Who Are These "Colts?: The Likelihood of Confusion, Consumer Survey Evidence and Trademark Abandonment in Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club, LTD.

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WHO ARE THESE “COLTS?”: THE LIKELIHOOD OF CONFUSION, CONSUMER SURVEY EVIDENCE AND TRADEMARK ABANDONMENT IN INDIANAPOLIS COLTS, INC. v. METROPOLITAN BALTIMORE FOOTBALL CLUB, LTD.

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I. INTRODUCTION

Modern professional sports merchandising is a multi-million dollar business. Protecting a team’s trademark, therefore, is not only a subset of intellectual property law, it is also an important component of both sports and business law.

Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club, Ltd.,1 recently decided by the United States Court of Appeals for the Seventh Circuit (Seventh Circuit), illustrates how professional football is experiencing a sharp increase in competition for valuable trademarks. Presently, at least seven professional football teams in the National Football League (NFL) are considering relocating to another city.2 In the wake of this exodus, the cities abandoned by their former teams will solicit replacement teams to continue their long-standing tradition of

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1. 34 F.3d 410 (7th Cir. 1994).
2. Peter King, Down . . . and Out: Citing His Crushing Debts, Art Modell is Taking His Browns to Baltimore, SPORTS ILLUSTRATED, Nov. 13, 1995, at 28, 30. These teams include: the Houston Oilers, Tampa Bay Buccaneers, Arizona Cardinals, Cincinnati Bengals, Chicago Bears, Detroit Lions and the Seattle Seahawks. Id. at 32-33. It has also been suggested that the New England Patriots may pursue relocation options. Ron Reid, On The NFL: Your 1995 Owners’ Scorecard, PHILA. INQUIRER, Nov. 15, 1995, at C1 (suggesting New England is considered a restless franchise whose owner is unhappy with his current location). See also Steve Wulf, Bad Bounces for the N.F.L., TIME, Dec. 11, 1995, at 64 (listing NFL teams currently considering relocation and asking “What does the N.F.L. stand for? . . . No Fixed Location? No Fan Loyalty? National Flux League?”).
professional football. A significant consequence of this trend will include clashes over the rights to valuable team logos and other trademarks. This disturbing new era in professional sports is being referred to as "Franchise Free Agency." 

The Seventh Circuit had the unique opportunity to establish a workable legal framework through which trademark clashes would be litigated in Indianapolis Colts. Unfortunately, the court failed to concretely define the manner in which such trademark disputes should be adjudicated. In this decision, the Seventh Circuit held that a Canadian Football League (CFL) expansion team infringed on the trademark of an NFL team. In reaching this conclusion, the court addressed three fundamental issues of trademark litigation. First, the court faced the issue of how a party in a trademark action should make the required showing of a "likelihood of confusion." Second, the court considered the amount of weight that should be given to consumer survey evidence in making this "likelihood of confusion" determination. Third, the court addressed the effect that should be given to a judicial determination that a contested trademark had been abandoned.

In reaching its decision, the Seventh Circuit failed to properly analyze all of the factors relevant to the "likelihood of confusion" determination and, instead, gave excessive weight to consumer survey evidence. At the same time, the court disregarded a valid defense available to the defendant. The court's treatment of these three issues leaves considerable doubt as to whether future trademark litigation of this type will be properly decided.

3. See Steve Rushin, The Heart of a City: Cleveland Won Round 1 In What Will Be an Agonizing Battle to Hold On to Its Beloved Browns, SPORTS ILLUSTRATED, Dec. 4, 1995, at 59 (detailing fifty year tradition of die-hard fan support for Cleveland's professional football team).

4. King, supra note 2, at 28-29. In the NFL, "Franchise Free Agency" describes the anticipated relocation of as many as seven teams, due to the changing economic circumstances facing team owners. Id. at 30, 32. See also Lewis Lord, Make Way for His Baltimore Browns, U.S. NEWS & WORLD REP., Nov. 20, 1995, at 41 ("In this dollar-driven decade, it's no surprise that free-agency franchises are all the rage in the National Football League").

5. Indianapolis Colts, 34 F.3d at 416. The Seventh Circuit's decision affirmed the district court's grant of a preliminary injunction to the plaintiff, the Indianapolis Colts. Id.

