

ESTTA Tracking number: **ESTTA1022712**

Filing date: **12/16/2019**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	88072028
Applicant	DELTA FAUCET COMPANY
Applied for Mark	LOWRY
Correspondence Address	EDGAR A. ZARINS MASCO CORPORATION 17450 COLLEGE PARKWAY LIVONIA, MI 48152 UNITED STATES Trademarks@mascohq.com 313-792-6485
Submission	Appeal Brief
Attachments	1155561_AppealBrief.pdf(118056 bytes)
Filer's Name	EDGAR A. ZARINS
Filer's email	trademarks@mascohq.com
Signature	/EDGAR A. ZARINS/
Date	12/16/2019

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

Applicant: DELTA FAUCET COMPANY

TRADEMARKS

Serial No.: 88/072,028

Mark: LOWRY

Law Office: 126

Examining Attorney: Zarick, D.

APPEAL BRIEF

The Examining Attorney has refused registration Applicant's mark LOWRY based on a finding that Applicant's mark LOWRY is primarily merely a surname. For the following reasons, the refusal is respectfully traversed and reversal is requested in view of the following comments.

The Examining Attorney bases the refusal on the fact that the term has no other known meaning. However, Applicant has provided alternative meanings of the term supporting the argument that the mark is not merely a surname. The purpose behind prohibiting the registration of surnames is not to protect the public from exposure to surnames but rather to keep surnames available for people who might wish to use their surnames in their businesses. If the surname is rare, it is also unlikely that someone other than the applicant will want to use the surname in connection with plumbing products. Accordingly, registration of the current mark should be allowed.

The burden of establishing a prima facie case that a term is primarily merely a surname falls on the Examining Attorney. *In re Etablissements Darty et Fils*, 759 F.2d 15, 225 U.S.P.Q. 652, 653 (Fed. Cir. 1985). In addition, "[t]he question of whether a word sought to be registered

is primarily merely a surname within the meaning of the statute can only be resolved on a case by case basis," taking into account a number of various factual considerations. *Id.*

The Trademark Trial and Appeal Board reviews five factors when determining if a name is primarily merely a surname:

- (1) whether the surname is rare;
- (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;
- (4) whether it has the "look and feel" of a surname; and
- (5) whether the stylization of lettering is distinctive enough to create a separate commercial impression.

In re Benthin Management GmbH, 37 USPQ2d 1332, 1333-1334 (TTAB 1995).

The second of the five factors the Trademark Trial and Appeal Board takes into consideration is whether the term is a surname of "anyone connected with the applicant." *In re Monotype Corp.*, 14 U.S.P.Q.2d 1070, 1071. In this case, the Applicant respectfully submits that no one connected with the Applicant has the surname LOWRY or any literal equivalents.

The third factor the Board considers when deciding whether a mark is primarily merely a surname is whether the term has any recognized meaning other than as a surname. Respectfully, the Examining Attorney has disregarded the alternative meaning of the mark that Applicant has put forth. Therefore, the Examining Attorney has also overlooked how consumers are likely to view LOWRY. The USPTO has stated that:

[C]ertain surnames are so rare that they do not even have the appearance of surnames. In such cases, even in the absence of non-surname significance, a reasonable application of the "primary significance to the purchasing public" test could result in a finding that the surname, when used as a mark, would be perceived as arbitrary or fanciful.

T.M.E.P. § 1211.01(a)(vi). Consumers would be likely to view it as a fanciful term.

Furthermore, the absence of a conventional dictionary definition for “LOWRY” does not provide any real support for the refusal because, as the Board has held:

While a significant non-surname meaning usually helps the position of an applicant, we find that the converse (i.e., a determination that the involved term does not have any non-surname meaning) does not help significantly the position of the Trademark Examining Attorney.

Amlin, supra. See also *In re Garan Inc.*, 3 U.S.P.Q.2d 1537, 1539 (T.T.A.B. 1987) (“That there are no other meanings of the name in the English language will not support refusal of registration of the surname under the ‘primarily merely a surname’ statutory language unless the average member of the purchasing public would, upon seeing it used as a trademark, recognize it as a surname.”). This collection of evidence indicates that the term is not merely a surname.

The fourth factor the Trademark Trial and Appeal Board has identified is whether the mark has the “look and feel” of a surname. 37 U.S.P.Q.2d 1332 at 1334. While the determination as to whether a term has the “look and feel” of a surname is decidedly subjective, it is readily apparent that LOWRY unlike other terms which look and sound like surnames, does not have the structure and pronunciation of a surname. With the technology available today, almost any term can be found as a surname on a directory yet that should not be a primary indicator. Indeed, LOWRY falls with the category of words that do not have the appearance of surnames.

The final factor the Board takes into consideration is whether the stylization of lettering is distinctive enough to create a separate commercial impression. 37 U.S.P.Q.2d 1332 at 1334. Where the mark is in standard characters, it is unnecessary to consider the fifth factor. *In re Yeley*, 85 U.S.P.Q.2d 1150, 1151 (T.T.A.B. 2007).

In view of the above arguments, Applicant believes that the proposed mark is entitled to registration on the Principal Register. However, if there is any doubt as to whether the significance

of a term is primarily merely a surname, the USPTO must resolve the doubt in favor of the applicant. *Id.*

Conclusion

In view of the foregoing, Applicant respectfully requests that the refusals under Section 2(e)(4) of the Trademark Act of 1946 be reversed and the mark be allowed for publication on the Principal Register.