

This Opinion is not a  
Precedent of the TTAB

Mailed: August 16, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re S Squared Ventures, LLC*  
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Serial No. 86813357  
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JungJin Lee, Heather M. Dent and Erin C. Bray of Trademark Lawyer Law Firm,  
PLLC, for S Squared Ventures, LLC.

Lee B. Hunt, Trademark Examining Attorney, Law Office 115,  
Daniel Brody, Managing Attorney.

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Before Kuhlke, Kuczma and Hightower,  
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:


S Squared Ventures, LLC (“Applicant”) seeks registration on the Principal  
Register of the mark UHAI (in standard characters) for

Hair care products, namely, shampoo, conditioner, oil, gel,  
foam, spray, styling custard, hair regrowth kits comprised  
primarily non-medicated exfoliating scrub, scalp serum  
and temple balm for promoting hair growth in  
International Class 3.<sup>1</sup>

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<sup>1</sup> Application Serial No. 86813357 was filed on November 9, 2015, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). “The English translation of ‘UHAI’ in the mark is Swahili for ‘LIFE.’”

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), citing Registration No.

4402733 for the mark  for "hair care product, namely, shampoo used to strengthen the hair" in International Class 3, owned by Magik Products Corporation<sup>2</sup>, as a bar to registration.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed and Applicant and the Examining Attorney submitted briefs. We affirm the refusal to register.

#### I. Likelihood of Confusion

Our determination of likelihood of confusion under § 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. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks, and the similarities and nature of the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098,

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<sup>2</sup> Registration No. 4402733 was issued on September 17, 2013. The colors black, beige and gold are claimed as features of the mark. "The mark consists of the words 'LIFE FOR' on black color and the word 'HAIR' on gold color. The bottom part of the 'F' has some beige leaves shapes coming out o[f] it." The word "HAIR" is disclaimed.

192 USPQ 24, 29 (CCPA 1976). In addition, the similarity of the trade channels has also been raised.

A. Similarity and Nature of the Goods and the Channels of Trade

Applicant seeks to register its mark for “hair care products, namely, shampoo, conditioner, oil, gel, foam, spray, styling custard, hair regrowth kits comprised primarily [of]<sup>3</sup> non-medicated exfoliating scrub, scalp serum and temple balm for promoting hair growth” in International Class 3. Registrant’s mark is registered for “hair care product, namely, shampoo used to strengthen the hair” in International Class 3.

Likelihood of confusion may be found based on any item that comes within the identification of goods in the involved application and registration. *See Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986 (CCPA 1981); *In re La Peregrina Ltd.*, 86 USPQ 1645 (TTAB 2008). Inasmuch as unrestricted and broad identifications are presumed to encompass all goods of the type described, Applicant’s “shampoo” goods encompass Registrant’s “shampoo used to strengthen the hair.” *See In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (citing *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981)); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). Thus, the goods are, in part, identical.

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<sup>3</sup> The identification of goods was amended in accordance with the description offered in the March 4, 2016 Office Action. However, it appears that the identification of goods provided in the Office Action and adopted by Applicant is missing a word(s) after the word “primarily.”

The Examining Attorney also submitted copies of product advertisements on the Internet to support the similarity and relatedness of the remainder of Applicant's goods to Registrant's goods:

