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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Cosmetic Dermatology, Inc.

Serial Nos. 76606583; 76606584; and 76606585

Henry S. Kaplan of Feldman Gale, P.A. for Cosmetic Dermatology, Inc.

Theodore McBride, Trademark Examining Attorney, Law Office 103 (Michael Hamilton, Managing Attorney).

Before Holtzman, Rogers and Drost, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On August 9, 2004, Cosmetic Dermatology, Inc. (applicant) filed three applications to register the mark DR. BRANDT in standard character form for the following goods:

> Skin cream, skin lotion, skin moisturizer, skin emollient, skin mask, skin scrub, exfoliate, skin cleanser, skin toner, skin gel, shave gel, sun screen and sun block preparation in Class 3.[1]

[1] Serial No. 76606583. The application contains an allegation of dates of first use anywhere and in commerce of August 31, 2001.

Printed matter, namely, postcards, newsletters, booklets, brochures, and press kits in the field of skin care in Class 16.[2]

Cosmetic bags sold empty in Class 18.[3]

The examining attorney refused to register the marks on the ground that the marks are primarily merely a surname under Section 2(e)(4) of the Trademark Act. 15 U.S.C. § 1052(e)(4).

After the examining attorney made the refusals final, applicant appealed.

"Among the factors to be considered in determining whether a term is primarily merely a surname are the following: (i) whether the surname is rare; (ii) whether anyone connected with applicant has the involved term as a surname; (iii) whether the term has any other recognized meaning; and (iv) whether the term has the "look and feel" of a surname." In re United Distillers plc, 56 USPQ2d 1220, 1221 (TTAB 2000). If the mark is stylized, which is not the case here, the fifth factor concerns the stylization because if the stylization is "distinctive

[2] Serial No. 76606584. The application contains an allegation of dates of first use anywhere and in commerce of July 2002.
[3] Serial No. 76606585. The application contains an allegation of dates of first use anywhere and in commerce of August 2002. The examining attorney objected to applicant's previous identification for the goods in Class 18. In its reply brief (p. 7), applicant adopted one of the identifications of goods that was suggested by the examining attorney.

enough, this would cause the mark not to be perceived as primarily merely a surname." See In re Benthin Management GmbH, 37 USPQ2d 1332, 1334 (TTAB 1995).

"The USPTO has the burden of establishing a prima facie case that a term is primarily merely a surname." In re Gregory, 70 USPQ2d 1792, 1794 (TTAB 2004). To meet its burden, the Office must show that the primary significance of the term 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), quoting, Ex parte Rivera Watch Corp., 106 USPQ 145 (Comm'r Pat. 1955) (emphasis in original).

With his first Office action, the examining attorney submitted evidence to support the refusal, but he also attached three Principal Register registrations that were registered without resort to Section 2(f) of the Trademark Act, and suggested that applicant could base a claim of acquired distinctiveness on these registrations. The three registrations are:

1. No. 2,285,902
BRANDT (typed)
"Make-up, skin cream, skin lotion, skin moisturizer and skin emollients" in Class 3

2. No. 2,481,763

"Make-up, skin cream, skin lotion, skin moisturizer and skin emollients" in Class 3

3. No. 2,913,027
DR. BRANDT MICRODERMABRASION IN A JAR (typed)
"Skin cream; skin lotion; skin moisturizer; facial scrub; and exfoliate in the nature of facial scrub" in Class 3.

The examining attorney's evidence to support the refusal comprises three additional pages. One page was from a website titled "Last Name Meanings" from "the MyFamily.com Network." Under "Search results for: Brandt," the following information was displayed:

> 33,489 Brandt's in existing Family Trees
> These could be completed branches of your family tree included in the more than 250 million names in trees already submitted by our users.
>
> 53,804 Brandt's in Census records
> Find family facts like age, residence, occupation and more. Trace up to six generations of your family tree with 140 years of American history.
>
> 6,651 Brandt's in Immigration Records (1500s-1900s)
> Learn details about your ancestors including physical description, age, occupation as well as migration information like name/type of ship and last foreign address.
>
> 38,474 Brandt's in Birth, Marriage, Military & Death Records

> Results found in Social Security Death Index as well as birth, marriage and death records. Also includes biographies, military records and historical journals.
>
> 72,081 Brandt's in Historic Newspaper (1786-1900s) View legal notices, community events, wedding announcements, births, advertisements and obituaries for members of your family tree.