6. Id. at 412-14. For a full discussion of the court's treatment of the "likelihood of confusion" determination, see infra notes 99-101 and accompanying text.

7. Id. at 414-16. For a full discussion of the court's treatment of consumer survey evidence, see infra notes 102-08 and accompanying text.

8. Indianapolis Colts, 34 F.3d at 412-13. For a full discussion of the court's treatment of trademark abandonment, see infra notes 110-26 and accompanying text.
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This article will examine the Seventh Circuit's treatment of the three issues discussed above in the context of past precedent and current trends in trademark law. Section II of this article presents the factual foundation leading up to the Indianapolis Colts litigation. Section III examines the legal background of the three issues, focusing on Seventh Circuit jurisprudence. Section IV analyzes the reasoning employed by the Seventh Circuit in reaching its decision in Indianapolis Colts, as well as the strengths and weaknesses of this reasoning. Lastly, sections V and VI suggest the effect that the Seventh Circuit's holding will have on this rapidly developing area of sports law.

II. FACTS

In 1952, the Dallas Texans, a member team of the NFL, moved from Dallas to Baltimore.9 This team was renamed the "Baltimore Colts."10 The team remained in Baltimore for thirty-two years, becoming "one of the most illustrious teams in the history of professional football."11

In 1984, the team owner, Robert Irsay, obtained permission from the NFL to move the team to Indianapolis where the team was renamed the "Indianapolis Colts."12 This surprise move outraged the citizens of Baltimore.13 The City of Baltimore instituted litigation in a vain attempt to block the team's relocation to Indianapolis.14

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9. Indianapolis Colts, 34 F.3d at 411. The court began its discussion of the case by recounting the series of events that led up to the recent dispute over the use of the name "Baltimore Colts."
10. Id. See John Steadman, Colts Name, CFL Style, is Worth Fight, BALTIMORE EVENING SUN, Jan. 26, 1994, at D1 (explaining name "Colts" for Baltimore team was "suggestion of a fan . . . who submitted [it as] the winning entry in a contest . . .").
11. Indianapolis Colts, 34 F.3d at 411. See also Dave Sottille, Playing the Name Game, YORK DAILY REC., July 31, 1994, at 7 (stating jam-packed Colts' home game "was often referred to as the world's largest outdoor insane asylum during the glory years . . .").
12. Indianapolis Colts, 34 F.3d at 411.
13. Id. See also Ted Curtis & Joel H. Stempler, So What Do We Name the Team? Trademark Infringement, the Lanham Act and Sports Franchises, 19 COLUM.-VLA J.L. & ARTS 23, 29-30 (1995) (asserting Irsay is "most hated man in Maryland" because of clandestine move); Jon Morgan, Hearing Ends, Ruling Due Monday in Suit Over Use of CFL Colts Name, BALTIMORE SUN, June 25, 1994, at C11 (expressing sentiment that Irsay "poisoned the waters" for his NFL franchise in opinion of Baltimore citizens).
14. Indianapolis Colts, 34 F.3d at 411. The City of Baltimore tried to get the team back by condemnation under its power of eminent domain. Id. The Indianapolis Colts responded by bringing a countersuit. Id. Neither party was successful in the litigation. Id. (citing Indianapolis Colts v. Mayor & City Council of Baltimore, 775 F.2d 177 (7th Cir. 1985); Indianapolis Colts v. Mayor & City Council of Baltimore, 741 F.2d 954 (7th Cir. 1984), cert. denied, 470 U.S. 1052 (1985); Indianapolis Colts v. Mayor & City Council of Baltimore, 733 F.2d 484 (7th Cir. 1984)).
In February of 1994, the Canadian Football League (CFL) granted a franchise for an expansion team to be located in Baltimore. A few days before that franchise was granted, the NFL sent the Commissioner of the CFL a letter requesting that the CFL discontinue plans to use the name “Baltimore Colts.” The NFL’s letter threatened legal action if the CFL did not honor the request.