- AGADIR® is used for shampoo for strengthening hair, conditioner, hair oil treatments, styling gel, finishing spray (June 30, 2016 Final Office Action at 9-20);<sup>4</sup>
- PANTENE® is used for hair regrowth kits, foam, custard, conditioners, shampoos, spray detangler for strengthening hair, and offers a full line of products to protect hair (June 30, 2016 Final Office Action at 22-59);
- AMERICAN CREW® is used for hair recovery thickening shampoo, styling gel, and grooming spray for hair (June 30, 2016 Final Office Action at 60-79);
- KARANIQUE® is used for a hair regrowth system that includes hair strengthening shampoo, conditioner, spray, and foam (January 28, 2017 Denial of Request for Reconsideration at 121-29);
- NIOXIN® is used for hair regrowth kits featuring shampoo, conditioner and scalp treatment (January 28, 2017 Denial of Request for Reconsideration at 130-36);
- GQ HAIR™ is used for a hair regrowth system that features shampoo, conditioner, foundation oil and vitamins marketed for rejuvenating hair (January 28, 2017 Denial of Request for Reconsideration at 137-43);
- CAVIAR™ is used for a hair regrowth stimulation kit that features shampoo for repairing hair (January 28, 2017 Denial of Request for Reconsideration at 144-50);
- CERAFILL™ is used for a hair thickening treatment featuring strengthening shampoo, conditioner and hair foams (January 28, 2017 Denial of Request for Reconsideration at 151-59).

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<sup>4</sup> Page cites provided for items in Applicant's application file are to the pdf version of the file wrapper provided by the Trademark Status & Document Retrieval (TSDR).

As shown by the foregoing, the same entity commonly offers the relevant goods of Applicant and Registrant under the same mark. Because Applicant's hair styling goods are of the type commonly marketed with Registrant's goods, the goods, at minimum, are related for likelihood of confusion purposes. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-03 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009).


Further, since neither Applicant's nor Registrant's identification of goods recite any limitation on the channels of trade or the classes of consumers to whom they are marketed, it is presumed that Applicant's shampoo and related products, and Registrant's shampoo for strengthening hair products, move in all normal channels of trade and are marketed to all prospective consumers for such goods. *See Coach Services Inc. v. Triumph Learning LL*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012); *In re Integrated Embedded*, 120 USPQ2d 1504, 1515 (TTAB 2016); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). As to the identical goods, shampoo, it is presumed that they travel in the same channels of trade to the same class of purchasers. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (Board entitled to rely on this legal presumption). As to Applicant's related goods, the record establishes that they are marketed to the same consumers in the same channels of trade as Registrant's goods.

Accordingly, the factors of the similarity of goods and the similarity of trade channels favor a finding of likelihood of confusion.

B. Similarity of the Marks

Marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F. 3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) (citing *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988)); *see also In re 1st USA Realty Prof’ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007). When the goods or services are identical or virtually identical, the degree of similarity between the marks necessary to support a determination that confusion is likely declines. *See Bridgestone Americas Tire Operations, LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012); *In re Viterra Inc.*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992).

1. Connotation and Commercial Impression

Applicant has applied to register the mark UHAI; Registrant’s mark is LIFE FOR HAIR and Design, *i.e.*,  . On their face, Applicant’s mark and the cited mark are not similar in sight or sound. Applicant’s mark UHAI is a Swahili term directly

translating into the English word “life.”<sup>5</sup> Indeed, Applicant amended its application to include the following translation statement: “The English translation of ‘UHAI’ in the mark is Swahili for ‘LIFE.’”<sup>6</sup> Applicant has not argued or demonstrated that UHAI is anything other than a direct translation for the word “life.”

Under the doctrine of foreign equivalents, a mark in a foreign language and a mark that is its English equivalent in meaning and connotation may be found to be confusingly similar. *See, e.g., In re Aquamar, Inc.*, 115 USPQ2d 1122, 1127-28 (TTAB 2015); *In re Thomas*, 79 USPQ2d 1021, 1025 (TTAB 2006); *In re Ithaca Indus., Inc.*, 230 USPQ 702, 704 (TTAB 1986). Therefore, marks comprised of foreign words are translated into English to determine similarity in meaning and connotation with English word marks. *Palm Bay*, 73 USPQ2d at 1696.