No entries from this website were included as evidence.

The examining attorney's other two pages consist of ten entries from a Google search for "Mr. Brandt" (9,770 results). Two of these entries appear to be from the same website so that there are only eight individual entries. Of these eight, one appears to show use of the name as a first name ("Mr. Brandt Louie – SFU Board of Governors") and one is apparently from Australia.[4] Inasmuch as "it is the surname significance of the term in the United States which is determinative of the registrability issue," the Australian evidence is much less probative. In re BDH Two Inc., 26 USPQ2d 1556, 1558 (TTAB 1993).

In response to this evidence, applicant acknowledged the three registrations referenced by the examining attorney and submitted evidence that applicant had obtained an additional registration (No. 2,959,414) for the mark DR. BRANDT ADVANCED DERMO-BOTANICAL SKINCARE for similar skin care products on the Principal Register without resort to

[4] www.polsis.uq.edu.au.

Section 2(f).[5] Applicant also provided evidence that there is a bird known as "Brandt's cormorant" and a town named Brandt in Deuel County, South Dakota with an estimated population in 2003 of 108. More significantly, applicant included an entry from dictionary.com that defined Brandt as Willy Brandt (1913-1992), "German political leader. He served as chancellor of West Germany (1969-1974) and won the 1971 Noble Peace Prize for his efforts to reduce tension between the East and the West." Finally, applicant included the "Consent of Dr. Fredric S. Brandt" to the "registration of my name Dr. Brandt in connection with the foregoing application."

In his final Office action, the examining attorney provided additional information on the Brandt's Cormorant and Brandt, South Dakota, as well as a page from the Wikipedia website that indicated that "Brandt is a common German family name and hence commonly refers to people" and it set out the following individuals:

- Georg Brandt (1694-1768) – Swedish chemist and mineralogist
- Johann Friedrich von Brandt was a German naturalist

[5] In a paper dated September 12, 2006, which applicant captioned as a sur-reply, applicant informed the board that a notice of allowance issued for its mark "dr. brandt" in a design similar to the design in Reg. No. 2,481,763. At this late stage, it is not appropriate to consider additional evidence that at best is cumulative with the other evidence of record.

- Karl Brandt was the personal physician to Adolf Hitler and headed the administration of the Nazi euthanasia program in 1939
- Di Brandt is an award winning Canadian poet and literary critic
- Kyle Brandt is an actor
- Paul Brandt is a Canadian country music singer
- Richard Brandt is a utilitarian philosopher
- Willy Brandt was German chancellor from 1969-1974 and Nobel laureate in 1971.

Based on this evidence, we now must apply the factors discussed previously to determine if the term BRANDT is primarily merely a surname.[6]

The first factor we consider is the evidence of whether the surname Brandt is rare. Normally, the examining attorney includes evidence of telephone listings in surname cases. Here, the examining attorney has chosen to rely on simply listing the total number of responses that a search for "Brandt" on a database returned. We have cautioned that "the probative value of search engine summary results (and the web site contents themselves) will vary depending upon the facts of a particular case." In re

[6] We have not considered any new evidence that applicant submitted with its briefs that was not previously submitted. In re Zanova Inc., 59 USPQ2d 1300, 1302-03 (TTAB 2001) ("Moreover, creation of the record to be considered in an ex parte appeal must, at some point, be concluded. Accordingly, we have not considered the evidence submitted with the reply brief and deny the alternative request for remand so that the Examining Attorney can consider this evidence"). We add that even if we did, the evidence would include additional evidence, such as telephone entries, that would support the examining attorney's position.

