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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Broe Management Company, LLC d/b/a The Broe Group

Serial No. 86715987

Thomas S. Birney of Door, Carson & Birney, P.C.
for Broe Management Company, LLC d/b/a The Broe Group.

Steven W. Jackson, Trademark Examining Attorney, Law Office 107
(J. Leslie Bishop, Managing Attorney).

Before Adlin, Masiello and Hightower, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Broe Management Company, LLC d/b/a The Broe Group (“Applicant”) seeks a
Principal Register registration for the mark shown below



for “investment services, namely, asset acquisition and management services;
financial asset disposition services, namely, business liquidation services.”¹ The

¹ Application Serial No. 86715987, filed August 5, 2015 based on an alleged intent to use the mark in commerce under Section 1(b) of the Trademark Act, and later amended to allege first use dates of August 2015. The application includes this description of the mark: “The mark

application includes Applicant's claim of acquired distinctiveness in part under Section 2(f) of the Act as to the term "Broe."

The Examining Attorney refused registration on the ground that Applicant's mark is "primarily merely a surname" under Section 2(e)(4) of the Act, specifically finding that Applicant's "adding a non-distinctive design element or letter stylization ... does not change the surname significance ..." and that Applicant's evidence of acquired distinctiveness is insufficient. Office Action of December 30, 2016. After the refusal became final Applicant appealed and Applicant and the Examining Attorney filed briefs.

Is Applicant's Mark Primarily Merely a Surname?

Marks which are "primarily merely a surname" may not be registered on the Principal Register unless they have acquired distinctiveness. 15 U.S.C. § 1052(e) and (f); *In re Etablissements Darty et Fils*, 759 F.2d 15, 225 USPQ 652, 653 (Fed. Cir. 1985). "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." *Azeka Bldg. Corp. v. Azeka*, 122 USPQ2d 1477, 1480 (TTAB 2017). This is a question of fact, on which the Office bears the burden of proof. It can be resolved only on a case-by-case basis. *Darty*, 225 USPQ at 653; *In re Eximus Coffee, LLC*, 120 USPQ2d 1276, 1278 (TTAB 2016). Here, the record includes evidence typical of many surname cases: whether anyone affiliated with Applicant is

consists of the word 'Broe' with the letters 'B', 'r' and 'e' in black stylized lettering and the letter 'o' in green."

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named BROE; whether the term has any non-surname meaning; and whether the term is rarely used as a surname. *See, e.g., Azeka Bldg.*, 122 USPQ2d at 1480-81; *In re Eximus Coffee*, 120 USPQ2d at 1278.

The evidence establishes that Applicant is named for its founder and chief executive officer Pat Broe:

11/17/2015

Broe.com



“Seeing opportunities is not enough. You have to act – and wisely.”

Pat Broe, Founder and CEO, The Broe Group

Starting in Colorado, but now extending across North America, the Broe story is a history of critical investments, each one a chance to revitalize communities and transform industries, one transaction at a time.

Pat Broe started by recognizing the value in Denver’s 1970s real-estate market and capitalizing on it.

At that time his small share of the American Dream had roofs on it. Forty years later, that dream is much bigger than just duplexes and fixer-uppers. Now, along with over 1000 employees of the Broe Group and its affiliates, Broe owns and manages a multi-billion dollar portfolio of affiliated energy,

transport, technology, and real estate assets across the United States and Canada.

It continues to be a journey of seized opportunities.

With its strong asset base and willingness to take the long view, Broe is poised to help accelerate America’s industrial renaissance well into the 21st century.

The timeline below reflects a few key moments, of seeing value that others miss, and working to make that value real.

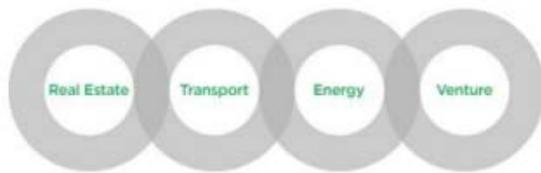
And it’s just the beginning.

<http://broe.com/the-broe-story/>

Office Action of November 20, 2015. As in *In re Integrated Embedded*, 120 USPQ2d 1504, 1506 (TTAB 2016), “[t]his screenshot indicates that Applicant derived its name

and ‘dba,’ [Broe Group], from Mr. [Broe],” which supports a finding that Broe will be perceived as a surname. Elsewhere on its website, Applicant specifically refers to itself as a “family-owned business”:

Capitalizing on Market Trends



Broe is an actively managed, family-owned business and industrial enterprise with four primary business platforms and a keen focus on growth through acquisitions and investment. The company has a continuing interest in real estate, transport assets, energy and venture investments, as outlined below.