The doctrine is applicable when it is likely that an ordinary American purchaser would “stop and translate” the foreign term into its English equivalent. *Palm Bay*, 73 USPQ2d at 1696; *see also* Trademark Manual of Examining Procedure (TMPEP) § 1207.01(b)(vi)(A) (April 2017). The ordinary American purchaser refers to “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); *see also In re Thomas*, 79 USPQ2d at 1024 (citing J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:26 (4th ed. 2006), which states “[t]he test is whether, to

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<sup>5</sup> *See* March 4, 2016 Office Action at 16-17, 18 from <http://en.bab.la/dictionary/swahili-english/uhai> and <https://en.glosbe.com/sw/en/uhai>.

<sup>6</sup> June 7, 2016 Response to Office Action at 3.

those American buyers familiar with the foreign language, the word would denote its English equivalent”).

The Federal Circuit explained the following regarding the doctrine of foreign equivalents:

Under the doctrine of foreign equivalents, foreign words from common languages are translated into English to determine genericness, descriptiveness, as well as similarity of connotation in order to ascertain confusing similarity with English word marks. ... 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*, 73 USPQ2d 1696. Thus, the doctrine of foreign equivalents is not an absolute rule, but merely a guideline, which should be applied only when it is likely that the ordinary American purchaser would stop and translate the foreign word into its English equivalent. *In re Weiss Watch Co.*, 123 USPQ2d 1200, 1204 (TTAB 2017). The doctrine is generally applied when the English translation is a literal and exact translation of the foreign wording. *See In re Aquamar, Inc.*, 115 USPQ2d at 1127-28 (holding MARAZUL for imitation crab meat and frozen and fresh processed fish and seafood likely to be confused with BLUE SEA for non-live and frozen fish, where “mar azul” is the Spanish equivalent of the English word “blue sea”); *In re Thomas*, 79 USPQ2d at 1021 (MARCHE NOIR for jewelry likely to be confused with BLACK MARKET MINERALS for retail jewelry and mineral store services despite marks being “decidedly different in sound and appearance,” in large part because “marche noir” means “black market” in French and the addition of MINERALS did not serve to distinguish the marks); *In re Ithaca Indus., Inc.*, 230 USPQ 702 (TTAB 1986)



(finding LUPO for men’s and boys’ underwear likely to be confused with cited registration for WOLF and design for sportswear, where LUPO is the Italian equivalent of the English word “wolf”).

Applicant does not dispute that the Swahili language is spoken by people in the world including people in the United States. Applicant asserts, however, that the Examining Attorney’s evidence does not rise to a level which suggests that Swahili is a “common modern” language in the United States such that customers are likely to be confused as to the source of Applicant’s goods when viewed in conjunction with the cited mark.<sup>7</sup>

Section 1207.01(b)(vi)(B) of the TMEP offers the following guidance for applying the doctrine of foreign equivalents to determine whether Swahili is a common modern language:

The doctrine applies to words or terms from common, modern languages, which encompasses all but dead, obscure, or unusual languages. See *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1377, 73 USPQ2d 1689, 1696 (Fed. Cir. 2005). Thus, an examining attorney should provide evidence to show that the foreign language is a common, modern language. The type of evidence will vary depending on the particular facts of the case but, if available, the examining attorney should provide evidence of the percentage or number of United States consumers who speak the language in question.

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<sup>7</sup> Applicant’s Brief on *Ex Parte* Appeal pp. 10-11 (20 TTABVUE 14-15).

To show that the Swahili language<sup>8</sup> is far from “dead, obscure or unusual,”<sup>9</sup> the Examining Attorney submits evidence identifying Swahili, also called Kiswahili, as a “lingua franca,”<sup>10</sup> which is defined by Oxford Dictionary as “[a] language that is adopted as a common language between speakers whose native languages are different,”<sup>11</sup> and identifying Swahili as the primary or secondary language of approximately 80-100 million individuals around the world.<sup>12</sup>

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<sup>8</sup> The “Swahili language is also called Kiswahili, [a] Bantu language spoken either as a mother tongue or as a fluent second language on the east coast of Africa. ... Swahili is widely used as a lingua franca in: (1) Tanzania, where it is the language of administration and primary education; (2) Kenya, where it is, after English, the main language for these purposes; (3) Congo (Kinshasa), where a form of Swahili is one of the four languages of administration, the main language for this purpose being French; and (4) Uganda, where the main language is English.” January 28, 2017 Denial of Request for Reconsideration, Encyclopaedia Britannica, Swahili language, African Language, <https://www.britannica.com/topic/Swahili-language> at 81 (9 TTABVUE 8).

