

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB 7/12/00

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Joseph Phelps Vineyards

Serial No. 75/626,764

Thomas Schneck, Esq. for Joseph Phelps Vineyards.

Zhaleh S. Delaney, Trademark Examining Attorney, Law Office 101
(Jerry Price, Managing Attorney).

Before Simms, Hohein and Bucher, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Joseph Phelps Vineyards has filed an application to
register the mark "BACKUS VINEYARD" for "wine."¹

Registration has been finally refused under Section
2(e)(4) of the Trademark Act, 15 U.S.C. §1052(e)(4), on the
ground that the mark which applicant seeks to register is
primarily merely a surname.

¹ Ser. No. 75/626,764, filed on January 25, 1999, which alleges dates
of first use of September 30, 1980.

Applicant has appealed. Briefs have been filed,² but an oral hearing was not requested. We affirm the refusal to register.

As stated by the Board in *In re Hamilton Pharmaceuticals Ltd.*, 27 USPQ2d 1939, 1940 (TTAB 1993):

At the outset, it is well settled that whether a mark is primarily merely a surname depends upon whether its primary significance to the purchasing public is that of a surname. The burden is upon the Examining Attorney, in the first instance, to present evidence sufficient to make out a prima facie showing in support of the contention that a particular mark is primarily merely a surname. Provided that the Examining Attorney establishes a prima facie case, the burden shifts to the applicant to rebut the showing made by the Examining Attorney. See *In re Harris-Intertype Corp.*, 518 F.2d 629, 186 USPQ 238, 239-40 (CCPA 1975) and *In re Kahan & Weisz Jewelry Mfg. Corp.*, 508 F.2d 831, 184 USPQ 421, 422 (CCPA 1975). Whether a term sought to be registered is primarily merely a surname within the meaning of ... the Trademark Act must necessarily be resolved on a case by case basis and, as is the situation with any question of fact, no precedential value can be given to the amount

² Applicant, in its appeal brief, has for the first time in the prosecution of its application requested, as "alternative relief," that "[i]n the event that this appeal is decided adversely to Applicant," the application be "remand[ed] to the Examiner in order to amend the application to seek registration under Section 2(f) of the Trademark Act and to present evidence of acquired distinctiveness." As an appendix to its brief, applicant has submitted evidence of acquired distinctiveness consisting of "135 news articles and documents from 1983 to the present" which assertedly show "public recognition of Backus Vineyard as [i]dentifying and distinguishing wine associated with Applicant" The evidence submitted by applicant with its brief, however, is not only untimely under Trademark Rule 2.142(d), but in any event Trademark Rule 2.142(g) provides in relevant part that "[a]n application which has been considered and decided on appeal will not be reopened except for the entry of a disclaimer ... or upon order of the Commissioner" Since neither situation is applicable in this case, the alternative request for remand is denied and the evidence accompanying applicant's brief will not be given further consideration.

of evidence apparently accepted in a prior proceeding. See *In re Etablissements Darty et Fils*, 759 F.2d 15, 225 USPQ 652, 653 (Fed. Cir. 1985). However, the inclusion in a mark of a generic or merely descriptive term does not preclude its surname significance if, when considered as a whole, the primary significance of the mark to the purchasing public is that of a surname. See *In re Hutchinson Technology Inc.*, 852 F.2d 552, 7 USPQ2d 1490, 1492 (Fed. Cir. 1988); *In re Woolley's Petite Suites*, 18 USPQ2d 1810, 1812 (TTAB 1991); and *In re E. Martinoni Co.*, 189 USPQ 589, 591 (TTAB 1975).

We agree with the Examining Attorney that, contrary to applicant's contentions, the record herein contains sufficient evidence to make out a prima facie case that the primary significance of the designation "BACKUS VINEYARD" to the wine purchasing public is that of a surname. Specifically, while there is no evidence showing that anyone named "Backus" is associated with applicant, the Examining Attorney, in support of her position, has submitted a report from a search of the PHONEDISC POWERFINDER USA ONE 1998 database (4th ed.) showing a total of 2,962 listings for individuals having the surname "BACKUS";³ excerpts from a search of the "NEXIS" database in

³ The preface thereto states that:

The listings making up the data base were gathered from address lists and telephone directories, and contain or 115 million names, addresses, and phone numbers. The listings may contain a small number of duplicate listings for the same individual when the individual maintained two addresses or moved.

