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Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Kunz Management LLC

Serial No. 86773122

Prudence Thiry of Reitler Kailas & Rosenblatt,
for Kunz Management LLC.

Ingrid C. Eulin, Trademark Examining Attorney, Law Office 111,
Robert L. Lorenzo, Managing Attorney.

Before Kuhlke, Ritchie, and Lynch,
Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Applicant, Kunz Management LLC (“Applicant”), seeks registration of the mark BRASSERIE KUNZ, in standard characters, on the Principal Register for services ultimately identified as “restaurant services, namely, providing of food and beverages for consumption on and off the premises,” in International Class 43.¹ The Trademark

¹ Application Serial No. 86773122 was filed on September 30, 2015 under Section 1(b) of the Trademark Act, based on Applicant’s assertion of a bona fide intent to use the mark in commerce, and disclaiming an exclusive right to the term “BRASSERIE” apart from the mark as shown.

Examining Attorney refused registration of Applicant's proposed mark under Section 2(e)(4) of the Trademark Act, 15 U.S.C. § 1052(e)(4), on the ground that the applied-for mark is primarily merely a surname. When the refusal was made final, Applicant filed this appeal, which is fully briefed. For the reasons discussed below, after considering the relevant arguments and evidence, we affirm the refusal to register.

Section 2(e)(4) Surname Refusal

Section 2(e)(4) of Trademark Act precludes registration of a mark which is “primarily merely a surname” on the Principal Register without a showing of acquired distinctiveness under Section 2(f) of the Act, 15 U.S.C. § 1052(f). “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.” 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 as a whole to the purchasing public is that of a surname. *Earnhardt v. Kerry Earnhardt, Inc.*, 864 F.3d 1374, 123 USPQ2d 1411 (Fed. Cir. 2017); *see also In re Hutchinson Technology Inc.*, 852 F.2d 552, 7 USPQ2d 1490, 1492 (Fed. Cir. 1988); *In re Beds & Bars Ltd.*, 122 USPQ2d 1546, 1548 (TTAB 2017); *In re Eximius Coffee, LLC*, 120 USPQ2d 1276, 1277 (TTAB 2016);. 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). On appeal, we must weigh all of the evidence from

the Examining Attorney and the Applicant to determine whether the mark is primarily merely a surname. *See In re Sava Research Corp.*, 32 USPQ2d 1380, 1381 (TTAB 1994).

The Board's oft-cited "*Benthin* factors," *see In re Benthin Mgmt. GmbH*, 37 USPQ2d 1332, 1333-34 (TTAB 1995), are examples of inquiries that may lead to evidence regarding the purchasing public's perception of a term's primary significance.² In *Etablissements Darty et Fils*, 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 therein 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. We consider these and any other relevant factors in turn. *Id.*; *see also In re Integrated*

² In *Benthin*, the Board stated that inquiries or "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 that 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). These inquiries or factors are not exhaustive and are not presented in order of importance. We make our determination on a case-by-case basis, and any of the "*Benthin* factors" – singly or in combination – and any other relevant circumstances may shape the analysis in a particular case. *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 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).

Embedded, 120 USPQ2d 1504, 1506 (TTAB 2016) (affirming refusal of BARR GROUP for various IT and other services as being primarily merely a surname).

The Examining Attorney submitted evidence that about 7500 people in the United States have Kunz as a surname.³ The Examining Attorney further submitted evidence that a search for the surname Kunz on Whitepages.com revealed 12,237 exact matches.⁴ Applicant does not assert that Kunz is rare surname, and we find that it is not.

As to use of the surname, we note that Applicant is known as Kunz Management LLC. The Examining Attorney has further submitted evidence that Applicant is affiliated with the well-known chef, Gray Kunz.

Kunz Management: About Us: Kunz Management, established by Chef Gray Kunz in 2006 in New York and Hong Kong, is an international company that oversees hotel and restaurant management, a diversified real-estate portfolio, and the development of food-related environment initiatives.⁵

Biography: Gray Kunz: . . . While in Manhattan, his exceptional culinary artistry earned him four stars from The New York Times, Best Chef in New York City, and the James Beard Foundation nominated him numerous times for Best American Chef. Among many other awards, and distinctive recognitions, he was inducted into the Restaurant Hall of Fame by the Culinary Institute of America.⁶

New York Restaurants: The Return of the Prodigal Chefs: Thomas Keller and Gray Kunz, two of the most brilliant cooks in America, have been AWOL from New York kitchens for more than five years. . . . Both have been sorely missed by New York food lovers, . . .⁷

³ *Namestatistics.com*. Attached to January 21, 2016 Office Action, at 7.

⁴ *Whitepages.com*. Attached to January 21, 2016 Office Action, at 2-5.

⁵ <http://Graykunz.net>. Attached to August 31, 2016 Final Office Action, at 2.

⁶ <http://Graykunz.net>. Attached to Attached to August 31, 2016 Final Office Action, at 4.

⁷ *NYmag.com/nymetro/food/features*. Attached to August 31, 2016 Final Office Action, at 6.

Gray Kunz, One of the '90s Biggest NYC Chefs, Returns With Salt & Char in Saratoga Springs; By Serena Dai; Jul 11, 2016; New York.⁸

Applicant does not dispute the affiliation.

