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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Les Collines, LLC

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Serial No. 77871104

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Mark J. Nielsen, Esq. for Les Collines, LLC.

Steven Fine, Trademark Examining Attorney, Law Office 110  
(Chris A.F. Pedersen, Managing Attorney).

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Before Quinn, Mermelstein and Wolfson, Administrative  
Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Les Collines, LLC filed an application to register the  
mark LES COLLINES (in standard characters) for "vineyard  
and winery services, namely, the cultivation of grapes for  
others; [and] viticulture services, namely, grape growing  
and cultivation of grapes for others" (in Class 44).<sup>1</sup> The

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<sup>1</sup> Application Serial No. 77871104, filed November 12, 2009,  
alleging first use anywhere and first use in commerce on  
September 15, 2002. The application includes a claim of  
ownership of Registration No. 2893710, issued October 12, 2004,  
of the mark LES COLLINES (in standard characters) for "fresh  
grapes." This registration also includes the same translation  
statement as the one found in the present application.

application includes the following statement: "The English translation of LES COLLINES in the mark is THE HILLS."

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used in connection with applicant's services, so resembles the previously registered mark HILLS VINEYARD (in standard characters) ("VINEYARD" disclaimed) for "vineyard and winery services, namely, the cultivation of grapes for others"<sup>2</sup> as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs.

The examining attorney maintains that while the marks LES COLLINES and HILLS VINEYARD do not look or sound alike, the words "les collines" and "hills" have the same meaning to individuals who are proficient in both English and French. Because the English term "hills" or "the hills" is a literal and exact translation of the French term "les collines," the examining attorney insists that the doctrine of foreign equivalents is applicable to this case. According to the examining attorney, a French speaker would not need to "stop and translate" such simple wording as

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<sup>2</sup> Registration No. 3615995, issued May 5, 2009.

that comprising applicant's mark; rather, the translation would almost be second nature. Further, the examining attorney states that the term "hill" or "hills" is not so weak as to preclude a likelihood of confusion. Although the examining attorney states that applicant's evidence "may show that HILLS is common in marks that are otherwise distinguishable," he goes on to state that "it does not follow that HILLS by itself or with the generic wording VINEYARD should be afforded a lower level of protection against a subsequent mark that is legally identical to it." (Brief, unnumbered p. 5). The examining attorney also points out that the services are, in part, identical, and that even sophisticated purchasers would not be immune from confusion as to source.

Applicant is the owner and operator of the LES COLLINES vineyard in the Walla Walla Valley in the state of Washington. As shown by the document originating from the U.S. Department of the Treasury, Alcohol and Tobacco Tax and Trade Bureau, the Walla Walla Valley is an authorized wine appellation of origin, being a designated American Viticultural Area since 2004. Applicant acknowledges that its mark translates into the English term "hills" or "the hills." (Request for Reconsideration, p. 1). According to applicant, however, the purchasers of its services are

wineries, which are sophisticated, professional purchasers that would not stop and translate a vineyard name that comprises foreign words. Applicant points out that the United States has a substantial domestic wine industry, which includes the sale of wines from foreign countries (over 7,000 foreign brands), and that brand names consisting of foreign words are common in the wine industry in this country. According to applicant, these names are accepted for what they are, simply names, and that purchasers in the wine industry do not stop and translate these names. Applicant also points to the foreign names of grape varietals that, applicant contends, people in the wine industry do not stop and translate. These individuals, especially winery owners and winemakers, are accustomed to seeing thousands of foreign names used in the industry and, because of their familiarity with so many names in foreign languages, foreign names are taken at face value. Accordingly, applicant concludes that the doctrine of foreign equivalents does not apply in this case. Even if the doctrine applies, however, applicant argues that confusion is unlikely to occur. Applicant puts significant stock in the sophistication of purchasers for viticulture services, and the complexities of the purchasing decisions involving vineyard and viticulture services. In addition

to relying on the difference in sound and appearance between the marks LES COLLINES and HILLS VINEYARD, applicant contends that the terms "hills" and "hill" are weak inasmuch as vineyards are commonly planted on hills, thus leading wineries to adopt the term "hills" or "hill" as part of their names and trademarks. Applicant also points to the absence of any instances of actual confusion between the marks, putting emphasis on its ownership of a registration of the mark LES COLLINES for "fresh grapes." In urging that the refusal be reversed, applicant submitted two declarations with numerous related exhibits.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Insofar as the services are concerned, the question of likelihood of confusion is determined based on the