<sup>9</sup> Examining Attorney’s Appeal Brief (22 TTABVUE 7).

<sup>10</sup> January 28, 2017 Denial of Request for Reconsideration, Encyclopaedia Britannica <https://www.britannica.com/topic/Swahili-language> at 81 and <https://www.britannica.com/topic/lingua-franca> at 86 (9 TTABVUE 8, 10 TTABVUE 3). A “lingua franca” is “[a] language that is adopted as a common language between speakers whose native languages are different.” [https://en.oxforddictionaries.com/definition/lingua\\_franca](https://en.oxforddictionaries.com/definition/lingua_franca) at 91 (10 TTABVUE 8).

<sup>11</sup> January 28, 2017 Denial of Request for Reconsideration citing Oxford Dictionary at [https://en.oxforddictionaries.com/definition/lingua\\_franca](https://en.oxforddictionaries.com/definition/lingua_franca) at 91 (10 TTABVUE 8).

<sup>12</sup> January 28, 2017 Denial of Request for Reconsideration, Peter N. Karanja, *Kiswahili Dialects Endangered: The Case of Kiamu and Kimvita*, Int’l. J. Human. & Soc. Sci., vol. 2 No. 17, September 2012, at 114-115 (12 TTABVUE 2-3); St. Lawrence University’s Modern Languages Department website places the number of Swahili speakers worldwide at approximately 150 million, at 14 (4 TTABVUE 14). “**Language Use** It is also common for people of numerous ethnic groups to speak Swahili as L1 [*i.e.*, national, *de facto* national language], especially in urban and very mixed areas. ...” <https://www.ethnologue.com/language/swh> at 52-53 (7 TTABVUE 9-10).

Swahili is “a Bantu language that is a trade and governmental language over much of East Africa and in the Congo region.”<sup>13</sup> Swahili is spoken in the African countries of Kenya, Tanzania, Zanzibar, Uganda, Democratic Republic of Congo, Zambia, Mozambique, Malawi, Rwanda and Burundi, Somalia, and the Comoro Islands. Due to immigration and increased travel of people to different parts of the world, Swahili speaking people are found in many other parts of the world, including the United States.<sup>14</sup>

Major universities across the United States offer classes and programs covering the Swahili language, including: Baylor University (Texas), Harvard University (Massachusetts), The Ohio State University, Portland State University (Oregon), St. Lawrence University (New York), Stanford University (California), the University of Illinois, the University of Mississippi, the University of Pennsylvania (“Swahili’s flexibility has contributed to its rise as not only the national official language of several East African countries, but also to its international reputation.”), and the University of Virginia.<sup>15</sup> Additionally, several universities also have student Swahili

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<sup>13</sup> January 28, 2017 Denial of Request for Reconsideration, <https://www.merriam-webster.com/dictionary/Swahili> at 57-58 (7 TTABVUE 13-15).

<sup>14</sup> January 28, 2017 Denial of Request for Reconsideration, Where Swahili is Spoken <https://swahililanguage.stanford.edu/where%20swahili%20is%20spoken.html> at 95-96 (10 TTABVUE 12-13); *see also* St. Lawrence University Modern Languages website at <http://www.stlawu.edu/modern-languages/Swahili> at 14 (4 TTABVUE 14).

