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***No Infringement Intended* — Why Won't the USPTO Register My Last Name?****Hosts: Rusty Close and Austin Padgett****Recorded: 1/27/26****Aired: 2/23/26****Austin Padgett (00:13):**

Come one and come all. Welcome to *No Infringement Intended*, an Intellectual Property podcast of our law firm, Troutman Pepper Locke, LLP, hosted by the so-called Bad Boys of Intellectual Property, Rusty Close, and me, Austin Padgett. Fair warning listeners, we have another guitar related episode today, but we're coming at it from a little bit of a different angle. That should build up some expectation for you. While we're getting ready for what we're about to drop on you, please make sure that you're subscribed. And you know what? Light up those five stars for your boys over here while you're at it. We've started to stack up some five star reviews, and it's really going to help us hit our ultimate goal, which is getting nominated for the Golden Globe Podcast Award. Rusty, I don't know if you saw that that award exists now, but I just saw that on the latest Golden Globes.

**Rusty Close (01:01):**

Yeah. Amy Poehler's got something coming for her, and it's called The Bad Boys of IP.

**Austin Padgett (01:05):**

Yeah, my kids - we were watching it as a family, and my kids were like, "Whoa, are you in the running for this?" I said it would just be an honor to be nominated.

**Rusty Close (01:17):**

I love that our kids think there's a chance, though. That's a beautiful thing.

**Austin Padgett (01:20):**

I mean, yeah, this podcast is a big deal. Well, we keep it rolling Rusty, I think you've got the old mailbag segment for today.

**Rusty Close (01:27):**

Yeah. Speaking of being a big deal, loyal listener, Chris in San Diego, fellow Bad Boy of IP, reached out to let us know what a great job we were doing, how much he was enjoying all of our episodes. But he had a question he posed for us. He wanted us to weigh in on who the greatest Georgia musical acts were, and I don't know that we can come up with a definitive answer and we probably have to set some parameters and just say who are associated with Georgia. But I mean, where would you start?

**Austin Padgett (02:00):**

The greatest? Man, I know some of my favorites.

**Rusty Close (02:04):**

Hey, that can be the greatest too.

**Austin Padgett (02:06):**

Yeah, so we can knock out a few of the obvious. I mean, just go over to Athens.

**Rusty Close (02:11):**

Right.

**Austin Padgett (02:11):**

You've got several that you could list over there.

**Rusty Close (02:15):**

You got R.E.M., you got The B-52's, you got – I'm sure a favorite of yours – Widespread Panic.

**Austin Padgett (02:21):**

Absolutely. You have the entirety of the Elephant 6 collective bands and the entire wellspring that that was and formed. You have the Futurebirds.

**Rusty Close (02:34):**

Well, it's either Futurebirds or The Futurebirds. I think it depends on where you look. Similarly Drive-By Truckers or The Drive-By Truckers, depending on the place and time. We can also go south to Macon.

**Austin Padgett (02:49):**

Yeah, we could. We could go deeper south to Thomasville if we want to have – let's stick with, let's just list some of – maybe instead of greatest, some of our favorites.

**Rusty Close (03:01):**

I think so. Our favorites, I mean, for me, obviously The Allman Brothers, you got Otis Redding, you've got The Black Crows, and this isn't even getting into the hip hop artists. We've got OutKast and Goodie Mob and Ludacris and all of those. But for me, if I had to just pick two, it's going to be The Allman Brothers and The Black Crows.

**Austin Padgett (03:21):**

Man, yeah, that's a great list. I'm going to throw out a guilty pleasure of mine with Collective Soul.

**Rusty Close (03:27):**

There you go.

**Austin Padgett (03:28):**

From the nineties into the two thousands, they could write a hook like crazy. It's also in Varsity Blues with the song "Run", which as you know, is a huge impetus of this entire podcast.

**Rusty Close (03:39):**

Near and dear to both of our hearts

**Austin Padgett (03:41):**

Down in South Georgia, I like The Currys. Do you know those guys?

**Rusty Close (03:44):**

I'm not familiar.

**Austin Padgett (03:45):**

Man, just kind of more inventive folk, some tight harmonies. It's good stuff.

**Rusty Close (03:51):**

That's a sub genre right there.

**Austin Padgett (03:53):**

I think you'd enjoy it, actually. I'll send you some YouTube clips. If we're going to go historically, Tommy Dorsey or Thomas Dorsey, known as Georgia Tom, I think he grew up in Georgia. He's most associated with Chicago, but he's kind of like the father of gospel music.

**Rusty Close (04:10):**

Got it.

