

This Opinion is Not a
Precedent of the TTAB

Mailed: October 18, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Kirsh Helmets, Inc.

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Serial No. 87390575

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Lee Palmateer of Lee Palmateer Law Office LLC,
for Kirsh Helmets, Inc.

Jean H. Im, Trademark Examining Attorney, Law Office 101,
Ronald R. Sussman, Managing Attorney.

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Before Kuhlke, Lykos and English,
Administrative Trademark Judges.

Opinion by English, Administrative Trademark Judge:

Kirsh Helmets, Inc. (“Applicant”) seeks registration on the Principal Register of the mark KIRSH, in standard characters, for “crash helmets, motorcycle helmets; protective helmets; safety helmets; safety goggles; motorcycle goggles” in International Class 9.¹

¹ Application Serial No. 87390575; filed March 29, 2017 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intent to use the mark in commerce.

The Trademark Examining Attorney has refused registration on the ground that Applicant's mark is primarily merely a surname under Section 2(e)(4) of the Trademark Act, 15 U.S.C. § 1052(e)(4). When the refusal was made final, Applicant appealed and requested reconsideration. The Examining Attorney denied Applicant's request for reconsideration, and the appeal was resumed. We affirm the refusal to register.

I. Record on Appeal

The Examining Attorney submitted the following evidence that is of record for this appeal:

1. A LexisNexis public records search for the surname KIRSH showing 819 results. The first 50 results were made of record and reflect persons with the surname KIRSH residing in California, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, New York, North Carolina, Ohio, Pennsylvania, Texas, Virginia, and Washington state.²
2. A search of whitespages.com showing a "representative sample" of 1,167 results for the surname KIRSH listing persons with the surname residing in California, Florida, Georgia, Illinois, Indiana, Maryland, Michigan, Minnesota,

² June 22, 2017 Office Action at TSDR 60-61. Citations to the prosecution record are to the Trademark Status & Document Retrieval ("TSDR") system. All other citations are to TTABVUE, the Board's online docketing system.

New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Virginia, and Wisconsin;³

3. Articles in regional newspapers and national magazines, as well as printouts from websites, referring to people with: (i) the surname KIRSH, including jazz artist and Grammy winner Bernie Kirsh, billionaire Nathan Kirsh, South Carolina state representative Herb Kirsh, Las Vegas radio personality Ronald Kirsh, television producer Bob Kirsh, and professors at UCSD (David Kirsh), the University of Michigan (Marvin Kirsh), Rutgers (Andrea Kirsh), and the State University of New York at Geneseo (Steven Kirsh);⁴ and (ii) the surname Kirsch, including Russell Kirsch, inventor of square pixels, David Kirsch, celebrity personal trainer, and actor Brendan Kirsch.⁵
4. Wikipedia.org entries listing four “notable” people with the surname KIRSH⁶ and seventeen “notable people” with the surname Kirsch.⁷
5. Printouts from the websites houseofnames.com and ancestry.com identifying KIRSH as an alternate spelling of Kirsch.⁸

³ June 22, 2017 Office Action at TSDR 80-87. Applicant asserts that the whitepages.com search covers the surname KIRSCH (Appeal Br. 9 TTABVUE 6), with a “c,” but the search results are for KIRSH, without a “c.”

⁴ January 16, 2018 Final Office Action at TSDR 24-59; August 3, 2018 Req. Recons. Denial 6 TTABVUE 10-14 and 7 TTABVUE 2-12.

⁵ June 22, 2017 Office Action at TSDR 62-79; January 16, 2018 Final Office Action at TSDR 60-75; August 3, 2018 Req. Recons. Denial 6 TTABVUE 6-9.

⁶ August 3, 2018 Req. Recons. Denial 6 TTABVUE 5.

⁷ January 16, 2018 Final Office Action at TSDR 11-12.

⁸ *Id.* at TSDR 13-15 and 20-23.

