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THE TTAB

Mailed: December 2, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Suphachatwong Innovation Co., Ltd.*

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Serial No. 86516441  
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Alexander Lazouski, Esq.  
for Suphachatwong Innovation Co., Ltd.

Travis Wheatley, Trademark Examining Attorney, Law Office 115,  
John Lincoski, Managing Attorney.

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Before Quinn, Cataldo, and Lykos,  
Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Suphachatwong Innovation Co., Ltd. (“Applicant”) filed an application to register on the Principal Register VEASY (in standard characters) as a mark for “plant and flower seeds; live plants and flowers; live tropical plants, orchids and vandas, being orchids” in International Class 31.<sup>1</sup>

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<sup>1</sup> Application Serial No. 86516441, filed January 28, 2015 under Section 44 of the Trademark Act, 15 U.S.C. § 1126, based on Reg. No. 013432745 issued March 18, 2015 by the European Community’s Office for Harmonization in the Internal Market (OHIM), now known as the European Union Intellectual Property Office (EUIPO).

The Trademark Examining Attorney refused registration under Section 2(e)(4) of the Trademark Act, 15 U.S.C. § 1052(e)(4), on the ground that VEASY is primarily merely a surname.

When the Examining Attorney made the refusal final, Applicant appealed. Applicant and the Examining Attorney filed briefs.

We reverse the refusal.

### *Arguments*

The Examining Attorney asserts that the evidence establishes a *prima facie* case that VEASY is primarily merely a surname; although he acknowledges the “relative rarity” of the surname based on the number of “hits” in public records (approximately 300-400), the Examining Attorney maintains that the additional evidence shows that the consuming public has been exposed to VEASY as a surname and, thus, the public will primarily perceive it as a surname. (6 TTABVUE 7). Further, the Examining Attorney points to the absence of evidence showing that the term has any meaning or significance other than as a surname, and that VEASY has the structure and pronunciation of a surname, pointing to the existence of the more common surname VEASEY which, according to the Examining Attorney, is the surname of “famous individuals.” (6 TTABVUE 8). The Examining Attorney goes on to contend that Applicant’s evidence and arguments do not rebut the *prima facie* showing that VEASY is primarily merely a surname. In support of the refusal, the Examining Attorney submitted electronic telephone directory listings; excerpts of articles

retrieved from the LexisNexis database; excerpts retrieved from the website of the U.S. Census Bureau; dictionary evidence; and portions of third-party websites.

Applicant argues that the Examining Attorney failed to make a *prima facie* case that VEASY is primarily merely a surname. In this connection, Applicant contends that VEASY is an extremely rare surname and, thus, the majority of consumers will never encounter a person with that surname. Therefore, Applicant asserts, consumers will not perceive the mark as a surname. Applicant also states that news articles making reference to individuals with the surname VEASY fail to show that these persons are known by consumers; that VEASY does not have the “look or feel” of a surname, discounting the evidence regarding the surname VEASEY; and that no one connected with Applicant has the surname VEASY. Applicant also claims that VEASY is a combination of the words “very” and “easy,” or “vase” and “easy,” suggesting that Applicant’s plants and flowers can be easily grown, arranged or kept alive in a vase; that is, a new breed of plants that are very easy to maintain.

### *The 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 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. *See In re United Distillers plc*, 56 USPQ2d 1220, 1221 (TTAB 2000).

*See also In re Hutchinson Tech. Inc.*, 852 F.2d 552, 7 USPQ2d 1490, 1492 (Fed. Cir. 1988). This expression of the test restates the rule set forth in *In re Kahan & Weisz Jewelry Mfg. Corp.*, 508 F.2d 831, 184 USPQ 421, 422 (CCPA 1975) (“[A] correct resolution of the issue can be made only after the primary significance of the mark to the purchasing public is determined ...”) and *In re Etablissements Darty et Fils*, 759 F.2d 15, 225 USPQ 652, 653 (Fed. Cir. 1985) (“*Darty*”). 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 nonsurname “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 *In re Benthin Mgmt. GmbH*, 37 USPQ2d 1332, 1333-34 (TTAB 1995), are also examples of inquiries that may lead to evidence regarding the purchasing public’s perception of a term’s primary significance.<sup>2</sup> These inquiries or “factors” are not exclusive and any of these circumstances – singly or in

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<sup>2</sup> 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).

combination – and any other relevant circumstances may shape the analysis in a particular case.<sup>3</sup> *In re Eximius Coffee, LLC*, 120 USPQ2d 1276, 1278 (TTAB 2016).

