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## UNITED STATES: The Eyes Have It—J HUTTON Primarily Merely a Surname

**Contributor:** Robert P. Felber, Jr., Waller Lansden Dortch & Davis, LLP, Nashville, Tennessee, USA

**Verifier:** Timothy J. Lockhart, Willcox & Savage, P.C., Norfolk, Virginia, USA

Mr. Felber and Mr. Lockhart are members of the INTA Bulletins—North America Subcommittee.

In a precedential decision, the Trademark Trial and Appeal Board (Board) upheld the refusal of the United States Patent and Trademark Office (USPTO) to register the trademark J HUTTON on grounds that the mark is primarily merely a surname under Section 2(e)(4) of the Trademark Act. *In re Colors in Optics, Ltd.*, Serial No. 87558653 (Feb. 7, 2020).

Colors in Optics, Ltd. (the applicant), applied to register the standard characters mark J HUTTON for “eyewear, eyewear frames, and sunglasses.” The USPTO refused registration of the mark, stating that the mark is primarily merely a surname. The applicant admitted that “Hutton” is a surname but argued that, due to the inclusion of the initial “J” in the mark, J HUTTON is not merely a surname but a reference to a specific individual, Jade Hutton, the company’s Chief Creative Officer. The applicant submitted evidence of other registered marks that consist of surnames preceded by one or more initials that were issued without claims of acquired distinctiveness.

The Board stated that assessing whether a mark is primarily merely a surname involves determining the primary significance of the mark to the consuming public, taking into account:

- The degree of the surname’s rareness;
- Whether anyone connected with the applicant has that surname;
- Whether the term has any recognized meaning other than that of a surname;
- Whether the term has the “structure and pronunciation” of a surname; and
- Whether the stylization of lettering is distinctive enough to create a separate commercial impression.

These factors are not exclusive and any of them alone or in combination with the other relevant factors may shape the analysis in a particular case. The Board noted that there is no *per se* rule with regard to the addition of initials to surnames. Adding a single initial to a surname may cause consumers to perceive a mark as a personal name, while, in some cases, adding two initials to a surname may not create such an impression. The Board stated that, “In all cases involving a surname preceded by one or more initials, it is the factual record that matters the most, because only from such a record can we make reliable findings about consumer perception.”

The Board distinguished *In re J.J. Yeley*, 85 USPQ2d 1150 (TTAB 2007) in which a well-known NASCAR driver was able to successfully register the mark J.J. YELEY. In that case, the evidence showed that J.J. YELEY had a recognized meaning as a mark due to Mr. Yeley’s popularity as a racecar driver. The Board also found that J.J. YELEY had the “look and sound” of a personal name because it included two initials.

In this case, the applicant failed to present evidence that Jade Hutton was known as “J Hutton” or that the relevant consumers would perceive J HUTTON as identifying a specific individual. Consequently, the examining attorney’s *prima facie* showing that the mark was primarily merely a surname was not rebutted.

The Board affirmed the refusal to register.

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