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Subject: U.S. TRADEMARK APPLICATION NO. 86673659 - HUSMAN - N/A - EXAMINER BRIEF

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# UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 86673659

MARK: HUSMAN



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**GENERAL TRADEMARK INFORMATION:**

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**TTAB INFORMATION:**

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>

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## **EXAMINING ATTORNEY'S APPEAL BRIEF**

### **INTRODUCTION**

Applicant has appealed the trademark examining attorney's final refusal to register the mark HUSMAN used in connection with "hats; long-sleeved shirts; shirts; sweat shirts; [and] T-shirts" for being primarily merely a surname.

Registration is refused because applicant's mark HUSMAN in standard characters is primarily merely a surname because (1) the evidence shows that there are at least 940 instances of "HUSMAN" and

therefore the surname is not rare, (2) the term “HUSMAN” has no recognized meaning in dictionaries or elsewhere other than applicant’s recent coinage of the term to refer to a man who lives with a woman without being married on her own website, (3) the evidence shows that HUSMAN has the structure and pronunciation of a surname (e.g., Houseman and Huisman), and (4) the mark HUSMAN is in standard characters and therefore does not have sufficient stylization to remove its primary significance from that of a surname.

### **ISSUE ON APPEAL**

Whether applicant’s mark HUSMAN used in connection with “hats; long-sleeved shirts; shirts; sweat shirts; [and] T-shirts” is primarily merely a surname.

### **PROCEDURAL HISTORY**

On June 27, 2015, applicant filed its application to trademark the term HUSMAN in standard characters for an intent to use the mark in connection with “hats; long-sleeved shirts; shirts; sweat shirts; [and] T-shirts”.

On September 30, 2016, the previous trademark examining attorney issued a non-final Office action refusing registration pursuant to Section 2(e)(4) of the Trademark Act for being primarily merely a surname. The previous examining attorney advised of the possibility of overcoming the refusal by amending to the Supplemental Register upon an acceptable amendment to allege use.

After consideration of applicant’s March 25, 2016 response, the current trademark examining attorney issued a final Office action maintaining the Section 2(e)(4) refusal as final.

On October 28, 2016, the trademark examining attorney denied applicant’s October 13, 2016 Request for Reconsideration.

On January 4, 2017, applicant’s brief was forwarded to the trademark examining attorney.

### **ARGUMENTS**

## **APPLICANT'S MARK HUSMAN IS PRIMARILY MERELY A SURNAME**

Registration is refused because the applied-for mark is primarily merely a surname. Trademark Act Section 2(e)(4), 15 U.S.C. §1052(e)(4); *see* TMEP §1211.

“The test for determining whether a mark is primarily merely a surname is the primary significance of the mark as a whole to the purchasing public.” *In re Integrated Embedded*, 120 USPQ2d 1504, 1505 (TTAB 2016) (quoting *In re Hutchinson Tech. Inc.*, 852 F.2d 552, 554, 7 USPQ2d 1490, 1492 (Fed. Cir. 1988)); *see In re Kahan & Weisz Jewelry Mfg. Corp.*, 508 F.2d 831, 832, 184 USPQ 421, 422 (C.C.P.A. 1975); TMEP §1211.01.

### **Four of the Five Inquiries in the Test for Surname Significance Weigh in Favor of the Mark Being Primarily Merely a Surname**

The following five inquiries are often used to determine the public's perception of a term's primary significance:

- (1) Whether the surname is rare;
- (2) Whether anyone connected with applicant uses the term as a surname;
- (3) Whether the term has any recognized meaning other than as a surname;
- (4) Whether the term has the structure and pronunciation of a surname; and
- (5) Whether the term is sufficiently stylized to remove its primary significance from that of a surname.

*In re Eximius Coffee, LLC*, 120 USPQ2d 1276, 1278 & n.2, 1282-83 (TTAB 2016) (citing *In re Benthin Mgmt. GmbH*, 37 USPQ2d 1332, 1333-34 (TTAB 1995) for the *Benthin* inquiries/factors); TMEP §1211.01; *see also In re Etablissements Darty et Fils*, 759 F.2d 15, 16-18, 225 USPQ 652, 653 (Fed. Cir. 1985).

These inquiries are not exclusive, and any of these circumstances – singly or in combination – and any other relevant circumstances may be considered when making this determination. *In re Eximius Coffee, LLC*, 120 USPQ2d at 1277-78; TMEP §1211.01.

As to the first inquiry, the LexisNexis evidence attached to the previous Office action shows that the surname “HUSMAN” is not rare because it appears 779 times as a surname. Attached to the final Office action is further evidence from the 2000 Census (<http://names.mongabay.com/data/hg/HUSMAN.html>) showing that “HUSMAN” had 938 occurrences in the 2000 Census. Accordingly, the name is not rare.