When we are faced with a Section 2(e)(4) refusal of a term in standard character form, with no other literal or design elements, we consider the impact the applied-for term has or would have on the purchasing public because “it is that impact or impression which should be evaluated in determining whether or not the primary significance of a word when applied to a product is a surname significance. If it is, *and it is only that*, then it is primarily merely a surname.” *In re Harris-Intertype Corp.*, 518 F.2d 629, 186 USPQ 238, 239 (CCPA 1975) (quoting *Ex parte Rivera Watch Corp.*, 106 USPQ 145, 149 (Comm’r Pat. 1955)) (emphasis in original).

Whether the primary significance of an applied-for mark is merely that of a surname is a question of fact. *See Darty*, 225 USPQ at 653-54. 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; *see also, e.g., In re Pohang Iron & Steel Co.*, 230 USPQ 79, 79 (TTAB 1986). The entire record is examined to determine the primary significance of a term.

Among the circumstances that may be probative in determining if a mark is primarily merely a surname are:

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<sup>3</sup> *See Benthin*, 37 USPQ2d at 1333 (stating that notwithstanding the rareness of BENTHIN as a surname, panel “would find” that it “would be perceived as primarily merely a surname” because of lack of other meanings and because it is the name of applicant’s Managing Director, but the highly stylized form shifted the balancing of factors to a finding that BENTHIN is not primarily merely a surname).

whether the term is the surname of anyone connected with the applicant;

whether the term has any recognized meaning other than as a surname;

whether evidence shows that the term has the structure and pronunciation of a surname;

whether there is contextual use related to surname significance; and

whether the evidence shows use of the term as a surname is rare.

*Exinius Coffee*, 120 USPQ2d at 1278. Because the Examining Attorney and Applicant focused their arguments on these issues, we review each in turn, but in making our determination we weigh them together and accord the appropriate weight to each one based on the evidence of record.<sup>4</sup>

*Whether VEASY is the Surname of Anyone Connected with Applicant*

There is no evidence to indicate that anyone connected with Applicant has the surname VEASY; indeed, Applicant states that “no one connected with or related to Applicant has the involved term as a surname.” (4 TTABVUE 13). *Cf. In re Integrated Embedded*, 120 USPQ2d 1504, 1506-07 (TTAB 2016) (applicant’s website showing, discussing the credentials of, and enabling visitors to contact, applicant’s “Namesake” and Chief Technical Officer Thomas Barr serve to reinforce the primary significance of BARR as a surname in the proposed mark BARR GROUP); *Eximius Coffee*, 120 USPQ2d at 1278-80 (where the surname of those associated with the applicant was

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<sup>4</sup> No other factors are discussed, nor is there evidence that implicates the probative significance of any other possible factor, inquiry or circumstance.

ALDECOA and the product was promoted as “premium family coffee,” this reinforced the surname significance of ALDECOA).

*Whether VEASY Has Any Recognized Meaning Other Than As a Surname*

Of record are dictionary pages showing that there is no listing for VEASY. (onelook.com; macmillandictionary.com). There is no evidence showing VEASY has any recognized meaning other than as a surname. We are not persuaded by Applicant’s argument, especially in the absence of corroborating documentary evidence (e.g., advertisements), that the term is the product of a combination of the words “very” and “easy,” or “vase” and “easy,” suggesting that Applicant’s plants and flowers can be easily grown, arranged or kept alive in a vase, or that the goods comprise a new breed of plants very easy to maintain.

*Whether VEASY Has the Structure and Pronunciation of a Surname*

Assessing whether VEASY has the structure and pronunciation of a surname, is a “decidedly subjective” inquiry. *Benthin*, 37 USPQ2d at 1333; *see also Binion*, 93 USPQ2d 1531, 1537 (TTAB 2009). Under this factor, examining attorneys and applicants may submit evidence that, due to a term’s structure and pronunciation, the public would or would not perceive it to have surname significance.

