

THIS DECISION IS NOT A
PRECEDENT OF THE TTAB

Mailed: September 15, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Innovative Technologies
Corporation of America, Inc.

Serial No. 78691831

Peter M. de Jonge of Thorpe North & Western LLP for
applicant.

Scott Sisun, Trademark Examining Attorney, Chris A.F.
Pedersen, Managing Attorney, Law Office 110.

**Before Holtzman, Mermelstein, and Ritchie de Larena,
Administrative Trademark Judges.**

Opinion by Mermelstein, Administrative Trademark Judge:

Innovative Technologies Corporation of America, Inc.,
seeks registration of the mark HAIR OF THE DOG (standard
characters) for "clothing, namely, shirts, t-shirts, pants,
shorts, headwear, hats, socks, sleepwear and dresses" in
International Class 25. Registration has been finally
refused pursuant to Trademark Act § 2(d), 15 U.S.C.
§ 1052(d), on the ground that applicant's mark so resembles
the mark in Registration No. 2986486,¹ LES CHEVEUX DU CHIEN

¹ Registered August 16, 2005, based on an application filed
February 14, 2004. The registration file includes the following

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(standard characters), for "custom manufacture of clothing, personal accessories in the nature of jewelry, stoles, scarves, linens, and home décor items," as to be likely, if used on or in connection with the identified goods, to cause confusion, to cause mistake, or to deceive.

After careful consideration of the record, we reverse.

I. Applicable Law

Our determination under Trademark Act § 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *See In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks." *Federated*

statement: "The foreign wording in the mark translates into English as the hair of the dog."

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Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999), and cases cited therein.

II. Discussion

We review the relevant *du Pont* factors as they apply to this case.

A. The Similarity Or Dissimilarity of the Marks in Their Entireties as to Appearance, Sound, Connotation and Commercial Impression.

Applicant argues - and the examining attorney does not disagree - that the marks at issue differ visually and aurally. The examining attorney nonetheless argues that the marks are similar "in meaning and commercial impression; the doctrine of foreign equivalents is applicable based on the unequivocal translation of the registered mark to mean 'hair of the dog'...." Ex. Att. Br. at 3.

Under the doctrine of foreign equivalents, foreign words from common, modern languages are translated into English to determine similarity of connotation with English words in a likelihood of confusion analysis. See *Palm Bay Import, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, [396 F.3d 1369, 73 USPQ2d 1689, 1696 (Fed. Cir. 2005).] The doctrine is applied when it is likely that "the ordinary American purchaser would 'stop and translate [the term] into its English equivalent.[']" *Id.*, quoting *In re Pan Tex Hotel Corp.*, 190 USPQ 109, 110 (TTAB 1976). See generally, J.T. McCarthy, MCCARTHY ON TRADEMARKS

AND UNFAIR COMPETITION, § 23:36 (4th ed. 2006). The Board has determined that the "ordinary American purchaser" in a case involving a foreign language mark refers to the ordinary American purchaser who is knowledgeable in English as well as the pertinent foreign language. *In re Thomas*, 79 USPQ2d 1021, 1025 (TTAB 2006).

In re La Peregrina Ltd., 86 USPQ2d 1645, 1647-48 (TTAB 2008).

1. Does the Doctrine of Foreign Equivalents Apply to Marks in French?

Applicant argues that the French Language is not widely recognized in the U.S., and has provided data from the U.S. Census Bureau,² indicating that in the 2000 U.S. Census, only 2,097,206 people, or "less than 1%," of the population spoke French or French Creole in the home.³ Applicant concludes that "[t]he typical American consumer is likely to take the [cited] foreign word mark as it is and will not even be aware of its English language counterpart." Appl. Br. at 3.

We disagree with applicant's assertion that the doctrine of foreign equivalents cannot apply to marks in

² The Census Bureau data was attached to applicant's brief. While such evidence would usually be considered untimely, Trademark Rule 2.142(d), we may - and do - take judicial notice of Census Bureau data. *In re Spirits Int'l N.V.*, 86 USPQ2d 1078, 1085 n. 11 (TTAB 2008).