As to the second inquiry, there is no evidence that anyone connected with the application bears the name “HUSMAN.”

As to the third inquiry, the online definitions from Merriam-Webster.com and AHDictionary.com (American Heritage) attached to the previous Office action show that there is no recognized meaning for the term “HUSMAN.” Evidence that a term has no recognized meaning or significance other than as a surname is relevant to determining whether the term would be perceived as primarily merely a surname. See *In re Eximius Coffee, LLC*, 120 USPQ2d 1276, 1280 (TTAB 2016); *In re Petrin Corp.*, 231 USPQ 902, 903 (TTAB 1986); TMEP §1211.02(b)(vi). Thus, in this case, this term appears to have no well-recognized meaning or significance (other than applicant’s admittedly coined meaning) other than as a surname.

Regarding the fourth inquiry or whether the term has the structure and pronunciation of a surname, the examples from Wikipedia.org attached to the previous Office action show that the wording “HUSMAN” has the structure and pronunciation of a surname not only because it is in fact a surname (as evidenced by the 938 examples in the 2000 census), but also because it is similar to “Housman” and “Huisman” which also have two syllables, start with an “H”, contain a “U” and “S” after the “H”, and have the terminal wording “man.”

Regarding the fifth and final inquiry, the mark HUSMAN is in standard characters. Therefore, there is no stylization or design element to take away from “HUSMAN” being primarily merely a surname.

Accordingly, four of the five inquiries weigh in favor of a finding that HUSMAN is primarily merely a surname.

### **Applicant’s Arguments Are Unavailing**

Applicant's arguments have been considered and found unpersuasive for the reasons set forth below.

### Rarity

In its appeal brief, applicant argues that the relevant number of people in the United States bearing the surname HUSMAN is 940 which renders HUSMAN a rare surname. Attached to the letter denying applicant's Request for Reconsideration was evidence from WhitePages.com referencing 940 exact matches and 26,037 possible matches for "HUSMAN. Further, this evidence references 2,254 birth records, 412 death records, 371 marriage records, and 66 divorce records. Even if it were established that the operative number is 940, this is not a rare surname.

Applicant argues that the many of the 940 instances of HUSMAN as a surname are duplicative and therefore the actual number is less than 940. However, "[t]here is no rule as to the kind or amount of evidence necessary to show that [a] mark would be perceived as primarily merely a surname." *In re Eximius Coffee, LLC*, 120 USPQ2d 1276, 1278 (TTAB 2016); see TMEP §1211.01. Each case is decided on its own facts, based on the evidence of record. TMEP §1211.01; see *In re Eximius Coffee, LLC*, 120 USPQ2d at 1278 (citing *In re Etablissements Darty et Fils*, 759 F.2d 15, 17, 225 USPQ 652, 653 (Fed. Cir. 1985)).

The overall search results from LexisNexis.com, WhitePages.com, and the 2000 Census show a sufficient number of uses as a surname such that the purchasing public would perceive the primary significance of this term to be a surname. See *In re Kahan & Weisz Jewelry Mfg. Corp.*, 508 F.2d 831, 832, 184 USPQ 421, 422 (C.C.P.A. 1975); *In re Binion*, 93 USPQ2d at 1537; TMEP §§1211, 1211.01. Although there may appear to be some minor duplication, it is possible that two different individuals with the same name may reside in a different residence and have a different phone number.

Further, the Court of Appeals for the Federal Circuit and Trademark Trial and Appeal Board have long recognized that the USPTO has limited resources for obtaining evidence when examining applications for registration; the practicalities of these limited resources are routinely taken into account when reviewing a trademark examining attorney's action. See *In re Pacer Tech.*, 338 F.3d 1348, 1352, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003) (citing *In re Loew's Theatres, Inc.*, 769 F.2d 764, 768, 226 USPQ 865, 868 (Fed. Cir. 1985)); *In re Florists' Transworld Delivery, Inc.*, 106 USPQ2d 1784, 1786 (TTAB 2013); TBMP §1208.

