Opinion by Lykos, Administrative Trademark Judge:

The Mischief Brewing Company, LLC (“Applicant”) seeks registration on the Principal Register of the mark RICHTER in standard characters for “beer” in International Class 32. The application includes the following translation statement: “The English translation of ‘Richter’ in the mark is ‘Judge.”’
The Trademark Examining Attorney has refused registration of Applicant’s mark pursuant to Section 2(e)(4) of the Trademark Act, 15 U.S.C. § 1052(e)(4), on the ground that the applied-for mark is primarily merely a surname.

When the refusal was made final, Applicant appealed and requested reconsideration. The Trademark Examining Attorney maintained the refusal to register and denied the request for reconsideration. Thereafter, the appeal was resumed and is now briefed. For the reasons set forth below, we affirm the refusal to register.

Section 2(e)(4) of the Trademark Act of 1946 provides that absent a showing of acquired distinctiveness under Section 2(f), 15 U.S.C. § 1052(f), registration on the Principal Register must be refused if the proposed mark is “primarily merely a surname.”

“The test for determining whether a mark is primarily merely a surname is the primary significance of the mark as a whole to the purchasing public.” In re Hutchinson Technology Inc., 852 F.2d 552, 7 USPQ2d 1490 (Fed. Cir. 1988) (citing In re Kahan & Weisz Jewelry, Mfg. Corp., 508 F.2d 831, 184 USPQ 421, 422 (CCPA 1975)). See also Harris-Intertype Corp., 518 F.2d 629, 186 USPQ 238, 239 (CCPA 1975). “[I]t 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.

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2 “No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it ... (e) Consists of a mark which ... (4) is primarily merely a surname.” 15 U.S.C. § 1052.
surname.” In re Harris-Intertype Corp., 186 USPQ at 239. See also In re Hutchinson Technology, 7 USPQ2d at 1492 (quoting Kahan & Weisz Jewelry Mfg. Corp., 184 USPQ at 422)). In evaluating whether a proposed mark is “primarily merely a surname,” we consider whether “it is also a word having ordinary language meaning” since “[t]he language meaning is likely to be the primary meaning to the public.” In re Etablissements Darty et Fils, 759 F.2d 15, 225 USPQ 652, 653 (Fed. Cir. 1985) (citing Fisher Radio Corp. v. Bird Electronic Corp., 162 USPQ 265, 266-67 (TTAB 1969) (BIRD not primarily merely a surname)). If, however, there is “no common word meaning,” we must decide the “more difficult question” of whether the mark “would be perceived as a surname or as an arbitrary term.” Id. In In re Benthin Mgmt. GmbH, 37 USPQ2d 1332, 1333-34 (TTAB 1995) (“Benthin”), the Board identified several examples of inquiries or “factors” that may lead to evidence regarding whether the primary significance of a term to the purchasing public is merely as a surname.3 In re Integrated Embedded, __ USPQ2d __ (TTAB 2016) (Ser. No. 86140341).

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3 Applicant and the Examining Attorney both cite this opinion to which is entirely consistent with the Court of Appeals for the Federal Circuit and its predecessor court and Board cases discussed herein. 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). “These factors are not exclusive nor presented in order of importance. We make our determination on a case-by-case basis, and any of the Benthin factors – singly or in combination – and any other relevant circumstances may shape the analysis in a particular case.” In re Integrated Embedded, __ USPQ2d __ (TTAB 2016) (Ser. No. 86140341).
In support of the refusal, the Examining Attorney has introduced the following relevant evidence:

- An online article showing that Richter is the surname of members of Applicant’s limited liability company. *See* “Brewing Up Mischief in Arizona: Interview with Brandon & April Richter,” *Drink With The Wench*, http://drinkwiththewench.com (November 18, 2014 Final Office Action).

- Search results from the surname database in Lexis.com showing 43,963 entries for the surname RICHTER. (May 21, 2015 Denial of Request for Reconsideration).

- Search results from the *Whitepages* website (www.whitepages.com) finding 100 exact matches for the surname RICHTER in the United States. (September 29, 2014 Office Action).

- An entry entitled “Richter (surname)” from *Wikipedia* stating “Richter is a German-language surname (Richter – German for judge),” and listing well-known individuals bearing the surname. (September 29, 2014 Office Action).

- Printouts from various web sites showing recognized individuals named “Richter,” including Charles Francis Richter, a U.S. seismologist who lived from 1900 to 1985 and the inventor of the “Richter scale”), Jason James Richter (an American actor), Joey Richter (an American actor and singer), John C. Richter (U.S. Attorney for the Western District of Oklahoma), Karl W. Richter (an American aviator), Matthew Richter (an American arts producer), Mike Richter (an American ice hockey player), Pat Richter (a football player for the University of Wisconsin-Madison and a Washington D.C. professional football team), Roy Richter (American auto racer, inventor, and businessman), Stacey Richter (an American writer of short fiction), and Travis Richter (guitarist of the American rock band, From First to Last). (November 18, 2014 Final Office Action).

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4 In accordance with our practice, we have considered evidence obtained from *Wikipedia* submitted with the Examining Attorney’s first office action since Applicant was afforded the opportunity to rebut such evidence. *See In re Swatch Group Management Services AG*, 110 USPQ2d 1751, 1754 n.4 (TTAB 2014) (Board considered Wikipedia evidence submitted with examining attorney’s first office action which applicant had an opportunity to rebut). *See also* Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) § 1208.03 (2016).
Applicant acknowledges that RICHTER is a surname, but argues that it is not primarily merely a surname because it possesses other well-recognized meanings, the most well-known being the Richter magnitude scale, a scale formerly used to quantitatively measure the magnitude of an earthquake. See entry from Wikipedia entitled “Richter magnitude scale” (May 15, 2015 Request for Reconsideration), and article titled “Hands on Activity: Magnitude of the Richter Scale” from the web site www.TeachEngineering.org (October 27, 2014 Response to Office Action). In addition, Applicant also points to evidence of other non-surname meanings of “Richter”:

- An excerpt from the online digital history portal of Franklin County, Kansas, showing “Richter, Kansas” established in 1890. (October 27, 2014 Response to Office Action).

