

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

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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 KW Intellectual Properties, Inc.

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Serial No. 85402206
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H. David Starr and Howard W. Kline of Nath, Goldberg & Meyer for KW Intellectual Properties, Inc.

Kristina Morris, Trademark Examining Attorney, Law Office 116 (Michael W. Baird, Managing Attorney).

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Before Bucher, Shaw and Kuczma, Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

KW Intellectual Properties, Inc. (“applicant”), appeals from the final refusal to register the following mark in standard character format:

THE SPIRIT OF LINDY

for goods identified as: Caps; Hats; Shirts; T-shirts in Class 25.¹

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¹ Application Serial No. 85402206 filed on August 19, 2011, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

The examining attorney issued a final refusal to register the mark pursuant to § 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), citing the following Registration, owned by Aria Collection, Inc. as reflected in the Office records, as a bar to registration:

Registration No. 3916358²



For: Blouses; Coats; Dresses; Jackets; Shirts; Sweaters; T-shirts; Tank tops; Tank-tops [sic]; Vests in Class 25.

After the refusals were made final, applicant appealed and filed a request for reconsideration which was denied. Applicant and the examining attorney have filed briefs. For the reasons set forth below, the refusal to register is reversed.

Likelihood of Confusion

Our determination under § 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of 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., Inc.*, 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 between the goods and services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). However, we also address each of the

² Registration No. 3916358 issued February 8, 2011, for the mark LINDI in stylized form.

factors as to which applicant or the examining attorney has presented evidence or arguments.

A. Similarity of Goods, Channels of Trade and Classes of Consumers

We first consider the *du Pont* factor involving the similarity or dissimilarity of applicant's goods (caps; hats; shirts; t-shirts), in relation to the goods in the cited registration (blouses; coats; dresses; jackets; shirts; sweaters; t-shirts; tank-tops; and vests) and their channels of trade and classes of consumers. It is well-settled that the issue of likelihood of confusion between applied-for and registered marks must be determined on the basis of the goods and services as they are identified in the involved application and registration. *Paula Payne Products Co. v. Johnson Publishing Co., Inc.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973).

To the extent the identifications of goods in the subject application and the cited registration both include shirts and t-shirts, the goods are identical in part. In determining the similarity of applicant's and registrant's goods and services, it is sufficient if likelihood of confusion for each Class of goods is established for any item encompassed by the identification of goods for that Class. *See In re Wacker Neuson SE*, 97 USPQ2d 1408, 1409 (TTAB 2010) citing *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

The relatedness of applicant's and registrant's nonoverlapping goods is demonstrated by the third-party retailer websites which offer shirts and t-shirts along with hats, pants, blouses, and sweaters.³ This evidence shows that

³ See attachments to December 14, 2011 Office Action consisting of printouts from www.gap.com and www.eddiebauer.com, and attachments to January 9, 2012 Final Office

applicant's goods are related in that they are the types of products offered for sale by the same entity. The fact that these entities concentrate their businesses on clothing and are not mass retailers selling all types of products, increases the probative value of this evidence. Additionally, the usa.tommy.com website shows images of shirts and hats bearing the same trademarks, providing additional evidence that such products are in fact sold under the same trademarks and are closely related. Many cases have recognized different types of clothing items to be related goods. *See Cambridge Rubber Co. v. Cluett, Peabody & Co.*, 286 F.2d 623, 128 USPQ 549, 550 (CCPA 1961) (women's boots related to men's and boy's underwear); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991) (women's pants, blouses, shorts and jackets related to women's shoes); *In re Pix of America, Inc.*, 225 USPQ 691, 691-92 (TTAB 1985) (women's shoes related to outer shirts); and *In re Cook United, Inc.*, 185 USPQ 444, 445 (TTAB 1975) (men's suits, coats and trousers related to ladies' pantyhose and hosiery). Thus, there is sufficient evidence that applicant's goods and registrant's products are closely related.

