

**This Opinion is Not a
Precedent of the TTAB**

Mailed: August 6, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Kerridge Commercial Systems Limited
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Application Serial No. 87383302
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Trevor P. Schmidt, Hutchison, PLLC
for Kerridge Commercial Systems Limited

Doritt Carroll, Trademark Examining Attorney, Law Office 116,
Christine Cooper, Managing Attorney.

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Before Zervas, Adlin, and Dunn,
Administrative Trademark Judges.

Opinion by Dunn, Administrative Trademark Judge:

Kerridge Commercial Systems Limited (“Applicant”) seeks registration pursuant to Trademark Act Sections 1(b) and 44(e), 15 U.S.C § 1051(b) and 1126(e), of the mark KERRIDGE COMMERCIAL SYSTEMS (in standard characters, COMMERCIAL SYSTEMS disclaimed) for various goods and services, all for use in the distribution, wholesale, merchant and retail industries.¹

¹ The goods and services for which Applicant seeks registration are:
International Class 9

Computer software for managing sales activities, inventory, customer relationships, financial management and performing data analytics in the distribution, wholesale, merchant and

The Examining Attorney refused registration on the ground that KERRIDGE is “primarily merely a surname” under Section 2(e)(4) of the Trademark Act. After the refusal became final, Applicant appealed, and Applicant and the Examining Attorney filed briefs. We affirm the refusal to register.

EVIDENTIARY MATTERS

i. Screenshot lacking URL and date

The Examining Attorney attaches a screenshot to her Final Office Action as “evidence that KERRIDGE is the name of the applicant’s founder, which the

retail industries; computer software to facilitate communications between buyers and suppliers, generate customized price lists for customers, generate invoices, process orders and payments for use in the distribution, wholesale, merchant and retail industries; computer software for customer relationship management and financial accounting in the distribution, wholesale, merchant and retail industries

International Class 35

Business consulting and accounting services relating to the distribution, wholesale, merchant and retail industries; business administration services relating to the distribution, wholesale, merchant and retail industries

International Class 36

Financial services, namely financial transaction and payment processing services, namely, providing secure commercial transactions and payment options relating to the distribution, wholesale, merchant and retail industries

International Class 42

Computer services, namely cloud hosting provider services and electronic data storage; computer software services, namely, providing temporary use of on-line non-downloadable software for managing sales activities, inventory, customer relationships, financial management and performing data analytics in the distribution, wholesale, merchant and retail industries; computer software services, namely, providing temporary use of online non-downloadable software to facilitate communications between buyers and suppliers, generate customized price lists for customers, generate invoices, process orders and payments relating to the distribution, wholesale, merchant and retail industries; and computer software services, namely, providing temporary use of online non-downloadable software for customer relationship management and financial accounting in the distribution, wholesale, merchant and retail industries

examining attorney attaches as SnagIt – Kerridge.” (January 9, 2018 Final Office Action, p. 11). The screenshot, which states that Applicant was founded in 1907 by F.W. Kerridge, does not have a URL or a date. Applicant contends that “this site is not maintained by, or associated with, Applicant [and] Applicant attempted to review the site referenced by the Examining Attorney in the final Office action and the listing is not available. A direct search of Wikipedia similarly did not generate any results.” Because the Examining Attorney’s screenshot does not include the URL or date of access, and Applicant has objected to its consideration, we sustain Applicant’s objection and do not consider the screenshot.² See *In re I-Coat Company, LLC*, 126 USPQ2d 1730, 1733 (TTAB 2018) (“The requirement that materials printed from websites must include a date and source/URL applies equally to evidence submitted by examining attorneys in *ex parte* cases as it does to parties involved in *inter partes* cases because it ensures that an applicant can verify the information presented in the case.”); *In re Mueller Sports Medicine, Inc.*, 126 USPQ2d 1584, 1587 (TTAB 2018) (“Moreover, in view of the TMEP’s extension to examining attorneys of the requirements set forth in *Safer v. OMS* for the URL and date to be displayed on website excerpts, we further extend these requirements to both examining attorneys and applicants in *ex parte* proceedings.”); Trademark Manual of Examining Procedure (TMEP) §1208.03 (2019) (“If an examining attorney does not include the

² The Examining Attorney maintains that Applicant does not dispute that Applicant’s founder bore the surname Kerridge. (6 TTABVUE 5). We disagree with this characterization because the Examining Attorney did not ask Applicant or offer evidence to show that Applicant’s founder was named Kerridge.