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**Austin Padgett (04:11):**

Then historically you've got Bessie Jones and the Sea Island Singers who kind of recorded and kept track of all the spirituals and things like that. You've got, across the state, you've got a wide spectrum of – you have jazz musicians, bluesmen, indie pop.

**Rusty Close:**

College rock.

**Austin Padgett:** You got Deer Hunter.

**Rusty Close:** Right, yeah.

**Austin Padgett:** Bro country.

**Rusty Close:** A favorite of both of ours.

**Austin Padgett:** Just for Chris's sake, I'm going to throw out a little – not huge deep cut – but Faye Webster out of Atlanta. She has kind of like this R&B thing that she does, but it's got steel guitar. It's a cool vibe if you just need some good chill music, great lyrics. Really interesting music. I think she's awesome.

**Rusty Close (04:58):**

Well, we'll get some follow up from Chris and see if we met his expectations.

**Austin Padgett (05:02):**

I love it. Thank you. Mutual friend of the pod, Chris. Thank you for that. Well, Rusty, while we're naming things again, which is something that we apparently like to do on this podcast quite a bit, how about you name your names? Do you have any nicknames back in the good old days or have friends with great names?

**Rusty Close (05:19):**

I mean, Rusty is a nickname, right? My given name is Christopher Coleman, and I'm a junior and had red hair when I was a kid. So Rusty, the name I've gone by all of my life is a nickname. But two guys that I grew up with, one, his name was Jeremy, but his dad always called him "Bullfrog", as in Jeremiah was a bullfrog.

**Austin Padgett (05:44):**

Oh, I love that.

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**Rusty Close (05:45):**

Another buddy who, I mean I've known since we were old enough to know other people. We went to preschool together. His last name was Rice, and a little league baseball coach called him "Rice Patty". All our lives, he was known as Patty. Everybody called him Patty, and we've been out of touch probably since college. I don't know if he still goes by Patty, but he'll always be Patty to me.

**Austin Padgett (06:11):**

Oh, I love it. I love it. I came through high school when Austin Powers was kind of becoming a big thing. I got a lot of the Austin Powers and his various catchphrases.

**Rusty Close (06:23):**

A lot of "Yeah baby's" thrown your way?

**Austin Padgett (06:25):**

Yeah, yeah. "Groovy."

**Rusty Close (06:26):**

That had to be great.

**Austin Padgett (06:27):**

Yeah, it was very interesting at least. But on our cross-country team, one of our best runners was this guy named Jonathan Forrest. Shout out Jonathan. We would be out in the community on one of our practice runs or something, and the buses would be running, and you'd hear these kids yelling, "Run Forrest, run" as we're going. I would tell you that was the worst thing that they yelled, but it wasn't even close. That was probably the most complimentary.

**Rusty Close (06:52):**

No respect for the cross country team.

**Austin Padgett (06:54):**

Yeah, not at all. We also had, she was a lovely person and had a great name – Cheryl Merrill – in my high school class.

**Rusty Close (07:00):**

No way.

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**Austin Padgett (07:00):**

Yeah, I thought that was always a great name. Shout out to Cheryl as well.

**Rusty Close (07:04):**

For sure.

**Austin Padgett (07:04):**

I should tell you, I didn't plan on – just in pure candor, when I ran cross country and I showed up for our first practice, the student, Luke, looked at me and I was scrawny. I mean barely anything. He said, oh man, here comes “Buffman!” But it was like “Duffman” from The Simpsons – he would say it like that. That became one of the nicknames that I went by through high school. At one point there was this radio station that we would listen to on our drive to school and they would give birthdays. On my birthday, my mother and brother had called in, and – I guess they sent an email or something – they didn't know how to say it until they said it “Buffmen”, like on my birthday as we were driving in. Great memories.

**Rusty Close (07:49):**

I'm going to see if I can get that one brought back and have it be your name at the firm going forward.

**Austin Padgett (07:54):**

“Buffman”. But yeah, the radio would be an even better edit.

**Rusty Close:**

Right.

**Austin Padgett:**

Well, the reason we're talking about names here is kind of this whole, well what is a name? What's in a name? Type of thing. I wanted to talk about a weird trademark rule about surnames. There's a special trademark rule when it comes to protecting your surname as a mark. Rusty, a few episodes ago, we learned that Stacy's true mission in life is to repair VCRs. It's a mission she's apparently run away from, but I hope that she's been reflecting on that episode. I know she listens. Shout out to Stacy as well because there's still time for her to find this true purpose in life. As all my VCR repairman buddies tell me all the time, it's never too late.