<sup>15</sup> January 28, 2017 Denial of Request for Reconsideration, <http://faculty.virginia.edu/Swahili/language/> at 7-9 (4 TTABVUE 7-9), <https://swahililanguage.stanford.edu/faculty.html> at 10-11 (4 TTABVUE 10-11), <http://swahili.linguistics.illinois.edu/> at 12-13 (4 TTABVUE 12-13), <http://www.stlawu.edu/modern-languages/swahili> at 14-17 (4 TTABVUE 14-17), <https://www.pdx.edu/wll/courses-swahili> at 18-19 (5 TTABVUE 2-3), <http://www.baylor.edu/swahili/index.php?id=14598> at 20 (5 TTABVUE 4), <https://aaas.osu.edu/students/languages/swahili/courses> at 21-22 (5 TTABVUE 5-6), <http://alp.fas.harvard.edu/swahili>

clubs including the University of Michigan (“We are an organization that comes together to celebrate our love for the language of Kiswahili and the culture surrounding it.”), the University of Mississippi, and the University of Pittsburgh.<sup>16</sup>

The Examining Attorney also submits the following evidence in support of the commonality of the Swahili language and the appreciable number of individuals who speak and know Swahili in the United States:

### Broadcasts:

#### **An American Radio Station That’s Saying ‘Jambo’ To Kenyans<sup>17</sup>**

There are about 100,000 people born in Kenya who are now living in America. Over the last 50 years, there’s been a growing number of Kenyans immigrating to America. In fact, the number is doubling. ... “Jambo” is Swahili for hello. The station, not even 2 years old, streams over the Internet in Kikuyu and Swahili, and can be heard from a mobile phone, iPad or laptop. ...

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at 24-25 (5 TTABVUE 8-9), <https://plc.sas.upenn.edu/swahili> at 26-29 (5 TTABVUE 10-13), <http://modernlanguages.olemiss.edu/swahili> at 66 (8 TTABVUE 8).

<sup>16</sup> January 28, 2017 Denial of Request for Reconsideration, <https://maizepages.umich.edu/organization/swahiliclub> at 23 (5 TTABVUE 7), <http://modernlanguages.olemiss.edu/swahili> at 66-67 (8 TTABVUE 8-9), <http://www.ucis.pitt.edu/africa/content/swahili-student-association> at 68-71 (8 TTABVUE 10-13).

<sup>17</sup> January 28, 2017 Denial of Request for Reconsideration, <http://www.npr.org/2014/07/19/332562902/an-american-radio-station-thats-saying-jambo-to-kenyans> at 30-34 (5 TTABVUE 14 - 6 TTABVUE 2-5).

**Voice of America Swahili**<sup>18</sup>

Program schedule featuring news, music, sports, learning English ...

**VOA Swahili Service Celebrates 50<sup>th</sup> Anniversary**<sup>19</sup>

... We are the first African language service ... we have developed over the years an audience that is very large, that is very loyal, that trusts Voice of America, ... foresee prospects for growth because a sizeable audience speaks the language. Swahili is the single largest language group in Africa and that is an impressive target audience. ...

Religious:

**Out of Africa and into the heart of Mormondom – Swahili LDS branch offers wounded souls new hope while battling old demons**<sup>20</sup>

...Such is the social experiment underway among the band of believers in the Parleys Creek LDS congregation, known as the Swahili branch.

It's as if a United Nations refugee camp in Africa ... had been plopped into the heart of Salt Lake City. ...

... –but for the Swahili branch, which includes Mormon converts from Kenya, Tanzania, Burundi, Democratic Republic of Congo, Rwanda, Uganda and a smattering of other countries, the challenge is magnified tenfold. ...

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<sup>18</sup> January 28, 2017 Denial of Request for Reconsideration, <http://tunein.com/radio/Voice-of-America-Swahili-s17850/> at 35-40 (6 TTABVUE 6-11) and <http://www.voaswahili.com> at 41-44 (6 TTABVUE 41-44). Voice of America (VOA) is the largest U.S. international broadcaster, providing news and information in more than 40 languages to an estimated weekly audience of 236.6 million people. ... VOA is part of the Broadcasting Board of Governors, the government agency that oversees all non-military, U.S. international broadcasting. It is funded by the U.S. Congress. <http://www.insidevoa.com/p/5831.html> at 97 (11 TTABVUE 2).

