

O-321-14

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION TO PROTECT, IN THE UK,
INTERNATIONAL REGISTRATION NO 1162360
BY INDUSTRIE IP PTY LIMITED IN RESPECT OF THE TRADE MARK**

INDIE & Co.

IN CLASS 25

**AND IN THE MATTER OF OPPOSITION
THERE TO UNDER NO 401129
BY INDIE PRODUCTION SARL**

BACKGROUND

1) On 27 March 2013, Industrie IP Pty Limited ("the applicant") applied under the Trade Marks Act 1994 to protect the following international registration ("IR") in the UK:

IR 1162360

INDIE & Co.

International registration date: 27 March 2013

Designation date: 27 March 2013

Priority date: 25 March 2013

Priority country: Australia

Class 25: *Children's clothing, footwear; headgear for wear.*

Class 35: *Retail services connected with clothing.*

2) The application was published in the Trade Marks Journal and on 28 October 2013, Indies Production SARL ("the opponent") filed notice of opposition to the Application based upon Section 5(2)(b), Section 5(3) and Section 5(4)(a) of the Trade Marks Act 1994 ("the Act"). For procedural efficiency, I will detail only its grounds based upon Section 5(2)(b).

3) The opponent contends that the applied for mark is similar to its earlier Community Trade Mark ("CTM") and in respect of goods and services that are similar or identical to goods covered by its CTM. The relevant details of the earlier CTM are:

CTM 9701657



Filing date: 01 February 2011

Date of entry in register: 20 May 2011

4) This is an earlier mark as defined by Section 6 of the Act. The opponent relies upon all of the goods listed, but for the purposes of these proceedings, its best case lies with the goods listed in its Class 25 specification that reads as follows:

Clothing, including town wear, ready-to-wear garments, sportswear (other than for diving), beach wear, swimwear, nightwear, leisurewear, casual wear for men, women and children; Outer clothing; Coats; Overcoats; Parkas; Anoraks; Car coats; Mantles; Wraps; Raincoats; Slickers, rainwear (clothing); Gabardines (clothing); Blousons; Windbreakers (clothing); Jackets; Waistcoats; Dresses; Suits; Tracksuits; Shirts; Blouses; Polo shirts; Smocks; Camisoles; Tank tops; Henleys; Sweatshirts; Pullovers; Sweaters; Cardigans; Knitted goods (clothing); Jersey clothing; Gloves (clothing); Mufflers; Shawls; Scarves; Ties; Skirts; Trousers; Knickers; Shorts; Belts (clothing); Braces; Pyjamas; Nightshirts; Negligees; Negligees; Peignoirs; Underclothing and body linen; Hosiery; Bodice; Petticoats; Pantyhose, stockings, socks, ankle length socks; Shoes; Rain footwear; Slippers; Headgear.

5) The applicant subsequently filed a counterstatement denying the opponent's claims. The protection process for the earlier mark was completed less than five years prior to the date of publication of the applied for mark. Consequently it is not open to the proof of use requirements set out in Section 6A of the Act. Nevertheless, the applicant ticked the box on the form TM8 requesting that the opponent does provide proof of use. The Registry informed the applicant that this was an error on 9 December 2013.

6) Both sides filed evidence in these proceedings. Both sides ask for an award of costs. Neither side requested to be heard but both filed written submissions in lieu of attendance at a hearing. After careful consideration of the papers on file, I give my decision.

Evidence

7) Both sides filed evidence, but it is not necessary that I record any of the detail other than to comment that the applicant's evidence does not provide any detail of the level of activity in the UK other than referring to the existence of one retail outlet in London.

DECISION

8) In *Specsavers International Healthcare Limited & Others v Asda Stores Limited* [2012] EWCA Civ 24 para 51 et seq, the Court of Appeal approved the following principles gleaned from the decisions of the European Court of Justice ("the CJEU") in *Sabel BV v Puma AG*, Case C-251/95 [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97 [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98 [2000]

E.T.M.R. 723, *Matratzen Concord GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case C-3/03, *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04 and *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* Case C-334/05P:

- “(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors;
- (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may, in certain circumstances, be dominated by one or more of its components;
- (f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;
- (g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;
- (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either *per se* or because of the use that has been made of it;
- (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks causes the public to wrongly believe that the respective goods [or services] come from the same or economically-linked undertakings, there is a likelihood of confusion."

Comparison of goods and services

9) In assessing the similarity of goods, it is necessary to apply the approach advocated by case law and all relevant factors relating to the respective goods and services should be taken into account in determining this issue. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* the CJEU stated at paragraph 23:

'In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, *inter alia*, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary.'