The Examining Attorney argues that the surname VEASY is similar in structure and pronunciation to the more common surname VEASEY which, according to the Examining Attorney, is the surname of certain “famous individuals.” In this

connection, the Examining Attorney submitted the results of a search of the LexisNexis database showing that the surname VEASEY is a more common surname than VEASY, appearing 2049 times. According to the Examining Attorney, the evidence also shows “famous individuals” with the surname VEASEY, including a U.S. Congressman,<sup>5</sup> a former Chief Justice of the Delaware Supreme Court, and an executive producer for CSI:NY, a television show. The Examining Attorney also highlights that Representative Veasey is a named plaintiff in a “nationally known” U.S. Supreme Court case involving voting rights.<sup>6</sup> The Examining Attorney further pointed out two instances when publications mistakenly used VEASY rather than the correct VEASEY in identifying two individuals.<sup>7</sup>

Because of the highly subjective nature of this inquiry, we find that the evidence of record is insufficient to establish the Examining Attorney’s point. We recognize that VEASY and VEASEY obviously differ by only one letter; thus, they are similar in structure. Further, given the similar structure, they are likely to sound similar

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<sup>5</sup> The record lacks details regarding the Examining Attorney’s implication that there would be significant public exposure to this name. The mere fact that Marc Veasey (R-Texas) is a member of Congress is not, in and of itself, sufficient to establish the examining attorney’s point. This lack of evidence stands in contrast to the record in *In re Gregory*, 70 USPQ2d 1792, 1795 (TTAB 2004), showing that James Rogan, in addition to being a former Director of the USPTO, was the majority leader of the California State Assembly before being elected to represent a U.S. House district in Southern California; that he received press attention for his role as an impeachment manager during the impeachment trial of former President Clinton; and that he subsequently received additional press attention for his role as a candidate for re-election in what was reported to be, at that time, the most expensive race ever for a seat in the U.S. House of Representatives.

<sup>6</sup> *Veasey v. Abbott*. Although this case undoubtedly has received attention in a general election year, there is no evidence to show that it is a “nationally known” case (as would be the situation with *Roe v. Wade* or *Bush v. Gore*).

<sup>7</sup> There again is a lack of evidence to show that the named individuals are prominent and/or would be familiar to consumers.

when spoken, recognizing, of course, that there is no correct pronunciation of a mark. *See, e.g., In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012). However, at bottom, there is no direct objective evidence bearing on how members of the public perceive VEASEY. *See Eximius Coffee*, 120 USPQ2d at 1280 (reference to purported surnames “without proving that they are surnames, without showing how common such surnames with the suffix “OA” are, 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 similar to that of other purportedly common surnames”). In sum, we find that the evidence falls short of establishing how consumers actually understand VEASEY. With respect to this difficult type of argument, we would require more objective evidence, from Applicant or the Examining Attorney, of how members of the public likely would perceive VEASY. Indeed, evidence showing that VEASEY is primarily merely a surname, and a common one at that, would have been probative in showing that the similarly structured and pronounced surname VEASY is also primarily merely a surname.

*Whether Contextual Use Reveals Surname Significance*

Inasmuch as there is no evidence showing the mark in actual use, the record does not reveal any contextual clues that might identify the term as a surname to

consumers.<sup>8</sup> When an unfamiliar term is first encountered, the consumer often learns its meaning through context. At the present time there is nothing to show any contextual use that would make VEASY more likely to be perceived as a surname than as a coined or unknown term.

In view thereof, the present case is clearly distinguishable from *Darty*, 225 USPQ at 653, wherein the Court observed that DARTY was “used in the company name in a manner which reveals its surname significance (Darty et Fils translates as Darty and Son),” highlighting that “[t]his, *in itself*, is highly persuasive that the public would perceive DARTY as a surname.” *Id.* (emphasis added).