<sup>19</sup> January 28, 2017 Denial of Request for Reconsideration, <http://www.insidevoa.com/a/voa-swahili-service-celebrates-50th-anniversary/666384.html> at 101-103 (11 TTABVUE 6-8).

<sup>20</sup> January 28, 2017 Denial of Request for Reconsideration, The Salt Lake Tribune 45-47 (7 TTABVUE 2-4).

... sermons are in English or Swahili, then translated by a person standing next to the speaker ...

Even illiterate members can belt out the Swahili Christian hymns ...

**New Hope Lutheran Church, 60 Oliver Avenue, Valley Stream, New York<sup>21</sup>**

New Hope Lutheran Church-Swahili Service is a congregation of Swahili speakers and other people otherwise connected to the language or people that speaks it. ...

**Jehovah's Witness convention draws local congregations<sup>22</sup>**

About 18 Jehovah's Witness conventions are held in the [Dallas/Forth Worth] area each year, but not all are in English, ... This weekend, the Swahili Notional Convention is also being held at the Irving Convention Center, and a Korean convention was held last week. ...

**Silver Spring Assembly Swahili Ministry<sup>23</sup>**

The Swahili Ministry meets from 1-2:45 p.m. Every Sunday afternoon. ... 12805 Georgia Avenue, Silver Spring, Maryland 20906.

**First Evangelical Free Church of Los Angeles<sup>24</sup>**

... The founders could not have imagined that one day hymns, prayers, and teaching would take place not only in

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<sup>21</sup> January 28, 2017 Denial of Request for Reconsideration, New Hope Lutheran Church, Valley Stream, NY <https://www.facebook.com/New-Hope-Lutheran-Church-Swahili-Service-444432498988905/info?fref=ps> at 54-55, 64-65 (7 TTABVUE 11-12, 8 TTABVUE 6-7).

<sup>22</sup> January 28, 2017 Denial of Request for Reconsideration, <http://www.midlothianmirror.com/news/20160826/jehovahs-witness-convention-draws-local-congregations> at 72-73 (8 TTABVUE 14-15).

<sup>23</sup> January 28, 2017 Denial of Request for Reconsideration, <http://silverspringag.org/swahili-ministry> at 104 (11 TTABVUE 9).

<sup>24</sup> January 28, 2017 Denial of Request for Reconsideration, <http://www.evfreela.org/#/about-us/history> at 105 (11 TTABVUE 10).

Swedish and English but also in Chinese, Spanish, French, Swahili, and Lingala. ...

### Educational/cultural:

#### **The Swahili Institute of Chicago (SWITCH)<sup>25</sup>**

##### Background

The Swahili Institute of Chicago (SWITCH) was established in December 1988 ... The purpose of SWITCH is to promote African language, culture and history.

Kiswahili, a major African language of the large “Bantu” language family, is used by over 100 million people. As a non-tribal language, it is destined to become the Pan-African language of Kwanzaa and has roots in the Black movement for social change and cultural awareness. It is offered in some sixty institutions of higher learning in the U.S.

SWITCH advocates the inclusion of Kiswahili as a world or “foreign” language option in our public school systems. ...

#### **Educator teaches toddlers Swahili to help strengthen cultural identity<sup>26</sup>**

Milwaukee...The scene plays out several times a day every Thursday as Xaba introduces toddlers and young children to Swahili, the most widely spoken language in Africa, the ancestral home for most of the children at Gray’s Child Development Center. ... For Xaba, teaching the children Swahili also is a way to strengthen their sense of cultural identity and broaden their horizons in an increasingly global community. ... one of the primary benefits of the language is to build character within an African cultural framework.