URL and the date when the Internet evidence was accessed or printed and the applicant objects, the Board will not consider the material.”).

ii. Evidence submitted with appeal briefs

Applicant submitted with its brief two exhibits from Wikiwand and Wikipedia (with date and URL) showing that searches for “Kerridge Commercial Systems” produced no results, and a screenshot (lacking date and URL) showing information about Kerridge, a hamlet in the United Kingdom. Because the record in the application should be complete prior to the filing of an appeal, Applicant’s evidence is late and will not be considered. Trademark Rule 2.142(d), 37 C.F.R. § 20142(d).

The Examining Attorney’s appeal brief also includes two exhibits which were not submitted prior to the notice of appeal, namely, the results of a second Whitepages.com search for the term KERRIDGE and dictionary excerpts; the Examining Attorney requests that we take judicial notice of the exhibits. Online search results are not the appropriate subject of judicial notice. *See In re Viventia Biotech Inc.*, 80 USPQ2d 1376, 1377 (TTAB 2006); TBMP 1208.04 and 704.12. While the Board has the discretion to take judicial notice of dictionary definitions, the Board is reluctant to exercise this discretion where, as here, Applicant has no opportunity to counter the evidence. Fed. R. Evid. 201; TBMP 1208.04.

LEGAL STANDARD FOR SURNAME REFUSAL

Section 2(e)(4) of the Trademark Act, 15 U.S.C. § 1052(e)(4), precludes registration of a mark on the Principal Register that is ”primarily merely a surname,” without a

showing of acquired distinctiveness under Section 2(f) of the Act, 15 U.S.C. 1052(f).³ A term is primarily merely a surname if, when viewed in relation to the goods or services for which registration is sought, its primary significance to the purchasing public is that of a surname. *See Earnhardt v. Kerry Earnhardt, Inc.*, 846 F.3d 1374, 123 USPQ2d 1411, 13 (Fed. Cir. 2017); *In re Hutchinson Tech. Inc.*, 852 F.2d 552, 7 USPQ2d 1490, 1492 (Fed. Cir. 1988); *In re Weiss Watch Company, Inc.*, 123 USPQ2d 1200, 1201 (TTAB 2017).

The Board's primary reviewing court has long held that, in determining whether the purchasing public would perceive a proposed mark as primarily merely a surname, the Board may consider: 1) whether the applicant adopted a principal's name and used it in a way that revealed its surname significance; 2) whether the term has a nonsurname "ordinary language" meaning; and 3) the extent to which the term is used by others as a surname. *In re Etablissements Darty et Fils*, 759 F.2d 15, 225 USPQ 652, 653 (Fed. Cir. 1985). These considerations are not exclusive and any of these circumstances singly or in combination and any other relevant circumstances may be relevant in a particular case. *See Id.* (considering whether mark "is used in the company name in a manner which reveals its surname significance."); *In re Harris-Intertype Corp.*, 518 F.2d 629, 186 USPQ 238, 239 (CCPA 1975) (considering whether there is "general acceptance [of HARRIS] as a given name."); *Earnhardt v.*

³ The application is based on Applicant's European Union registration and an allegation of a bona fide intent to use the mark, and Applicant has not claimed or argued that the KERRIDGE portion of its mark, or that its mark as a whole, has acquired distinctiveness in the United States.