Office Action of February 18, 2016. This suggests, to any unsure of the term’s meaning, that Broe could be the surname of the family that owns Broe Group. This suggestion would of course be confirmed as accurate to anyone encountering Applicant’s website’s reference(s) to Pat Broe. *See Darty*, 225 USPQ at 653 (finding that DARTY is primarily merely a surname in part because it “is not only the surname of the principal of the business, but also is used in the company name in a manner which reveals its surname significance ...”); *In re Integrated Embedded*, 120 USPQ2d at 1506-07.

Consumers are also likely to believe that Broe is a surname because the “negative” dictionary evidence of record reveals that the term has no other, non-surname meaning. Office Action of December 30, 2016.² By contrast, the Wikipedia entry for “Broe” specifically states that “**Broe** is a surname. Notable people with the surname include: Carsten Broe football team manager [and] Georg Broe surrealist artist.”

² <https://www.ahdictionary.com/word/search.html?q=broe> and <https://en.oxforddictionaries.com/search?utf8=%E2%9C%93&filter=noad&query=broe>. We have not considered pages which appear to be from a British dictionary.

Office Action of November 20, 2015.³ Although the entry goes on to state “See also Broe Township, Benson County, North Dakota,” we find this insufficient to overcome the surname significance of “Broe,” as there is no evidence about the origin of the township’s name or its size or renown. *See In re Champion International Corp.*, 229 USPQ 550, 551 (TTAB 1985) (“we are of the opinion that such uses are either somewhat obscure, or represent the normal naming of a place or building after an individual (whether President McKinley or someone else). Accordingly, we do not believe that these other meanings of the term ‘MCKINLEY’ are sufficient to take it out of the ‘primarily merely a surname’ category”). *See also In re Isabella Fiore, LLC*, 75 USPQ2d 1564, 1567 (TTAB 2005) (“It would hardly be surprising that a surname also identified streets, villas or towns and such minor geographic occurrences do not demonstrate that the term is not primarily a surname. To be considered primarily merely a surname, a term does not have to be devoid of any non-surname significance.”); *In re Hamilton Pharmaceuticals, Ltd.*, 27 USPQ2d 1939 (TTAB 1993).

Indeed, other than the completely unexplained, bare reference to a Broe Township in North Dakota, all of the remaining evidence in the record establishes the term’s surname significance. For example, the Examining Attorney introduced the following evidence of people who share the surname Broe with Applicant’s founder:

USA Track & Field’s website indicates that Tim Broe, a middle distance runner, competed in the 2004 Olympics and is a 3-time USA Outdoor 5,000 meter champion.

³ <https://en.wikipedia.org/wiki/Broe>.

Ohio State University's website indicates that Michael Broe is a Post Doctoral Researcher and Visiting Scholar in the Department of Evolution, Ecology and Organismal Biology.

Bryant University Athletic's website reveals that Charlie Broe is a distance freestyler on the Men's Swim & Dive team who set two school records as a freshman.

The Charleston City Paper's article entitled "Former DanceFx director Jenny Broe opens a new studio, DanceLab Charleston" indicates that Ms. Broe will perform at Charleston Fashion Week and the Charleston Heart Ball.

According to its website, the Four Seasons Orchestra's conductor is Dr. Carolyn Waters Broe, who has been the featured solo violist and conductor in California and Arizona orchestras. She has won several awards and toured with the American Festival Orchestra.

Office Action of December 30, 2016 (printouts from "usatf.org," "osu.edu," "bryantbulldogs.com," "charlestoncitypaper.com" and "fourseasonsorchestra.org"). In addition, the Examining Attorney introduced evidence that approximately 1,250 Americans have the surname Broe. Office Action of November 20, 2015 (printout from "namestatistics.com").

While the evidence makes clear that Broe is a rare surname, that does not mean it is not primarily merely a surname. *In re Beds & Bars Ltd.*, 122 USPQ2d 1546, 1551 (TTAB 2017) ("Even a rare surname may be held primarily merely a surname if its primary significance to purchasers is that of a surname."); *In re Eximus Coffee*, 120 USPQ2d at 1281 ("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.") (numerous citations omitted). Where, as

here, a surname is rare but has no other meaning, and is the name of someone affiliated with an applicant (in this case its founder and CEO who is prominently featured on the company's website), it may be found to be primarily merely a surname.

We agree that the circumstances and record of this case establish that the primary significance of ALDECOA is as a surname. As in *Darty*, we accord particular weight to Applicant's 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. As to the other relevant circumstances presented by the Examining Attorney and Applicant, there is no persuasive evidence in the record that ALDECOA would be perceived as anything other than a surname in the United States. Moreover, there is no evidence in the record to give the structure and pronunciation of ALDECOA any weight in the determination. And even though it is a relatively rare surname, with minimal additional public exposure in the media, this is outweighed by Applicant's use as a surname in connection with its goods. On balance, we find that ALDECOA is primarily merely a surname.