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<sup>25</sup> January 28, 2017 Denial of Request for Reconsideration, <http://swahiliinstitute.org/Background.html>, 50-51 (7 TTABVUE 7-8).

<sup>26</sup> January 28, 2017 Denial of Request for Reconsideration, *LexisNexis*® December 09, 2001 Milwaukee Journal Sentinel at 107-109 (11 TTABVUE 12-14).

**Mt. Zion students learning words<sup>27</sup>**

... And through the efforts of retired public schoolteacher and administrator S. Johari Andika, many local schoolchildren are better versed in Swahili, the dominant indigenous language of East Africa. ... Swahili is one of the 12 great languages. It crosses all cultures. ... Andika, 59, has taught Swahili at extracurricular, seminar-like classes at many Charleston County public schools. ...

Despite the foregoing evidence introduced by the Examining Attorney, Applicant contends that “the doctrine should 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.’ *La Peregrina*, 86 USPQ2d at 1648.”<sup>28</sup> As shown in Table 1 of the American Community Survey Reports submitted by Applicant, 88,685 persons in the United States speak Swahili at home.<sup>29</sup>

The Board has previously observed, albeit in a non-precedential opinion, and we agree, that sources documenting the primary language spoken at home should not be confused with the percentages of Americans who know a particular language. *In re Savisa (Pty) Ltd.*, Serial No. 78154196, 2005 WL 548058 at \*3 (TTAB Feb. 24, 2005) (Board found the language Afrikaans to be a common modern language for purposes

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<sup>27</sup> January 28, 2017 Denial of Request for Reconsideration, Lexis Nexis October 7, 2004 The Post and Courier, Charleston, SC at 111-113 (11 TTABVUE 16-18).

<sup>28</sup> Applicant Brief on *Ex Parte* Appeal p. 7 (20 TTABVUE 11).

<sup>29</sup> See December 29, 2016 Request for Reconsideration at 13, 17-41 (18 TTABVUE 13, 17-41) copy of Language Use in the United States: 2011, American Community Survey Reports issued August 2013 including Table 1 (at 40) Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 Years and Over for the United States: 2009-2013 Release Date: October 2015; Table 1 is also found on the website of the United States Census Bureau at: <https://www.census.gov/data/tables/2013/demo/2009-2013-lang-tables.html>. The Board may take judicial notice of standard reference works, including the U.S. census. *In re Highlights for Children, Inc.*, 118 USPQ2d 1268, 1271 n.7 (TTAB 2016); *In re Aquamar, Inc.*, 115 USPQ2d at 1127 & n.6.



of the doctrine of foreign equivalents based on a showing of its broad usage around the world.).<sup>30</sup> “[P]eople may speak English at home, but may still have studied another language at school. Or people who have emigrated to the United States from another country, or have lived abroad, or whose parents or relatives are from another country, may be familiar with, or even fluent in, a foreign language, but may still speak English as the primary language in their homes.” *Id.* at \*3. None of those speakers would be represented in Applicant’s cited statistic of the number of Americans who speak Swahili in their homes, yet each would be among the appreciable group who would translate Applicant’s mark to “LIFE.”


The Swahili language is not dead, obscure, or unusual. The evidence shows that Swahili is a common modern language used in several East African countries as well as in the United States. The Examining Attorney has presented evidence of the use of the Swahili language in the United States at universities offering various educational programs and sponsoring Swahili clubs, by religious and cultural organizations offering services in Swahili, and by broadcasting media.<sup>31</sup> Such evidence establishes that the Swahili language constitutes a common modern

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<sup>30</sup> *In re Fiat Grp. Mktg. & Corporate Commc’ns S.p.A.*, 109 USPQ2d 1593, 1596 n.6 (TTAB 2014); *In re the Procter & Gamble Co.*, 105 USPQ2d 1119, 1120-21 (TTAB 2012) (citation to non-precedential opinions permitted but not encouraged; non-precedential decisions not binding on the Board).


