

**I. APPLICANT’S MARK IS NOT PRIMARILY MERELY A SURNAME**

Applicant respectfully submits that the mark MERCER for “*Child safety seats for vehicles, namely, car seats and booster seats; hard infant carriers, namely, safety seats for infants and children for vehicles; strollers; travel systems for infants and children*” and related goods, all of which are identified in the subject application, is not primarily merely a surname in violation of Section 2(e)(4) and therefore should be registered on the principal register.

The Trademark Trial and Appeal Board has identified five examples of inquiries that may lead to evidence regarding the public’s perception of a term’s primary significance (see TMEP §1211.01):

- (1) whether the surname is rare;
- (2) whether the term is the surname of anyone connected with the applicant;
- (3) whether the term has any recognized meaning other than as a surname;
- (4) whether it has the "structure and pronunciation" of a surname; and
- (5) whether the stylization of lettering is distinctive enough to create a separate commercial impression.

In general, if the word is a rare surname, no one connected with the applicant has that surname, it has meaning other than as a surname, does not look and sound like a surname, or is in stylized form so as to create a non-surname impression, it is less likely that it is primarily merely a surname. *Id.*

**(1) Is the Surname Rare?**

The Examining Attorney has presented evidence showing the proposed mark appearing 77,416 times as a surname in a nationwide telephone directory of names provided through the LEXISNEXIS® surname database. Although 77,416 may seem like a large amount, this result should be taken in the context of the overall population of the country. The following lists the top twenty surnames in the United States (with the number of occurrences), as well as the listing for MERCER, according to 2010 U.S. Census data:

<u>Name</u>	<u>Number of Occurrences</u>
Smith	2,442,977
Johnson	1,932,812
Williams	1,625,252
Brown	1,437,026
Jones	1,425,470

Garcia	1,166,120
Miller	1,161,437
Davis	1,116,357
Rodriguez	1,094,924
Martinez	1,060,159
<b>Mercer</b>	<b>77,416</b>

See [https://www.census.gov/topics/population/genealogy/data/2010\\_surnames.html](https://www.census.gov/topics/population/genealogy/data/2010_surnames.html). As noted in the census data, MERCER is the 10,016<sup>th</sup> most popular name in the United States. Therefore, there are 10,016 *more* popular surnames than MERCER. The census data also reveals that MERCER accounts for approximately 0.00025% of the percentage of the U.S. population as of 2010 (the population recorded in the 2010 Census was 308,700,000 *see* <https://www.census.gov/programs-surveys/decennial-census/decade.2010.html>). This is an indication that MERCER as a surname is extremely rare in the United States, and should not be considered as being primarily merely a surname.

**(2) Does Anyone Connected with the Applicant use the Term as Surname?**

Where the mark is not the surname of the applicant or anyone involved in making the product, the Board is likely to find this factor neutral. *In re Gregory*, 70 USPQ2d 1792 (TTAB 2004). Where the applicant or a corporate officer actually has that surname, that evidence would weigh against the registrability of the mark. *In re Giger*, 2006 TTAB LEXIS 61 (TTAB 2006).

With regard to the subject application, the Applicant is Diono, LLC. No corporate officer or other executive level employee associated with the company has MERCER as a surname. To the extent that any non-managerial employee has the surname MERCER is purely by coincidence.

**(3) Does the Word have any Recognized Meaning other than a Surname?**

The term MERCER is a historical term dating back to the 13<sup>th</sup> century in Britain and has a recognized meaning as *a dealer in usually expensive fabrics* (*see* <https://www.merriam-webster.com/dictionary/mercet>).

#### **(4) Does the word have the Structure and Pronunciation of a Surname?**

The Board has stated "[w]hen a term does not have the look and sound of a surname, it clearly aids the applicant. On the other hand, when it does look and sound like a surname, such a finding merely tends to reinforce a conclusion that the term's primary significance is as a surname." *In re Gregory*, 70 USPQ2d 1792 (TTAB 2004). The Board asks whether consumers could perceive the mark to be initials, an acronym, or a coined word rather than a surname. *Id.*

Consumers are likely to perceive the MERCER mark as an arbitrary mark since there is no obvious nexus between the term MERCER and car seats. Arbitrary marks are commonly used as source identifiers. Therefore, since the mark is an extremely rare surname, consumers are likely to perceive the mark as an arbitrary term used to identify the source of the associated goods.

#### **(5) Is the Word Presented in Use in a Stylized Form Distinctive Enough to Create a Separate Non-Surname Impression?**

The proposed mark MERCER is not presented in a stylized form. Although a stylized mark would help to create a non-surname impression, stylization is not a requirement. Rather, it is simply one of the five factors that weigh for or against a mark being classified as merely a surname. Therefore, although this factor does not weigh in favor of creating a non-surname impression, the majority of the other factors do weigh in favor of a finding that the mark is not primarily merely a surname.

## **II. ANY DOUBT SHOULD BE RESOLVED IN APPLICANT'S FAVOR**

The Board has held that if there are doubts about whether a term is a surname, it will "resolve them in favor of the applicant and for publication of the mark." *In re Isabella Fiore, LLC*, 75 USPQ2d 1564 (TTAB 2005); [\*In re Benthin Mgmt. GmbH\*, 37 USPQ2d 1332 \(TTAB 1995\)](#) ("[O]n the question of whether a mark would be perceived as primarily merely a surname, we are inclined to resolve doubts in favor of the applicant and pass the mark to publication with the knowledge that others who have the same surname and use it or wish to use it for the same or similar goods or services can file a notice of opposition."); [\*In re S. Oliver Bernd Freier GbmH & Co.\*, 20 USPQ2d 1878 \(TTAB 1991\)](#) ("There is ... a certain ambiguity present in this mark so that it cannot be predicted whether the perception of the consuming public would be as a surname or a given name. In view thereof, we will resolve that doubt in favor of the applicant.").

Applicant respectfully requests that the Examining Attorney resolve any doubts in Applicant's favor.

### **III. CONCLUSION**

On the basis of the foregoing, Applicant respectfully submits that the present application is now in the condition for allowance. A reconsideration, allowance, and passage to publication is therefore respectfully requested.