identification of services in the application vis-à-vis the services as set forth in the cited registration. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n.4 (Fed. Cir. 1993); and *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006). Both the application and the cited registration set forth identical recitations of services: "vineyard and winery services, namely, the cultivation of grapes for others." Applicant's recitation of services also includes "viticulture services, namely, grape growing and cultivation of grapes for others" which, if not identical to registrant's services, are nevertheless very closely related to registrant's services. The identity between applicant's and registrant's services is a factor that weighs heavily in favor of a finding of likelihood of confusion.

As to the marks, we examine the similarities and dissimilarities of the marks in their appearance, sound, meaning, and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). Where, as in the present case, the marks appear in connection with, at least in part, legally identical services, the degree of similarity between the marks that is necessary to support a finding of likely confusion declines. *Century 21 Real*

*Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

The marks LES COLLINES and HILLS VINEYARD are different in sound and appearance. In point of fact, there is nothing even remotely similar between the marks in these respects.

With respect to meaning, the French term "colline" is translated into English as "hill," and "les collines" as "hills" or "the hills" (French-English Collins Dictionary 2007). The dictionary evidence shows that the English translation is unambiguously exact and direct, with no other relevant connotations or variations in meaning. Applicant does not contend to the contrary, as confirmed by applicant's own translation in the present application and its prior registration. Further, applicant acknowledges, with good reason, that French is a common, modern language. *See, e.g., In re Thomas*, 79 USPQ2d 1021, 1024 (TTAB 2006) (evidence showed that, of the foreign languages with the greatest number of speakers in the United States, French is second only to Spanish).

Whether or not to apply the doctrine of foreign equivalents in this case when it comes to meaning is at the heart of the difference between applicant's and the

examining attorney's respective positions on the merits of the likelihood of confusion refusal.

The United States is a country of immigrants, and many citizens are bilingual, speaking both English and a foreign language. *In re Peregrina Limited*, 86 USPQ2d 1645 (TTAB 2008). Under the doctrine of foreign equivalents, a foreign word (from a modern language familiar to an appreciable segment of American consumers) and the English equivalent may be held to be confusingly similar. *Id.* Whether an examining attorney should apply the doctrine of foreign equivalents turns upon the significance of the foreign mark to the relevant purchasers, which is based on an analysis of the evidence of record. Although words from modern languages are generally translated into English, the doctrine of foreign equivalents has evolved into a guideline, not an absolute rule, and is applied only when it is likely that "the ordinary American purchaser would 'stop and translate' [the term] into its English equivalent." *Palm Bay Import, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1696, quoting *In re Pan Tex Hotel Corp.*, 190 USPQ 109, 110 (TTAB 1976). See generally TMEP §1207.01(b)(vi) (7<sup>th</sup> ed. 2010). "When it is unlikely that an American buyer will translate the foreign mark and will take it as it is, then the doctrine



of foreign equivalents will not be applied." *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1696, citing *In re Tia Maria, Inc.*, 188 USPQ 524 (TTAB 1975) (no likelihood of confusion between TIA MARIA for a Mexican restaurant and AUNT MARY'S for canned vegetables). The "ordinary American purchaser" includes "all American purchasers, including those proficient in a non-English language who would ordinarily be expected to translate words into English." *In re Spirits Int'l, N.V.*, 563 F.3d 1347, 90 USPQ2d 1489, 1492 (Fed. Cir. 2009). Professor McCarthy's view is that "[a] rigid, unthinking application of the 'doctrine' of foreign equivalents can result in a finding quite out of phase with the reality of customer perception." Simply stated, Professor McCarthy's opinion is that the doctrine should not be transformed into a mechanical and rigid doctrine. J.T. McCarthy, McCarthy on Trademarks and Unfair Competition, §§11:35; 23:36; and 23:37 (4<sup>th</sup> ed. 2011).