Kerry Earnhardt, Inc., 123 USPQ2d at 1381 (considering “whether adding the additional term to the surname altered the primary significance of the mark as a whole to the purchasing public.”); *In re Weiss Watch Co.*, 123 USPQ2d at 1204 (considering whether “ordinary American purchaser would stop and translate the foreign word into its English equivalent”); *Azeka Bldg. Corp. v. Azeka*, 1?21 USPQ2d 1477, 1481 (TTAB 2017) (considering “whether there is contextual use related to surname significance”). There is “no hard and fast rule as to the amount of evidence necessary to demonstrate that a mark is or is not primarily merely a surname.” *In re Standard Elektrik Lorenz A.G.*, 371 F.2d 870, 152 USPQ 563, 566 (CCPA 1967). *Accord, In re Eximius Coffee, LLC*, 120 USPQ 2d 1276, 1278 (TTAB 2016) (“There is no rule as to the kind or amount of evidence necessary to show that the applied-for mark would be perceived as primarily merely a surname.”).

i. Primary significance of KERRIDGE

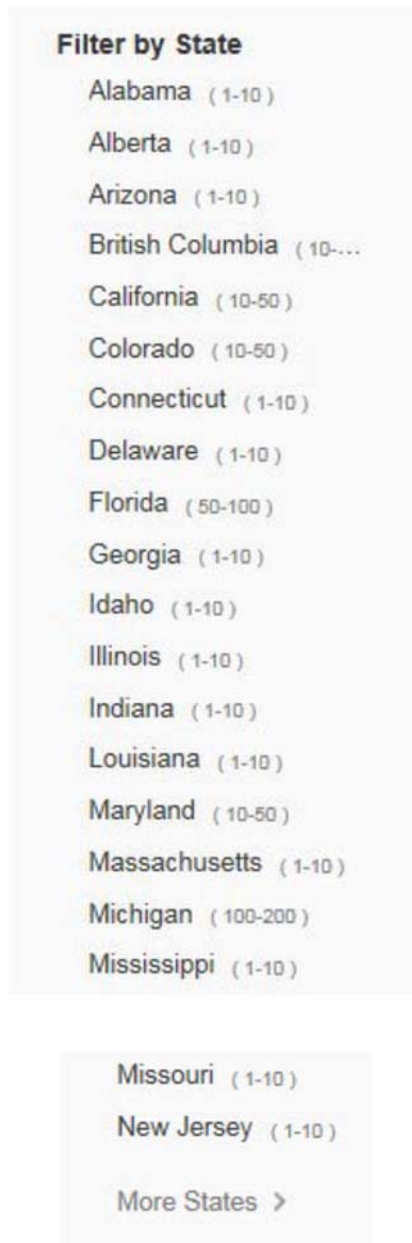
The record establishes that the term KERRIDGE is a surname. In the first Office action, the Examining Attorney states “Please see the attached evidence from WhitePages.com, establishing the surname significance of KERRIDGE. This evidence shows the applied-for mark appearing almost 500 times as a surname in a nationwide phone directory of names.” June 16, 2017 Office Action, p. 8-13.⁴ Applicant argues

⁴ The record includes a description of the Whitepages.com website as a “people search engine” which allows the user to “lookup phone numbers, find mobile numbers, do an address search.” January 9, 2018 Final Refusal, p. 5. The Whitepages.com website allows a geographically restricted search for terms such as names. *See In re Hollywood Lawyers Online*, 110 USPQ2d 1852, 1856 (TTAB 2014) (describing evidence as “Results from a search in the online white pages showing addresses around the United States for various businesses that include Hollywood in their name, e.g., Hollywood Video (Washington DC), Planet Hollywood

that the search results “were not reflective of the use of ‘Kerridge’ as a surname” and contends that the results may not be limited to the identical term Kerridge. More specifically, Applicant submitted its search results for the same term and states that it yielded “a similar results page, but clicking beyond the first page indicates that some of the ‘results’ relate to surnames that may sound similar to Kerridge or have originated from a similar derivation but do not reflect an actual use of Kerridge as a surname.” December 18, 2017 Response to Office Action, p. 5-8. Suffice it to say, the competing search results are not identical, and Applicant’s search results including phonetic equivalents to Kerridge do not demonstrate that the Examining Attorney’s search results also include phonetic equivalents. Most significantly, both searches reveal individuals in the United States who have the surname KERRIDGE.