6. Printouts from search.ancestry.com listing persons with the surname KIRSH identified in the 1940 U.S. Census.⁹
7. Printouts from Applicant's website.¹⁰

Applicant submitted the following evidence:¹¹

1. Data from the 2010 U.S. Census showing: (a) 479 persons in the U.S. with the surname KIRSH ranking it the 44,808th most popular surname in the United States; and (b) 8764 persons in the U.S. with the surname Kirsch ranking it the 4050th most popular surname in the United States;¹²
2. 2010 U.S. Census list of the thirty-two most frequently occurring surnames in the United States.¹³
3. Printout from the U.S. Census website identifying the U.S. population on July 4, 2010 as 309,369,575.¹⁴
4. Printouts from two websites identifying KIRSH as a given name.¹⁵

⁹ *Id.* at TSDR 16-19.

¹⁰ *Id.* at TSDR 8-10.

¹¹ Applicant also submitted a dictionary.com definition for the word "famous" to support its assertion that the persons identified in the Examining Attorney's evidence with the surnames KIRSH and KIRSCH are not "famous." Req. Recons. 4 TTABVUE 5 and 7-10.

¹² December 22, 2017 Office Action Resp. at TSDR 11; *see also id.* at 7 (identifying URL address for the evidence).

¹³ *Id.* at 11-12.

¹⁴ *Id.* at 13.

¹⁵ *Id.* at 14-17.

II. Evidentiary Issues

A. Applicant's Evidentiary Objections

Applicant raises a number of objections to the Examining Attorney's evidence. First, Applicant objects to the search results from the LexisNexis public records database on grounds that "[t]he LEXISNEXIS surname database is not available without a subscription, and therefore, ... the data should not be considered without a detailed, comprehensive and complete description of the database."¹⁶ Following Office guidance, the evidence includes the search summary identifying the specific search conducted, the files searched and the results, and the number of search results reviewed.¹⁷ TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") § 710.01(a) (Oct. 2018). Accordingly, and because we routinely consider data from this database when considering surname refusals, we have considered the LexisNexis search results for whatever probative value they might have. *See, e.g., In re Olin Corp.*, 124 USPQ2d 1327, 1331 (TTAB 2017) (considering LexisNexis public records search in concluding that OLIN is not rarely encountered as a surname); *Cf. Luxco, Inc. v. Consejo Regulador del Tequila, A.C.*, 121 USPQ2d 1477, 1505 n.185 (TTAB 2017) (considering articles currently available only through subscription to The New York Times archives).

Second, Applicant argues that evidence regarding the surname Kirsch with a "c" is irrelevant because Kirsch is different from the mark at issue here, KIRSH without

¹⁶ December 22, 2017 Office Action Resp. at TSDR 7, n.1. The URL addresses on the LexisNexis printouts are lengthy and the ends are cut off. Applicant did not raise this issue

a “c.” As discussed in Section III.D. below, we have considered this evidence only for the limited purpose of analyzing whether Applicant’s mark has the structure and pronunciation of a surname.

Third, in its reply brief, Applicant objects to the Examining Attorney’s evidence on grounds that the evidence lacks authentication and foundation, constitutes hearsay, and/or is irrelevant. These objections are not well-taken. To the extent these objections are raised for the first time in Applicant’s reply brief,¹⁸ they are untimely. Moreover, authentication is not an issue because the entirety of the Examining Attorney’s evidence is from the Internet and bears the URL addresses and dates the pages were accessed and printed. *I-Coat Co.*, 126 USPQ2d at 1732-33. In addition, the Board generally takes a more permissive stance with respect to the admissibility of evidence in an ex parte proceeding because it is difficult for an Examining Attorney to establish facts without reliance on the type of evidence submitted here. *See In re Hudson News Co.*, 39 USPQ2d 1915, 1920 n.10, 1924 n.18 (TTAB 1996), *aff’d without opinion* (Fed. Cir. 1997) (recognizing the USPTO’s limited resources and the

so we deem any objection on this basis waived. *In Re I-Coat Co., LLC*, 126 USPQ2d 1730, 1733 (TTAB 2018).

¹⁷ June 22, 2017 Office Action at TSDR 60-61.

¹⁸ Applicant’s evidentiary objections correspond to the list of evidence identified in the Examiner’s Statement. The Examining Attorney did not submit new evidence with the Examiner’s Statement, but merely lists the evidence that was attached to the Office Actions and Request for Reconsideration Denial.