Because there are no limitations as to trade channels or classes of purchasers in the description of goods in either of the applications or the cited registration, we must presume that the respective goods travel through all usual trade channels for such goods and to all classes of prospective purchasers for those goods. *See In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992) and *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

Action consisting of printouts from www.ralphlauren.com, www.usa.tommy.com and www.jcrew.com.

The website evidence submitted by the examining attorney shows that applicant's goods and the goods in the cited registration are related, move in the same channels of trade, and are sold under conditions that would create a potential for confusion such as being offered for sale on the same websites. To the extent applicant's and registrant's respective clothing items are not restricted to particular trade channels and are therefore offered to the general consuming public, the classes of purchasers overlap and this overlap also weighs in favor of a finding of likelihood of confusion under *du Pont. In re Wilson*, 57 USPQ2d 1863, 1866 (TTAB 2001).

Based on the legally identical or highly related nature of the goods set forth in the application and cited registration, and the similar trade channels and customers, the *du Pont* factors of the similarity of the goods, trade channels and customers favor a finding of likelihood of confusion.

B. Sophistication of Purchasers

Applicant argues that the purchasers of its services are sophisticated and will exercise a relatively high degree of care reducing any likelihood that the public would be confused.⁴ Specifically, applicant contends that consumers exercise a higher degree of care when purchasing clothing items priced over \$15. Relying on a dated Tenth Circuit case, *Jordache Enterprises Inc. v. Hogg Wyld, Ltd.*, 828 F.2d 1482, 4 USPQ2d 1216, 1220 (10th Cir. 1987), for the proposition that individuals purchasing moderately priced clothing (in excess of \$15) exercise a relatively high

⁴ Applicant's Appeal Brief pp. 13-14.

degree of care, applicant points to clothing prices listed on the third-party retailer websites and on registrant's website.⁵ The prices reflected on the third-party sites are not relevant because they do not relate to the cost of applicant's goods or the cost of the goods in the cited registration. Inasmuch as registrant's website is not in the record, and the examining attorney has objected to applicant's reliance on the information in the website, this information has not been considered.⁶ Applicant's reliance on a case that is more than 25 years old for what it says about costs of goods, together with the lack of evidence regarding the cost of applicant's goods or registrant's goods, is not probative evidence of consumer sophistication. The clothing items in this case are common items that would be purchased by a wide variety of members of the public and there is no evidence that these consumers would exercise a greater degree of care when purchasing such items. Even assuming purchasers of applicant's and registrant's products are sophisticated, this does not necessarily mean that they are immune to source confusion because sophisticated purchasers can be confused by very similar marks. *See Shell Oil*, 26 USPQ2d at 1690; *In re Cynosure Inc.*, 90 USPQ2d 1644, 1647 (TTAB 2009), citing *Wm. K. Stamets Co. v. The Metal Products Co.*, 176 USPQ 92, 93 (TTAB 1972) (even technically trained purchasers who are extremely familiar with expensive machinery may be confused when similar marks are used with respect to the same

⁵ See Applicant's Appeal Brief pp. 13-14.

⁶ The record in the application should be complete prior to the filing of an appeal. Generally, any materials not previously made of record during prosecution of the application are untimely if submitted for the first time after the appeal is filed. *See* Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d).

goods); TMEP 1207.01(d)(vii). In view of the ordinary nature of the clothing items in the subject application and cited registration, and the lack of evidence as to the degree of care with which purchases are made, the sophistication of purchasers is a neutral factor in our likelihood of confusion determination.

C. Similarity of the Marks

We now turn to the *du Pont* factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, meaning and commercial impression. *du Pont*, 177 USPQ at 567.

In comparing the marks, we are mindful that the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks in their entirety are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Elec. Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd*, No. 92-1086 (Fed. Cir. June 5, 1992). The focus is on the recollection of the average purchaser who normally retains a general rather than specific impression of trademarks. *See Coach Services Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); and *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Where the goods of the applicant and cited registrant are similar and/or closely related as they are in this case, the degree of similarity between the marks

required to support a finding of likelihood of confusion is not as great as would be required with diverse goods. *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987); also see *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350, 1354 (Fed. Cir. 2004).