With regard to the Examining Attorney’s White Pages evidence, we note the depicted “filter by state” sidebar shows results for names outside of the United States. As shown below, the “filter by state” sidebar lists 19 states and two Canadian provinces (Alberta and British Columbia) and the range of results found in the state or province (1-10, 10-50, 50-100, 100-200). The sidebar from the Examining Attorney’s search is shown here:

(Washington DC), Hollywood Smile (Columbus, OH), Hollywood Casino (Columbus, OH), Hollywood Nails (Miami, FL), Hollywood Tans (Atlanta, GA) (www.whitepages.com).”).



Only surname use in the United States is relevant to our determination. *See Société Civile Des Domaines Dourthe Frères v. S.A. Consortium Vinicole De Bordeaux Et De La Gironde*, 6 USPQ2d 1205, 1208 (TTAB 1988) (“The fact that DOURTHE is recognized as a surname in France has no bearing on its right to be registered in the United States.”); *In re Wickuler-Kupper-Brauerei KGaA*, 221 USPQ 469, 470 n. 2 (TTAB 1983) (“Berlin (Germany) telephone directory made of record by a previous

Examining Attorney is of little probative value.”). Because the Examining Attorney’s search included Canadians with the name Kerridge, it does not appear likely that there are 454 individuals in the United States with the surname “Kerridge.”

However, at a minimum, the sidebar shows at least the following results for the name “Kerridge”; one result in 13 states (Alabama, Arizona, Connecticut, Delaware, Georgia, Idaho, Illinois, Indiana, Louisiana, Massachusetts, Mississippi, Missouri, and New Jersey), at least 10 results in 3 states (California, Colorado, and Maryland), at least 50 results in 1 state (Florida), and at least 100 results in 1 state (Michigan). Thus, at a minimum, the Whitepages.com results establish at least 193 results for “Kerridge” from 18 different U.S. states.

Applicant argues that this is an insignificant portion of the U.S. population, and cites a Google search page showing “323.1 million (2016)” as the result of searching “current population of the United States.” (December 18, 2017 Response to Office Action, p. 10). The relative rareness of a name is not necessarily relevant ”given the large number of different surnames in the United States, even the most common surnames would represent but small fractions of such a database.” *In re Weiss Watch Co.*, 123 USPQ2d 1200, 1203 (TTAB 2017) quoting *In re Gregory*, 70 USPQ2d 1792, 1795 (TTAB 2004). In fact, even surnames less common than KERRIDGE have been found to be primarily merely a surname in certain cases. See *In re Beds & Bars Limited*, 122 USPQ2d 1546 (TTAB 2017) (5 individuals named BELUSHI); *In re Adlon Brand GmbH & Co. KG*, 120 USPQ2d 1717, 1720 (TTAB 2016) (75 individuals named ADLON); *In re Eximius Coffee, LLC*, 120 USPQ2d at 1280 (233 people with

the surname ALDECO); *In re Picone*, 221 USPQ 93, 95 (TTAB 1984) (112 phone directory listings for PICONE); *In re Cazes*, 21 USPQ2d 1796, 1796 (TTAB 1991) (23 phone listings for LIPP); *In re Rebo High Definition Studio Inc.*, 15 USPQ2d 1313, 1314 (TTAB 1990) (6 phone directory listings for REBO). The Federal Circuit has cautioned against setting any numerical requirement for a surname refusal. *See In re Etablissements Darty et Fils*, 225 USPQ at 653 (“The quantum of evidence which was persuasive against finding surname significance in one case may be insufficient in another because of differences in the names themselves.”). *Accord In re Adlon Brand GmbH & Co. KG*, 120 USPQ2d at 1721 (“This strictly numerical approach to a surname analysis has been squarely rejected.”).