10) Other factors may also be taken into account such as, for example, the distribution channels of the goods concerned (see, for example, *British Sugar Plc v James Robertson & Sons Limited (TREAT)* [1996] RPC 281).

11) I also bear in mind the following guidance of the General Court ("the GC") in *G rard Meric v OHIM (Meric)*, T-133/05:

"29 In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application (Case T-388/00 *Institut f r Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 *Oberhauser v OHIM – Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 *Vedial v OHIM – France Distribution (HUBERT)* [2002] ECR II-5275, paragraphs 43 and 44; and Case T- 10/03 *Koubi v OHIM – Flabesa (CONFORFLEX)* [2004] ECR II-719, paragraphs 41 and 42)."

12) Finally, in terms of understanding what a "complementary" relationship consists of, I note the judgment of the GC in *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-325/06 where it was stated:

"It is true that goods are complementary if there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking (see, to that effect, Case T-169/03 Segio Rossi v OHIM - Sissi Rossi (SISSI ROSSI) [2005] ECR II-685, paragraph 60, upheld on appeal in Case C-214/05 P Rossi v OHIM [2006] ECR I-7057; Case T-364/05 Saint-Gobain Pam v OHIM - Propamsa (PAM PLUVIAL) [2007] ECR II-757, paragraph 94; and Case T-443/05 El Corte Ingles v OHIM - Bolanos Sabri (PiraNAN diseneno original Juan Bolanos) [2007] ECR I-0000, paragraph 48)."

13) For ease of reference, the respective goods and services are:

Opponent's goods	Applicant's goods and services
<p>Class 25: <i>Clothing, including town wear, ready-to-wear garments, sportswear (other than for diving), beach wear, swimwear, nightwear, leisurewear, casual wear for men, women and children; Outer clothing; Coats; Overcoats; Parkas; Anoraks; Car coats; Mantles; Wraps; Raincoats; Slickers, rainwear (clothing); Gabardines (clothing); Blousons; Windbreakers (clothing); Jackets; Waistcoats; Dresses; Suits; Tracksuits; Shirts; Blouses; Polo shirts; Smocks; Camisoles; Tank tops; Henleys; Sweatshirts; Pullovers; Sweaters; Cardigans; Knitted goods (clothing); Jersey clothing; Gloves (clothing); Mufflers; Shawls; Scarves; Ties; Skirts; Trousers; Knickers; Shorts; Belts (clothing); Braces; Pyjamas; Nightshirts; Negligees; Negligees; Peignoirs; Underclothing and body linen; Hosiery; Bodice; Petticoats; Pantyhose, stockings, socks, ankle length socks; Shoes; Rain footwear; Slippers; Headgear.</i></p>	<p>Class 25: <i>Children's clothing, footwear; headgear for wear.</i></p> <p>Class 35: <i>Retail services connected with clothing.</i></p>

Class 25

14) It is self evident that the opponent's general term *clothing* includes goods in the form of the applicant's *children's clothing*. Therefore, having regard for the principle set out in *Meric*, these two terms include identical goods. Further, the opponent's specification also includes various types of clothing identified as being *for children*. Such goods are clearly identical to the applicant's goods. The applicant attempts to make a case for adult clothing having no association with children's clothing. I do not agree with its conclusions, but it is not relevant

anyway because of the notional considerations I must undertake based upon the wording contained in the respective specifications rather than considering the respective marketing strategies of the parties. When undertaking such a notional analysis, I must have regard for the fact that the opponent's specification includes both clothing at large and various items of clothing specifically for children.

15) Similarly, in respect of the applicant's *headgear for wear*, this includes identical goods to those covered by the opponent's term *headgear*.

16) Once again, the same principle applies when considering the applicant's broad term *footwear*. This term includes socks, shoes, rain footwear and slippers, all goods listed in the opponent's specification. These terms, therefore, cover identical goods.

Class 35

17) The applicant submits that retailing is very different to the branding of individual items and suggests that there "is no connection whatsoever between the goods [of the opponent]" and retailing services relating to clothing. As the opponent points out, the "the GC" has clarified the position regarding the comparison of goods and the retailing of the same goods in *Oakley, Inc. v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, T-116/06. Having discussed the issue of similarity of clothing goods and the retailing of the same in paragraphs 45 to 56, the court concluded at paragraph 57 that:

"... it is indisputable that those services and goods display similarities, having regard to the fact that they are complementary and that those services are generally offered in the same places as those where the goods are offered for sale."