Looking at applicant's THE SPIRIT OF LINDY mark and registrant's LINDI mark, they are different in appearance. The marks are similar in sound only to the extent both marks contain the name "Lindi/Lindy."

Turning to the meaning of the marks, applicant has submitted evidence establishing that "Lindy" and "Lucky Lindy" are recognized nicknames for the well-known American aviator, Charles Lindbergh, who in 1927, was the first person to complete a solo transatlantic flight.⁷ The evidence also shows that the plane in which Mr. Lindbergh made his historic transatlantic flight was named "The Spirit of St. Louis." The significance and popularity of the plane is reflected in the fact that the actual plane is displayed at the Smithsonian Institution's National Air and Space Museum.⁸ Mr. Lindbergh's association with "The Spirit of St. Louis" is also well established. His Pulitzer Prize-winning autobiography was entitled "The Spirit

⁷ See definition of "Lindy" from www.merriam-webster.com/dictionary/lindy attached to December 16, 2011 Response to Office Action; article entitled "Lindy in the Sky with Amelia, Orville and Wilbur" published at: [Theater Review – 'Take Flight' – Musical About Early Aviators at McCarter Theater – NYTimes.com](http://www.nytimes.com) attached to February 29, 2012 Request for Reconsideration; "Charles Lindbergh, Man of the Year, Jan. 2. 1928, cover of *TIME Magazine*; Charles Lindbergh Biography published at <http://www.biography.com/print/profile/charles-lindbergh-938> . . . attached to February 29, 2012 Request for Reconsideration; "Lucky Lindy" article published at http://www.navworld.com/navcerebrations/lucky_lindy.htm attached to February 29, 2012 Request for Reconsideration.

⁸ See attachment to December 16, 2011 Response to Office Action entitled Milestones of Flight "Ryan NYP 'Spirit of St. Louis'" obtained from www.nasm.si.edu/exhibitions/gal100/st.louis.html.

of St. Louis.”⁹ Additionally, a motion picture movie about Mr. Lindbergh’s transatlantic flight was also entitled “The Spirit of St. Louis,” and featured James Stewart, a major movie star at the time.¹⁰

The examiner admits that LINDY is Charles Lindbergh’s nickname, but also points to evidence showing that LINDY may be a given name as well as a surname.¹¹ The context in which LINDY is used in applicant’s mark, i.e., with the phrase “The Spirit Of,” enhances the connotation of Charles Lindbergh. In view of the foregoing, we find the commercial impression of applicant’s THE SPIRIT OF LINDY mark connotes Charles Lindbergh and his plane, “The Spirit of St. Louis.”

As to the meaning of the cited LINDI mark, evidence submitted by applicant indicates that LINDI is a “coastal town located at the far end of the Lindi Bay, on the Indian Ocean in southeastern Tanzania.”¹² Relying on this evidence, applicant argues the commercial impression of the cited mark is that of a geographical location. The examining attorney counters that there is no clear meaning of LINDY or LINDI noting the evidence of the significance of LINDY as a given name and a

⁹ See Charles Lindbergh. Biography published at <http://www.biography.com/print/profile/charles-lindbergh-938> . . . attached to February 29, 2012 Request for Reconsideration; and “The Pulitzer Prizes 1954 Winners” obtained from <http://www.pulitzer.org/awards/1954> attached to February 29, 2012 Request for Reconsideration.

¹⁰ See “The Spirit of St. Louis” from <http://www.imdb.com/title/tt051003>, and Turner Classic Movies Film Article “The Spirit of St. Louis” retrieved from <http://www.tcm.com/this-month/article/62545%7C0/The-Spirit-of-St-Louis.html> attached to February 29, 2012 Request for Reconsideration.

¹¹ See printouts from www.thinkbabynames.com and www.houseofnames.com attached to January 9, 2012 Final Office Action.

