

This Opinion is Not a
Precedent of the TTAB

Mailed: May 28, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Delta Faucet Company
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Serial No. 88072028
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Edgar A. Zarins of Masco Corporation,
for Delta Faucet Company.

Diana Zarick, Trademark Examining Attorney, Law Office 126,
Andrew Lawrence, Managing Attorney.

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Before Zervas, Ritchie and Hudis,
Administrative Trademark Judges.

Opinion by Hudis, Administrative Trademark Judge:

Delta Faucet Company (“Applicant”) seeks registration on the Principal Register of the proposed mark LOWRY (in standard characters) for “plumbing products, namely, faucets” in International Class 11.¹

¹ Application Serial No. 88072028 filed on August 9, 2018, 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.

The Trademark Examining Attorney refused registration under Trademark Act Section 2(e)(4), 15 U.S.C. §1052(e)(4), on the ground that Applicant's proposed mark, as applied to the goods identified in the application, is primarily merely a surname.

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm 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).² A term is primarily merely a surname if, when viewed in relation to the goods 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); *see also In re Hutchinson Tech. 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 United Distillers plc*, 56 USPQ2d 1220, 1221 (TTAB 2000). 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

² The LOWRY application at issue includes neither a claim of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(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 (TTAB 2017). Accordingly, those issues are not before us in this appeal.

public is determined”); *see also In re Etablissements Darty et Fils*, 759 F.2d 15, 225 USPQ 652, 653 (Fed. Cir. 1985) (citing *In re Kahan & Weisz*, 184 USPQ at 422).

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) (emphasis original) (quoting *Ex parte Rivera Watch Corp.*, 106 USPQ 145, 149 (Comm’r Pat. 1955)).

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 653. 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 inquiries 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.³ These inquiries are not exclusive, and any of these circumstances – singly or in combination – and any other relevant circumstances may be considered when making this determination. *In re Eximius Coffee, LLC*, 120 USPQ2d 1276, 1277-78 (TTAB 2016). 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. The Evidentiary Record

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

- Results from a LexisNexis® public record surname database search showing 35,616 occurrences of the surname “Lowry”. The Examining Attorney’s evidence specifically lists the first 200 results.⁴
- Spreadsheet results from a search of the *United States 2010 Census* titled “Surnames Occurring 100 or more times.” This source lists the surname

³ 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).

⁴ Office Action of September 19, 2018 at TSDR 5-15. Page references herein to the application record refer to the online database of the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system. All citations to documents contained in the TSDR database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer. References to the 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 applicable.

“Lowry” ranked as number 1,428 in terms of frequency of the surname in the United States in 2010, with a count of 24,895 people.⁵

- Results from a search of *The American Heritage Dictionary* online showing a reference to “Lowry” as the surname of a British writer noted for his novel *Under the Volcano* (1947), as well as for his poems and short stories.⁶
- Results of a search on the website *Rhyme Zone* showing references to “Lowry” as the surname of an English novelist, an English painter, and as a common surname in the United States (1 in 10000 families; popularity rank #1295).⁷
- Results from the following online dictionary sources, showing no alternate meaning for “Lowry”: *The Online Slang Dictionary*, *Dictionary of American Regional English*, *Green’s Dictionary of Slang*, *SlangSite.com*, and *Macmillan Dictionary*.⁸
- Results of a search on the website *HouseofNames.com* discussing the English-Scottish-Irish origins of the family name “Lowry”. This source also notes the spelling variations of the surname Lowry such as Lawrie, Laurie, Larrie, Laurie, Laury, Lawry, and Lowrie.⁹
- Results of a search on the website *SurnameDB.com* also discussing the English-Scottish-Irish origins of the surname “Lowry”. This source again notes the spelling variations of the surname Lowry such as such as Laurie, Lawrey, Lowre, Lowres, Lowrie, and Lavery.¹⁰
- Results of a search on the website *Forebears* discussing that the “Lowry” surname is derived from the name of an ancestor, “the son of Lawrence.” Noted North English and Scottish variations of this name include Lowrie and Laurie. The search results also mention that the Lowry surname is most prevalent in the United States.¹¹
- Spreadsheet results from a search of the *United States 2010 Census* titled “Surnames Occurring 100 or more times.” This source lists a number of similar looking and sounding surnames to “Lowry” (with the respective ranking of each listed in parentheses), such as: Larey (120,187), Lari (69,579), Larry (5,817), Lary (16,755), Laure (113,155), Laurey (133,048), Lauri (50,960), Laurie (9,234), Laury (19,614), Lavery (8,401), Lawery (63,873), Lawrey (63,373),

⁵ Office Action of April 22, 2019 at TSDR 7.