The present case likewise is distinguishable from the recent decision in *Eximius Coffee* wherein the Board determined that although ALDECOA is a rare surname (233 individuals as shown by U.S. Census records) with “minimal additional public exposure in the media,” nevertheless it is primarily merely a surname. In that case, the Board relied upon what the Examining Attorney characterized as “a strong connection with the owners of the application,” further noting the Examining Attorney’s observation that “[i]n both *Darty* and *Rebo* [*In re Rebo High Definition Studio Inc.*, 15 USPQ2d 1314 (TTAB 1990)] the court determined the mark was a surname on very similar facts as to this case. i.e., the mark was rare but there was evidence of a connection to the applicant and there was no other meaning.” In *Eximius Coffee*, the Board, citing *Darty*, “accord[ed] particular weight to Applicant’s

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<sup>8</sup> In the event Applicant subsequently commences use and files a Statement of Use, the Examining Attorney, when examining the evidence of actual use, may at that time revisit the contextual use issue and its possible bearing on registrability under Section 2(e)(4).

association of the goods with the family name ALDECOA, both on the website showing the founder's and current owner's surname is ALDECOA and the packaging that refers to 'A Family Coffee' directly under the surname ALDECOA." *Eximius Coffee*, 120 USPQ2d at 1283. As noted earlier, no such contextual use has been shown here and, inasmuch as no one with the surname is connected to Applicant, it would be unlikely for this type of use to occur. The same can be said when distinguishing the present case from *Integrated Embedded*, where applicant's website showed, discussed the credentials of, and enabled visitors to contact applicant's "Namesake" and Chief Technical Officer Thomas Barr; these uses served to reinforce the primary significance of BARR as a surname in the proposed mark BARR GROUP. *Integrated Embedded*, 120 USPQ2d at 1506-07.

Contextual use could come up in other ways, not just in the context of whether the connection of someone with the surname is stressed by the applicant. For example, if there is an obscure non-surname meaning, and that meaning would be suggestive (not descriptive) of the goods, the applicant might choose to stress the suggestive significance of the obscure meaning, which might become more important than the surname meaning, in terms of primary consumer perception. Thus, contextual use can harm an applicant, as in ALDECOA and BARR GROUP, but in theory, it could help; and it may be part of the analysis apart from this one factor.

*Whether VEASY Is Rarely Encountered As A Surname*

The Examining Attorney conducted a nationwide telephone directory search using the LexisNexis Public Records database, which showed 417 listings of VEASY. Of these, the Examining Attorney submitted 100 examples.<sup>9</sup> The Examining Attorney also submitted excerpts from the U.S. Census Bureau website showing the frequency of all surnames occurring 100 or more times in the Census 2000 returns. VEASY appeared 333 times, giving it a ranking on the list of 57252 (out of 151672 surnames that appeared at least 100 times; according to the Examining Attorney “VEASY was in approximately the top 38% in frequency of appearance in the Census 2000 results for all surnames appearing at least 100 times”).

By any standard, VEASY is a very rare surname. Even a rare surname, however, may be held primarily merely a surname if its primary significance to purchasers is that of a surname. Some surnames have only surname significance, and consumers recognize them as surnames despite their rarity. One significant reason may be contextual clues that identify the term as a surname to consumers. (*see* discussion, *supra*). Another reason for consumer recognition of a rare surname is that media

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<sup>9</sup> Applicant essentially objects to consideration of the number of individuals totaling 417, asserting that because information identifying only 100 of them was submitted, “it should be assumed that no more than 100 individuals carry a surname VEASY.” To the contrary, we agree with the Examining Attorney’s assessment that this representative sample is sufficient in the circumstances. In saying this, however, we appreciate Applicant’s point that even in the representative sample of 100, there are no fewer than 5 instances showing duplicative references. We therefore have relied upon what we view to be the more reliable Census 2000 number of 333 individuals with the surname VEASY. *See* TMEP § 1211.02(b)(iii) (October 2016) (“Because the [Census Bureau] database reflects the number of individuals, rather than the number of households, with a particular name, search results from this database may be more persuasive evidence of surname frequency than results from telephone directory listings.”).

publicity for the surname makes the surname significance well-known so that consumers regard the surname significance as primary. *See In re Gregory*, 70 USPQ2d at 1795.

