

This Opinion is Not a  
Precedent of the TTAB

Mailed: May 28, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Fair Isaac Germany GmbH*

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Serial No. 87424333

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Shuangqi Wang and Timothy M. Kenny of Norton Rose Fulbright US LLP,  
for Fair Isaac Germany GmbH.

Thomas M. Manor, Trademark Examining Attorney, Law Office 110,  
Chris A. F. Pedersen, Managing Attorney.

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Before Taylor, Ritchie and Hudis,  
Administrative Trademark Judges.

Opinion by Hudis, Administrative Trademark Judge:

Fair Isaac Germany GmbH (“Applicant”) seeks registration on the Principal  
Register of the mark SIRON (in standard characters) for:

Computer software, particularly for the extraction and comparison of data contained in different data storage systems, to process, transform, prepare and feed this data into reports, files and data base systems; platform- and database independent software tool for building and supplying data warehouses; software for and in the programming language 4GL for generating client/server and Internet applications; software and enterprise software applications for use in assessing, measuring, monitoring, tracking, detecting, preventing and managing fraud; software and enterprise software applications for use in assessing, measuring, monitoring, tracking, detecting, preventing,

combating and defending against money-laundering, terrorist financing, and third party bribery and corruption risks; software and enterprise software applications for use in fulfilling international tax reporting obligations in International Class 9.<sup>1</sup>

The Examining Attorney refused registration on the ground that Applicant's mark is primarily merely a surname under Trademark Act Section 2(e)(4), 15 U.S.C. § 1052(e)(4).<sup>2</sup>

When the refusal was made final, Applicant appealed and requested reconsideration.<sup>3</sup> The Board thereupon, that same day, instituted the appeal and remanded the Application for the Examining Attorney to consider Applicant's request for reconsideration.<sup>4</sup> After the Examining Attorney denied the request for reconsideration on September 13, 2018,<sup>5</sup> the appeal was resumed on September 29,

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<sup>1</sup> Application Serial No. 87424333 filed on April 25, 2017, under Trademark Act Section 1(b), 15 U.S.C. § 1051(b), based upon Applicant's allegation of a bona fide intention to use the mark in commerce.

<sup>2</sup> The Examining Attorney also required Applicant to respond to an inquiry as to whether anyone connected with Applicant was or is using the term "SIRON" as a surname. TSDR 127. The requirement was deemed satisfied by Applicant's January 24, 2017 Response to Office Action, which indicated that no one connected with Applicant bears SIRON as a surname. TSDR 121.

Page references herein to the application record refer to the online database of the USPTO's Trademark Status & Document Retrieval ("TSDR") database. Coming after the TSDR designation are the page references to the application record in .pdf downloadable format. References to the Board's interim Orders and the parties' briefs on appeal refer to the Board's TTABVUE docket system. Coming before the designation TTABVUE is the docket entry number; and coming after this designation are the page references, if available and applicable.

<sup>3</sup> 1 TTABVUE and 4 TTABVUE.

<sup>4</sup> 2 TTABVUE.

<sup>5</sup> 5 TTABVUE through 7 TTABVUE.

2018.<sup>6</sup> Both Applicant and the Examining Attorney filed briefs.<sup>7</sup> For the reasons discussed below, we reverse the refusal to register.

## I. Applicable Law

Trademark Act Section 2(e)(4) precludes registration of a mark on the Principal Register which is “primarily merely a surname” without a showing of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f).<sup>8</sup> 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); *In re United Distillers plc*, 56 USPQ2d 1220 (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 ....”); *In re Etablissements Darty et Fils*, 759 F.2d 15, 225 USPQ 652, 653 (Fed. Cir. 1985).

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<sup>6</sup> 8 TTABVUE.

<sup>7</sup> 9 TTABVUE, 11 TTABVUE and 12 TTABVUE.

<sup>8</sup> The SIRON application at issue includes neither a claim of acquired distinctiveness under Trademark Act Section 2(f) nor a request for registration on the Supplemental Register under Trademark Act Section 23, 15 U.S.C. § 1091, which in any event (subject to certain exceptions not applicable here) is unavailable with respect to this intent-to-use application. *See In re Olin Corp.*, 124 USPQ2d 1327, 1332-33 (TTAB 2017); *In re Weiss Watch Co., Inc.*, 123 USPQ2d 1200, 1201 n. 2, 2017. Accordingly, those issues are not before us in this appeal.

When, as here, 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, and the burden of marshalling those facts to make a prima facie case rests with the Examining Attorney. *See Darty*, 225 USPQ at 653-54 and *Hutchinson*, 7 USPQ2d at 1492. 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. *Darty*, 225 USPQ at 654. We examine the entire record to determine the primary significance of a term. If there is any doubt, we “are inclined to resolve such doubts in favor of applicant.” *In re Benthin Mgmt. GmbH*, 37 USPQ2d 1332, 1334 (TTAB 1995).