⁶ Office Action of September 19, 2018 at TSDR 21.

⁷ Office Action of April 22, 2019 at TSDR 14.

⁸ *Id.* at 8-13.

⁹ Office Action of September 19, 2018 at TSDR 22.

¹⁰ *Id.* at 23.

¹¹ *Id.* at 24.

Lawrie (19,527), Lawry (20,871), Lowary (64,891), Lower (7,183), Lowery (799), and Lowey (64,200).¹²

Applicant made of record the following definitions from the online *Urban Dictionary*¹³ to traverse the Examining Attorney's refusal to register the proposed LOWRY mark:

- LAWRY – A person who is unpleasant; those who wreck your image.
- LAWRY'S – A hater, somebody that is jealous of you because you are wealthier or flyer [sic] than they are.
- LAWRIES – people that hate you just because your [sic] rich or got it going on.
- LAWRY – n. derived from the Lawry brand of seasoning salt; a hater, or anyone whose presence is unwanted or unpleasant; one who is upset, or salty, hence the Lawry's reference; v. to get angry and/or display displeasure.
- LAWRY'S – When a person is embarrassed or humiliated. It can also mean when a person is angry at another.
- LAWRY'S – A Restaurant in Beverly Hills, California.

III. Discussion

We now examine the evidence and review the proffered arguments with respect to the *Benthin* inquiries. 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 LOWRY is Encountered as a Surname

We consider first the frequency of, and public exposure to, LOWRY as a surname. *In re Olin*, 124 USPQ2d at 1330. On the other hand, “[t]he relevant question is not simply how frequently a surname appears ... but whether the purchasing public for

¹² Office Action of April 22, 2019 at TSDR 15-23.

¹³ Office Action Response of March 18, 2019 at TSDR 4-13.

Applicant's goods is more likely to perceive Applicant's proposed mark as a surname rather than as anything else." *Beds & Bars*, 122 USPQ2d at 1551.

The Examining Attorney's evidence from the LexisNexis® public record surname database, and spreadsheet results from a search of the *United States 2010 Census*, persuade us that "Lowry" is not rarely encountered as a surname. We also note the mentions in the *Forebears* website that the "Lowry" surname is most prevalent in the United States; and in the *Rhyme Zone* website that "Lowry" is a common surname in the United States. Therefore LOWRY is likely to be perceived by the public as having surname significance. In its Brief, Applicant does not even contest the relative prevalence of "Lowry" as a surname in the United States.

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

Applicant affirmatively states, and there is no record evidence to the contrary, that "no one connected with the Applicant has the surname LOWRY or any literal equivalents."¹⁴ However, the fact that no one named LOWRY is associated with Applicant is not controlling. *See In re Gregory*, 70 USPQ2d 1792, 1795 (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.

¹⁴ Applicant's Brief, 4 TTABVUE 3.

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

The Examining Attorney's search results from *The American Heritage Dictionary* and *Rhyme Zone* show "Lowry" as the surname of a British/English novelist and English painter. Further, search results from *The Online Slang Dictionary*, *Dictionary of American Regional English*, *Green's Dictionary of Slang*, *SlangSite.com*, and *Macmillan Dictionary* show no alternate meaning for "Lowry". Evidence that a term has no recognized meaning or significance other than as a surname is relevant to determining whether the term would be perceived as primarily merely a surname. See *In re Weiss Watch*, 123 USPQ2d at 1203.

In an attempt to contradict the Examining Attorney's evidence, Applicant made of record related *Urban Dictionary* definitions of the terms LAWRY, LAWRY'S and LAWRIES as a person or persons who are unpleasant, jealous or simply hate others. Applicant's *Urban Dictionary* definitions also include references to a brand of seasoning salt and the name of a restaurant in California. In its Brief, Applicant argues that "the Examining Attorney ... disregarded the alternative meaning[s] of the mark that Applicant ... put forth [and] ... [t]herefore ... also overlooked how consumers are likely to view LOWRY."¹⁵

In response, the Examining Attorney argues:

Applicant's argument that the applied-for mark has other meanings is not persuasive. Applicant ... only provided entries from *Urban Dictionary* for misspellings of the term "lowry," thus this does not appear to show any alternative recognized meaning for the mark "LOWRY" ... Even giving applicant the benefit of the doubt as to the proffered