In re Eximus Coffee, 120 USPQ2d at 1283. As there, so here. *Cf. In re Benthin Management GmbH*, 37 USPQ2d 1332 (TTAB 1995) (stating that were it not for its "highly stylized" form, "we would find that the service mark BENTHIN ... would be perceived as primarily merely a surname," based on highly similar evidence to that presented here and in *Eximus Coffee*).

While Applicant's mark in this case is presented in a stylized format, it is not nearly so "highly stylized" as the mark in *Benthin*:



the letters of which “also function as a design element.” *In re Benthin Management*, 37 USPQ2d at 1334. Applicant’s mark, by contrast, is merely displayed in a certain font of no particular note with one of its letters being green. The display of BENTHIN, on the other hand, features a much more distinctive font, letters of different sizes presented atypically and an oval design. Applicant’s mark in this case is also less distinctive than the mark in *In re Picket Hotel Company*, 229 USPQ 760 (TTAB 1986):



the stylization of which was nevertheless found to be “insignificant, in that it is clearly not so distinctive as to create any separate commercial impression in the minds of purchasers of appellant’s services.” *Id.* at 763. Applicant’s display of the letters “r,” “o” and “e” in lower case does not have “such an impact on the commercial impression created by the mark as to alter its primary significance to the purchasing public from that of a surname to that of a service mark.” *In re Directional Marketing Corp.*, 204 USPQ 675, 677 (TTAB 1979). In fact, surnames are typically displayed with their first letter capitalized and the remaining letters in lowercase, the same way Applicant displays its name and its founder’s name on its website.

That leaves only a nondistinctive font and a green “o,” neither of which alters the primary significance of BROE given the other evidence in the record. Neither the font nor the green letter alter the mark’s commercial impression in any way. For example, in *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millenium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1133 (Fed. Cir. 2015), the Federal Circuit affirmed our finding that



and



create “the same continuing commercial impression” despite the obvious differences between the fonts and paw designs. *See also Paris Glove of Canada Ltd. v. SBC/Sporto Corp.*, 84 USPQ2d 1856, 185 (TTAB 2007) (“there is no material alteration between the original, registered AQUA STOP rectangular form of the mark which shows the words depicted on two lines, and the semicircular and linear forms which depict the words on one line ... the particular stylizations of the semicircular and linear forms simply do not change the essential nature of the rectangular form mark”); *S&L Acquisition Co. v. Helene Arpels, Inc.*, 9 USPQ2d 1221, 1226 (TTAB 1987) (“there can be no doubt that ‘ADRIEN ARPEL’ whether represented in block

form or stylized lettering is the single dominant commercial impression of both marks engendering the same and continuing commercial impression”).

In short, the record leaves no doubt that when the purchasing public considers **Broe** in relation to Applicant’s investment and financial asset disposition services, it will primarily signify a surname, specifically that of Pat Broe whose family owns Broe Management Company d/b/a The Broe Group.

Has the “Broe” Surname Acquired Distinctiveness?

The essential disagreement between Applicant and the Examining Attorney revolves around Applicant’s short-term use of the stylized form of its BROE mark. Specifically, in response to the original refusal to register, Applicant submitted a claim of acquired distinctiveness which was rejected because at the time the application was based on an intent to use rather than actual use, and Applicant failed to submit any evidence meeting the requirements for establishing that a mark in an intent to use application has acquired distinctiveness. Office Action response of November 24, 2015 and Office Action of December 16, 2015.⁴ In response, Applicant filed its Amendment to Allege Use, thus making the requirements for proving the acquired distinctiveness of marks in intent to use applications irrelevant.

The next day, Applicant requested reconsideration of its claim of acquired distinctiveness based on the amendment, but the Examining Attorney was unmoved,

⁴ The Examining Attorney summarized these requirements in the Office Action, citing: *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1812 (Fed. Cir. 2001); *In re Nielsen Bus. Media, Inc.*, 93 USPQ2d 1545, 1547 (TTAB 2010); *In re Binion*, 93 USPQ2d 1531, 1538 (TTAB 2009); *Kellogg Co. v. Gen. Mills Inc.*, 82 USPQ2d 1766, 1770-71; *In re Rogers*, 53 USPQ2d 1741, 1744-45; and TMEP § 1212.09(a).

because the involved mark has only been in use since August 2015, which is significantly less than the five years normally found sufficient to establish that surnames have acquired distinctiveness. Office Action response of February 19, 2016 and Office Action of April 13, 2016.