Applicant asserts, however, that there is an ordinary language meaning of the term “KUNZ,” as translated from German. Applicant submitted (both with its Response to Office Action and with its Appeal Brief) a link to a website that Applicant says shows that the term Kunz may be translated as “Konrad.” The Board has clearly noted, however, that “[p]roviding only the link without the material attached is not sufficient to introduce it into the record.” Trademark Trial and Appeal Board Manual of Procedure 1208.03 (June 2017); *see also In re Fantasia Distribution, Inc.*, 120 USPQ2d 1137, 1143, n.13 (TTAB 2016), citing *In re Planalytics*, 70 USPQ2d 1453, 1458 (TTAB 2004) (providing a link to a website does not suffice to put information in the record because of the transitory nature of the information available through the link); *In re HSB Solomon Assoc. LLC*, 102 USPQ2d 1269, 1274 (TTAB 2012) (“[T]he evanescent nature of web content makes it particularly important that a copy of the relevant material be submitted in the record”). Thus we cannot consider the link offered by Applicant or the information that may be contained therein.

Applicant also submitted a single German-English dictionary entry that that the term “Hinz und Kunz” is translated from German as “every Tom, Dick and Harry,” with an indication that the term “von Hinz zu Kunz” is translated as “from pillar to post; from one place to another.”⁹ Applicant refers to the case *In re Isabella Fiore*,

⁸ Attached to August 31, 2016 Final Office Action, at 10.

⁹ *Dictionary.Reverso.net*. Attached to July 21, 2016 Response to Office Action, at 25.

LLC, 75 USPQ2d 1564 (TTAB 2005) (finding FIORE for various bags and other goods not primarily merely a surname). There, the Board considered evidence submitted by Applicant that the term in the mark had a known meaning in Italian, specifically, “flower.” The Board cautioned, however, that just to “uncover a dictionary entry for the term in question” may not be sufficient. *Id.* at 1569, quoting *In re Nelson Souto Major Piquet*, 5 USPQ2d 1367, 1367-1368 (TTAB 1987) (finding “Piquet” was “the name of a relatively obscure card game” and “unlikely to be known to purchasers”). By contrast, the Board found that consumers were likely to “stop and translate” FIORE as neither the term nor the language is “obscure.” *Id.* at 1569. Here, we cannot make an analogous finding.

The terms submitted by Applicant for translation, unlike in the *Fiore* case, are not a direct translation of either “KUNZ” or “BRASSERIE KUNZ.” Rather, Applicant submitted translations of “KUNZ” as part of different, larger phrases that appear to be idioms. There is no indication of what “KUNZ” would mean, and how consumers would perceive it, by itself, or with the term “BRASSERIE.” Thus we find the minimal dictionary evidence submitted by Applicant to be unavailing. There is no evidence or indication that consumers would understand “KUNZ” to be anything other than primarily merely a surname.

Of course, as Applicant points out, we must consider the meaning of the mark as a whole. *See Azeka Bldg. Corp. v. Azeka*, 122 USPQ2d 1477, 1482 (TTAB 2017). In this regard, the Examining Attorney submitted dictionary definitions of the term “BRASSERIE” as follows:

brasserie: an informal restaurant, especially one in France or modeled on a French one and with a large selection of drinks.¹⁰

brasserie: an informal usually French restaurant serving simple hearty food.¹¹

Thus “BRASSERIE” is generic for, or at least merely descriptive of, Applicant’s applied-for restaurant services. *See Earnhardt* 123 USPQ2d at 1415. Considering the mark in its entirety, nothing about the combination of BRASSERIE and KUNZ changes the meaning of the component terms. Therefore, BRASSERIE does not alter the primary surname significance of BRASSERIE KUNZ.

The Examining Attorney further submitted evidence that it is a common convention for restaurants to be named after their owner or chef, such as Applicant here, Kunz Management LLC, with its chef, Gray Kunz:

How to Name Your Restaurant So It Wins Beard Awards: by Helen Rosner; Feb 19, 2015; . . . If you follow restaurants even a little bit, you’ve noticed that their names follow patterns, ebbs and flows of ideas, concepts, and lexical constructions. . . . Girls’ Names . . .Boys’ Names . . . Chefs’ Names . . . Animals . . .¹²

Fantasy Name Generator: . . Restaurant names can be almost anything, although most restaurants seem to be named after the owner, a local landmark, or the soul, goal or theme of the restaurant. . . .¹³

This evidence suggests that the addition of the word BRASSERIE not only does not alter the primary surname significance, but rather it may in fact underscore that KUNZ is a surname. *Cf. In re Piano Factory Grp. Inc.*, 85 USPQ2d 1522, 1527 (TTAB

¹⁰ *Oxforddictionaries.com/us*. Attached to January 21, 2016 Office Action, at 9.

¹¹ *Merriam-webster.com*. Attached to January 21, 2016 Office Action, at 13.

¹² *Eater.com*. Attached to August 31, 2016 Final Office Action, at 20-21.

¹³ *Fantasynamesgenerators.com*. Attached to August 31, 2016 Final Office Action, at 31.

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2006) (finding the addition of “& SONS” to the surname emphasized the surname significance).

When considered as a whole, we find that Applicant’s applied-for mark BRASSERIE KUNZ would be perceived as primarily merely a surname.

Decision: The refusal to register Applicant’s mark is affirmed under Section 2(e)(4) of the Trademark Act.