Fitch IBCA Inc., 64 USPQ2d 1058, 1060 (TTAB 2002). See also In re Thomas, 79 USPQ2d 1021, 1026 (TTAB 2006) ("The number of Google hits for 'black market' with jewelry, without any context for the hits, is irrelevant"). Here, we are troubled by the description of the searched databases. For example, it is unclear whether the information is even limited to United States information. The family tree information does not indicate whether it is only providing family tree information for the parts of a family tree that consists of family members in the United States. Other information is historical. Applicant argues that "[l]istings over the last 200 years from 1786 into the 1900's are not competent evidence to establish what consumers in the market place perceive today." Reply Brief at 4. We agree that historical newspapers from the nineteenth century or immigration records from the "1500s" are not very relevant to understanding whether a term is a surname in the twenty-first century. Furthermore, both the historical newspapers and immigration records end at the "1900s." It would be helpful to know whether the 1900s included the 1990s as opposed to ending at the "Roaring Twenties." In addition, the 140 years of Census records would not be current information because the recent census information would be personal information that would not be

available to the public. 36 CFR § 1256.24(a) ("[I]n accordance with 44 U.S.C. § 2108(b), we do not grant access to restricted census and survey records of the Bureau of the Census less than 72 years old containing data identifying individuals enumerated in population censuses").

While it may be a good guess that if a surname was a common surname in historical census records, it is likely to continue to be a common surname now, our decision should be based on evidence and not a guess. Therefore, we look at the actual evidence of record on the rareness of the surname Brandt. We note that the examining attorney has provided Google search results that indicate that at least six people have the surname "Brandt." In addition, because there are more that 9,000 results for "Mr. Brandt," it is reasonable to conclude that "Brandt" is at least a rare surname in the United States. See, e.g., In re Gregory, 70 USPQ2d 1792, 1795 (TTAB 2004) (Board held ROGAN to be primarily merely a surname, in part because of more than 1000 telephone listings and the "existence of these individuals [former well-known congressman and a Salt Lake City councilman] with the surname ROGAN leads us to conclude that the name may be rare when viewed in terms of frequency of use as a surname in the general population,

but not at all rare when viewed as a name repeated in the media and in terms of public perception. Accordingly, we conclude that ROGAN is not a rare surname"). Unlike the Gregory case, the evidence is simply too cryptic to conclude that "Brandt" is anything other than a rare surname in the United States. However, we certainly cannot find that the term BRANDT is so extremely rare that the evidence would only slightly support the examining attorney's position. See In re Garan Inc., 3 USPQ2d 1537, 1540 (TTAB 1987).

The second factor we consider is whether anyone associated with applicant has the involved term as a surname. In this case, applicant has submitted the consent of Dr. Fredric S. Brandt. This factor supports the examining attorney's position.

The third factor concerns any other recognized meaning that the term may have. We note that the examining attorney's Google search was for the term "Mr. Brandt." This search would tend to not discover any non-surname meaning for the term. Applicant, in response, points out that the term is a name of a type of cormorant and a very small town in South Dakota. This evidence is insignificant. In re Nelson Souto Major Piquet, 5 USPQ2d 1367, 1367-68 (TTAB 1987) ("Piquet" held primarily merely a

surname even though it was also "the name of a relatively obscure card game"); Harris-Intertype, 186 USPQ at 239 (evidence that "Harris' was the name of cities in Arizona, Kansas, Minnesota, Missouri, and Oklahoma and counties in Georgia and Texas did not prevent term from being primarily merely a surname); In re Sava Research Corp., 32 USPQ2d 1380, 1381 (TTAB 1994) ("[W]e have given little weight to the fact that SAVA is the name of a town in Israel and a river in Bosnia").

Still relative to the third factor, applicant has provided evidence that the term Brandt is included in an online dictionary as a reference to Willy Brandt, the former chancellor of West Germany and a Noble Peace Prize winner. We add that the term Brandt is similarly defined in *The Random House Dictionary of the English Language (unabridged)* (2d ed. 1987) as a reference to the late West German chancellor.[7] While the examining attorney argues that "the name WILLY BRANDT is not so widely known so as to cause DR. BRANDT to loose its significance as a surname in the eyes of the public" (Brief at unnumbered p. 10), the examining attorney has structured his search in such a way