Nonetheless, the new Baltimore franchise owner, James L. Speros, announced that his team would be named the “Baltimore CFL Colts.” This announcement coincided with the team being publicly launched, merchandise licensed, and other steps being taken to prepare for the commencement of play. One of the steps taken by Speros was registration with the United States Patent and Trademark Office for trademark rights to the name “Baltimore Colts,” as well as “Baltimore CFL Colts,” more than a year after NFL Properties failed to renew its federal registration for the name “Baltimore Colts.” Speros subsequently filed a

15. The CFL is a professional football league operating out of Canada which, at the time of this case, had four teams located in American cities. Id. The CFL has no affiliation with the NFL, and the CFL version of football is distinct from the one played in the NFL. Ken Murray, Basketball-Like Pace Sets Canadian Games Apart from Its NFL Counterpart, BALTIMORE SUN, July 5, 1994, at D1 (discussing difference between how football is played in NFL and CFL, as well as chronology of formation of Baltimore’s CFL team).

16. Ken Murray, NFL Vows to Saddle CFL With Suit Over Colts Name, BALTIMORE SUN, Feb. 12, 1994, at 1C. The letter was sent by John Flood, President of NFL Properties. Id. NFL Properties is the merchandising branch of the NFL, and “[p]ursuant to an agreement between the NFL clubs and the NFL Trust, NFL Properties has the power and standing to enforce the league’s marks.” Steven N. Geise, Comment, A Whole New Ballgame: The Application of Trademark Law to Sports Mark Litigation, 5 SETON HALL J. SPORT L. 553, 567 (1995).

17. Murray, supra note 16, at C1 (“The NFL . . . faxed a letter to CFL commissioner Larry Smith asking him to discontinue plans to use the name Baltimore Colts.”).

18. Dave Sottile, CFL Brings Colts Back to Baltimore: The NFL Denied the Handoff, But the Canadian League Wants to Give the People What They Want, YORK DAILY REC., Mar. 2, 1994, at 1. Speros claimed that he solicited advice concerning the team name from a broad cross-section of the Baltimore community, including the media, fans, women and children, all of whom seemed to come up with the same name repeatedly. Id. Speros explained:

I did this for the fans of Baltimore . . . There has been an issue with NFL Properties over the use of the name, and in our minds this seems to clear up any confusion. Our official name is the Baltimore CFL Colts, so there will [be] no misconception of who we are and what league we’re playing in.

Id.

19. Indianapolis Colts, 34 F.3d at 411.

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declaratory judgment motion in federal court seeking judicial affirmation that he owned these trademark rights.\textsuperscript{21}

Two months later, the Indianapolis Colts, along with the NFL and NFL Properties, filed suit in an Indiana federal court accusing the CFL team of trademark infringement.\textsuperscript{22} The Indianapolis Colts obtained a preliminary injunction which prevented the new team from using the name "Colts," "Baltimore Colts," or "Baltimore CFL Colts."\textsuperscript{23} The United States Court of Appeals for the Seventh Circuit affirmed the injunction, holding that the district court committed no clear error in finding that the Canadian team's "use of the name 'Baltimore CFL Colts' whether for the team or on merchandise was likely to confuse a substantial number of consumers."\textsuperscript{24}

III. BACKGROUND

The Seventh Circuit's Indianapolis Colts decision raises concerns about the interplay of three important issues in a federal trademark infringement action. The first issue is how the required showing of a "likelihood of confusion" between the product or service of the trademark holder and the alleged infringer should be made.\textsuperscript{25} The second issue concerns the amount of weight that should be given to consumer survey evidence in making this "likelihood of confusion" determination. The third issue involves the effect, or non-effect, of a judicial finding that a trademark holder has abandoned a contested trademark.


\textsuperscript{22} John R. O'Neill, \textit{NFL Colts Blitzing CFL Colts: NFL Joins Lawsuit Charging Trademark of Name}, INDIANAPOLIS STAR, Apr. 30, 1994, at B1. The suit alleged that the CFL Colts had acted in bad faith by adopting trademarks "virtually identical" to those of the Indianapolis Colts. \textit{Id.} The suit also alleged that the CFL Colts wanted to "deceive and mislead the public into believing" that the CFL Colts were affiliated with the NFL Colts. \textit{Id.}

\textsuperscript{23} \textit{Indianapolis Colts}, 34 F.3d at 411. The injunction prevented the CFL team from using the names "in connection with the playing of professional football, the broadcast of football games, or the sale of merchandise to football fans and other buyers." \textit{Id.} United States District Court Judge Larry J. McKinney granted the injunction on the grounds that "consumers of 'Baltimore CFL Colts' merchandise are likely to think, mistakenly, that the new Baltimore team is an NFL team related in some fashion to the Indianapolis Colts ..." \textit{Id.} Judge McKinney summarized by stating "[t]he mark Colts is clearly the property of the plaintiffs as a registered trademark. Clearly, the defendants cannot appropriate that mark to their own use." Jon Morgan, \textit{Judge Sides With NFL on Colts}, BALTIMORE SUN, June 28, 1994, at A1.