Applicant made a general comment in its Appeal Brief and its December 22, 2017 Office Action Response that “[t]he record is not adequate to consider the LEXISNEXIS® surname database evidence or the other evidence submitted with the June 22, 2017 Office Action” but did not raise any specific objections other than an objection that access to the LexisNexis database requires a subscription. 9 TTABVUE 4, n.1; December 22, 2017 Office Action Resp. TSDR 7, n.1

difficultly for examining attorneys to establish some facts without relying on LexisNexis database evidence); *see also In re Broadway Chicken Inc.*, 38 USPQ2d 1559, 1565 (TTAB 1996). Although there is a hearsay element to some the Examining Attorney's evidence, there is no bias in the evidence which was not prepared for purposes of this case. *Hudson News*, 39 USPQ2d at 1920 n.10 (allowing NEXIS evidence despite hearsay nature); *Broadway Chicken*, 38 USPQ2d at 1565 (considering telephone directory listings, search of the American Business Directory compiled from telephone directory listings and supplemented by telephone interviews, and Dun & Bradstreet report, despite the hearsay element of the evidence).

B. Examining Attorney's Request for Judicial Notice

The Examining Attorney explains that he inadvertently failed to attach to the June 22, 2017 Office Action evidence that there is no definition for the term "Kirsh" in *The American Heritage Dictionary*, and asks that we take judicial notice of this fact. *The American Heritage Dictionary* is a readily verifiable and reliable dictionary and the absence of a definition in this dictionary may assist us in the determination of this case. Accordingly, we exercise our discretion to take judicial notice that the term "kirsh" is not defined in *The American Heritage Dictionary*.¹⁹ *See Societe Civile Des Domaines, et al. v. S.A. Consortium Vinicole de Bordeaux Et De La Gironde*, 6 USPQ2d 1205, 1208 (TTAB 1988) (taking judicial notice of various dictionaries "evidencing the absence of any other meaning for the term [DOURTHE]").

¹⁹ <https://www.ahdictionary.com/word/search.html?q=kirsh>, accessed October 15, 2019.

III. Decision

A mark that is “primarily merely a surname” may not be registered on the Principal Register unless it has 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). Applicant does not argue that its proposed mark has acquired distinctiveness, but argues only that its proposed mark is not primarily merely a surname.

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.*, 864 F.3d 1374, 123 USPQ2d 1411, 1413 (Fed. Cir. 2017); *In re Beds & Bars Ltd.*, 122 USPQ2d 1546, 1548 (TTAB 2017) (citing *Etablissements Darty et Fils*, 225 USPQ at 653). Whether the primary significance of an applied-for mark is merely that of a surname is a question of fact that must be resolved on a case-by-case basis. *Olin*, 124 USPQ2d at 1330.

We examine the entire record to determine the primary significance of a term to the purchasing public. *Id.*; *Etablissements Darty et Fils*, 225 USPQ at 653; *Beds & Bars*, 122 USPQ2d at 1548; *In re Benthin Mgmt. GmbH*, 37 USPQ2d 1332, 1333-34 (TTAB 1995). In this case the Examining Attorney and Applicant have presented evidence and arguments regarding the following inquiries: (1) the extent to which the term is encountered as a surname, i.e., the degree of a surname’s rareness; (2) whether the term is the surname of anyone connected with the applicant; (3) whether

the term has any recognized meaning other than as a surname; and (4) whether the term has the structure and pronunciation of a surname.²⁰ *Olin*, 124 USPQ2d at 1330.