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: a) whether the applicant adopted a principal’s name and used it in a way that revealed its surname significance; b) whether the term had a non-surname “ordinary language” meaning; and c) the extent to which the term was used

by others as a surname. *Darty*, 225 USPQ at 653. The Board’s oft-cited “*Benthin* factors,” see *Benthin* 37 USPQ2d at 1333-34, are also examples of inquiries that may lead to evidence regarding the purchasing public’s perception of a term’s primary significance.<sup>9</sup> These “factors” are not exclusive and any of these circumstances – singly or in combination – and any other relevant circumstances may shape the analysis in a particular case. For example, “[w]e also consider if there is evidence to so indicate whether the public may perceive the mark to be primarily a meaningless, coined term. *In re Adlon Brand GmbH & Co. KG*, 120 USPQ2d 1717, 1719 (TTAB 2016).

## II. Evidentiary Record

The Examining Attorney made of record the following evidence in support of his refusal to register SIRON on the grounds that it is primarily merely a surname:

- The appearance of SIRON 484 times as a surname in a LEXISNEXIS® weekly updated directory of cell phone and other phone numbers (such as voice over IP) from various data providers (making the first 100 results of record).<sup>10</sup>
- Search results of SIRON from the *Merriam-Webster, Inc.* (2015), *Collins* (2018), *Macmillan Publishers Limited* (2009-2018) and *Webster* online dictionaries,

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<sup>9</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).

<sup>10</sup> July 25, 2017 Office Action, TSDR 130-137.

and the *Wikipedia* online encyclopedia, demonstrating no recognized meaning in those reference materials of the term searched.<sup>11</sup>

- The appearance of SIRON 15 times as a surname on FACEBOOK® (although, from the nature of the materials submitted the Board cannot discern whether some of these listings are duplicative).<sup>12</sup>
- The online biography page of Ms. Jan Siron, an instructor at the Bishop Kelly High School, Boise, Idaho.<sup>13</sup>
- The online profile of Chris Siron, an artist from Baltimore, Maryland, whose works have been curated by GBCA/Baker Artist Portfolios.<sup>14</sup>
- Online contact information for Ellen Siron, a Coldwell Banker sales associate in Columbia, South Carolina.<sup>15</sup>
- Online contact information for Diane Siron, Assistant – Membership and Programs for the McLean County Chamber of Commerce, Bloomington, Illinois.<sup>16</sup>
- An online funeral home obituary of, and a funeral service announcement for, William “Bill” Lyle Siron, formerly of Brookeville, Maryland.<sup>17</sup>
- A entry in the *Dictionary of American Family Names* (Oxford Univ. Press 2003) of SIRON as a “derisive nickname for someone who gave himself airs and graces, or an occupational name for someone in the service of a great lord, from a diminutive of Old French *sire* ‘lord.’”<sup>18</sup>
- The appearance of SERON 11 times as a surname in a LEXISNEXIS® database of U.S. newspapers.<sup>19</sup>

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<sup>11</sup> July 25, 2017 Office Action, TSDR 139-142; February 15, 2018 Office Action TSDR 106-115.

<sup>12</sup> September 13, 2018 Reconsideration Denial, TSDR 13-15.

<sup>13</sup> *Id.*, TSDR 16-17.

<sup>14</sup> *Id.*, TSDR 18-20.

<sup>15</sup> *Id.*, TSDR 21-22.

<sup>16</sup> *Id.*, TSDR 23-24.

<sup>17</sup> *Id.*, TSDR 25-26.

<sup>18</sup> *Id.*, TSDR 27-29.

<sup>19</sup> *Id.*, TSDR 30-45.

- The appearance of SIRON 19 times as a surname in a LEXISNEXIS® database of U.S. newspapers.<sup>20</sup>
- The appearance of SERON 204 times as a surname in a LEXISNEXIS® weekly updated directory of cell phone and other phone numbers (such as voice over IP) from various data providers.<sup>21</sup>
- The appearance of SIRUN 16 times as a surname in a LEXISNEXIS® weekly updated directory of cell phone and other phone numbers (such as voice over IP) from various data providers.<sup>22</sup>

Applicant submitted no evidence to traverse the Examining Attorney's refusal to register the mark. The burden of proof nevertheless rests with the Examining Attorney. *See Darty*, 225 USPQ at 653-54 and *Hutchinson*, 7 USPQ2d at 1492.