Applicant points out that there is no record evidence demonstrating an association between Applicant and any individual named Kerridge. Applicant submitted its website page “About Us”, with a listing of “Management Team” which includes no individuals named Kerridge. (December 18, 2017 response to Office Action, p. 12-15). If there was an association between a person named Kerridge and Applicant’s business, and that association were promoted to the public, it would enhance the public’s perception of the term as a surname. *In re Integrated Embedded*, 120 USPQ2d 1504, 1507 (TTAB 2016) (where applicant’s promotional materials touted the credentials and accomplishments of its founder Mr. Barr, this reinforced the likely public perception of BARR as a surname.) However, the converse is not true. The absence of a person named Kerridge in Applicant’s current management does not, in itself, reduce the likelihood that the public would perceive the mark as a

surname. *In re Adlon Brand GmbH & Co. KG*, 120 USPQ2d at 1724; *In re Piano Factory Group, Inc.*, 85 USPQ2d 1522, 1524 (TTAB 2006).

We determine whether the purchasing public for Applicant's goods and services is more likely to perceive KERRIDGE as merely a surname or as something else. *See In re Eximus Coffee*, 120 USPQ2d at 1283; *Miller v. Miller*, 105 USPQ2d 1615, 1620 (TTAB 2013); *In re United Distillers plc*, 56 USPQ2d 1220, 1221 (TTAB 2000). The Examining Attorney made of record evidence that the terms BERRIDGE, DERRIDGE, FERRIDGE, and SERRIDGE, identical to KERRIDGE except for the first letter, also are surnames. The evidence does not show any of the surnames to be very common. In addition, the Board has found whether a term has the structure and pronunciation of a surname to be a “decidedly subjective” inquiry. *In re Eximius Coffee, L.L.C.*, 120 USPQ2d at 1280. Accordingly, we find this evidence, at best, offers some corroboration of the Whitepages.com evidence that the primary significance of KERRIDGE is as a surname.

Applicant argues that KERRIDGE has phonetic and visual similarities to commonly used non-surname terms such as porridge, courage, and carriage, and to geographic terms such as Cambridge and Woodbridge.⁵ We disagree that the term KERRIDGE is likely to be mistaken for one of these terms, or to have the same

⁵ Applicant also notes (4 TTABVUE 11) that “the suffix ‘ridge’ as used in ‘Kerridge’ further brings to mind geographic features and could suggest to the purchasing public a specific mountain ridge (i.e. KER RIDGE).” Because there is no record evidence that the term KER has a separate meaning, we see no basis for a prospective consumer to consider KERRIDGE as two terms joined.

ordinary word or geographic significance. The terms “porridge,” “courage,” “carriage,” “Cambridge” and “Woodbridge” look dissimilar to Kerridge, and there is no evidence to support a conclusion that the one similarity in how some of the words sound would result in the term KERRIDGE being perceived as something other than a surname. In sum, the record includes no evidence that the term KERRIDGE has any significance other than as a surname.

ii. Additional wording “COMMERCIAL SYSTEMS” does not alter primary significance of KERRIDGE as merely a surname

To evaluate whether the commercial impression of a mark that combines a surname with a second term is still primarily merely the surname, the Board must determine whether the primary significance of the mark as a whole in connection with the recited goods and services is that of the surname. *Earnhardt v. Kerry Earnhardt, Inc.*, 123 USPQ2d at 1413. More specifically, the mark must be considered “in its entirety” rather than merely “consider[ing] the mark as two separate parts.” *Id.*, quoting *In re Hutchinson Technology Inc.*, 852 F.2d 552, 7 USPQ2D 1490, 1492 (Fed. Cir. 1988). A key element in such an inquiry is determining the relative distinctiveness of the second term in the mark. *Id.*; accord, *In re Weiss Watch Co.*, 123 USPQ2d at 1206.