Even if 940 instances were determined to be rare, the statute makes no distinction between rare and commonplace surnames and even a rare surname may be unregistrable under Trademark Act Section 2(e)(4) if its primary significance to purchasers is that of a surname. *E.g.*, *In re Etablissements Darty et Fils*, 759 F.2d 15, 16-18, 225 USPQ 652, 653 (Fed. Cir. 1985); *In re Eximius Coffee, LLC*, 120 USPQ2d 1276,

1281 (TTAB 2016) (citing *In re E. Martinoni Co.*, 189 USPQ 589, 590-91 (TTAB 1975)); TMEP §1211.01(a)(v). There is no minimum amount of evidence needed to establish that a mark is primarily merely a surname. See *In re Etablissements Darty et Fils*, 759 F.2d at 17, 225 USPQ at 653; *In re Petrin Corp.*, 231 USPQ 902, 903 (TTAB 1986); TMEP §1211.02(b)(i).

In further reference to the rarity argument, even if 940 instances were determined to be rare, three of the other four inquiries or factors weigh in favor of a finding that HUSMAN will be perceived as primarily merely a surname. In any event, a "strictly numerical approach to a surname analysis has been squarely rejected" by the Federal Circuit. See *In re Etablissements Darty et Fils*, 225 USPQ 652, 653 (Fed. Cir. 1985). More importantly, the Board has recently reiterated that "even a rare surname is unregistrable if its primary significance to purchasers is a surname." *In re Eximius Coffee, LLC*, 102 USPQ2d 1276, 1281 (TTAB 2016).

Applicant cites *In re United Distillers PLC*, 56 USPQ2d 1220 (TTAB 2000) for the proposition that the 940 instances is rare because it must be considered in the context of the total population of the United States which applicant submits is 281 million people. However, not only is the disposition of that case not citable as precedent per the Board's opinion, the opinion does not stand for the proposition that rarity must only be considered in the context of the total population. As discussed above, the issue of rarity is considered on a case-by-case basis, there is no fixed number to establish rarity, and the other inquiries weigh in favor of finding that HUSMAN is primarily merely a surname.

Citing applicant's website for selling her clothing goods, applicant argues that the website clearly explains that HUSMAN is meant to refer to a man who lives with a woman without being married to her. Insofar as applicant argues that the term "HUSMAN" is a play on the words "husband" and "man," a mark's primary surname significance is generally retained unless the non-surname significance displaces the primary surname significance of that mark. See *In re Petrin Corp.*, 231 USPQ 902, 904 (TTAB 1986) (holding PETRIN primarily merely a surname despite applicant's argument that the mark represents an abbreviated contraction of "petroleum" and "insulation"); TMEP §1211.01(a)(ii); see also *In re Etablissements Darty et Fils*, 759 F.2d 15, 17-18, 225 USPQ 652, 653-54 (Fed. Cir. 1985) (holding DARTY primarily merely a surname despite applicant's argument that the mark is a play on the word "dart").

In the present case, applicant's evidence is insufficient to show that the intended non-surname significance has displaced the primary surname significance of the mark. As previously argued, even if applicant has coined the term HUSMAN to mean something other than merely a surname, applicant has not established that a website selling T-shirts to promote the concept of a "HUSMAN" as being a man who lives with a woman without marrying her is enough to override the facts that (1) there are at least 940 living people in the United States with the surname HUSMAN, (2) that there is no recognized meaning of "HUSMAN" in common dictionaries, (3) the name "HUSMAN" has the look and feel of a surname compared to examples like Housman and Huisman (which applicant concedes on page 7 of her brief), and (4) applicant's mark HUSMAN is in standard characters with no stylization or design elements

to add anything other than surname significance. Applicant has provided no evidence of internet traffic on her website, sales figures, online or print articles referencing “HUSMAN” as having applicant’s intended meaning, or anything else other than her own website to sufficiently establish that applicant’s coined meaning of “HUSMAN” has displaced the primary surname significance to the public.

Finally, applicant argues that the uncertainty or doubts about whether the mark HUSMAN would be perceived primarily as a surname should be resolved in favor of applicant. However, since four of the five inquiries show primarily surname significance, there is no doubt or uncertainty to resolve.

## **CONCLUSION**

For the reasons discussed above, applicant’s mark HUSMAN used in connection with “hats; long-sleeved shirts; shirts; sweat shirts; [and] T-shirts” is primarily merely a surname because: (1) the evidence shows that there are at least 940 instances of “HUSMAN” and therefore the surname is not rare, (2) the term “HUSMAN” has no recognized meaning in dictionaries or elsewhere other than by applicant’s recent coinage on her own website of the term to refer to a man who lives with a woman without being married, (3) the evidence shows that HUSMAN has the structure and pronunciation of a surname (e.g., Houseman and Huisman), and (4) the mark HUSMAN is in standard characters and therefore does not have sufficient stylization to remove its primary significance from that of a surname.

Accordingly, the refusal under Section 2(e)(4) of the Trademark Act should be affirmed.

Respectfully submitted,

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