### III. Evidentiary Issues

Before proceeding to the merits of the Examining Attorney's refusal, we address one evidentiary matter Applicant raises. Applicant protests that a large portion of the Examining Attorney's evidence was made of record as part of his September 13, 2018 Reconsideration Denial; such that Applicant was denied an opportunity to respond to this evidence.<sup>23</sup> To the contrary, Applicant could have requested remand of its application to address this additional evidence. Moreover, Applicant was able to, and did, present arguments in response to the Examining Attorney's evidence in Applicant's Appeal Brief and Reply Brief.<sup>24</sup>

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<sup>20</sup> *Id.*, TSDR 46-69.

<sup>21</sup> *Id.*, TSDR 70-79.

<sup>22</sup> *Id.*, TSDR 80-81.

<sup>23</sup> 9 TTABVUE 4.

<sup>24</sup> 9 TTABVUE 6-11 and 12 TTABVUE 3.

#### **IV. Discussion**

We now focus our attention on the evidence and arguments with respect to the *Benthin* factors. While we review each in turn, we make our determination by weighing them together and according the appropriate weight to each one based on the evidence of record.

##### **A. The Extent to Which SIRON is Encountered as a Surname**

We consider first the frequency of, and public exposure to, SIRON as a surname. In this regard, “[t]he relevant question is not simply how frequently a surname appears, ... but whether the purchasing public for Applicant’s goods is more likely to perceive Applicant’s proposed mark as a surname rather than anything else.” *Beds & Bars*, 122 USPQ2d at 1551.

In total and factoring in the possibility of duplication, the Examining Attorney introduced evidence demonstrating surname use of SIRON in the United States 523 times. Applicant contends that this evidence pales in comparison to other Board decisions in which the marks at issue were found not to be primarily merely surnames.<sup>25</sup> Applicant’s briefing also repeatedly criticizes what it believes is the relatively limited examples found within the United States and made of record by the Examining Attorney in which SIRON is used as a surname when compared against the U.S. population as a whole.<sup>26</sup>

In response, the Examining Attorney asserts that:

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<sup>25</sup> 9 TTABVUE 5-8.

<sup>26</sup> 9 TTABVUE 5, 11 and 12 TTABVUE 3.

[A]ll population numbers and derivative percentages referenced by the Applicant in their brief were not supported by attached evidence, and therefore should be disregarded as well as Applicant's statements and conclusions derived therefrom. Applicant is responsible for ensuring that attachments are in fact submitted and for providing attachments in a format acceptable to the Office. ... The record in an application should be complete prior to the filing of an appeal.<sup>27</sup>

True, Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), does provides that the record should be complete prior to the filing of an appeal. *See In re Procter & Gamble Co.*, 105 USPQ2d 1119, 1120 (TTAB 2012) (applicant's discussion in its brief of third-party registrations not considered because the registrations were not properly introduced during the examination process); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1203.02(e) (2018) ("Evidentiary references made in briefs but not supported by timely submissions may not be considered."). However, we can, and in this appeal do, take judicial notice of U.S. Census data. *Weiss Watch*, 123 USPQ2d at 1204. As of July 1, 2018, the U.S. Census Bureau's "Quick Facts" says that the estimated U.S. population was just over 327 million.<sup>28</sup>

Notwithstanding Applicant's arguments noted above, this strictly numerical approach to a surname analysis (comparing the surname evidence at issue to prior cases, or to the United States population as a whole) has been squarely rejected:

[W]ith respect to issues of fact, no precedential value can be given to the quantum of evidence apparently accepted in a prior case. The quantum of evidence which was persuasive against finding surname significance in one case may be insufficient in another because of differences in the names themselves.

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<sup>27</sup> 11 TTABVUE 8.

<sup>28</sup> *See*, <https://www.census.gov/quickfacts/fact/table/US/PST045218>, last visited, May 20, 2019.

*Adlon*, 120 USPQ2d at 1721, quoting *Darty*, 225 USPQ at 653.

On the other hand, based on the total quantum of evidence he himself made of record, the Examining Attorney concedes that SIRON is relatively rare.<sup>29</sup> We find this evidence weighs in favor of finding that SIRON is not primarily merely a surname. *See Benthin*, 37 USPQ2d at 1333. Moreover, no evidence has been made of record demonstrating that SIRON is a surname associated with a well-known person or persons such that it would be subject to wide exposure as a surname. *Cf. Beds & Bars*, 122 USPQ2d at 1552 (Despite its rarity, BELUSHI'S found to be primarily merely a surname based upon its affiliation with well-known actor-comedians John and Jim Belushi).