³ The number of U.S. residents who speak French in the home considerably understates the size of the relevant population. As with other modern foreign languages, many people speak or understand French in varying degrees, even though it may not be their first language or the one spoken at home.

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the French language because it is not spoken by enough people in the U.S. marketplace. While the doctrine of foreign equivalents is not an absolute rule, "words from modern languages are generally translated into English." *Palm Bay*, 73 USPQ2d at 1696. According to applicant's Census data, French is spoken in the home by more than two million people, second only to Spanish. Indeed, our precedent and that of our primary reviewing court shows application of the doctrine to French, e.g., *Palm Bay*, as well as other languages even less common in the U.S.

(according to applicant's census data) than French. E.g., *In re Ithaca Industries, Inc.*, 230 USPQ 702 (TTAB 1986) (Italian); *In re Accumulatorenfabrik Sonnenschein G.M.B.H.*, 160 USPQ 341 (TTAB 1968) (German). "[W]e presume that a word in one of the common, modern languages of the world will be spoken or understood by an appreciable number of U.S. consumers for the product or service at issue." *In re Spirits Int'l*, 86 USPQ2d at 1085 (applying doctrine to mark in Russian). Applicant offers no reason to deviate from this presumption here.

As noted, we have made clear that the relevant consumer for doctrine of foreign equivalents purposes is "the ordinary American purchaser who is knowledgeable in English as well as the pertinent foreign language." *La*

Peregrina, 86 USPQ2d at 1648 (citation omitted). French is a common, modern language, spoken by a significant number of people in the United States. Thus, rather than excluding French-speaking American consumers, proper application of the test instead focuses on them.⁴

2. Is HAIR OF THE DOG the equivalent of LES CHEVEUX DU CHIEN?

Although the doctrine of foreign equivalents generally applies to marks in French, the question is whether those who understand French "will stop and translate the word into its English equivalent." *Palm Bay Import, Inc.*, 73 USPQ2d at 1696. This question in turn necessarily depends upon the particular facts and circumstances of the case. Unfortunately, neither the examining attorney nor the applicant squarely addresses this question.

As noted, the cited registration includes a translation of the mark, stating that LES CHEVEUX DU CHIEN means "the hair of the dog." The examining attorney submitted various translations from web-based automated translation services consistently agreeing with the translation in the registration, and the applicant does not contend otherwise.

⁴ We note that this is not a case dealing with an obscure language understood by only a very small number of consumers in this country.

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Nonetheless, the examining attorney's evidence does not clearly demonstrate that applicant's mark is equivalent in meaning to the in the cited registration. While it is true that a mechanical translation of the registered mark yields the same English words in the same order (but for the definite article), it is far from clear that the resulting phrase has the same meaning in French as it does in English.

As applicant noted in response to an Office Action, "the phrase 'hair of the dog' has been used for many years to refer to an alcoholic beverage ... consumed for the purpose of relieving a hangover." Response at (Dec. 5, 2006). This meaning is consistent with evidence proffered by applicant⁵ and not disputed by the examining attorney. This idiomatic meaning differs substantially from the literal meaning of the words - far afield from a discussion of the keratinous epidermal filaments of the canine species. In light of the evidence of record, we find that the most likely commercial impression of THE HAIR OF THE DOG (in English) is a reference to the hangover cure.⁶

⁵ See Hair of the Dog, http://urbanlegends.about.com/od/medical/-a/hair_of_the_dog.htm; Hair of the Dog, http://en.wikipedia.org/wiki/Hair_of_the_dog. Response to Office Action (Dec. 7, 2006).

⁶ Much depends on context, of course, and the connotation of the mark might well be different if applicant were, for instance, in the pet grooming business. But there is nothing in this record

The problem with the examining attorney's position is that nothing in the evidence of record indicates that this idiom has the same meaning in French. Thus, while the mark primarily refers to a hangover cure in English, a French speaker will likely see the mark LES CHEVEUX DU CHIEN and perceive it literally as a statement about a dog's hair. While the French undoubtedly have their own solutions to hangover relief, there is nothing to indicate that they would call such a cure LES CHEVEUX DU CHIEN.