\textsuperscript{24} \textit{Indianapolis Colts}, 34 F.3d at 416.

\textsuperscript{25} MICHAEL A. EPSTEIN, MODERN INTELLECTUAL PROPERTY 7-35 (2d ed. Supp. 1992). This required showing has been referred to as the "touchstone of trademark law." \textit{Id.} (quoting Little Caesar Enters. v. Pizza Caesar, Inc., 834 F.2d 568, 570 (6th Cir. 1987)).
A. The "Likelihood of Confusion" Determination

Federal trademark law is governed by the Lanham Act. Sections 32(1) and 43(a) of the Lanham Act are particularly important in trademark infringement cases. Section 32(1) provides for a civil cause of action when a federally registered trademark has been infringed, while section 43(a) protects against confusion as to the source, sponsorship or association between the goods or services of economic competitors.

The central consideration in an infringement action brought under either Section 32(1) or 43(a) of the Lanham Act is whether a "likelihood


27. Section 32(1) of the Lanham Act provides in relevant part:
Any person who shall, without the consent of the registrant—
   (a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of
       a registered mark in connection with the sale, offering for sale, distribution, or advertis-
       ing of any goods or services on or in connection with which such use is likely to cause
       confusion, or to cause mistake, or to deceive; or
   (b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply
       such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints,
       packages, wrappers, receptacles or advertisements intended to be used in commerce
       upon or in connection with the sale, offering for sale, distribution, or advertising of
       goods or services on or in connection with which such use is likely to cause confusion,
       or to cause mistake, or to deceive, shall be liable in a civil action by the registrant for
       the remedies hereinafter provided.


28. Section 43(a) of the Lanham Act provides in part:
   (1) Any person who, on or in connection with any goods or services, or any container
       for goods, uses in commerce any word, term, name, symbol, or device, or any combina-
       tion thereof, or any false designation of origin, . . . which
       (a) is likely to cause confusion, or to cause mistake, or to deceive as to the affilia-
           tion, connection, or association of such person with another person, or as to the origin,
           sponsorship, or approval of his or her goods, services, or commercial activities by an-
           other person,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.


29. Curtis & Stempler, supra note 13, at 24 (discussing protection afforded by Section
   32(1) and 43(a) of Lanham Act).

30. Epstein, supra note 25, at 309 (explaining requirements to be held liable under section
   32(1)).

31. Id. at 316.1-316.2 (stating section 43(a) gives broader protection to trademarks than
   section 32(1) provides because it also protects trademarks not federally registered).
of confusion” exists.32 “Likelihood of confusion” can be defined as the probability that the accused infringer’s mark is the legal cause, or cause in fact, of confused, mistaken or deceived states of mind of potential consumers.33 In other words, an inquiry into the “likelihood of confusion” focuses on the product of the alleged infringer and asks whether the public believes that the product originates from, or is somehow endorsed or authorized by, the plaintiff.34

Courts have traditionally determined this “likelihood of confusion” based on the application of a multi-factor test.35 Generally, these factors include (1) the strength of the plaintiff’s mark; (2) the degree of similarity between the plaintiff’s and the defendant’s marks; (3) the proximity of the two products or services; (4) the likelihood that the prior owner will bridge the gap; (5) actual confusion; (6) the defendant’s good faith in adopting the mark; (7) the quality of the defendant’s product or service; and (8) the sophistication of the buyers.36 In addition to these traditional factors, courts have taken other considerations into account, such as the size of the plaintiff’s investment, the expectations of the public, the plaintiff’s treatment of its own mark, the methods by which the products are advertised, the geographical distribution of the products, and the similarity in appearance of the products.37