18) Having regard for the finding of the GC, I conclude that there is an average degree of similarity between the opponent's goods and the applicant's services. I base this conclusion on the fact that the respective goods and services are complementary and often offered for sale at the same places and by the same traders, but that they are different in terms of nature, purpose and method of use.

The average consumer

19) Matters must be judged through the eyes of the average consumer (*Sabel BV v. Puma AG*, paragraph 23), who is reasonably observant and circumspect (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V.*, paragraph 27). The degree of care and attention the average consumer uses when selecting goods and services can, however, vary depending on what is involved (see, for

example, the judgment of the GC in *Inter-Ikea Systems B.V. v. OHIM*, Case T-112/06).



20) The average consumer of the parties' goods will be ordinary members of the public who wish to purchase clothing, footwear and headgear. The purchase is normally made from high street or Internet retailers. In respect of the nature of the purchasing act for these goods, I am mindful of the comments of Mr Simon Thorley, sitting as the Appointed Person, in *React trade mark* [2000] R.P.C. 285:

“There is no evidence to support Ms Clark’s submission that, in the absence of any particular reputation, consumers select clothes by eye rather than by placing orders by word of mouth. Nevertheless, my own experience tells me it is true of most casual shopping. I have not overlooked the fact that catalogues and telephone orders play a significant role in this trade, but in my experience the initial selection of goods is still made by eye and subsequent order usually placed primarily by reference to a catalogue number. I am therefore prepared to accept that a majority of the public rely primarily on visual means to identify the trade origin of clothing, although I would not go so far as to say that aural means of identification are not relied upon.”

21) The GC has continued to identify the importance of visual comparison when considering the purchasing act in respect of clothing (see for example Joined Cases T-117/03 to T-119/03 and T-171/03 *New Look Ltd v OHIM (NLSPORT et al)* [2004] ECR II-3471 at [49]-[50] and Case T-414/05 *NHL Enterprises BV v OHIM (LA KINGS)* [2009] ECR II.). There is nothing before me in the current proceedings to lead me to conclude differently and, consequently, taking into account the above comments, I conclude that the purchasing act will generally be a visual one. However, I do not ignore the aural considerations that may be involved. The purchase of clothing and similar goods is, if not quite an everyday purchase, certainly a regular purchase for most consumers. Whilst these goods vary in cost, they are not normally very expensive. Taking account of this, the level of attention paid by the consumer is reasonable rather than high.

Comparison of marks

22) For ease of reference, the respective marks are:

Opponent's mark	Applicant's mark
	

23) The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The visual, aural and conceptual similarities of the marks must, therefore, be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components; in relation to this the CJEU in *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV* Case C-342/97 stated:

“27. In order to assess the degree of similarity between the marks concerned, the national court must determine the degree of visual, aural or conceptual similarity between them and, where appropriate, evaluate the importance to be attached to those different elements, taking account of the category of goods or services in question and the circumstances in which they are marketed.”

24) There cannot be an artificial dissection of the marks, although it is necessary to take into account any distinctive and dominant components. The assessment of the similarity of the marks must be made by reference to the perception of the relevant public.

25) The applicant’s mark readily divides into the components “INDIE” and “& CO.”, the first functioning as a personal name, the second element being a reference to a company status. In terms of distinctiveness, it is the first of these elements that serves to distinguish the goods and services as originating from a particular trader. The second element merely functions to indicate the status of that trader.

26) The opponent’s mark consists of the word INDIES, a device being reminiscent of three figures presented in a square and an additional square border framing the whole mark. I do not agree with the applicant when it submits that the device element is the dominant and distinctive element. The word INDIES is the dominant and distinctive element, being positioned prominently within the mark and above the device element. However, I do recognise that this device (of the three figures) is distinctive in its own right, if not being quite as dominant in the mark as the word element.

27) Having identified the dominant and distinctive elements of the respective marks, I will now consider the level of similarity. Visually, both marks share the word INDIE, albeit being pluralised in the opponent’s mark by the addition of the letter “S”. In all other aspects, the marks differ. The applicant’s mark contains the added element “& Co.” and is represented in a bold typeface with the letters having a slight “shadow”. The opponent’s mark, on the other hand, is represented in an informal style, being reminiscent of being hand written/drawn. Whilst taking these differences into consideration, the dominance in the respective marks of the INDIE/INDIES element results in the marks sharing a moderate level of visual similarity.

28) From an aural perspective, only the word elements need to be considered because the device elements present in the opponent's mark will not be referred to orally. Consequently, the comparison is between the four syllables of the applicant's mark, namely "IN-DEE-AND-CO" and the two syllables of the opponent's mark, namely "IN-DEES". The first two syllables are identical with the exception of the additional "s" sound present in the opponent's mark. The last two syllables of the applicant's mark are absent from the opponent's mark. Taking all of this into account, the presence, at the start of both marks, of the "IN-DEE"/"IN-DEES" sound creates a good deal of similarity.

