

This Opinion is not a
Precedent of the TTAB

Mailed: December 27, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Aulbach Lizenz AG
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Serial No. 79156860
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James R. Menker of Holley & Menker PA for Aulbach Lizenz AG.

Claudia Garcia, Trademark Examining Attorney, Law Office 111,
Robert L. Lorenzo, Managing Attorney.
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Before Cataldo, Wolfson, and Larkin,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Aulbach Lizenz AG (“Applicant”) requests reconsideration of the Board’s November 7, 2016 decision, 10 TTABVUE, affirming the final refusal of registration on the Principal Register of the mark HECHTER (stylized) for various goods in International Classes 18 and 25 on the ground that the mark is “primarily merely a surname” within the meaning of Section 2(e)(4) of the Trademark Act, 15 U.S.C. § 1052(e)(4). For the reasons discussed below, we deny the request for reconsideration.

“Generally, the premise underlying a request for rehearing, reconsideration, or modification under 37 C.F.R. § 2.129(c) is that, based on the evidence of record and the prevailing authorities, the Board erred in reaching the decision it issued. The request may not be used to introduce additional evidence, nor should it be devoted simply to a reargument of the points presented in the requesting party’s brief on the case. Rather, the request normally should be limited to a demonstration that, based on the evidence properly of record and the applicable law, the Board’s ruling is in error and requires appropriate change.” Trademark Board Manual of Procedure (“TBMP”) § 543 (2016).

Applicant’s request for reconsideration is devoted to a reargument “of the points presented in [Applicant’s] brief on the case.” *Id.* In its appeal brief, Applicant’s main argument was “that the Examining Attorney has failed to establish a *prima facie* case that HECHTER is primarily merely a surname.” 4 TTABVUE 6. On the request for reconsideration, Applicant makes the same argument that “the evidence of record does not constitute a *prima facie* showing that the applied-for mark would be perceived by the purchasing public as primarily merely a surname.” 11 TTABVUE 2. Applicant fails to show, however, “that, based on the evidence properly of record and the applicable law, the Board’s ruling is in error and requires appropriate change.” TBMP § 543.

In our decision, we found that the Examining Attorney had established a *prima facie* case by showing that Hechter appeared as a surname in the United States in the Lexis Public Records database and media articles, that it was the surname of

Applicant's founder, and that it had no meaning other than as a surname. 10 TTABVUE 19. We affirmed the refusal because Applicant failed to rebut the Examining Attorney's *prima facie* case with any evidence that Hechter had any non-surname meaning and the record as a whole supported the refusal. 10 TTABVUE 19. On the request for reconsideration, Applicant acknowledges that "the evidence of record shows that HECHTER is the surname of a handful of people in the United States and that it is the surname of a person connected with Applicant," and implicitly concedes that HECHTER "does not have a recognized meaning . . ." other than as a surname. 11 TTABVUE 2-3. Applicant nevertheless attacks the Examining Attorney's *prima facie* case on the ground that the number of Americans with the surname Hechter "is so small that very few, if any, members of the purchasing public (i.e., purchasers of clothing) could have encountered HECHTER being used as a surname." 11 TTABVUE 3.

The Board has rejected Applicant's position that "a *prima facie* showing that a mark is primarily merely a surname requires that at least a substantial number of the purchasing public would be aware of or recognize the surname significance of a term." 11 TTABVUE 4. There is no minimum number of persons who must have, or be aware of, a surname in the United States for a mark consisting of that surname to be found to be primarily merely a surname under Section 2(e)(4) if the record shows that the mark is a surname in the United States, that there is some recognition of the mark as such in the United States, and that there is no other demonstrated meaning of the mark. *In re Adlon Brand GmbH & Co. KG*, 120 USPQ2d 1717, 1724

(TTAB 2016). “The issue to be determined under the statute is whether the public would perceive the surname significance as the proposed mark's primary significance, not whether the surname is rarely encountered.” *Adlon*, 120 USPQ2d at 1721.¹ “[T]he degree of a surname's rareness is not dispositive of the amount or kind of evidence the entire record must contain to establish that a mark's primary significance to the purchasing public is that of a surname; the amount or kind of evidence necessary to demonstrate that the term is ‘primarily merely’ a surname will vary on a case-by-case basis.” *Id.*

In *Adlon*, the Board found that the proposed mark ADLON was primarily merely a surname where the record showed that Adlon was a surname of 75 people in the United States, that the American public had been “exposed to and had discussed” Adlon as a surname, and that Adlon had no “ordinary language meaning.” *Id.* at 1724. Similar evidence of surname significance is present in the record in this case. In *Adlon*, the Board noted that “if a person named Adlon were associated with the business and that association were promoted to the public, it would enhance the public’s perception of the term as a surname.” *Adlon*, 120 USPQ2d at 1724. Such evidence of the association of Daniel Hechter with Applicant, and of the promotion of that association to American consumers, is present in the record in this case, and strengthened the Examining Attorney’s *prima facie* case that HECHTER is primarily

¹ Applicant’s position here is essentially that of the dissent in *Adlon*, which argued that “the extreme rarity of the surname ADLON, coupled with the lack of a sufficient degree of media exposure of the term as a surname, strongly suggests that few consumers would know, or know of, a person named ADLON. The extreme rareness of a surname indicates to me that consumers are less likely to view the term as a surname.” *Adlon*, 120 USPQ2d at 1726.

merely a surname. *See In re Eximius Coffee*, 120 USPQ2d 1276, 1281 (TTAB 2016); *In re Integrated Embedded*, 120 USPQ2d 1504, 1507 (TTAB 2016).

Applicant also argues that “the Board’s test unfairly places the burden on the applicant to prove that the applied-for mark has a non-surname significance on the mere showing that HECHTER is an actual surname no matter how rare.” 11 TTABVUE 3-4. The Examining Attorney’s *prima facie* case went beyond merely proving “that HECHTER is an actual surname no matter how rare,” *see In re Etablissements Darty et Fils*, 759 F.2d 15, 225 USPQ 652, 653 (Fed. Cir. 1985), and Applicant was required “to demonstrate that the term has another significance that is its primary significance as perceived by the public.” *Adlon*, 120 USPQ2d at 1724. Applicant argues here that HECHTER would be viewed as a “fanciful term,” not as a surname, 11 TTABVUE 3, but “to show that the public would perceive a proposed mark as a coinage, in the face of evidence establishing that the mark is a surname with no other recognized meaning, some objective countervailing evidence of such a perception is required.” *Id.* at 1723. Applicant offered none during prosecution and points to none here.

Applicant has failed to show “that, based on the evidence properly of record and the applicable law, the Board’s ruling is in error and requires appropriate change.” TBMP § 543. Accordingly, the request for reconsideration is denied.