**Rusty Close:**

Right.

**Austin Padgett:**

Well, let's imagine Stacy finally sees the light and opens up her shop and she names it "Close VCR Repairs". She does this because VCR repair is an art, of course. Reputation, name. They mean everything in that line of business. Well, you and Stacy give me a call to get my professional expertise and tell me that we should help her get that business name protected. I'm going to tell you that we have to have a hard conversation with Stacy right up front, right out of the gate.

**Rusty Close (09:16):**

Is this about the name or about the business plan in and of itself?

**Austin Padgett (09:19):**

I think the business plan is sound, Rusty. As I told you before, the time is now. There aren't that many VCRs and therefore the market's wide open for her to jump in because the repairmen have all gone on to other skills and trades.

**Rusty Close (09:33):**

AI has taken their jobs.

**Austin Padgett (09:34):**

That's right. Well, we're going to have this conversation, and I'm going to have to tell her in a pretty candid way that the Lanham Act does not like her name. The Lanham Act is the federal trademark act that we have here in the U.S. When I say that, it's a little bit of an overstatement, but the idea is that the Lanham Act has a special provision in it that prohibits the registration of marks that are "primarily merely surnames." That's a weird mouthful, of course. "Primarily merely a surname", and hoping I don't have to say it too many times on this podcast. I knew what I was getting into when I signed up for this one. Any guesses, Rusty, as to the reasons that we're building this fence around surnames?

**Rusty Close (10:20):**

Well, I mean, in some ways, we don't want one person to sort of corner the market on a name when it's a name that others can have, I assume. I mean, we don't want to tie up that name when others might be out there wanting to use it in a similar way. They're going, well wait, wait, what about me? Is this just because I didn't get there first, I don't get to use my own name? Is it along those lines?

**Austin Padgett (10:47):**

It is. You've highlighted kind of both aspects of it, in that we have the tension between commercial interests and individual rights happening here. The main consideration is you want fairness to others because they might have that name. "Everyone has a right to use their own

name” is kind of the old saying that you'll see in some of the older cases and case books. It's unfair to let anyone monopolize it. At the same time. It's kind of this lack of distinctiveness that it's primarily identifying people and not the products themselves. The reasoning is important because we'll get into some cases in a second, but you're going to get – when we go through the factors – you're going to get a taste of both of those reasonings. I said this before on this podcast that when it comes to trademarks, the key thing I keep reminding clients and colleagues about when we work through these problems is that this is all about consumer protection. That you have to kind of put that lens on first. There are some extra protections for your brand and what you've done and tried to build it up and all those sorts of things. But really it's about how are we protecting consumers from being confused as we go through these types of things. It's not every surname; it's those marks that are “primarily merely surnames.” We get one of the classic go-tos in the law. We get a multifactor test.

**Rusty Close (12:17):**

Love it.

**Austin Padgett (12:18):**

Let me give you the five factors of what makes a “primarily merely surname.” First is: how rare is the surname? This goes to that policy of other people should be able to use their names. Well, if it's a rare surname, we don't have many people to worry about.

The more common the surname is, the more likely a refusal will be at the Trademark Office, is the general gist. The second factor is: what's the connection between the name and the mark owner? Is it the name of a founder, a principal, someone associated with the business? Something like that. As you would guess, the more connected it's to the business, the more likely it is to be found a surname. The third one is: does the term mean something besides a surname? That is, in your case, “Close.” We'll work through it in a second, but I'm just hinting at it here.

**Rusty Close (13:07):**

Sure.

**Austin Padgett (13:08):**

Fourth is: does it have the structure and sound of a surname? That is, does it have the look and feel of a surname? Does it have an apostrophe “s” at the end to make it look and sound – or does S-O-N “son”, like Anderson or Masterson or something like that? Then the fifth is: how is the mark presented to consumers, which I'll tell you is probably the least important factor, from my experience on going through these. Let's go through Stacy's business. We'll run it as a hypothetical here. Let's go through these factors. How rare is the surname? Do you have any sense?

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**Rusty Close (13:45):**

I mean, I've never done any surveys. I think haven't known a lot of Closes that we weren't related to. I think if you flip through the phone book, if you can find one, it's maybe – depending if we're talking metro-Atlanta – maybe it's a part of a page, maybe a column, but it's not one I run into that frequently. Whenever I do, most people say, “Any relation to Glenn?” That is the big joke that they use.

**Austin Padgett (14:11):**

Got you. Yeah, yeah, yeah. That makes sense. I see it.

**Rusty Close (14:14):**

Yeah.