29) Conceptually, the presence of the "& Co." element in the applicant's mark conveys a personal name significance upon the INDIE element. Insofar as the INDIES element of the opponent's mark will be perceived also as the plural of possessive of the same personal name, there is some conceptual similarity.

Distinctive character of the earlier trade mark

30) I must consider the distinctive character of the earlier mark because the more distinctive it is, either by inherent nature or by use the greater the likelihood of confusion (*Sabel BV v Puma AG* [1998] RPC 199). The distinctive character of the earlier trade mark must be assessed by reference to the goods for which it is registered and by reference to the way it is perceived by the relevant public (*Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91).

31) Whilst the opponent has provided evidence that includes evidence demonstrating use of its mark in the UK, I will not consider the effect upon its mark's distinctive character because its inherent distinctive character is reasonably strong with the mark being made up of a device and what appears to be a made up word. Any enhancement to this inherent level of distinctive character is unlikely to be such as to change the outcome of these proceedings.

Likelihood of confusion

32) I must adopt the global approach advocated by case law and take into account that marks are rarely recalled perfectly with the consumer relying instead on the imperfect picture of them he has in kept in his mind (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27). I must take into account all factors relevant to the circumstances of the case, in particular the interdependence between the similarity of the marks and that of the goods or services designated (*Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*).

33) The applicant has argued that its business is in respect of children's clothing whereas the opponent's business is in respect of clothing for adults. I note this, but I am not persuaded. Guidance on this point has been provided by the GC in *Oakley*, where it stated:

“76 Consideration of the objective circumstances in which the goods and services covered by the marks in dispute are marketed is fully justified. The examination of the likelihood of confusion which the OHIM authorities are called on to carry out is prospective. Since the particular circumstances in which the goods covered by the marks are marketed may vary in time, and depending on the wishes of the proprietors of the trade marks, the prospective analysis of the likelihood of confusion between two marks, which pursues an aim in the general interest, that is, that the relevant public may not be exposed to the risk of being misled as to the commercial origin of the goods in question, cannot be dependent on the commercial intentions, whether carried out or not – and which are naturally subjective – of the trade mark proprietors (QUANTUM, paragraph 75 above, paragraph 104, and T.I.M.E. ART/Devinlec v OHIM, paragraph 75 above, paragraph 59).”

34) Therefore, for assessing the likelihood of confusion I must disregard the relative market strategies of the respective parties. I must, instead, focus on the notional analysis based upon the global appreciation of all the relevant factors that includes the list of goods of the respective marks.

35) The applicant identifies a number of other “Indie” marks on the register and submits that the existence of these in Class 25 suggests that “Indie” marks for clothing co-exist with the opponent’s mark without confusion. The opponent states that it is well understood that the existence of other similar or identical marks on the register should play no part in the assessment of confusion. Whilst I would not go as far as to say it “plays no part”, it is true that it is rarely helpful, as is the case here. The reasons for this have been explained by the GC in *Zero Industry Srl v OHIM* – T-400/06:

“73. As regards the results of the research submitted by the applicant, according to which 93 Community trade marks are made up of or include the word ‘zero’, it should be pointed out that the Opposition Division found, in that regard, that ‘... there are no indications as to how many of such trade marks are effectively used in the market’. The applicant did not dispute that finding before the Board of Appeal but none the less reverted to the issue of that evidence in its application lodged at the Court. It must be found that the mere fact that a number of trade marks relating to the goods at issue contain the word ‘zero’ is not enough to establish that the distinctive character of that element has been weakened because of its frequent use in the field concerned (see, by analogy, Case T-135/04 GfK v OHIM – BUS(Online Bus) [2005] ECR II-4865, paragraph 68, and Case T-29/04 Castellblanch v OHIM – Champagne Roederer (CRISTAL CASTELLBLANCH) [2005] ECR II-5309, paragraph 71).”

36) The opponent refers to the case of *Wassen International v OHIM – Stroschein Gesundheitskost (SELENIUM-ACE)*, Case T-312/03 where the GC

observed, at paragraph 37, that the average consumer will more easily refer to goods by citing the name rather than describing the figurative elements. Whilst I accept this as being so, I also keep in mind the guidance of the GC when commenting on the importance of visual considerations of marks in the clothing field, in *New Look Ltd v OHIM* - T-117/03 to T-119/03 and T-171/03 (GC):

“Generally in clothes shops customers can themselves either choose the clothes they wish to buy or be assisted by the sales staff. Whilst oral communication in respect of the product and the trade mark is not excluded, the choice of the item of clothing is generally made visually. Therefore, the visual perception of the marks in question will generally take place prior to purchase. Accordingly the visual aspect plays a greater role in the global assessment of the likelihood of confusion.”

