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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Hartz & Company, Inc.

Serial No. 74/646,137

Herbert Cohen of Wigman, Cohen, Leitner & Myers for
applicant.

Jeffrey J. Look, Trademark Examining Attorney, Law Office
108 (David Shallant, Managing Attorney).

Before Simms, Hanak and Quinn, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application has been filed by Hartz & Company, Inc.
to register the mark LANHAM for "men's clothing and
formalwear, namely, shirts, pants, suits, hats, jackets,
coats, shorts, sweaters, vests, ties, and rainwear."¹

The Trademark Examining Attorney has refused
registration under Section 2(e)(4) of the Act on the ground
that the applied-for mark is primarily merely a surname.

When the refusal was made final, applicant appealed. Applicant and the Examining Attorney submitted briefs.² We affirm the refusal to register.

Whether a mark is primarily merely a surname depends upon whether its primary significance to the purchasing public is that of a surname. In *re* Hutchinson Technology, Inc., 852 F.2d 552, 7 USPQ2d 1490 (Fed. Cir. 1988). The Office has the burden of establishing a prima facie case that a term is primarily merely a surname. In *re* Etablissements Darty et Fils, 759 F.2d 15, 225 USPQ 652 (Fed. Cir. 1985). Provided that the Examining Attorney establishes a prima facie case, the burden shifts to the applicant to rebut the showing made by the Examining Attorney. In *re* Harris-Intertype Corp., 518 F.2d 629, 186 USPQ 238, 239-40 (CCPA 1975). The Board, in the past, has taken into account various factual considerations in making a determination whether a mark is proscribed by Section 2(e)(4). In *re* Benthin Management GmbH, 37 USPQ2d 1332 (TTAB 1995).

With respect to the surname significance of LANHAM, the Examining Attorney has made of record printouts retrieved

¹ Application Serial No. 74/646,137, filed March 13, 1995, alleging a bona fide intention to use the mark in commerce.

² Applicant originally requested an oral hearing. However, the request subsequently was withdrawn.

from the PHONEDISC U.S.A. database (1994 edition).³ This evidence shows listings for almost 3,300 individuals having the surname "Lanham." This situation is to be contrasted with the ones found in *In re Sava Research Corp.*, 32 USPQ2d 1380 (TTAB 1994) and *In re Benthin Management GmbH*, supra, wherein the listings in each instance numbered only about 100 individuals. To the extent that applicant would have us conclude that "Lanham" is an uncommon surname, we would point out that even such surnames are not registrable on the Principal Register. *In re Industrie Pirelli per Azioni*, 9 USPQ2d 1564 (TTAB 1988), *aff'd unpublished decision*, No. 89-1231 (Fed. Cir. July 17, 1989). As stated in the past, there is no minimum or "magic" number of directory listings required to establish a prima facie case for refusal of registration under Section 2(e)(4). *In re Cazes*, 21 USPQ2d 1796 (TTAB 1991).⁴

In addition to the telephone directory listings, the Examining Attorney submitted a "representative sample" of slightly over 2,600 excerpts retrieved from the NEXIS database. The excerpts show instances where "Lanham" has

³ The preface to the PHONEDISC U.S.A. database states that the database consists of listings "gathered from approximately 5,000 U.S. address lists and telephone directories including a total of 76,000,000 listings."

⁴ In this connection, we see no reason to engage in the mathematical analysis, comparing the commonness of Lanham with the surnames Smith, Jones or Lopez, conducted by applicant and the Examining Attorney.

appeared as a surname. Although there is no way of knowing the circulation figures for the involved printed publications, it is obvious that the public, to some extent, has been exposed to this surname use.

In considering the NEXIS evidence, we recognize, as applicant is quick to point out, that the excerpts show that the term "Lanham" has some geographic meaning. It is true that a minority of the articles make reference to "Lanham" as a geographical place in Maryland. However, most of these references appear in publications originating in the Washington, D.C./Baltimore, MD metropolitan area.

Further, the Examining Attorney introduced excerpts from *Webster's New Geographical Dictionary* (1988), *Webster's II New Riverside University Dictionary* (1988) and *Webster's New World Dictionary* (1988). The term "Lanham" does not appear in any of these publications. In *American Places Dictionary* (1994), the only reference is to "Lanham-Seabrook" (in Prince George's County, Maryland), covering an area of 5.2 square miles with a population of 16,792 (1990).⁵

⁵ To the extent that any of the materials were submitted for the first time with the appeal brief (see Trademark Rule 2.142(d)), we are able to take judicial notice of this evidence. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd* 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

In view of the evidence on this point, we agree with the Examining Attorney's assessment that "Lanham" is "a small and relatively obscure suburb of Washington, D.C." and that the obscurity greatly diminishes the likelihood that persons will perceive the term as geographic, especially outside of the Washington/Baltimore metropolitan area. Although applicant is a Maryland corporation, there is no persuasive evidence of record that would indicate any significant consumer recognition of and association between "Lanham" and the geographic location of Lanham, Maryland. In any event, "unless there is a readily recognized meaning for a term apart from its surname significance, the fact that other meanings for the term exist does not necessarily indicate that the term would have a primary meaning to the purchasing public other than that of its ordinary surname significance." *In re Hamilton Pharmaceuticals Ltd.*, 27 USPQ2d 1939, 1942 (TTAB 1993).

We also have considered applicant's argument that the term would be perceived as the name of the federal trademark statute. We again agree with the Examining Attorney's assessment of this contention: ". . .to the vast majority of American consumers of clothing goods, the commercial impression of the mark is not likely to call to mind the trademark statute unless they happen to be involved in intellectual property law. Even if someone did not know the

name of the Trademark Act, the act itself was named after the *surname* of the congressman who was the primary author of the act [Fritz Garland Lanham of Texas]." [emphasis in original]

We note, of course, applicant's assertion that "Lanham" is not the surname of anyone connected with applicant. Although we have considered this factor and find that the factor weighs in applicant's favor, we view it to be less probative than the other objective factors.

This brings us to a decidedly subjective factor, that is, whether "Lanham" has the "look and feel" of a surname. In re Industrie Pirelli per Azioni, supra at 1566; and In re Sava Research Corp., supra at 1381. Simply put, we find that "Lanham" has the look and sound of a surname.

Since applicant has failed to sufficiently set forth persuasive evidence or arguments to rebut the prima facie showing by the Examining Attorney, we conclude that LANHAM is primarily merely a surname under Section 2(e)(4) of the Act.

Decision: The refusal to register is affirmed.

R. L. Simms

E. W. Hanak

T. J. Quinn

Administrative Trademark
Judges, Trademark Trial

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and Appeal Board

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