Here, Applicant seeks to register the mark KERRIDGE COMMERCIAL SYSTEMS for various goods and services for use in the distribution, wholesale, merchant and retail industries. In refusing registration because the mark

KERRIDGE COMMERCIAL SYSTEMS is primarily merely a surname, the Examining Attorney required a disclaimer of COMMERCIAL SYSTEMS, explaining:

Attached are dictionary definitions for “commercial” (relating to commerce or business) and “systems” (a group of items working together). The applicant offers various computer goods and services that work together in the distribution industry. Thus, the applicant offers “commercial systems.”⁶

The Examining Attorney informed Applicant that “[c]ombining a surname with the generic name (i.e. ‘commercial systems’) for the goods and services does not overcome a mark’s surname significance.”

Applicant does not contest the requirement for a disclaimer, dispute the lack of distinctiveness of the phrase COMMERCIAL SYSTEMS as applied to its goods and services, or contend that the additional term COMMERCIAL SYSTEMS alters the commercial impression of KERRIDGE. Applicant submitted the required disclaimer, and thus admits that the term is merely descriptive of its goods and services. *See In re DNI Holdings Ltd.*, 77 USPQ2d 1435, 1442 (TTAB 2005) (“it has long been held that the disclaimer of a term constitutes an admission of the merely descriptive nature of that term ... at the time of the disclaimer”). *See also Quaker State Oil Refining Corp. v. Quaker Oil Corp.*, 453 F.2d 1296, 172 USPQ 361, 363 (CCPA 1972) (disclaimer is an admission of descriptiveness at the time the disclaimer was made). In its appeal brief, Applicant contends the refusal should be withdrawn because

⁶ Among the several definitions in the record, the Examining Attorney refers to the definition of “commercial” as “occupied with or engaged in commerce or work intended for commerce” and “systems” as “a group of devices or artificial objects or an organization forming a network especially for distributing something or serving a common purpose.” Merriam-Webster.com (June 16, 2017 Office Action, p. 8 and 21).

KERRIDGE is not primarily merely a surname, without addressing the additional wording COMMERCIAL SYSTEMS.

The addition of the descriptive term COMMERCIAL SYSTEMS in the mark does not detract from the primary significance of KERRIDGE. Based on the dictionary definitions showing that COMMERCIAL SYSTEMS are devices and objects for distribution and other common commercial purposes, the identification of Applicant's goods and services as used "in the distribution, wholesale, merchant and retail industries," and Applicant's disclaimer of the term COMMERCIAL SYSTEMS in its mark as applied to all of its goods and services, we find that the term COMMERCIAL SYSTEMS when applied to Applicant's goods and services working together in commercial applications is a merely descriptive term for Applicant's goods and services. Where, as here, descriptive wording is appended to a surname, the combination when viewed as a whole in the context of the Applicant's goods will generally be considered to be primarily merely a surname under Section 2(e)(4). *Azeka Bldg. Corp. v. Azeka*, 122 USPQ2d at 1482 n.9 (TTAB 2017) (AZEKA'S RIBS primarily merely a surname for barbeque sauce); *In re Hamilton Pharms. Ltd.*, 27 USPQ2d 1939 (TTAB 1993) (HAMILTON PHARMACEUTICALS primarily merely a surname for pharmaceutical products); *In re Cazes*, 21 USPQ2d 1796 (TTAB 1991) (BRASSERIE LIPP primarily merely a surname for restaurant services); *In re Woolley's Petite Suites*, 18 USPQ2d 1810 (TTAB 1991) (holding WOOLLEY'S PETITE SUITES primarily merely a surname for hotel and motel services).

After consideration of all the arguments and evidence presented, we find that the primary significance of KERRIDGE is as a surname, and that, because the additional words COMMERCIAL SYSTEMS are merely descriptive and disclaimed, the proposed mark KERRIDGE COMMERCIAL SYSTEMS is primarily merely a surname.

DECISION

The refusal to register Applicant's mark under Section 2(e)(4) of the Act is affirmed.