¹⁵ Applicant's Brief, 4 TTABVUE 3.

misspelled words, “[a] term may be primarily merely a surname even if it is the phonetic equivalent of a word that has an ordinary meaning (e.g., Byrne/burn; Knott/not or knot; Chappell/chapel). [TRADEMARK MANUAL OF EXAMINING PROCEDURE] (TMEP) § 1211.01(a)(ii) [October 2018]. See *In re Pickett Hotel Co.*, 229 USPQ 760, 76[1] (TTAB 1986) (holding PICKETT SUITE HOTEL primarily merely a surname despite applicant’s argument that PICKETT is the phonetic equivalent of the word “picket”). Even if there were alternative obscure meanings for the wording “LOWRY” in *Urban Dictionary*, the existence of other non-surname meanings of a mark does not preclude the mark from being held primarily merely a surname. *Miller v. Miller*, 105 USPQ2d 1615, 1620-21 (TTAB 2013); see *In re Harris-Intertype Corp.*, 518 F.2d 629, 631, 186 USPQ 238, 239 (CCPA 1975); *In re Hamilton Pharms. Ltd.*, 27 USPQ2d 1939, 1942 (TTAB 1993). The issue is not whether a mark that has surname significance might also have a non-surname significance, but whether, in the context of an applicant’s goods, the non-surname significance is the mark’s primary significance to the purchasing public. *Miller v. Miller*, 105 USPQ2d at 1621; see *In re Harris-Intertype Corp.*, 518 F.2d at 631, 186 USPQ2d at 239; *In re Hamilton Pharms. Ltd.*, 27 USPQ2d at 1942. Thus, applicant’s argument does not diminish the surname significance of the wording in the mark when viewed in relation to the applied-for goods. Because there does not appear to be a non-surname significance to the term “LOWRY” that displaces the primary surname significance of the mark, this factor weighs in favor of finding the mark’s primary significance is that of a surname.

Having reviewed the decisions cited by the Examining Attorney, we agree that Applicant’s citations to *Urban Dictionary* definitions of the terms LAWRY, LAWRY’S and LAWRIES do not establish an understood definition of LOWRY by the American public. The terms found by Applicant in the *Urban Dictionary* do not have the same spelling as the proposed mark. Moreover, Applicant has not cited to other sources that would demonstrate these definitions are neither obscure nor remote. See *In re Harris-Intertype*, 186 USPQ at 239 (noting that Applicant’s evidence of non-surname usage of HARRIS in dictionaries and directories was “somewhat obscure.”). Overall, these *Urban Dictionary* definitions do not overcome the great weight of the evidence

provided by the Examining Attorney that LOWRY does not have a generally recognized meaning or significance other than as a surname.

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

We recognize, first, that the assessment of whether LOWRY 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.”

Here, the Examining Attorney made of record results from her searches of the *HouseofNames.com*, *SurnameDB.com*, *Forebears* and *United States 2010 Census* websites demonstrating that LOWRY has the structure and pronunciation of other known surnames such as Larey, Lari, Larrie, Larry, Lary, Laure, Laurey, Lauri, Laurie, Laury, Lavery, Lawery, Lawrey, Lawrie, Lawry, Lowary, Lower, Lowery, Lowey, Lowre, Lowres and Lowrie. Applicant provided no contrary evidence on this point. Thus, Applicant’s contention, in the face of the Examining Attorney’s evidence, that “LOWRY falls with the category of words that do not have the appearance of surnames”¹⁶ rings hollow.

¹⁶ Applicant’s Brief, 4 TTABVUE 4.

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

The final *Benthin* inquiry for evaluating a surname refusal is whether the proposed LOWRY mark at issue is sufficiently stylized such that it would not be perceived as a surname. *Benthin*, 37 USPQ2d at 1334. Where, as Applicant acknowledges,¹⁷ the proposed mark sought for registration is in standard characters, it is unnecessary to consider this factor. *Yeley*, 85 USPQ2d at 1151.

IV. Conclusion

Balancing the results of our inquiries as discussed in *Darty* and *Benthin* in view of the evidence of record, we find that the overwhelming evidence points us to the conclusion that LOWRY has all the hallmarks and trappings of a surname to the exclusion of any other possible meanings.

Decision

The refusal to register Applicant's proposed mark LOWRY, on the grounds that it is primarily merely a surname, is affirmed.

¹⁷ Applicant's Brief, 4 TTABVUE 4.