**Austin Padgett (14:15):**

One of my favorite things to do is – I don't get to do it anymore, but when I was an associate, I would get to research, how big is this surname? How many people have this name? Because you're often battling the Trademark Office around data because they're going to go in typically and they'll look at a phone book – like a national phone book that's available online, and they'll pull out, oh, there's 25,000 names. What I like to do is go to the census data because with the census – and it lags. I mean, it's a deep lag. Right now we're still working off of 2010. That census. We didn't get that information until 2016. There's a long lag in what you get, but it's good data because it breaks it down and they give you an Excel spreadsheet of any names that came up above a hundred occurrences. At the top you've got Smith, and then you just keep working down and you can see what was found in the census, I mean to the number. I just looked up your surname and there were 9,474 hits at a rate of, for every hundred thousand people you meet in the U.S., 3.21 of them will be of your tribe.

**Rusty Close (15:32):**

That kind of tracks with my experience.

**Austin Padgett (15:34):**

That's the 3739th most prevalent name in the U.S. I would tell you from kind of experience, it's certainly not a big surname, but it's not super rare either. You're kind of in the middle there, you're hanging out with a strange lot of about 10,000 folks.

**Rusty Close (15:52):**

Just the middling folks.

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**Austin Padgett (15:54):**

That's right.

**Rusty Close (15:55):**

Yeah.

**Austin Padgett (15:55):**

That's right. Weighing that factor, it's probably about neutral. There used to be a – when I first started practicing, if I could pull that data and I could show how few people had that name, I felt pretty good about my win. I logged in some pretty good wins for my trademark owning clients on that. Then over time, I would tell you, just from the practice, surnames has become a much bigger thing and they've rejected a lot more based on this. What about the connection between the name and the mark owner? That's an obvious one here. She took your name when you got married, so she stuck with that connotation there.

**Rusty Close (16:30):**

For better or worse, as they say.

**Austin Padgett (16:32):**

Yeah.

**Rusty Close (16:33):**

Richer or poorer.

**Austin Padgett (16:35):**

That's right. Does the term mean something besides a surname? Here's where you may want to get inventive and roll in that last factor of how it's presented. You may want to close the door or proximity type of meaning. I don't know how you could do that in a graphic or something like that, but maybe you could make it seem like it's something other than a surname.

**Rusty Close (16:57):**

A lot of times people will ask if it's "Close" or "Close", and I'll tell them it's the adjective, not the verb. Then I like to watch their face as they try to process what I've just told them.

**Austin Padgett (17:10):**

Right.

**Rusty Close (17:12):**

As they try to noodle through which one is which. I can't figure it out.

**Austin Padgett (17:16):**

Oh yeah. I think I might've said it wrong already then on this actual podcast, so my bad.

**Rusty Close (17:22):**

No, no, you haven't. You've been using it the right way.

**Austin Padgett (17:24):**

Okay.

**Rusty Close (17:25):**

I mean, maybe you can squish the letters close together, right? Close up the space in between the letters and it's "Close". Or you put it nearer to the VCR repair or visually you're doing something wonky with it.

**Austin Padgett (17:40):**

Yeah, I'm just marking down to make sure the difference between the pronunciations is whether you voice the sibilant or not. If you allow your vocal cords keep pushing through the "s" to become more of a "z", that's American phonetic alphabet, et cetera. Alright, structure and term. Does it look and feel like a surname? I think they're going to say that one's probably neutral too because it is a surname, but it's also word. We'll talk more about this neutrality thing in a little bit. I've got some bones to pick here in bringing this one up. How do you think this turns out? If you get the rejection, you've got to go argue with the trademark examiner?

**Rusty Close (18:18):**

Well, in my experience with patent examiners, and I think it's the same for trademark examiners, they've sort of got quite a bit of discretion and it kind of just depends on what they want to do and how they're feeling on a given day. As long as they can make a reasonable case, they can kind of go whichever way they want. I'm sort of naturally a pessimist, so I'm kind of thinking that it would get rejected. But I do think we've, it's not the most common name and I think there's some factors that are working in our favor.

**Austin Padgett (18:48):**

Yeah, I think if we get inventive on the logo and present it as a logo rather than a word mark, we might stand a chance. But like you, I'm kind of pessimistic and particularly right now in that the examiners can build a pretty good file against your mark. It's not like a huge evidentiary lift. They just go and find stuff online and add it into the file and then while they're supposed to have

the burden, their burden to meet is pretty low actually. The appeal board is made up – a lot of them are former examiners – and so a lot of them know what they're looking for and how to look at that type of evidentiary record. It's becoming tougher and tougher to get these marks through these days.

