At bottom, it was incumbent on Applicant to demonstrate through the submission of evidence that the goods for which it now seeks registration are related to the travel bags, clothing items, metal locks for luggage, passport cases, pen or pencil holders and towels previously registered by Applicant under its standard character Kipling mark to the extent that there is a strong likelihood of transference of the trademark function of Kipling with respect to those registered goods to the goods which are the subject of its involved intent-to-use registrations. Because Applicant failed to demonstrate any degree of relatedness between the previously-registered goods and the involved goods, it has not met its burden of establishing that the term Kipling has acquired distinctiveness in connection with “cases for spectacles and sunglasses; chains for spectacles, sunglasses; eye glasses; eyeglass cases; eyeglass chains and cords; eyeglass frames; eyeglass lenses; eyeglasses; eyewear; eyewear cases; frames

for spectacles and sunglasses; sunglasses and spectacles; bags for laptops; tablet sleeves; laptop sleeves; cases for cellphones; bicycle helmets” (Serial No. 86356608) and “picture frames; mugs, tumblers, drinking bottles; trays for domestic purposes; coasters not of paper and other than table linen; leather coasters, plastic coasters” (Serial No. 86356569).

Decision: In each application, the refusal to register under Section 2(e)(4) on the ground that the term KIPLING is primarily merely a surname is affirmed, and Applicant has not shown that its mark has acquired distinctiveness.