In response to the established fact that "les collines" and "hills" are an unambiguously direct and exact translation, applicant submitted evidence in support of its proposition that purchasers in any event are not likely to translate the French term into English because of the manner in which the terms are encountered in the unique

marketplace environment of vineyards, wineries and viticulture. The doctrine generally will not be applied where the record indicates that it is unlikely purchasers would translate the mark because of "marketplace circumstances or the commercial setting in which the mark is used." *In re La Peregrina Limited*, 86 USPQ2d at 1648; and *in re Thomas*, 79 USPQ2d at 1026.

The essence of applicant's arguments is as follows: the wine industry is inundated with foreign language terminology (including grape varietals, wine names, vineyard names, and wine regions) and foreign language trademarks (including the names of foreign and domestic wineries, wine brands, and vineyards) and, as a result, the average American purchasers of vineyard and viticulture services, who are sophisticated wineries and winemakers, are so accustomed to seeing foreign languages in names and trademarks that they take them at face value, which is a common practice in the industry. The prevalence of so many names and trademarks in many different foreign languages, including French, reduces the likelihood that winery owners and winemakers would be inclined to stop and translate applicant's mark. The particular circumstances in which vineyard and viticulture services are evaluated and selected militate against the likelihood that purchasers of

such services will stop and translate foreign terms encountered in this unique marketplace. According to applicant, sophisticated wineries and winemakers look beyond the name of a vineyard to the practical realities of vineyard and viticulture services. While brand names convey a vineyard's goodwill, the translation of foreign words in a vineyard's name is not relevant information for the purchasing decision.

The record includes the declaration of Norman McKibben, applicant's managing partner. Mr. McKibben has been a winegrower and winery owner for over 20 years, and is currently involved with several wineries in the Walla Walla Valley in the state of Washington. Over the years, Mr. McKibben has received industry awards, including "Grape Grower of the Year" in 1998 awarded by the Washington Association of Wine Grape Growers. Mr. McKibben states, in pertinent part, that wineries, which are purchasers of vineyard services and fresh grapes for making wine, are sophisticated purchasers; that with so much foreign wine sold in the United States, it is commonplace to see wines bearing foreign names, and even domestic wines often bear foreign names to suggest a connection to old world winemaking; that because of the prevalence of foreign names in the wine industry, people do not translate them, but

rather they are accepted at face value as simply names; that he is unaware of anyone translating the name of his winery to "The Hills"; and that he is unaware of any instances of actual confusion between the marks.

Also of record is the declaration of Mark Nielsen, applicant's attorney, in support of various documents. The documents include excerpts from printed publications, including Wine Brands, Success Strategies for New Markets, New Consumers and New Trends (2008) by Evelyne Resnick. The author writes that the United States has the largest wine market in the world, with 7000 names from France, Italy, Australia, Chile and Spain, in addition to American wines. The record also includes a lengthy list, retrieved from [www.catchwine.com](http://www.catchwine.com), of California wineries showing that many of them bear names with foreign words (e.g., Clois du Bois, Etude and Zaca Mesa). The documents also include a search summary produced by Google's search engine showing several pages of "hits" for the search term "hills vineyard." Of the wineries listed, Mr. Nielsen produced home pages of the websites of twenty-five of the wineries.

Given the unusual and unique marketplace environment surrounding the purchase of vineyard, winery and viticulture services, we appreciate the potential merit of applicant's argument. We find, however, that the evidence

in support of this argument falls short, in the face of an exact and direct translation, of proving that wineries and winemakers take foreign words such as LES COLLINES at face value, rather than stopping and translating them. We acknowledge that the record includes numerous examples of foreign words used in winery and vineyard names, but a mere single declaration of applicant (not exactly an unbiased source) is not enough to persuade us that wineries and winemakers would not stop and translate applicant's mark. Actually, in the absence of more compelling evidence, as for example, affidavits or declarations of third-party wineries and winemakers, we think it is plausible that these purchasers are just as likely to stop and translate applicant's mark, if not more likely. We say this given their degree of exposure to foreign terms in the wine industry.