**Rusty Close (19:29):**

Can I ask a question? When you are searching the trademark database, is there a way to designate that “Close” in this context is a surname and not the everyday use of the word? Is there a way that you do that or when you're searching, is it going to pull up trademarks that just use the term as we would use it in ordinary conversation?

**Austin Padgett (19:54):**

It's a good question. There's no real way to flag it as a surname. What I would be looking for probably, if I'm trying to make that distinction is what they call a 2(f) declaration, which we should certainly talk about because even widely popular names are going to be able to be registered to some degree if they can acquire distinctiveness. Section 2(f) of the Lanham Act allows you to provide an affidavit or some sort of proof with an accompanying affidavit that shows, hey, I've actually acquired distinctiveness in this mark. If you think about Ford, McDonald's, Disney, all those were surnames. Let's say they get a rejection early on, well, they can show – maybe in a few different ways – I've been using it for over five years substantially by myself in this marketplace. I should be entitled because I've acquired distinctiveness. People can tell the difference between this as my surname and it as a mark applying - it's conveying more information than just my surname to these people – they're approaching this as a brand.

**Rusty Close (21:01):**

Okay.

**Austin Padgett (21:02):**

Let's go ahead and move there because even if, like I'm saying, even if you have a last name, if that name has acquired distinctiveness as the origin of source, then it's no longer merely a surname. That's what I'm looking for in that database. If we're searching to answer your question, I'm going to look for, okay, is there a 2(f) declaration there? Because if so, they probably, they had some sort of rejection based on descriptiveness, and in some instances it might be surname type of descriptiveness. Because 2(f), you can overcome other types of problems with a 2(f) declaration other than just surnames. It could be if the mark is merely descriptive, for example, or geographically descriptive. We can say, well, that might be true, but I have all of this evidence of like – I've sold half a million units all across the United States, or I have 500,000 followers.

**(21:55):**

I've built this huge thing. There's no magic number in a lot of these instances. It's can I make an evidentiary showing that convinces the examiner that I've got enough credibility here that people

view it as more than just a surname. That's the aspect of it. That's the consumer protection piece. Because if I say, well, you can't actually protect that, then I'm saying, I'm going to allow anybody else to come in and use this mark, and all of a sudden you've got potential confusion when one person has built a true brand out of their name. Those are those competing interests that we were talking about earlier. It doesn't take huge levels of fame to get there. What we're trying to balance is this right to the surname, the concept that's all about consumer confusion. A real-life case: let's take a guy named Pat Broe. He's the founder and CEO of The Broe Group. I should tell people that this is B-R-O-E, which is still exciting to get to say "bro" over and over again.

**Rusty Close (22:52):**

Very exciting.

**Austin Padgett (22:53):**

They provide financial management services, which makes it even better if you're talking to your buddies and they ask you where you keep your money and you say, I keep it with my Broe. They apply, and we have to go through the factors. The examiner looks and says, oh, this is a surname. I searched it up and I found people with this name. But let's go through the evidence. Rusty, do you know any other Broes, B-R-O-E out there?

**Rusty Close (23:22):**

I mean, I wish I did. It sounds like a pretty cool group to be associated with. I don't know if you watch The Morning Show on one of the streaming networks.

**Austin Padgett (23:32):**

It's on Apple. Yeah, I haven't seen that one.

**Rusty Close (23:34):**

One of the characters on this last season, his first name was Bro, and I'd have to go back and look, but my recollection is it was not just spelled B-R-O. Maybe it's a first name that we could also see in use.

**Austin Padgett (23:47):**

Interesting. Okay. Yeah, it might be. On this one, there were enough Broes where the PTO put in evidence of over a thousand people with that surname.

**Rusty Close:**

Wow.

**Austin Padgett:**

Which doesn't sound like a lot, but for these purposes, it's enough where you've got to consider how many of these other Broes are going to get into financial management.

**Rusty Close:**

All of them.

**Austin Padgett:**

It's a Broe heavy business.

**Rusty Close (24:11):**

Yeah, I mean it's what you're going into. It's your first choice.

**Austin Padgett (24:14):**

Absolutely. You were gifted a name, and you better use it.

**Rusty Close:**

Right.

**Austin Padgett (24:18):**

Evidence was applicant is also a "family owned business" and there was what they call negative dictionary evidence to show that Broe is not a defined term that means something else, which is oftentimes what we're trying to create – just arguments, just trying to get this thing through and showing, oh, this translates to some ancient language to the color red. We might do a logo in red or something like that. You try to get those through. Those aren't convincing anymore, but at a point in time they would fly. The board looks at it and says, okay, it's a relatively rare surname, but it's still primarily a surname. There's no other thing that it could be. But here we have this example where I was saying that even if that is the case, you can still make a showing as the applicant did here by putting in evidence that he's been using this with substantial exclusivity in his industry for over 40 years.