**B. Whether SIRON is the Surname of Anyone Connected with Applicant**

Applicant affirmatively states, and there is no record evidence to the contrary, that “[n]o one connected with Applicant bears SIRON as a surname.”<sup>30</sup> However, the fact that no one named SIRON is associated with Applicant is not controlling. *See In re Gregory*, 70 USPQ2d 1792, 1995 (TTAB 2004) (The Board stated the fact that “a proposed mark is not the applicant’s surname, or the surname of an officer or employee, does not tend to establish one way or the other whether the proposed mark would be perceived as a surname.”). Thus, this is a neutral factor in our determination.

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<sup>29</sup> September 13, 2018 Reconsideration Denial, TSDR 11. In his brief, 11 TTABVUE 7, the Examining Attorney attempts to walk back this concession, “even if [hypothetically,] ... ‘SIRON’ has some degree of rareness.” 11 TTABVUE 8.

<sup>30</sup> Applicant’s Office Action Response, January 24, 2018, TSDR 124.

**C. Whether SIRON has any Recognized Meaning Other than as a Surname**

The Examining Attorney has demonstrated that SIRON has no recognized meaning in English by showing that searches for SIRON in 4 online dictionaries, and in *Wikipedia*, collectively returned no results of a non-surname meaning. Conversely, the Examining Attorney also made of record an entry in the *Dictionary of American Family Names* noting the onomastic origins of SIRON as a “derisive nickname” or as “an occupational name for someone in the service of” another – but nonetheless recognizing SIRON as a surname. This “negative” dictionary evidence (i.e., listings showing nothing except surname/biographical meanings) supports a finding that the primary significance of SIRON is as a surname. *See, e.g., In re Eximius Coffee LLC*, 120 USPQ2d 1276, 1280 (TTAB 2016) (citing *In re Isabella Fiore LLC*, 75 USPQ2d 1564, 1566 (TTAB 2005). *See also Darty*, 225 USPQ at 653-654.

In response, Applicant concedes that SIRON does not have a recognized non-surname meaning, but nonetheless argues that Applicant’s Mark is likely to be recognized as a coined term or viewed as a play on the word “siren” to suggest a sense of urgency and alertness associated with “siren” when viewed in connection with the goods and services Applicant offers in the field of anti-fraud and anti-money-laundering.<sup>31</sup> However, Applicant provides no evidentiary support to show that its mark is so perceived, and “[a]ttorney argument is no substitute for evidence.” *Zheng Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018)

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<sup>31</sup> 9 TTABVUE 10.

(quoting *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)).

**D. Whether SIRON has the Structure and Pronunciation of a Surname**

We recognize, first, that the assessment of whether SIRON has the structure and pronunciation of a surname is a “decidedly subjective” inquiry. *Eximius Coffee*, 120 USPQ2d at 1280 (quoting *Benthin*, 37 USPQ2d at 1333). As the Board noted in *Olin*, 124 USPQ at 1332, “applicants and examining attorneys may submit evidence that, due to a term’s structure or pronunciation, the public would or would not perceive it to have surname significance.”

In support of his argument that SIRON has the structure and pronunciation of a surname, the Examining Attorney made of record LEXISNEXIS® phone directory data for the surnames SERON and SIRUN,<sup>32</sup> stating that he “believes the mark ‘SIRON’ is more alike to the surnames ‘Sirun’ and ‘Seron’ than any recognized words such as ‘siren.’” However, we are not persuaded by this evidence, because (from the proofs made of record) SERON and SIRUN are even less prevalent as surnames in the United States than is SIRON. Moreover, we do not find that SIRON is more similar in structure and pronunciation to surnames SIRUN or SERON than it is to the word “siren.” At best, we find this factor to be neutral.

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<sup>32</sup> 11 TTABVUE 12; September 13, 2018 Reconsideration Denial, TSDR 30-45, 70-81.

**E. Whether the Stylization of Lettering of the SIRON mark Sufficiently Distinctive to Create a Separate Commercial Impression**

The final *Benthin* factor for evaluating a surname refusal is whether the mark at issue is sufficiently stylized such that it would not be perceived as a surname. *Benthin*, 37 USPQ2d at 1334. Where, as here, the mark is in standard characters, it is unnecessary to consider this factor. *Yeley*, 85 USPQ2d at 1151.

**V. Decision**

In conclusion, we find that the record, taken as a whole, does not establish that the **primary** significance of SIRON to the purchasing public is that of a surname. In making this finding, we accord particular weight to our determination that SIRON, as conceded by the Examining Attorney, is rare, and that no one connected with Applicant has SIRON as a surname. Although SIRON appears not to have any recognized meaning other than that of a surname, the record does not establish that consumers are likely to perceive it **primarily** as a surname. Applicant is correct that doubt about whether a term is a surname should be resolved in its favor, as we do in this case.

The refusal to register Applicant's Mark SIRON is **reversed**.