In sum, we are reluctant to take the view of one individual, albeit knowledgeable in the wine industry, and extrapolate his view to an appreciable number of relevant purchasers in the viticulture industry.<sup>3</sup> Accordingly, we find that the doctrine of foreign equivalents is applicable

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<sup>3</sup> So as to be clear, we have discounted only Mr. McKibben's opinion about other customers' perceptions of the mark. However, we have relied upon some of his factual statements about the wine industry (see discussion, *infra*), given his long experience in the industry as a winegrower and winery owner.

in this case, and that the marks convey the same or very similar meaning.

Applying the doctrine of foreign equivalents, however, is only part of the determination of whether the marks being compared are confusingly similar. See *In re L'Oreal S.A.*, 222 USPQ 925, 926 (TTAB 1984) (noting that "similarity in connotation [of the marks] must be viewed as but a single factor in the overall evaluation of likelihood of confusion"). As noted earlier, appearance, sound, meaning and commercial impression are factors to be considered when comparing marks. Similarity of the marks in one respect, e.g. meaning, does not automatically result in a finding of likelihood of confusion even if the services are identical or closely related. In the present case, LES COLLINES and HILLS have a similar meaning when the doctrine of foreign equivalents is applied. "[S]uch similarity as there is in connotation must be weighed against the dissimilarity in appearance, sound and all other factors, before reaching a conclusion on likelihood of confusion as to source." *In re Sarkli, Ltd.*, 721 F.2d 353, 220 USPQ 111, 113 (Fed. Cir. 1983). See *In re Thomas*, supra.

As to commercial impression, we find that the marks LES COLLINES and HILLS VINEYARD engender overall commercial impressions that are completely different.

In sum, the differences between the marks in sound, appearance and overall commercial impression clearly outweigh the similarity in meaning when the doctrine of foreign equivalents is applied. The differences between the marks is a factor that weighs in favor of a finding of no likelihood of confusion.

In addition to the dissimilarities between the marks, there are other *du Pont* factors that contribute to the likelihood of confusion analysis.

In the present case the record demonstrates that the English words "hills" or "hill" are suggestive in the wine industry and, therefore, are weak. Mr. McKibben explained the importance of the "terroir" (comprising climate, soil type, topography and elevation) of a vineyard as it impacts the quality and characteristics of grapes grown for winemaking. According to Mr. McKibben, vineyards are often planted on hillsides due to advantages to such a location:

When vines are planted on hillsides, the vines can be exposed to more sun and therefore more heat during the growing season. Planting vineyards on hillsides allows the vineyard to take advantage of variations in soil types, drainage, and micro climate

considerations so that different grape varieties can be planted in places best suited to successful growth and harvesting. Planting on hillsides is also advantageous for avoiding damage to the vines in winter because cold air tends to settle, leaving marginally higher temperatures on the up slopes of hills.

In addition, the U.S. Department of the Treasury, Alcohol and Tobacco Tax and Trade Bureau's listing of "Authorized Wine Appellations of Origin - U.S. Viticultural Areas" shows the use of the term "Hills" in connection with several areas, including Dundee Hills, Eola-Amity Hills, Horse Heaven Hills, and Tracy Hills.

Also introduced by applicant is a search summary for "hills vineyard" using the GOOGLE search engine, showing the first thirty "hits"; applicant also submitted the home pages of the websites of twenty-five of these wineries (e.g., Sunset Hills, Solomon Hills and Whispering Hills).

The GOOGLE search summary, in and of itself, is not probative. Although the search summary shows many "hits," this evidence is of little probative value in the absence of specific information regarding each entry. "Search engine results - which provide little context to discern how a term is actually used on the webpage that can be accessed through the search result link - may be insufficient to determine the nature of the use of a term



or the relevance of the search results to registration considerations." *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007) (GOOGLE search results that provided very little context of the use of ASPIRINA deemed to be "of little value in assessing the consumer public perception of the ASPIRINA mark"); *In re Thomas*, 79 USPQ2d at 1026 (Board rejected an applicant's attempt to show weakness of a term in a mark through citation to a large number of GOOGLE "hits" because the "hits" lacked sufficient context); and *In re Remacle*, 66 USPQ2d 1222, 1223 n.2 (TTAB 2002). Here, the listings do not show that third parties actually use "HILL" or "HILLS" as part of their names or trademarks, or how consumers might encounter any such third-party uses.