**(25:18):**

The board comes in and they say, oh, wow, that's a long time. We have "a longstanding practice of allowing registration of surnames under section 2(f)." That's the section I was talking about, that you issue this declaration and say, I've been doing this for a long time, or I've got widespread evidence of my use. Those sorts of things. Upon a showing of substantially exclusive and continuous use for five years, and we're going to do that here – is what they say. The refusal to register is reversed and Broe gets registered. As of a couple of days ago when I was putting this together, is still registered. Shout out to Pat Broe out there.

**Rusty Close (25:54):**

Yeah, good job, Pat. This is one of those things where I'm thinking, okay, you've used it for 40 years. This is off the track, but what's motivating you to try to register it after all that time? All I'm thinking is Pat is ready to retire and wants to sell, pass along the business. As an asset to include in the deal, he needs the Broe Group to be a trademark term.

**Austin Padgett (26:20):**

It does start to sound like that when you start adding up those years. That's about, particularly in financial management, that's a long time to go. Yeah, for sure, that was my thought as well, is that okay, well, probably somebody did some due diligence on this and said, well, what if Pat's no longer with the business? What gives us the right to continue to use his name? All those sorts of things. Maybe I'm wrong, but all these types of things we're reading between the tea leaves based on actually pretty common experience of these things happening. Yeah, for sure.

**Rusty Close (26:52):**

I love it.

**Austin Padgett (26:53):**

Well, the question then is – I told you that this had to do with guitars and what does this have to do with guitars? I was hoping it would have to do more with guitars. I should tell you that I saw a case come down about BOWENS, the name BOWENS, from the Trademark Office's appeal board. I thought it was about George Bowen who passed away a couple of years ago. I don't want to make too much out of it, but when you talk about musicians making or tinkering with things a lot, George Bowen was a real player, like a studio musician. Played live too. I've never been able to play one, but he handmade acoustic guitars.

**Rusty Close (27:34):**

Okay.

**Austin Padgett (27:34):**

They are stunning to look at and they sound really good.

**Rusty Close:**

Okay.

**Austin Padgett:**

I think his son runs the company now and makes guitars as well. I was reading through these cases that were coming down and this one jumped out at me. I put it in the stack of like, okay, this is a podcast case right here. I was so pumped to get into it and was hoping that the board

would get to have this discussion about surnames, guitars, and how they're fairly important because of the reputation of builders and things like that. I first thought that it was weird that they applied for 'BOWENS' with an 'S', because I was almost positive that the last name was 'Bowen' without an 's'.

**Rusty Close (28:12):**

That was your first clue.

**Austin Padgett (28:14):**

Then I'm reading it and it came to me. I don't think this is the same guitar company at all. It's not adding up. Rusty, do you have one of those feeling charts at home for your children to point to which feelings they're feeling?

**Rusty Close (28:26):**

We generally just express the feelings with yelling as opposed to a chart. A chart might be a good idea, but I have seen them in the doctor's office, that kind of thing. Well, I think it's more how much pain are you in? But I think it's the same sort of thing.

**Austin Padgett (28:40):**

It is. It's this theory that if you can at least first identify your feelings, you're halfway to the goal of being able to make something more useful out of them than the screaming. Social, emotional wellness, et cetera. Of course, we have a chart that has all these weird faces on it for our kids to point to. They don't do it anymore. But we used to say, okay, which one is it that you're feeling? You have to decide right here and right now, which one you're feeling.

**Rusty Close (29:08):**

You get one shot at this.

**Austin Padgett (29:09):**

Exactly. If I'm reading this case and I'm realizing this is not the company I thought it was, and would not get to talk about it, I'm pointing to my feelings on this feeling chart and I'm pointing to the saddest Austin available. But let's get into what's going on because it's still a useful case. Probably a little background: when you apply for a trademark at the Trademark Office, you tell the Trademark Office four basic things. You tell them what the mark is that you're applying for, who is going to own it, what you're applying it in connection with – your goods and services – and then how long have you been using it? You don't necessarily have to be using it at the time of the application. You can file what's called an intent to use application, but before you register it, you got to show use of it. That's a U.S. type of thing. There's a couple of exceptions that I know some people are listing and already jumping to. Not important for this conversation.