¹² See attachment to December 16, 2011 Office Action obtained from en.wikipedia.org/wiki/Lindi.

surname, as well as the absence of evidence showing that U.S. consumers would be aware of the geographic significance of LINDI.

The evidence regarding the meaning of the word “Lindi” is not highly probative. If we accept applicant’s argument that LINDI has geographic significance, then the cited mark has a different commercial impression from applicant’s mark. More likely, the term “Lindi” has minimal meaning to U.S. consumers. In balancing the evidence relevant to the commercial impressions created by the marks, we take note of the fact that Charles “Lindy” Lindbergh was a famous American pilot. Even if the terms “Lindi” and “Lindy” have multiple meanings, the term “Lindy” in the context of applicant’s entire mark, refers to Charles Lindbergh. Therefore, the commercial impression of applicant’s THE SPIRIT OF LINDY mark is of Charles Lindbergh and his plane, “The Spirit of St. Louis.”

In a further attempt to distinguish its mark from the cited mark, applicant contends the common element of the marks, i.e., the LIND formative is frequently registered and must be considered a relatively weak term such that marks, like registrant’s mark, that contain this term would be limited to a narrow scope of protection that does not encompass applicant’s mark.¹³ To show the alleged weakness of marks containing LIND, applicant relies on sixty registrations and applications in Class 25 for marks that contain the LIND formative.¹⁴ According to applicant, marks containing the LIND formative are not likely to be perceived as

¹³ Applicant’s Appeal Brief p. 13; Applicant’s Reply Brief p. 5.

¹⁴ See attachments to February 29, 2012 Request for Reconsideration.

strong indicators of source as LIND is clearly diluted from pervasive use and frequent registration.¹⁵

Applicant's heavy reliance on these third-party registrations and applications is misplaced. While evidence of third-party *usage* of similar marks on similar goods and services is relevant to show the weakness of a mark, third-party *registrations* are not evidence that the marks depicted therein are in use or that the public is aware of them, and they are thus of no probative value as to the weakness of the cited marks. *See Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992). However, third-party registrations may be submitted to demonstrate the meaning of a word which comprises a mark, or a portion thereof, in the same way dictionary definitions are used to illustrate how a term is perceived in the trade or industry. *See The Institut National des Appellations D'Origine v. Vintners International Co. Inc.*, 958 F.2d 1574, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992) and *In re Box Solutions Corp.*, 79 USPQ2d 1953, 1955 (TTAB 2006).

Despite the fact that the third-party registrations are not probative of third-party use, they reveal that other than the LINDI mark in the cited registration, there is only one other registration, for the mark LINDE FRIDTJOF LINDE, which combine the letters LIND to form a word that could sound similar to the LINDI and LINDY in the cited mark and applicant's mark. While the remaining marks contain words incorporating LIND, the LIND formative is used in combination with other letters to form words such as LINDA, LINDSAY, and LINDEBERG, that do not

¹⁵ Applicant's Appeal Brief pp. 11-12.

sound or appear similar. In view of the foregoing, these third-party registrations do not impact the meaning of applicant's mark or the cited mark, nor do they support a finding that the cited mark is weak or otherwise entitled to a narrow scope of protection.

Similarity in any one of the elements (appearance, sound or meaning) alone may be sufficient to find a likelihood of confusion. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1987); and TMEP §1207.01(b) (October 2012). In this case, any similarities between the marks are more than overcome by their differences in commercial impression and appearance.

Conclusion

Despite the similarity in sound, and the similarity of the goods, channels of trade and customers, the combination of the nickname "Lindy" with the phrase "The Spirit Of" in applicant's mark reinforces the commercial impression of its mark with Charles Lindbergh, and is sufficient to distinguish applicant's mark from the cited mark so as to avoid a likelihood of confusion.

Decision: The refusal to register the mark in application Serial No. 85402206 under § 2(d) of the Trademark Act is reversed.