Neither applicant nor the examining attorney have submitted particularly useful translations of applicant's mark. The translations of the phrase submitted by the examining attorney⁷ do not offer any explanation or context, and we cannot simply assume that an idiom mechanically translated word-for-word into another language, will retain its idiomatic meaning. The cited registration contains a translation indicating that LES CHEVEUX DU CHIEN means "hair of the dog" in English, and there is no reason to doubt that this is correct. Yet, "hair of the dog" in English has two meanings, one literal and one idiomatic.

to suggest that applicant's business has anything to do with dogs.

⁷ The examining attorney offers translations from Google translate, Babel Fish Translation, Dictionary.com, and Applied Language Solutions, each indicating that the translation of LES CHEVEUX DU CHIEN into English is "hair of the dog" or "the hair of the dog."

Having found that the latter is the predominant meaning and the one most applicable to applicant's mark, it is clear that a mechanical, word-for-word translation does not answer the question at hand: do the marks at issue - considered as a whole - mean the same thing?

A more traditional source for translation dispels the notion that these marks are foreign equivalents. Under the entry for "hair," the LAROUSSE FRENCH-ENGLISH/ENGLISH-FRENCH DICTIONARY 375 (unabridged 1998)⁸ provides the following translation of "hair of the dog":

phr: ... to have a [hair] of the dog (that bit you) reprendre un verre (pour faire passer sa gueule de bois); here, a [hair] of the dog is what you need bois ça, il faut guérir le mal par le mal....

As can be seen, the phrase "hair of the dog" does not translate into "les cheveux du chien" in French. See *In re Sarkli, Ltd.*, 721 F.2d 353, 220 USPQ 111, 112 (Fed. Cir. 1983) ("None of these definitions makes 'second chance' the exact translation of 'repechage.'").

The facts in this case are significantly different from those in *In re Thomas*, 79 USPQ2d 1021 (TTAB 2006), cited by the examining attorney. In *Thomas*, we found the

⁸ The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983). We note that there was no entry in this source for

terms MARCHE NOIR (French) and BLACK MARKET to be equivalent precisely because the evidence showed that the marks have the same idiomatic meaning in both languages. *Thomas*, 79 USPQ2d at 1025. There is no such evidence in this case.

We find that the marks at issue are clearly different in their appearance and pronunciation. Further, it does not appear that the marks would be understood as having the same idiomatic meaning. At best, the marks carry the same meaning only when the context refers to dog hair, and not to the predominant idiomatic meaning of the phrase in English.

B. The Similarity or Dissimilarity and Nature of the Goods or Services

Applicant's goods are identified as "clothing, namely, shirts, t-shirts, pants, shorts, headwear, hats, socks, sleepwear and dresses," while the services in the cited registration are the "custom manufacture of clothing, personal accessories in the nature of jewelry, stoles, scarves, linens, and home décor items."

We agree with the examining attorney that these goods and services are commercially related. The prior registrant manufactures some of the same clothing items as

the phrase "cheveux du chien," or a reference under "cheveux"

applicant sells, and the third-party registrations submitted by the examining attorney covering, in each instance, both clothing and custom clothing manufacture serve to suggest that the goods and services are of a type that may emanate from the same source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1469 (TTAB 1988), *aff'd* (unpublished) No. 88-1444 (Fed. Cir. Nov. 14, 1988).

However, there are differences between these goods and services, and these differences must be considered along with the differences in the marks in determining whether there is a likelihood of confusion.

III. Conclusion

Considering "the cumulative effect of differences in the essential characteristics of the goods [and services] and differences in the marks," *Federated Foods* 192 USPQ at 29, we find that it has not been demonstrated that registration of applicant's mark would give rise to a likelihood of confusion in view of the cited registration.⁹

which translates into English as a reference to a hangover cure.
⁹ In making this determination we have given little weight to applicant's argument that its mark has coexisted with that of the cited registrant "for nearly four (4) years," and that it is "unaware of any facts which would give rise to an issue of existence of actual customer confusion." App. Br. at 6. Without evidence of the nature and extent of use by applicant and registrant, we cannot determine whether a meaningful opportunity

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Decision: The refusal to register under Trademark Act § 2(d) is reversed.

for actual confusion ever existed. *In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-1027 (TTAB 1984) (citations omitted).