Applicant maintains, in view thereof, that a listing of "less than 3,000 Backus names out of over 115 million ... is a hit rate of 0.000026 or 26 hits per million names," excluding errors due to duplication and the fact that the "database is admittedly larger than 115 million names by an unknown amount." While applicant asserts that such errors "favor" applicant and that "[a] hit rate of 26 per million means that Backus is not a common surname (notwithstanding a well

which individuals with the surname "Backus" are mentioned in about a dozen instances;⁴ and a definition from The American Heritage Dictionary of the English Language (3rd ed. 1992) of the word "vineyard" as meaning, in pertinent part, " 1. Ground planted with cultivated grapevines." In addition, with her brief, the Examining Attorney has submitted a page from Webster's

known actor named Jim Backus)," the number of duplicate entries (due to an individual having more than one telephone number) is relatively few (based upon our review of the accompanying printout of the first 100 matching names) and it must be remembered that the database omits telephone numbers for individuals having unlisted numbers. More importantly, even if applicant is correct that the term "Backus" is not a common surname, such evidence shows that the term plainly has surname significance.

⁴ Specifically, the Examining Attorney located 3,794 stories in the "CURNWS" file of the "NEWS" library using the search request "BACKUS" and made of record excerpts from 23 such stories. While a few of the stories, as applicant contends, are duplicative and a few others are of limited probative value since they were obtained from wire services and a foreign publication, the remaining stories, of which the following are representative, clearly show (**emphasis added**) the surname significance of the term "Backus":

"Call Randy Moskop at 776-3543 or Jim **Backus** at 664-4131." -- St. Louis Post-Dispatch, June 28, 1999;

"Clements, who was born Oct. 24, 1898, was about the age his 17-year-old great granddaughter, Allison **Backus** of Wimberly, is now when he traded in his school sports uniforms for Army fatigues." -- Austin American-Statesman, June 27, 1999;

"Climbers Jo **Backus** and Jim Briskey display modern gear often seen on a two-day Mount Rainier climb." -- News Tribune (Tacoma, WA), June 27, 1999;

"The board of directors of the A.E. 'Bean' **Backus** Gallery & Museum ... announces the appointment of Kathleen Piowaty Fredrick as administrative director She was a personal friend of the late Bean **Backus**, for whom the gallery is named." -- Press Journal (Vero Beach, FL), June 27, 1999; and

"[Where] else but in Hollywood could one find an 8-foot-high color rendering of Natalie Schaeffer and Jim **Backus** wardrobeed as Lovey and Thurston Howell III" -- LA Weekly, June 25, 1999.

II New Riverside University Dictionary to show, by the absence of any listing of the term "backus," that such term has no other ordinary meaning in the English language other than its surname significance.⁵

Applicant asserts, however, that the term "BACKUS has a special meaning in the trade juxtaposed to [the word] VINEYARD." Specifically, applicant contends that when its mark is considered in its entirety, the "special meaning ... is a meaning conjuring wine." Applicant also urges that the addition of the word "VINEYARD" to the term "BACKUS" results in a mark which as a whole is not primarily merely a surname, arguing that:

In the case of In re Hutchinson Technology ... the Court pointed out that the word "Technology" could not be ignored in an analysis of the mark and that even a common word like "Technology" could add trademark significance to what might be perceived as a surname, i.e. Hutchinson. In the present case, the Examining Attorney has ignored "VINEYARD" because it is alleged to be "unregistrable matter, such as a generic term". The present case is more like the Hutchinson Technology case than In re Cazes, 21 USPQ2d 1796 (TTAB, 1992) cited by the Examining Attorney where the relevant mark was BRASSERIE LIPP [and] ... there was no powerful alternative means [sic] for LIPP other than it being a surname. Certainly the term VINEYARD is not generic for wine, as stated by the Examining Attorney. At best, VINEYARD is merely descriptive or suggestive of wine. VINEYARD is more descriptive of

⁵ The Examining Attorney's request in her brief that "judicial notice of the dictionary excerpt ... be taken" is approved. It is settled that the Board may properly take judicial notice of dictionary definitions. See, e.g., Hancock v. American Steel & Wire Co. of New Jersey, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953) and University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc., 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983). In view thereof, it follows that the Board may judicially notice that a term is absent from a dictionary listing.

grapes than of wine. It was plain error for the Examining Attorney to fail to consider the entire mark and discard the term VINEYARD because VINEYARD gives context to BACKUS.

