

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Bayne Machine Works, Inc.

Serial No. 75/134,516

Richard M. Moose of Dority & Manning for Bayne Machine Works, Inc.

Barbara A. Gaynor, Trademark Examining Attorney, Law Office 104 (Sidney I. Moskowitz, Managing Attorney).

Before Hohein, Hairston and Walters, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

An intent-to-use application has been filed by Bayne Machine Works, Inc. to register the mark BAYNE for "hydraulic trash can dumpers, and adapter kits for hydraulic trash can dumpers comprised of mounting stands and brackets therefor, hydraulic controllers, mounting

adapters and replacement parts therefor."¹

Registration has been finally refused under Section 2(e)(4) of the Trademark Act, 15 U.S.C. §1052(e)(4), on the ground that the mark is primarily merely a surname. Applicant has appealed. Briefs have been filed,² but no oral hearing was requested.

In support of the refusal to register, the Examining Attorney made of record a printout retrieved from the PHONEDISC U.S.A. database (1995 ed.) which shows listings for 1,912 individuals having the surname "Bayne." In addition, she made of record excerpts of fifteen stories retrieved from the NEXIS database which make mention of individuals with the surname "Bayne."³ Also, the Examining Attorney submitted a page from Webster's II New Riverside University Dictionary (1994 ed.) which shows no entry for "Bayne." Finally, the Examining Attorney points to

¹ Application Serial No. 75/134,516 filed July 15, 1996 under Section 1(b) of the Trademark Act, based on applicant's allegation of a bona fide intent to use the mark in commerce.

² Applicant submitted for the first time, with its brief on the case, copies of the disclaimers entered in and the notices of allowance for application Serial Nos. 75/134,517 and 75/134,519. These applications are for the marks BAYNE COMBO LIFTER (COMBO LIFTER disclaimed) and BAYNE DOUBLE WIDE LIFTER (DOUBLE WIDE LIFTER disclaimed), respectively. The Examining Attorney properly objected to this evidence as being untimely submitted. See Trademark Rule. 2.142(d). Therefore, we have not considered this evidence. Even if we had, our decision herein would be the same.

³ According to the Examining Attorney, the search revealed over 11,000 stories of which she submitted a representative sample.

applicant's own president, Jimmy O. Bayne, as evidence that "Bayne" is a surname.

Applicant, in urging reversal of the refusal to register, argues that the NEXIS evidence is "limited;" that "Bayne" is a rare surname; and that "Bayne" is the phonetic equivalent of the word "bane" which has no surname significance. Relying on *In re Benthin Management GmbH*, 37 USPQ2d 1332 (TTAB 1995), where the Board found the mark BENTHIN in a stylized presentation not to be primarily merely a surname, applicant urges that we take into consideration that the purchasing public for its goods is not the general public, but a much smaller group which "is clearly not going to have an experience base as broad as the general public, and therefore correspondingly is less likely to encounter the relatively rare instances of surname usage urged by the PTO." Brief, p. 15.

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 prima facie that a term is primarily merely a surname. *In re Etablissements Darty et Fils*, 759 F.2d 15, 225 USPQ 652 (Fed. Cir. 1985).

Ser No. 75/134,516

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. See *In re Harris-Intertype Corp.*, 518 F.2d 629, 186 USPQ 238, 239-40 (CCPA 1975).

In this case, the PHONEDISC U.S.A. and NEXIS evidence are sufficient to establish a prima facie case that BAYNE is primarily merely a surname. With respect to the NEXIS evidence, it is enough that the Examining Attorney submitted a representative sample of the excerpts. As noted by the Examining Attorney, if applicant believed that the excerpts submitted were somehow not representative of the over 11,000 stories located, applicant could have conducted its own search and submitted the results thereof.

Also, as pointed out by the Examining Attorney, a surname refusal cannot be avoided simply because the surname is the phonetic equivalent of a word with an ordinary meaning. See *In re Pickett Hotel Company*, 229 USPQ 760 (TTAB 1986). In this case, the public would

readily recognize that "Bayne" is not the equivalent of the word "bane."⁴

Further, we find no support in *Benthin* for applicant's contention that the purchasing public for its goods would be less likely than the general public to recognize the surname significance of BAYNE. In this regard, we agree with the Examining Attorney:

The applicant puts forth neither factual evidence nor legal precedent to support its contention concerning its customers' knowledge and/or experience. Moreover, it seems that the applicant's customers would be even *more* familiar than the general public with BAYNE used as a surname since they are more likely to know or have contact with the president of the applicant's corporation, Jimmy O. Bayne. (*emphasis in original*)
Brief, p.7.

Also, this case is readily distinguishable from *Benthin* because the mark here is in typed capital letters whereas in *Benthin* the mark was displayed in "a highly stylized form."

Further, we should point out that even rare surnames (e.g., Darty) are precluded from registration. See *In re*

⁴ The case before us is readily distinguishable from *In re Monotype Corp., PLC*, 14 USPQ2d 1070 (TTAB 1989) where the applicant sought to register the mark CALISTO, an English variation of "Callisto," the name of a nymph in Greek mythology. The Board, in holding that CALISTO was not primarily merely a surname, found that many in the public would not realize that CASTILO is not the "correct" spelling of the mythological name "Castillo."

Ser No. 75/134,516

Etablissements Darty et Fils., supra.

Finally, the fact that "Bayne" is the surname of applicant's president is a factor favoring a finding that the primary significance of BAYNE is that of a surname.

Decision: The refusal to register is affirmed.

G. D. Hohein

P. T. Hairston

C. E. Walters
Administrative Trademark
Judges, Trademark Trial and
Appeal Board

Ser No. 75/134,516