[7] We take judicial notice of this definition. University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

that results concerning the West German chancellor would not likely appear. However, "decisions concerning historical names draw a line between names which are so widely recognized that they are almost exclusively associated in terms of their commercial impressions with the historical figures, and names which are semihistorical in character." In re Pickett Hotel Company, 229 USPQ 760, 761 (TTAB 1986) (citation omitted). The evidence does not demonstrate that the term "Brandt" would be almost exclusively associated with Willy Brandt. Therefore, we conclude that this factor only slightly favors applicant.[8]

The fourth factor is whether the term has the "look and feel" of a surname. We note that applicant has included evidence that it owns Principal Register registrations that include the word BRANDT in the mark and that are not registered under Section 2(f). However, most of these marks have a design or other words that may have detracted from the surname significance of the term. See,

[8] Although applicant does not argue the point, we do note that one Google result could be construed as an indication that Brandt may be a given name. We have given applicant the benefit of the doubt and considered this result as a given name. However, we cannot extrapolate from this single result that Brandt is a common given name. Even the name Hamilton was held to be primarily merely a surname despite more significant evidence of its use as a given name. In re Hamilton Pharmaceuticals Ltd., 27 USPQ2d 1939, 1944 (TTAB 1993) (The "evidence of record shows that usage of the common surname 'HAMILTON' as a given name is highly unusual").

e.g., Benthin, 37 USPQ2d at 1334 (Stylization may cause a mark "not to be perceived as primarily merely a surname").

The registration of a word does not foreclose the examining attorney from taking a different position in another application. The fact that applicant has obtained another registration for a different mark (DR. BRANDT and design or BRANDT) does not preclude further inquiry into the question of whether the mark DR. BRANDT without a design is a surname. See also In re Industrie Pirelli Societa per Azioni, 9 USPQ2d 1564, 1565 (TTAB 1988) ("We are also unpersuaded by applicant's argument that its ownership of incontestable registrations for the mark 'PIRELLI' means that the Examining Attorney's refusal in this case is an impermissible attack on those incontestable registrations"). While we have considered the evidence that other examining attorneys have concluded that in certain circumstances the term BRANDT apparently was not primarily merely a surname, we must make our determination on the record here.

The evidence shows that the term "Brandt" in addition to having surname significance is, as noted herein, also the last name of a German chancellor. Thus, the only exposure that most American would have to the term is as simply a surname or the surname of a German political

leader. There is nothing to suggest that it would not have the "look and feel" of a surname. We conclude by finding that this factor favors the examining attorney's position.

In addition to the term BRANDT, we note that the actual mark that applicant seeks to register is DR. BRANDT. The presence of the term "DR.," which is an abbreviation for the word "Doctor" does not significantly change the meaning of the mark. See In re Rath, 402 F.3d 1207, 74 USPQ2d 1174 (Fed. Cir. 2005) (Federal Circuit affirmed board decision holding that DR. RATH was primarily merely a surname); In re Giger, 78 USPQ2d 1405 (TTAB 2006) (GIGER MD held to be primarily merely a surname). We also look at how the term is used on the specimens. The specimens for Application No. 76606584 contain the following information:

> the doctor
>
> Dr. Fredric Brandt is a board certified member of the American Board of Internal Medicine and the American Board of Dermatology and has been in practice for more than 22 years.
>
> Dr. Brandt, author of the best-selling book "age-less", is internationally sought after as a lecturer in his field.

Consumers viewing these specimens would understand that "Brandt" is the surname of an individual associated with the applicant. Therefore, these specimens reinforce the surname significance of the mark DR. BRANDT.

We conclude that the mark DR. BRANDT, when used on the identified goods, is primarily merely a surname. Even though the evidence only lets us conclude that the term "Brandt" is a rare surname, nonetheless, it is a surname and even people who associated the term with the late West German chancellor will understand that it is the chancellor's surname. Also, considering the fact that Dr. Brandt is associated with applicant and that the term does have the look and feel of a surname, we agree that the examining attorney has made out a prima facie case that the mark DR. BRANDT is primarily merely a surname, which applicant has not rebutted.

Decision: The examining attorney's refusals to register the mark DR. BRANDT on the ground that it is primarily merely a surname are affirmed.