<sup>31</sup> Despite the fact that the Examining Attorney did not present data from the U.S. census, the Examining Attorney may provide other evidence that the Swahili language is a common, modern language by establishing, for example, that the Swahili language is spoken by a sizeable world population. Such evidence may be obtained from the USPTO’s Translations Branch, as well as the Internet, LexisNexis®, and any other relevant electronic or print resources. TMEP § 1207.01(b)(vi)(B).

language for purposes of applying the doctrine. *See* TMEP § 1207.01(b)(vi)(B) (“The doctrine applies to words or terms from common, modern languages, which encompasses all but dead, obscure, or unusual languages.”)

Thus, the doctrine of foreign equivalents applies. The evidence shows that Applicant’s mark UHAI is a Swahili word which directly translates to the English word “life.” Therefore, it is similar to Registrant’s mark  favoring a finding of likelihood of confusion.

## 2. Stylization and Disclaimed Wording in Registrant’s Mark

The absence of the term “FOR HAIR” in Applicant’s mark does not create a separate and distinguishable commercial impression from Registrant’s mark . “HAIR” has little if any source identifying significance as reflected by Registrant’s disclaimer of “hair.” It is merely descriptive of Registrant’s and Applicant’s goods which are for use on hair. Disclaimed matter that is descriptive of a party’s goods is typically less significant or less dominant when comparing marks. *See Citigroup Inc. v. Capital City Bank Group Inc.*, 98 USPQ2d 1253, 1257 (Fed. Cir. 2011); *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (finding “delta” the dominant part of the mark “THE DELTA CAFÉ because CAFÉ was disclaimed”). Additionally, the wording “FOR HAIR” shown in smaller and less stylized letters, and the beige leaves, in Registrant’s mark , are set apart from the word “LIFE.” Thus, the wording “FOR HAIR” and the leaves are of little significance rendering the word “LIFE” the dominant part of the registered mark.

Applicant argues that the stylized nature and design elements of Registrant's mark  distinguishes Registrant's mark from Applicant's standard character word mark. The rights in standard character marks reside in the wording or other literal element(s) and not in any particular display or rendition; therefore, a mark in standard characters may be displayed in any lettering style. A mark presented in stylized characters, with (or without) a design element, like Registrant's mark, generally will not avoid a likelihood of confusion with a standard character mark, like Applicant's mark, because the marks could be presented in the same manner, *i.e.*, in the same font, style, size and color as Registrant's mark. *See In re Viterra Inc.*, 101 USPQ2d at 1909; *In re Mighty Leaf Tea*, 94 USPQ2d at 1260 (rejecting an argument that the specific style of a registered mark could serve to distinguish the applicant's mark in standard character form); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) ("the argument concerning a difference in type style is not viable where one party asserts rights in no particular display"). We further find that the leaf design attached to the letter F in Registrant's mark is minimal and does not serve to distinguish the marks.<sup>32</sup> *CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983) ("in a composite mark comprising a design and words, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed"); *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987).

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<sup>32</sup> The Court in *In re Viterra*, 101 USPQ2d at 1911, noted that it was "not suggesting that a standard character mark encompass[] all possible design elements of the mark" and "[left] for future cases to determine the appropriate method of comparing design marks with standard character marks." We do not find it necessary to reach that question here, as the design element is minor and far outweighed by the dominant word LIFE.

Accordingly, because Applicant's mark UHAI is a Swahili word that directly translates into the dominant "LIFE" portion of Registrant's mark, the marks are similar.

C. Conclusion

Inasmuch as Applicant's and Registrant's goods, channels of trade and classes of consumers are identical and otherwise closely related and the marks are similar, confusion is likely between Applicant's mark UHAI and Registrant's LIFE FOR HAIR (and design) mark.

**Decision:** The refusal to register Applicant's mark UHAI is affirmed.