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12/7/00

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Baldwin Hardware Coporation**

Serial No. 75/403,890

Edgar A. Zarins for Baldwin Hardware Corporation

Karen A. McGee, Trademark Examining Attorney, Law Office
112 (Janice O'Lear, Managing Attorney)

Before Hanak, Hairston and Holtzman, Administrative
Trademark Judges.

Opinion by Hanak, Administrative Trademark Judge:

Baldwin Hardware Coporation (applicant) seeks to register BLAKELY in typed drawing form for "metal door hardware, namely, locks, latches and knobs." The intent-to-use application was filed on December 11, 1997.

The Examining Attorney refused registration pursuant to Section 2(e)(4) of the Trademark Act on the basis that BLAKELY is primarily merely a surname.

When the refusal was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request an oral hearing.

We note that the "the PTO [has] the burden of establishing a prima facie case that [BLAKELY] is 'primarily merely a surname.'" In re Etablissements Darty et Fils, 759 F.2d 15, 255 USPQ 652, 653 (Fed. Cir. 1985). Moreover, "the question of whether a [mark] sought to be registered is primarily merely a surname within the meaning of the statute can be resolved only on a case by case basis," taking into account a number of various factual considerations. Darty et fils, 225 USPQ at 653.

In this case, there are four factors which are relevant to a determination of whether BLAKELY would be perceived as primarily merely a surname. The first three factors are fairly objective. The final factor is decidedly subjective.

The first factor to be considered is "the degree of a surname's rareness." In re Garan Inc., 3 USPQ2d 1537, 1540 (TTAB 1987). See also In re Sava Research Corp., 32 USPQ2d 1380, 1381 (TTAB 1994). In this regard, the Examining Attorney made of record a printout from the PHONEDISC POWERFINDER USA ONE 1998 data base showing that out of 115 million listings, there are over 4,200 persons whose surname is BLAKELY.

In view of the evidence, we find that BLAKELY is not a rare surname, and that this first factor weighs in favor of

a finding that BLAKELY would be perceived as primarily merely a surname. To elaborate, this evidence shows that about 1 in 27,000 individuals has the surname BLAKELY. Thus, on average, even a modest size town would have one person whose last name is BLAKELY.

A second factor to be considered in determining whether BLAKELY would be perceived as primarily merely a surname is whether there is "anyone connected with applicant" having the surname BLAKELY. In re Monotype Corp., 14 USPQ2d 1070, 1071 (TTAB 1989). See also Sava, 32 USPQ2d at 1381. In this regard, it is undisputed that no person associated with applicant is named BLAKELY, and thus this second factor weighs in favor of a finding that the mark BLAKELY would not be perceived as primarily merely a surname.

A third factor to be considered is whether or not BLAKELY has any "recognized meaning other than that of a surname." In re BDH Two Inc., 26 USPQ2d 1556, 1558 (TTAB 1993). See also Sava, 32 USPQ2d at 1381. The record is devoid of any evidence showing that BLAKELY has any "recognized" meaning other than that of a surname. Thus, this third factor weighs in favor of a finding that BLAKELY would be perceived as primarily merely a surname. The only non-surname uses of BLAKELY are as the names of two small

towns (in Georgia and Pennsylvania) each having a population of less than 7,500.

This brings us to the fourth factor to be considered, which is decidedly subjective in nature. This fourth factor is whether BLAKELY has the "structure and pronunciation" of a surname, or stated somewhat differently, the "look and sound" of a surname. In re Industrie Pirelli, 9 USPQ2d 1564, 1566 (TTAB 1988); Sava, 32 USPQ2d at 1381. As stated in Industrie Pirelli, "certain rare surnames look like surnames, and certain rare surnames do not and that 'Pirelli' falls into the former category, while 'Kodak' falls into the later." 9 USPQ2d at 1566. In our judgment, BLAKELY does have the clear look and sound of a surname, and this weighs in favor of finding that BLAKELY would be perceived as primarily merely a surname.

In sum, while factor two favors applicant's position, the other three factors cause us to find that BLAKELY would be perceived as primarily merely a surname.

Decsion: The refusal to register is affirmed.

E. W. Hanak

P. T. Hairston

T. E. Holtzman
Administrative Trademark
Judges, Trademark Trial
And Appeal Board