We disagree with applicant's assertions. As applicant admits, the term "VINEYARD" is at least merely descriptive of wine and, as applicant is undoubtedly aware, numerous wineries and other wine-makers use such term, in both the singular and plural,⁶ as essentially a generic designation for the place or establishment where wine is produced. Thus, as a synonym for winery, it clearly cannot be disputed that any wine producer, including applicant, has the right to use the word "VINEYARD" to denote the place, establishment and/or entity where its wine is produced. As such, the addition of the highly descriptive, if not generic, term "VINEYARD" to the term "BACKUS," which the Examining Attorney has shown has only a surname connotation, simply does not change the surname significance engendered by the designation "BACKUS VINEYARD" when considered as a whole. The primary significance of such designation, in its entirety, is only that of a surname rather than any other "special meaning" as asserted by applicant.

Applicant, in fact, concedes in its brief that, "[i]f a consumer perceived that BACKUS was a surname, the meaning of the mark would be 'Vineyard of Mr. Backus'." The Examining Attorney, as noted above, has indeed established a prima facie case that the term "BACKUS," even though perhaps not a common surname, has

⁶ For example, not only do the specimens of use which applicant furnished show use of the designation "BACKUS VINEYARD," but they also utilize the name "JOSEPH PHELPS VINEYARDS".

only a surname significance to the relevant purchasing public for wine. Applicant acknowledges in this regard that, as indicated previously, the general public would especially be familiar with "a well known actor named Jim Backus," who it is commonly known supplied not only the voice of the cartoon character Mr. Magoo but also played millionaire Thurston Howell III on the classic television show "Gilligan's Island" for several seasons.⁷

Applicant further argues, however, that the term "BACKUS" is a "transliteration" of the Greek term "BAKXOS," which "is a name of a god, from Greek mythology, associated with wine" and that "the most frequent English 'translation' from the Greek is BACCHUS or BACKUS." In view thereof, applicant insists that:

Thus BACKUS is a transliterated name of a Greek god associated with wine. The present case is not unlike In re Monotype Corp. PLC, 14 USPQ2d 1070, 1071 (TTAB, 1989) In Monotype, CALISTO was held not primarily merely a surname, with the Board noting the mythological significance of the name "Callisto" (note slight transliteration variance with the mark). The Board specifically stated that it is common knowledge that there are variations in the rendering of mythological names transliterated from the Greek alphabet. The Examining Attorney does not dispute that BACKUS is a transliteration of the name of the god of wine, but argues that to consumers BACKUS is primarily a surname. Even if BACKUS is primarily a surname, which applicant disputes, surnames have origins and meanings, and Backus is evocative of the Greek god BAKXOS when considering wine.

⁷ Such show, while premiering in 1964 and running for three seasons, has continued to air in syndicated reruns for many years. Turner Entertainment Co. v. Nelson, 38 USPQ2d 1942, 1944 (TTAB 1996).

The Examining Attorney, on the other hand, not only disputes in her brief that the term "BACKUS" is a transliteration of the Greek god of wine and revelry,⁸ but maintains that, in any event, "the phonetic similarity of BACKUS to BACCHUS (the English language term for BAKXOS or the name of the Greek god of wine and revelry derived from various transliterations (Bakchos, Bakkhos, Bakkos) from the Roman alphabet) is simply not a 'readily recognizable' meaning" of the term "BACKUS". According to the Examining Attorney, "[i]t is only where an alternate 'readily recognizable' meaning of a surname is shown that registration of that surname should be granted on the Principal Register without evidence of acquired distinctiveness," citing *In re Piquet*, 5 USPQ2d 1367, 1368 (TTAB 1987) ["N. PIQUET" held primarily merely a surname despite significance of term "piquet" as the name of a relatively obscure card game]; *Fisher Radio Corp. v. Bird Electronic Corp.*, 162 USPQ 265, 266-67 (TTAB 1969) ["BIRD" found not primarily merely a surname because, while a surname, it also

⁸ In particular, the Examining Attorney points to an accompanying memorandum from the Translation Branch of the U.S. Patent and Trademark Office in which technical translator Steve M. Spar states that:

The most often used transliteration of the Greek word *Βάκχος* is "Bacchus," which is the Latin term. While the word "Backus" is highly suggestive of this word, it has never been a recognized variant thereof.