Applicant then clarified “that its Section 2(f) claim is in part with regard to the word ‘Broe.’” That is, Applicant claims use of the word BROE in block letters or without regard to font or stylization for more than five (in fact more than 40) years. To support this claim of acquired distinctiveness, Applicant submitted a declaration from Mark Richter, its Vice President (“Richter Dec.”). Office Action response of June 14, 2016. According to Mr. Richter

Applicant and its affiliates have continuously used the BROE mark in commerce in association with the applied-for services, and related goods and services for over forty (40) years ... The BROE mark has become distinctive through the Applicant’s substantially exclusive and continuous use in commerce in association with the applied-for services for at least five years immediately before the date of this application.

Richter Dec. ¶¶ 1-2.

While Mr. Richter also provided additional testimony supporting Applicant’s claim of acquired distinctiveness, this is typically not required when the mark at issue is a surname. Rather, “the USPTO has a longstanding practice of allowing registration of surnames under Section 2(f) upon a showing of substantially exclusive and continuous use of the name as a mark in regulable commerce for five years and of the applicant’s belief that such use has caused the mark to become distinctive of its goods.” *In re Adlon Brand GmbH & Co., KG*, 120 USPQ2d 1717, 1722 n.33 (TTAB

2016); *In re Lorillard Licensing Co., LLC*, 99 USPQ2d 1312, 1316 (TTAB 2011) (“the burden to prove that this combination is viewed as a trademark for cigarettes is necessarily greater than if this were, for example, a surname (for which a statement of substantially exclusive and continuous use for five years is normally sufficient).”); *In re Molson Indus. Ltd.*, 192 USPQ 402, 404 (TTAB 1976) (“applicant’s allegation of distinctiveness based upon five or more years of substantially exclusive use in commerce has been historically prima facie sufficient to establish distinctiveness in a surname”).

There is no reason not to follow this standard practice here. While Applicant claims more than five years use of the “Broe mark” or the “word Broe,” that is sufficient to establish that the involved stylized mark has acquired distinctiveness. Indeed, we have already found that the font and color in the applied-for mark is not significant and that the commercial impression created by the involved mark is simply the surname BROE, which Applicant has been using for well over five years. The fact that Applicant now seeks registration of BROE in a particular font with a green “o” does not change the fact that the essence of the applied-for mark, BROE, has been in use for more than five years. Because the mark **Broe** creates the same continuing commercial impression as BROE in block letters, Applicant’s use of BROE in block letters for more than five years is sufficient to establish that **Broe** has acquired distinctiveness.

Indeed, if Applicant had sought registration of BROE in standard characters, Mr. Richter’s declaration likely would have been sufficient by itself to establish acquired

distinctiveness and Applicant's right to a Principal Register registration. It would be perverse to find here that merely because Applicant sought registration of a more specific, minimally-stylized form of BROE, rather than BROE in standard characters, it is not entitled to registration.

... we cannot find that the display of applicant's mark is uncommon, noteworthy, or extraordinary. Applicant's mark, like many marks, contains a design, but the Office encourages applicants to submit drawings that depict their marks in standard character form. *See* TMEP § 807.04(b). Here, inasmuch as the term SPECTRAMET creates a distinct commercial impression apart from any stylization or design element ... we reverse the examining attorney's refusals to register on the ground that the [standard character] mark in the drawing is not a substantially exact representation of the mark as displayed on the specimens in these cases.

In re wTe Corp., 87 USPQ2d 1536, 1540 (TTAB 2008). *See also In re Viterra Inc.*, 671 F.3d 1358, 101, USPQ2d 1905, 1909 (Fed. Cir. 2012) ("to the extent the Board simply held that a standard character mark is not limited to any particular font, size, style or color, it is entirely consistent with our case law, the relevant regulations, and the TMEP"); *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011); *In re Strategic Partners, Inc.*, 102 USPQ2d 1397, 1399 (TTAB 2012) ("applicant's existing registration of ANYWEARS in standard character form means that the mark can be depicted in the identical font style and size in which applicant's applied-for mark is shown (or, for that matter, in the identical manner in which the ANYWEAR portion of registrant's mark is depicted). Accordingly, there is no meaningful difference between the standard character and stylized versions of applicant's marks").

Conclusion

Because the record leaves no doubt that BROE is primarily merely a surname, and **Broe** does not create any separate commercial impression from BROE in block letters, the Examining Attorney's finding that **Broe** is primarily merely a surname is affirmed. However, because Applicant has used BROE in block letter form for more than five years, it has established that **Broe** has acquired distinctiveness and is entitled to registration on the Principal Register.

Decision: The refusal to register Applicant's mark under Section 2(e)(4) of the Act is reversed, because the mark has acquired distinctiveness under Section 2(f) of the Act.

Masiello, Administrative Trademark Judge, concurring in the result:

I have no quarrel with the majority's conclusion that BROE is a surname. However, I find the analysis unnecessary, because I believe the stylized form of the mark is sufficient to render the mark not *merely* a surname. I also have no quarrel with allowing Applicant to enter its claim of acquired distinctiveness in part as to the literal portion of the mark.