**Rusty Close (30:06):**

Stay out of our mentions.

**Austin Padgett (30:07):**

Yeah, so they apply for the mark 'BOWENS', B-O-W-E-N-S, and it's not just for guitars. This is another clue to me when I started reading the goods and services. It is for tons of stuff: amps, MP3 players, speaker cables. There's one for "tremolo intonation tools, compromised of a screw and correspondingly groovy hollow cylinder for adjusting guitar intonation."

**Rusty Close (30:35):**

Okay.

**Austin Padgett (30:35):**

There's another one for "audio equipment, namely computer peripheral device for controlling DJ audio software." I'm already thinking these aren't my guys over here. This isn't Bowen Guitars, that beloved luthier maker of these fine instruments. Still don't know who these people are or what they do, but here's the case anyway. The thing that really clued me in though was that they filed it as an intent to use application, meaning that they're going to show use later, like I said a moment ago. When you do that, you take that 2(f) declaration off the board.

**(31:13):**

You can't tell them that you've acquired distinctiveness because that has to be based on prior use. Until you show use, you can't have prior use. You could arrange for it, but you'd have to kind of change the basis of your filing. They didn't do that here. It's an intent to use filing. For all our purposes, we're just saying they haven't used these things yet, but we're still going through the examination process. They get a refusal based on this idea that it's "primarily merely a surname" doctrine. They argue back and forth with the examiner, and the examiner holds tight and says, if you don't like it, you've got to appeal. They appeal, and the board finds this: that the surname Bowens is not rare. The examiner put 23,000 into evidence from a database. Though I would mention that the census data, the government's own data around names says it's around 9,000. Still a healthy number. Around the Close level of organization that your family runs.

**Rusty Close:**

Sure.

**Austin Padgett:**

Here's the big one. Nobody at the applicant is named Bowens, Bowen, or any variation. The board found this to be a so-called neutral factor. To me, it's like a light switch. It's either off or on. It might not be the deciding factor, but I don't know why we have this factor at all if we're just going to say it's a neutral factor. I don't know how it becomes any more favorable to the applicant.

**Rusty Close (32:42):**

So, they wanted to register it as BOWENS, but nobody there was named Bowens.

**Austin Padgett (32:48):**

Correct.

**Rusty Close (32:49):**

It's almost like they picked Xerox or Exxon or any other word, and they were going to give some meaning to that word, right?

**Austin Padgett (32:58):**

Yeah, and I should mention – this happens. We have clients who come in, they pick a mark, and fortunately you search it. One of the items that I often include in my searches “is this a surname?” I'll run to that census data and just run across it just to make sure, because they're becoming more and more prevalent. Where it used to when I started practice, you didn't necessarily have to worry about that. But we certainly have had clients who had no idea it was a surname and it gets picked up on the surname list and they get refusal based on it.

**Rusty Close (33:30):**

They're going, wait, wait, wait. This isn't a surname. This has nothing to do with a name.

**Austin Padgett (33:34):**

We'd never intended this. It's a little weird that the board says this is a neutral factor when it's like, well, let's give one to the applicant here because it's not their name. Like I said, it doesn't rule the day. It's a multifactor test.

**(33:49):**

Rusty, you know this, whenever they do a multifactor test, they say, no factors determinative. We're just going to weigh it all. We're throwing these out here because we've got to do something, but we're going to weigh it all at the end and then make a decision in the totality. The applicant's counsel argues there are other meanings like Bowen's Island or Bowen's Disease. The problem with that is examiner came back with evidence that those things are named after people, so it's just a surname. Good try, man. I would've done it too. What else – you've got to throw it out there to answer the call of the question.

**Rusty Close (34:23):**

Yeah, I mean, I can't think of any other usage that is not a name for Bowen, right? I mean, it doesn't have a meaning. It doesn't have a meaning at all, I don't think. Although I guess neither

does Xerox or some of those other words, but I guess those weren't also surnames in some instances.

**Austin Padgett (34:42):**

Right. Potentially if it means something else – if it's just a coined term and you came up with it, but it happens to be a surname, it's a dicey one now.

**Rusty Close:**

Yeah.

**Austin Padgett (34:53):**

I mean, these are just, like I said, they're more and more common. If you're on that list of surnames, you're probably going to get a refusal. I think there's probably some automatic or automated system that's flagging these things as they come in for the examiners. Just to say, hey, heads up – might want to check the surname list on this one. But that's the rub of it. The end of this case is BOWENS is not registered because it's found to be “primarily merely a surname.”

**Rusty Close (35:19):**

We don't have any insight into why they chose that name to begin with.