Thus we turn to consider the search results of the LexisNexis Public Records database showing 96 articles that reference individuals with the surname VEASY; the Examining Attorney also submitted excerpts retrieved from 10 city newspapers showing articles containing references to individuals named VEASY, and screenshots of websites making reference to people having the surname VEASY, as well as certain genealogy websites. The Examining Attorney states that “based on their occupations as artist, teacher, executive director of a non-profit active in the community, regionally recognized pediatric cardiac surgeon, they will interact regularly with a wide variety of people who are likely to recognized [sic] VEASY as a surname.” (Office action, 10/6/15). He does concede, however, that the evidence fails to show “a nationally famous figure.” (6 TTABVUE 12).

The relevant question is not simply how frequently a surname appears, however, but how frequently it has been exposed to the purchasing public as a surname, thereby causing consumers to recognize it as such. Our focus, then, is on whether the purchasing public for an applicant’s goods or services is more likely to perceive the applicant’s proposed mark as only a surname rather than as something else. *See In re United Distillers plc*, 56 USPQ2d at 1221. In *In re Gregory, supra*, for example, the record revealed appreciable media exposure afforded to individuals bearing the surname “Rogan,” including former Congressman and USPTO director James Rogan,

Baseball Hall of Famer Wilber Rogan, author Barbara Rogan, and actors Seth Rogan and Joe Rogan. Based on such evidence of wide public exposure, the Board concluded that “the name [Rogan] 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 and in terms of public perception.” *Id.* at 1795. That evidence of exposure is contrasted with the relatively limited exposure in the present case, which shows that VEASY is the surname of various individuals (including a nurse, real estate agent, doctor and sales consultant), but one that is seldom encountered by the consuming public.

The type of evidence submitted by the Examining Attorney can be probative and aid analysis because it shows public exposure to VEASY as a surname. However, to reiterate, he concedes the evidence fails to show “a nationally famous figure” with the surname. Further, Applicant accurately points out a number of infirmities of this evidence (duplicates; obituaries; short profiles or surname mentioned only in passing; surname buried in text, etc.), concluding that the evidence falls short of showing that VEASY “commonly appears in newspapers and other media, or of supporting a finding that individuals having the surname have enjoyed broad exposure to the general public such that ‘Veasy’ is well recognized as a surname.” (7 TTABVUE 5-6).

We agree with Applicant, and find that the Examining Attorney’s evidence does not “reflect the broad exposure that would place a rarely encountered surname more frequently in the public eye.” *In re Eximius Coffee*, 120 USPQ2d at 1281 (and cases cited thereat).

Based on the record, consumers would not think of the rare surname VEASY primarily merely as a surname because they are highly unlikely to have encountered it as such, but rather are just as likely to regard the term as being a coined term or unknown term with an unknown meaning. In such cases, we “pass the mark to publication with the knowledge that others who have the same surname and use it or wish to use it for the same or similar goods or services can file a notice of opposition.” *Benthin*, 37 USPQ2d at 1334.

As just noted, because the Office bears the burden of proof, the presumption is in favor of publishing proposed marks for opposition, so competitors may assert their rights to use the term. *Id.* In this case, given the rareness of VEASY as a surname, and the paucity of evidence demonstrating its public use as a surname, we simply cannot assume that the purchasing public will view the mark as a surname based on exposure to the surname use.

### *Conclusion*

We find the following: that the mark does not identify anyone associated with Applicant; that there are no contextual clues indicating the surname significance of VEASY; that the mark has no defined ordinary language meaning; that the evidence of record is insufficient to show a structure and pronunciation similar to another single surname that would render it more likely to be regarded as a surname than as a fanciful mark; and that use of VEASY as a surname by others, rare to begin with, has not been sufficiently exposed to the purchasing public that it is likely to be

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recognized as primarily merely a surname. In sum, we cannot say that the primary significance of VEASY to the purchasing public is that of a surname.

On balance, having weighed all of the evidence of record, we find that that Applicant's mark is not primarily merely a surname under Section 2(e)(4).

**Decision:** The refusal to register is reversed.