

This Opinion is Not a
Precedent of the TTAB

Mailed: June 16, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Strong Current, Ltd.

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Serial No. 86440263

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Christopher J. Day of the Law Office of Christopher J. Day,
for Strong Current, Ltd.

Shavell McPherson-Rayburn, Trademark Examining Attorney, Law Office 105,
Susan Hayash, Managing Attorney.

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Before Lykos, Hightower and Pologeorgis,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

Strong Current, Ltd. (“Applicant”) seeks registration on the Principal Register of the mark **INDI** in standard characters for “[c]lothing, namely, shirts, pants, beachwear, swimsuits, coverups, shorts, jackets, headwear” in International Class 25.¹

¹ Application Serial No. 86440263, filed October 30, 2014, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a). The application alleges April 2008 as the date of first use anywhere and in commerce.

Registration was refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's applied-for mark so resembles the registered mark **INDY** in typed format² for "t-shirts" and "hats" in International Class 25 that, when used on or in connection with Applicant's identified goods, it is likely to cause confusion or mistake or to deceive.³

When the refusal was made final, Applicant appealed and requested reconsideration. After the Trademark Examining Attorney denied the Request for Reconsideration, the appeal was resumed and is now briefed.

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*du Pont*"). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003).

At the outset, we observe that Registrant's goods are legally identical to certain of Applicant's as they are identified in the application and the cited registration,⁴ and as such, we must presume that these goods travel in the same channels of trade to the same classes of consumers. That being said, in some instances a single *du Pont* factor may be dispositive. *Kellogg Co. v. Pack'em Enters. Inc.*, 951 F.2d 330, 21

² A typed mark is the legal equivalent of a standard character mark. Trademark Manual of Examining Procedure ("TMEP") § 807.03(i) (April 2016).

³ Registration No. 1836834, registered May 17, 1994 on the Principal Register; Sections 8 and 15 affidavits accepted and acknowledged; renewed.

⁴ This is because Applicant's "shirts," as broadly worded without limitation, necessarily encompass Registrant's more narrowly defined "t-shirts." The same logic holds true for "hats" in the cited registration which clearly are a type of "headwear" as set forth in the application.

USPQ2d 1142, 1145 (Fed. Cir. 1991) (“We know of no reason why, in a particular case, a single *du Pont* factor may not be dispositive.”). When we compare the marks, we find that to be the case here.

The first *du Pont* likelihood of confusion factor involves an analysis of the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012).

The Examining Attorney, relying on the proposition that similarity in sound alone may be sufficient to support a finding that the marks are confusingly similar, contends that the marks **INDI** and **INDY** are essentially phonetic equivalents. *See, e.g., In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988). The Examining Attorney also points to the similarity in appearance. Applicant concedes that the marks are likely to be pronounced identically and look similar, and we do not disagree. Both the letters “I” and “Y,” as they appear at the end of each mark, could be pronounced in the same fashion as the long vowel sound “/ee/.” Because “there is no correct pronunciation of a mark” and because “it is impossible to predict how the public will pronounce a particular mark,” we must assume that the marks could be

pronounced in the same manner by consumers. *See Embarcadero Techs., Inc. v. RStudio, Inc.*, 105 USPQ2d 1825, 1835 (TTAB 2013) (quoting *In re Viterro Inc.*, 671 F.3d 1358, 1367, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012)); *In re Belgrade Shoe Co.*, 411 F.2d 1352, 1353, 162 USPQ 227, 227 (CCPA 1969). And of course because the marks are four-letter terms commencing with the same three letters, they are highly similar in appearance.

We find pivotal here, however, the distinctions between the marks in connotation and commercial impression. The primary meanings of Registrant's mark **INDY** are (1) "a form of auto racing in which specifically constructed cars are driven around a banked, regular, typically oval circuit, which allows for exceptionally high speeds," and (2) a nickname for the city of Indianapolis. Applicant's Response to Office Action dated March 20, 2015 (Google search result for "Indy definition").⁵ By contrast,

⁵ Here we think Applicant's Google search results are sufficiently probative because we are able to ascertain the full context of the searched term. We further take judicial notice of the following definitions of "Indy" from Dictionary.com based on the *Random House Dictionary* (2016 edition), and note that these definitions are consistent with Applicant's Google search results:

noun

1. Indianapolis, Ind.
2. the Indianapolis 500.

adjective

3. of or relating to the Indianapolis 500: an Indy race car.

Cf. In re Bayer AG, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007) (deeming Google search results that provided very little context of the use of ASPIRINA to be "of little value in assessing the consumer public perception of the ASPIRINA mark"); *In re Tea and Sympathy, Inc.*, 88 USPQ2d 1062, 1064 n.3 (TTAB 2008) (finding truncated Google search results entitled to little probative weight without additional evidence of how the searched term is used).

Applicant's mark **INDI**, with its fanciful spelling, carries no such significance.⁶ Thus, the marks project separate meanings and distinct commercial impressions. As a result, when confronted with both marks, prospective consumers are unlikely to assume that Applicant's and Registrant's respective goods originate from the same source.

In summary, we have carefully considered all of the evidence of record and arguments pertaining to the *du Pont* likelihood of confusion factors, including any evidence and arguments not specifically addressed in this opinion. We treat as neutral any *du Pont* factors for which there is no evidence or argument of record.⁷ In the present *ex parte* appeal, the record evidence shows that the dissimilarity of the marks in connotation and commercial impression is so great as to outweigh the other *du Pont* factors, namely the identical nature of the goods and trade channels. For

⁶ Applicant urges the Board to find that its mark **INDI** is a shortened version of the word "indie" which refers to independent art, music or design. See evidence submitted with Applicant's Office Action Response dated October 9, 2015. If Applicant's mark were spelled in an identical manner to the word "indie," or, alternatively, if the record showed that "indi" was a common abbreviation for "indie," we would not hesitate to make this factual finding. We cannot, however, given the record before us.

⁷ We note Applicant's argument that Applicant has been using its mark for nearly eight years in connection with its identified goods and is not aware of any instances of actual confusion. In support thereof, Applicant cites *Citigroup Inc. v. Capital City Bank Group Inc.*, 94 USPQ2d 1645 (TTAB 2010), *aff'd*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011), which reiterated the principle that the absence of likelihood of confusion may be probative of whether confusion is likely. The *Citigroup* case was an *inter partes* case; Applicant's argument, in the context of an *ex parte* proceeding, is entitled to little weight. See *In re Cook Medical Technologies LLC*, 105 USPQ2d 1377, 1383-84 (TTAB 2012) (internal citations omitted). We hasten to add that the record is devoid of probative evidence relating to the extent of use of Applicant's and Registrant's marks and, thus, whether there have been meaningful opportunities for instances of actual confusion to have occurred in the marketplace. See *id.* As such, we deem neutral the *du Pont* factor of the length of time during and conditions under which there has been contemporaneous use without evidence of actual confusion.

these reasons, we find confusion to be unlikely and reverse the Trademark Examining Attorney's Section 2(d) refusal.

Decision: The Section 2(d) refusal to register Applicant's mark is reversed.