A. Whether KIRSH is Rarely Encountered as a Surname

We first consider the public exposure to the term KIRSH as a surname. Applicant argues that KIRSH is “an extremely rare surname” because: (1) the LexisNexis results for KIRSH “represent[] only a 0.00000315 fraction (or 0.000315%) of the unique individuals in the database,” and may include duplicate and inactive records;²¹ (2) “[t]he record does not indicate whether the Lexis database results are limited to the United States” and “the record is indeterminate with regard to the geographic limitations” of the whitepages.com evidence;²² and (3) the 2010 U.S. Census identifies only 479 persons in the U.S. with the surname KIRSH making it the 44808th most popular surname.²³

We “agree that the probative value of the Lexis listings is limited for the reasons stated by Applicant,” *In re Eximius Coffee, LLC*, 120 USPQ2d 1276, 1280 (TTAB 2016), but taking into account the somewhat limited resources available to Examining Attorneys, we do not discount the evidence. *See, e.g., In re Pacer Tech.*,

²⁰ Another consideration, not applicable here because Applicant seeks registration of a standard character mark, is whether the term is sufficiently stylized to remove its primary significance from that of a surname.

²¹ Appeal Br. 9 TTABVUE 4-5.

²² Reply Br. 12 TTABVUE 10.

²³ Applicant also argues that it has extensively used its mark, but “to Applicant’s knowledge, no one has perceived the mark as primarily merely a surname.” December 22, 2017, Office Action Resp. at TSDR 8. Applicant has not submitted any evidence to support this self-serving statement. Moreover, it is unlikely that a purchaser or potential purchaser would make an unprompted comment on the surname significance of Applicant’s mark.

338 F.3d 1348, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003). Some duplication and inactive records are to be expected in this type of data compilation. The search results from whitepages.com are subject to similar limitations, and they include at least some results for persons in British Columbia, Canada. But again, the whitepages.com search results have some probative value because they appear to be primarily comprised of U.S. listings and they corroborate the LexisNexis results.

The excerpts from the LexisNexis and whitepages.com databases list a number of individuals with the surname KIRSH in more than twenty states and the District of Columbia. The Examining Attorney also submitted evidence that KIRSH is the surname of persons in the media, namely, a Grammy winner, radio personality, and television producer, a former politician in South Carolina, a billionaire profiled on Forbes.com, and professors from national universities.²⁴ This evidence is probative of the purchasing public's exposure to the surname KIRSH. *Bed & Bars*, 122 USPQ2d at 1551; *In re Gregory*, 70 USPQ2d 1792, 1795 (TTAB 2004); TMEP § 1211.01(a)(v).

Turning to the U.S. Census data, Applicant compares the U.S. population in July 2010 to the number of people identified in the 2010 census with the surname KIRSH to argue that KIRSH is an extremely rare surname. Given the large number of surnames in the United States, even the most common surname would represent only a small fraction of the U.S. population. *Gregory*, 70 USPQ2d at 1795. So we do not

²⁴ There is no indication that the LexisNexis search results include persons outside the United States. The search result excerpts attached are comprised of U.S. listings only. The whitepages.com search is for "KIRSH" in any "city, state or ZIP" indicating that the search is primarily comprised of U.S. listings. In addition, the whitepages.com search result excerpts are comprised of U.S. listings with two exceptions for an "A Kirsh" in Quesnel, British Columbia.

find this argument particularly persuasive. Moreover, “[e]ven a rare surname may be held primarily merely a surname if its primary significance to purchasers is that of a surname.” *Beds & Bars*, 122 USPQ2d at 1551; *see also Eximius 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); *In re Adlon Brand GmbH & Co.*, 120 USPQ2d 1717, 1720-21 (TTAB 2016) (finding ADLON merely a surname despite evidence that only 75 United States individuals have that name, and pointing out that the “strictly numerical approach to a surname analysis has been squarely rejected”).

We conclude from the evidence that KIRSH is a somewhat rare surname, but that there is public exposure to the surname throughout the United States. Accordingly, this evidence supports a finding that KIRSH is likely to be perceived by the public as having surname significance.

B. Whether KIRSH is the Surname of Anyone Connected with Applicant

There is no evidence that KIRSH is the surname of a person connected with Applicant. But the absence of such evidence “does not tend to establish one way or the other whether the proposed mark would be perceived as a surname.” *Gregory*, 70 USPQ2d at 1795. Accordingly, this consideration is neutral.