**Austin Padgett (35:25):**

We do not. I'm still not over the insight that this is not Bowen Guitars. An ongoing company – I think there's another potential problem out there for our applicant friends, but what do I know?

**Rusty Close (35:39):**

Yeah, similar enough that it could cause confusion. It has caused confusion for you. Although you may be a small audience that would be confused by it.

**Austin Padgett (35:48):**

Yeah, yeah. Certainly not marketplace confusion, but just in the reading of it, they confused me into getting excited to come talk about this case and tell you about this great luthier that – some great players that play these guitars. I don't know how many of them there are. I mean, they're fairly expensive right out the gate.

**Rusty Close (36:03):**

Yeah, I was going to say, are there any well-known musicians who are associated with that brand that you know of?

**Austin Padgett (36:08):**

Not well-known, but there are some kind of players' players that are out there.

**Rusty Close (36:12):**

Yeah.

**Austin Padgett (36:14):**

They have a scripted 'B' at the top of the headstock. Going back to our headstock discussion – and this might be different from guitar to guitar – but it's kind of off kilter from the ones that I've seen. It's not symmetrical. The 'B' has a little flow to it. It's a beautiful piece.

**Rusty Close (36:33):**

Okay.

**Austin Padgett (36:34):**

There's a lot of pearl inlay work that's done on a lot of these – just really lovely to look at guitars. You never know – they use different woods than you see on a lot of other guitars. If you believe in what are called tonewoods and that theory of guitar making, you'll start to hear the different sounds.

**Rusty Close (36:59):**

Okay.

**Austin Padgett (36:59):**

One thing that they would tell you is it doesn't accentuate the lows and the highs like a lot of other types of guitars do. They're designed to be even throughout. It's a very versatile acoustic instrument across different playing types and things like that. Yeah, I don't want to go too far down the rabbit hole on tonewoods, et cetera. But if you ever go to a presentation on those things, you'll come out a believer, man. They will make a believer out of you. That, oh man, Koa is the bomb. That's what I got to get, because that's what's ringing out to my ears. It's like going to the mattress store and they start you out on the most expensive mattress, and then everything else after that just doesn't compare.

**Rusty Close (37:40):**

We're going to have to figure out how to work tonewoods into an episode.

**Austin Padgett (37:46):**

Yeah, I'll work on that. Maybe we can find some – there are people who will tell you it does not make a really important difference.

**Rusty Close (37:53):**

They're just not believers, man.

**Austin Padgett (37:54):**

Yeah, they just haven't been exposed, man. You got to really dig in there and hear a bunch of different guitars right next to one another. You will start to hear differences. The problem is that you'll go to a sales presentation by one of the big guitar makers and they'll start telling you, oh, yeah, okay, this is what you got to listen for. So, you're primed for it. That's what makes it tough to kind of like, am I actually hearing this? Or is this – but then they'll play the other one next to it that you just heard, and then you hear that one again. It's like, oh man, I'm really starting to believe this thing that the ancient forests are singing through these instruments basically, and picking the frequencies that are going to most favored to exude from this instrument.

**Rusty Close (38:35):**

It reminds me of bourbon tasting notes. Where it's like, oh, I do taste currant in there. If it's written down for you, you're sort of going to taste those things. Your brain is kind of tricked into it.

**Austin Padgett (38:49):**

Right. Oh yeah, marshmallow! It's all sorts of weird stuff.

**Rusty Close (38:52):**

Yeah, campfire!

**Austin Padgett (38:54):**

Right? Yeah. That's the basic gist of surnames. It's an interesting doctrine, and we got to work through some trademark cases here. But it's really about: what do we do with these tensions between a person's name and their reputation, and then also trying to provide the protections for consumer confusion. It's an interesting policy item. I won't say a hot topic, but it's kind of a more prevalent basis of refusal that you're seeing these days at the Trademark Office if you ever apply for marks.

**Rusty Close (39:26):**

Yeah. Interesting. Well, I have to let Stacy know as she's trying to get her business off the ground.

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**Austin Padgett (39:31):**

Yes, please do. I'm happy to take on her case pro bono. Do the old family discount. I think that serves it up. You got anything else to add?

**Rusty Close (39:40):**

No, that's an interesting topic. That was a good one.

**Austin Padgett (39:43):**

Well, folks, thanks for bearing with us on that. I'm sorry we talked about guitars again. We'll try to give you some non-guitar episodes here in the near future, but thanks for hanging with us. While you're at it, make sure you're subscribed, hit those five stars, and whether you like the guitars or not, there's certainly *No Infringement Intended*.

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