- Another entry from Wikipedia entitled “Richter” showing other references including the name of an electro-rock band from Buenos Aires, Argentina; the Richter tuning scale for harmonicas developed in 1825; Gedeon Richter, Ltd., a Hungarian pharmaceutical company; a German toy company from the early 20th century; the song “Going Richter” by The Ziggens; and “Richter’s transformation” or Richter’s syndrome, a complication of blood-related neoplasms. (May 15, 2015 Request for Reconsideration).

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5 Applicant also submitted search results from the USPTO Trademark Electronic Search System (“TESS”) database showing various applications and registrations incorporating the term RICHTER. See October 27, 2014 Response to Office Action. As a general proposition, the mere listing of third-party applications and registrations is not sufficient to make the registrations and applications of record. *In re Hoefflin*, 97 USPQ2d 1174, 1177 (TTAB 2010); *In re Dos Padres Inc.*, 49 USPQ2d 1860, 1861 n.2 (TTAB 1998); *In re Broadway Chicken Inc.*, 38 USPQ2d 1559, 1560 n.6 (TTAB 1996). However, in this case, the Examining Attorney failed to advise Applicant during ex parte examination that the listing was insufficient to make the registrations of record; therefore, we deem the Examining Attorney to have waived any objection to consideration of the list itself. See e.g., *In re District of Columbia*, 101USPQ2d 1588, 1591 (TTAB 2012) (examining attorney’s objection overruled where on remand applicant submitted copies of the third-party registrations it listed in its response to the first Office action), aff’d sub nom. *In re City of Houston*, 731 F.3d 1326, 108 USPQ2d 1226 (Fed. Cir. 2013). That being said, given the incomplete nature of this evidence and the fact that as noted above, surname refusals must be considered on a case by case basis, the evidence is of limited probative value. See *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1264 n.6 (TTAB 2011) (TESS listing).
The search engine results from Google Translate showing “Richter” as the German word for “judge.” (October 27, 2014 Response to Office Action).

The existence of such other usages of a surname does not necessarily preclude the mark from being held primarily merely a surname. The Richter Scale derives its name from the surname of its inventor, thereby emphasizing its primary significance as a surname. See In re The British Oxygen Co. Ltd., 161 USPQ 242 (TTAB 1969) ("[T]he significance of “BOYLE” in Boyle’s Law and Boyle temperature is clearly that of a surname."). Inventions, theories, methods, and the like are frequently known by the surname of their originator, precisely because the surname so used reminds others of that person. And the remaining references Applicant points to, such as the tuning scale for harmonicas, geographic location in Kansas, and blood disorder are relatively obscure or reflect foreign usage. Thus, it is unlikely these other references would have much, if any, impact on the purchasing public.

Furthermore, the English translation of the German word “richter” as “judge” actually shows that the surname was derived from ancestral occupation. See In re Advanced Spine Fixation Systems, Inc., 25 USPQ2d 1367, 1369 (TTAB 1992) (“Many surnames of foreign origin have obscure meanings which lose out to the primary surname significance”). The ancestry.com website made of record explains the meaning and origin of the surname Richter in this context:

German: occupational name or status name for a judge, Middle High German rihtaere (from rhiten ‘to make right’). The term was used in the Middle Ages mostly to denote a part-time legal official. Such communal conciliators held a position of considerable esteem in rural communities; in Eastern Germany the term came to denote a village headman, which
was often a hereditary office. It is this region that the surname is most frequent. (September 29, 2014 Office Action).

*Compare In re Isabella Fiore LLC, 75 USPQ2d 1564, 1569 (TTAB 2005)* (Board applied the doctrine of foreign equivalents to find that consumers would “stop and translate” “FIORE” as “flower” and reversed examining attorney’s surname refusal).

Applicant also argues that RICHTER is such a rare surname that the public is unlikely to view it primarily merely a surname. The statute, however, makes no distinction between rare and commonplace surnames. *Kahan & Weisz Jewelry, Mfg. Corp.,* 184 USPQ at 422. Even assuming, arguendo, that RICHTER is indeed a relatively rare surname, a rare surname may be unregistrable under Trademark Act Section 2(e)(4) if its primary significance to purchasers is that of a surname. *See e.g., In re Industrie Pirelli Societa per Azioni,* 9 USPQ2d 1564, 1566 (TTAB 1988), aff’d, 883 F.2d 1026 (Fed. Cir. 1989) (although the record proves that “Pirelli” is a rare surname, the evidence shows that mark PIRELLI would be viewed primarily as a surname by the relevant public.).

In sum, the Examining Attorney has made of record multiple sources showing that RICHTER is a surname, and Applicant, which is managed by Richters, concedes the point. The other meanings of “Richter” are either relatively obscure, or in the case of the Richter scale, carry surname significance. Thus the “primary significance of the mark as a whole to the purchasing public” is that of a surname.

Accordingly, we find that that the evidence establishes that the mark RICHTER for “beer” would be perceived by the purchasing public as primarily merely a surname within the meaning of Section 2(e)(4) of the Trademark Act.
**Decision:** The refusal to register Applicant’s mark RICHTER for “beer” under Section 2(e)(4) is affirmed.