C. Whether KIRSH has Non-Surname Significance

The fact that KIRSH is not a term defined in *The American Heritage Dictionary* supports a finding that the primary significance of KIRSH is as a surname. *See, e.g.,*

Eximius Coffee, 120 USPQ2d at 1280 (citing *In re Isabella Fiore LLC*, 75 USPQ2d 1564, 1566 (TTAB 2005)); see also *Etablissements Darty et Fils*, 225 USPQ at 653-54. But Applicant argues that KIRSH has significance as a given name and points to two websites identifying it as such. In addition, the Examining Attorney's evidence shows that KIRSH comprises the first letters of "Kinetic Impact Reactive Safety Helmet" promoted on Applicant's website as the name for Applicant's helmet.²⁵

The mere existence of other non-surname meanings of a mark does not preclude a finding that it is primarily merely a surname. See *Mitchell Miller, PC v. Miller*, 105 USPQ2d 1615, 1621 (TTAB 2013) ("the record is devoid of evidence that the non-surname meanings of MILLER, i.e., a mill operator or a moth, are the primary significance thereof or somehow eclipse its surname significance" in connection with legal services); *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 *Etablissements Darty et Fils*, 225 USPQ at 653-54 (holding DARTY primarily merely a surname despite applicant's argument that the mark is a play on the word "dart"). Rather, we must consider whether the non-surname existence eclipses the surname significance of the proposed mark.

One of the two websites Applicant has submitted indicates that the "popularity" of KIRSH as a given name is 3.610 on a scale of 0 ("extremely rare") to 6 ("super

²⁵ January 16, 2018 Final Office Action at TSDR 8.

popular”).²⁶ There is, however, nothing in the record to establish the basis for this ranking or to otherwise demonstrate that the purchasing public would recognize KIRSH as a given name. *See Gregory*, 70 USPQ2d at 1796 (no evidence of record showing how commonly ROGAN used as a first name rather than a surname).

Similarly, the record does not reflect how frequently consumers are exposed to KIRSH as an acronym for “Kinetic Impact Reactive Safety Helmet.” Because the mark is not K.I.R.S.H., with periods, the significance of KIRSH as an initialism or acronym is not readily apparent, and the record does not reflect that Applicant expressly promotes the significance of KIRSH as an acronym so that the purchasing public would perceive it as such. *Petrin*, 231 USPQ at 904.

For these reasons, we cannot conclude that the primary significance of KIRSH to the purchasing public would be a given name or an initialism or acronym.

D. Whether KIRSH has the Structure and Pronunciation of a Surname

Last, we consider whether KIRSH has the structure and pronunciation of a surname. Evidence that a term has the structure and pronunciation of a surname may corroborate a finding that the primary significance of the term is that of a surname. *See Eximius Coffee*, 120 USPQ2d at 1280 (whether a term has the structure and pronunciation of a surname is a “decidedly subjective” inquiry); *In re Giger*, 78 USPQ2d 1405, 1409 (TTAB 2006). Pertinent evidence typically consists of other common surnames that are configured similarly and sound similar to the mark. *See*

²⁶ Notably, this website also identifies “accident” as a given name. December 22, 2017 Office Action Resp. at TSDR 14.

Eximius Coffee, 120 USPQ2d at 1280. Applicant's mark is phonetically identical to the surname Kirsch, which is not uncommon. Applicant's U.S. Census evidence shows that 8764 persons in the U.S. have the surname Kirsch. In addition, eleven out of the thirty-two most popular surnames in the United States consist of five letters and are one syllable long,²⁷ just like the surname KIRSH. For these reasons, we conclude that Applicant's mark has the structure and pronunciation of a surname.²⁸

IV. Conclusion

We find that the evidence, taken as a whole, establishes that the primary significance of KIRSH to the purchasing public is merely that of a surname within the meaning of Section 2(e)(4).

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

²⁷ The eleven surnames are Smith, Brown, Jones, Davis, Lopez, Moore, Perez, White, Clark, Lewis, and Young. December 22, 2017 Office Action Resp. at TSDR 11.

²⁸ Applicant's argument that "surname significance is further minimized by using KIRSH in a non-possessive form" is not persuasive. December 22, 2017 Office Action Resp. at TSDR 10. While use of a possessive reinforces a term's surname significance, the absence of a possessive does not detract from a term's surname significance.