Although the Examining Attorney asserts that, in a telephone conference, applicant's counsel "indicated ... that an objection to this evidence would not be forthcoming" and, indeed, applicant has not filed a reply brief of otherwise objected to consideration of such evidence as untimely under Trademark Rule 2.142(d), we need not decide whether the term "BACKUS" is a recognized variant or transliteration since the result in this case would be the same, in our view, as just regarding such term as being phonetically similar to, or even the equivalent of, the term "BACCHUS".

has a double-entendre meaning "which broadly encompasses an extremely wide range of feathered vertebrate"]; and In re Hunt Electronics Co., 155 USPQ 606, 607 (TTAB 1967) ["HUNT" held not primarily merely a surname since it is also "a commonly used dictionary word"]. The Examining Attorney, in addition, correctly points out that this case is distinguishable from In re Monotype Corp. PLC, supra, in that in the latter, the evidence was insufficient to establish a prima facie case that the term "CALISTO" was a surname and, thus, the Board was persuaded that the significance of such term was as the English language variant of "CALLISTO"--the name of a nymph in Greek mythology.

As to whether the surname "BACKUS" is a phonetic equivalent, or is otherwise a recognizable variant, of the either the terms "BAKXOS" or "BACCHUS," we judicially notice in this regard that, for example, The American Heritage Dictionary of the English Language (3rd ed. 1992) at 133 and 525 respectively contains in the following definitions (in relevant part):

"**Bacchanalia**," which is set forth as a noun meaning "1. The ancient Roman festival in honor of Bacchus. 2. **bacchanalia**. A riotous, boisterous, or drunken festivity; a revel. [Latin, from *Bacchus*, Bacchus, from Greek *Bakkhos*.]";

"**Bacchus**," which is listed as a noun signifying "*Greek & Roman Mythology*. See **Dionysus**"; and

"**Dionysus**," which is set forth as a noun connoting "*Greek & Roman Mythology*. The god of wine and of an orgiastic religion celebrating the power and fertility of nature. Also called *Bacchus*."

Ser. No. 75/626,764

We further observe, however, that as used on the wine labels furnished as specimens with the application, a representative

example of which is reproduced below (in reduced size),

there is simply nothing which plausibly or even remotely suggests that applicant, in utilizing the designation "BACKUS VINEYARD," is seeking to foster an association thereof with the Greek or Roman god of wine, "Bacchus," who appears to be more commonly known as "Dionysus". Applicant's labels are devoid of any representations of a mythological figure or boisterous activity; instead, such labels depict merely the pastoral scene of a vineyard.

Thus, even if the term "BACKUS" were to be regarded as a variant or equivalent of the name "Bacchus," such designations are plainly not interchangeable in appearance and there would seem to be no reason to believe that the wine purchasing public would readily recognize the latter as an alternative meaning to

the former. We tend to doubt that even a not insubstantial portion of the relevant purchasing public would be likely to have heard of "Bacchus," much less that they would immediately make the kind of association urged by applicant upon encountering the designation "BACKUS VINEYARD" on wine. Consequently, we find that the alternative meaning of the term "BACKUS" as the phonetic equivalent of the name "BACCHUS" is insufficient to rebut the Examining Attorney's prima facie case that the primary significance of the mark "BACKUS VINEYARD" is that of a surname. See, e.g., *In re Hamilton Pharmaceuticals Ltd.*, supra at 1942-43 ["HAMILTON PHARMACEUTICALS" for pharmaceutical products held primarily merely a surname notwithstanding evidence showing that term "HAMILTON" has some minor significance as geographical term and as a given name] and *In re Pickett Hotel Co.*, 229 USPQ 760, 761-62 (TTAB 1986) ["PICKETT SUITE HOTELS" for hotel, restaurant, and cocktail lounge services held primarily merely a surname since, although the term "PICKETT" is the phonetic equivalent of the word "PICKET," such designations "are not interchangeable in appearance or meaning"].

Decision: The refusal under Section 2(e)(4) is affirmed.

R. L. Simms

G. D. Hohein

D. E. Bucher
Administrative Trademark Judges,
Trademark Trial and Appeal Board