37) The opponent also submits that it is common practice to add “& Co.” to a business name to describe a type of business and cites well known businesses such as *Tiffany & Co*, *Selfridge & Co* and *R Twining & Co* and that it is also common for such names to be shortened to *Tiffanys*, *Selfridges* and *Twining's*. The opponent provides no evidence of this, but it is a submission not without merit and this is a further factor that I keep in mind. The significance of this is that aurally at least, there is likely to be circumstances when it will be perceived that the respective marks both refer to the same undertaking. However, factored against this is the difference in presentation style of the respective marks and the fact that visual consideration is important in the selection of clothes.

38) I must balance these points together with the fact that I have found that the respective goods are identical and the respective goods and services are similar to an average degree, that the respective marks share a moderate level of visual similarity, a good deal of aural similarity and that they are also conceptually similar. Further, whilst the purchasing act is primarily visual, I must not ignore aural considerations. Finally, I have found that the earlier mark is endowed with a reasonably strong level of inherent distinctive character.

39) Factoring all these points together, I find that whilst there is no likelihood of direct confusion, where one mark is confused with the other, there is a likelihood of indirect confusion where the average consumer, upon being exposed to both marks, will assume that the respective goods and services originate from the same or linked undertaking. The visual differences will not go unnoticed, however, the high similarity between the dominant and distinctive element of the respective marks will lead the average consumer to this perception. The naming practice, referred to in paragraph 37 above, also points towards such a finding.

40) Of course, whilst I have not considered the level, if any, of enhanced distinctive character of the opponent's earlier mark, any enhancement would, in any event, further increase the likelihood of confusion.

41) Finally, the applicant's evidence includes evidence of its own use of its mark. This use includes use in respect of a retail store, opened in London in 2013 and sales via a "global" website. It is not possible to ascertain the scale of use in the UK from the evidence provided, and with the relevant date of these proceedings being in March 2013, it is unclear if the retail store in London was actually trading as of this date. No explicit claim has been made of concurrent use, but the written submissions in respect of the Section 5(3) case claims that the applicant has established "a significant reputation". For the avoidance of doubt, if the evidence was intended to support a claim of acquired distinctiveness for the purposes of a defence to the Section 5(2) grounds, it fails to do so. To make good such the claim, I must be satisfied that the parties have traded in circumstances that suggest consumers have been exposed to both marks and have been able to differentiate between them without confusion as to trade origin (see to that effect the Court of Appeal in *The European Ltd v The Economist Newspaper Ltd* [1998] FSR 283 at page 291, Laddie J in *Compass Publishing BV v Compass Logistics Ltd* [2004] RPC 41 at 809 and the Court of Appeal in *Phones 4U Ltd v Phone 4u. co. uk Internet Ltd* [2007] RPC 5 at paragraphs 42 to 45 and Alan Steinfield QC, sitting as a deputy judge of the High Court, in *Fiorelli Trade Mark* [2007] RPC 18). This cannot be the case where the applicant has operated only one retail store in the UK for no more than three months prior to the relevant date (and possibly not at all before that date), where there are no turnover figures relating to the UK and where, by the applicant's own admission it operates in the area of children's clothing whereas the opponent's business is in the field of adult clothing. I conclude that concurrent use has not been demonstrated.

42) The opposition based upon Section 5(2)(b) therefore succeeds in its entirety.

Section 5(3) and Section 5(4)(a)

43) As the opposition is successful in its entirety based upon this ground, there is no need to consider the remaining grounds as they do not materially improve the opponent's position.

COSTS

44) The opposition having been successful, the opponent is entitled to a contribution towards its costs. I take account of the fact that no hearing has taken place but that both sides filed written submissions. Both sides also filed evidence, none of which assisted in determining the proceedings, consequently I decline to make an award in respect of the opponent's evidence but I do take account that it undertook work in considering the applicant's evidence. I award costs on the following basis:

Notice of Opposition and statement (inc. official fee) & considering other side's statement of case in reply:	£500
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Preparing and filing evidence & considering other side's evidence:	£200
Filing written submissions:	£400
TOTAL:	£1100

45) I order Industrie IP Pty Limited to pay Indies Production SARL the sum of £1100. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 22nd day of July 2014

**Mark Bryant
For the Registrar,
the Comptroller-General**