As indicated above, applicant did submit actual home pages retrieved from the websites of twenty-five of the wineries identified as "hits" by applicant's search. Given the importance of hills in growing grapes for wine, it comes as no surprise that wineries have a fondness for using the terms "hill" or "hills" as a component of their names and/or trademarks, or as a component of their names for particular vineyards.

The cumulative effect of the evidence relating to this point confirms that the terms "hill" and "hills" are, at a

minimum, highly suggestive of the terroir of the winery or vineyard; as such, the terms have diminished distinctiveness in the wine industry. Thus, regardless of the application of the doctrine of foreign equivalents and similarity in meaning, this suggestiveness buttresses applicant's position that confusion is not likely. See *In re Ness & Co.*, 18 USPQ2d 1815 (TTAB 1991) (finding no likelihood of confusion between the French mark LABONTE, which means "the goodness," and the mark GOOD-NESS for the same goods because of the laudatory nature of the marks, the dissimilarity in sight and sound, the slight differences in meaning, and the connotation of the mark GOOD-NESS in relation to applicant's company name "Ness & Co."); and *In re L'Oreal S.A.*, supra (applying the doctrine to the French mark HAUTE MODE, which means "high fashion," but finding no likelihood of confusion between the mark and HI-FASHION SAMPLER because of the suggestive nature of the marks and because of the differences in the marks due to the addition of the term SAMPLER in the English-language mark). The suggestiveness of the cited mark weighs in favor of a finding of no likelihood of confusion.

We next consider the trade channels, classes of purchasers and conditions of sale relating to the services. The record establishes that the relevant purchasers of

"vineyard and winery services, namely, the cultivation of grapes for others; and viticulture services, namely, grape growing and cultivation of grapes for others" comprise winery owners and winemakers. This class of purchasers is highly sophisticated. Moreover, as detailed by Mr. McKibben, the purchase of viticulture services typically involves a complicated and informed decision, certainly not made on impulse. Mr. McKibben states wineries are very selective about where they buy their grapes and who they entrust with management of the vines that will produce the grapes from which they will make their wines. These facts suggesting care in purchasing tend to minimize the likelihood of confusion. Accordingly, these factors weigh in favor of a finding that confusion is unlikely to occur.

Applicant's assertion of no actual confusion between the marks is entitled to little weight. *In re Majestic Distilling Co.*, 65 USPQ2d at 1205 ("uncorroborated statements of no known instances of actual confusion are of little evidentiary value"). See *In re Bisset-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of applicant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). The lack of

evidence of actual confusion carries little weight, *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965), especially in an *ex parte* context. In any event, the record is devoid of probative evidence relating to the extent of use of registrant's and applicant's marks and, thus, whether there have been meaningful opportunities for instances of actual confusion to have occurred in the marketplace. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000); and *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). Accordingly, the *du Pont* factor of the length of time during and conditions under which there has been contemporaneous use without evidence of actual confusion is considered neutral.

Finally, although we have considered applicant's ownership of Registration No. 2893710 of the same mark at issue herein for "fresh grapes," this fact is entitled to little probative value. See *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("Even if some prior registrations had some characteristics similar to [applicant's] application, the PTO's allowance of such prior registrations does not bind the board or this court.").

Based on our analysis of the relevant *du Pont* factors, we see the likelihood of confusion between the marks LES COLLINES and HILLS VINEYARD as amounting to only a speculative, theoretical possibility, even when the marks are used in connection with identical services. Confusion is unlikely due to 1) the differences between the marks in sound, appearance and overall commercial impression; 2) the inherent weakness of the term "Hills" (or "hill") in the wine industry; 3) the sophistication of purchasers of vineyard and viticulture services; and 4) the complexities involved in the purchasing decision for vineyard and viticulture services.

Language by our primary reviewing court is helpful in resolving the likelihood of confusion issue in this case:

We are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal.

*Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, 21 USPQ2d at 1391 (Fed. Cir. 1992), *citing* *Witco Chemical Co. v. Whitfield Chemical Co., Inc.*, 418 F.2d 1403, 1405, 164 USPQ 43, 44-45 (CCPA 1969), *aff'g* 153 USPQ 412 (TTAB 1967).

**Decision:** The refusal to register is reversed.