35. Kirkpatrick, supra note 33, at 2-7. “While ‘[t]here is no litmus rule which can provide a ready guide to all cases,’ there is a generally accepted method of analyzing the likelihood of confusion issue.” Id. See McCarthy, supra note 32, § 23.03[1] (stating trademark law has traditionally spelled out a list of foundational factors to be considered in determining “likelihood of confusion”); Friedman, supra note 32, at 692 (stating Federal courts apply eight factor test).
37. Epstein, supra note 25, at 311-12 n.95 (listing other variables some courts take into account); Friedman, supra note 32, at 692.
38. Friedman, supra note 32, at 692 (citing Jerome Gilson, Trademark Protection and Practice §§ 5.01-5.09 (1994)).
The traditional factors that make up the multi-factor test were originally established in the Restatement (First) of Torts. Eventually, the United States Court of Appeals for the Second Circuit (Second Circuit) formulated the traditional Restatement factors into a defined test. Following the Second Circuit's lead, each federal circuit adopted its own version of the multi-factor test, based on the traditional factors. As a result, each federal circuit has a "fountainhead" case and progeny setting forth its variation of the multi-factor test.

Recently, the Seventh Circuit reiterated its version of the multi-factor test in *Nike, Inc. v. "Just Did It" Enter.* The Nike court listed the
seven factors that the court is required to consider in determining whether a "likelihood of confusion" exists:

(1) the degree of similarity between the marks in appearance and suggestion; (2) the similarity of the products for which the name is used; (3) the area and manner of concurrent use; (4) the degree of care likely to be exercised by consumers; (5) the strength of the complainant’s mark; (6) actual confusion; and (7) intent on the part of the alleged infringer to palm off his products as those of another.\footnote{45}

The court stressed that a "likelihood of confusion" determination must be the result of an analysis of the entire multi-factor test, rather than an over-emphasis on any single factor.\footnote{46} In stating that this list is not exclusive, however, the Nike court indicated that other factors may also be relevant.\footnote{47} For example, the court suggested that the marketing channels used by the parties to the dispute may be an additional factor for consideration.\footnote{48}

The Nike court determined that the plaintiff had shown that certain factors indicated a "likelihood of confusion."\footnote{49} The court, however, cautioned that no one factor was determinative in the "likelihood of confusion" inquiry.\footnote{50} Instead, the court pointed to logos of Nike, Inc., a popular manufacturer of footwear, apparel and related accessories. \textit{Id.} at 1226-27. In what he termed as a "joke" and "personal pun," Stanard marketed t-shirts and sweatshirts which displayed Nike's registered mark known as the "swoosh design" and the word "Mike" underneath it instead of "Nike." \textit{Id.} Nike, Inc. saw no humor in Stanard's parody and sued for trademark infringement. \textit{Id.} at 1226.

In Nike, the Seventh Circuit reversed the district court's grant of summary judgment to the plaintiff. \textit{Id.} at 1233. The Nike court held that there were too many disputed facts on the record to conclude, as a matter of law, that the defendant's alleged infringement would confuse the public. \textit{Id.} In reaching this decision, the Nike court stressed the importance of analyzing all of the factors that make up the multi-factor test. \textit{Id.} at 1229-32 ("[W]e must analyze several factors relevant to the likelihood of confusion.").\footnote{45} \textit{Id.} at 1228 (citing \textit{McGraw-Edison}, 787 F.2d at 1167-68; \textit{Helene Curtis}, 560 F.2d at 1330).

\textit{Id.} at 1228 (citing \textit{McGraw-Edison}, 787 F.2d at 1168; \textit{Squirtco} v. Seven-Up Co., 628 F.2d 1086, 1091 (8th Cir. 1980)).

\textit{Id.} at 1228 (citing \textit{Carson} v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 833 (6th Cir. 1983); \textit{Toho Co.} v. Sears, Roebuck & Co., 645 F.2d 788, 790 (9th Cir. 1981); \textit{Walt Disney Prods.} v. Air Pirates, 581 F.2d 751, 759 (9th Cir. 1978), \textit{cert. denied sub nom. O'Neill} v. \textit{Walt Disney Prods.}, 439 U.S. 1132 (1979)).

\textit{Nike}, 6 F.3d at 1232 (holding plaintiff's and defendant's marks involve similar products with similar uses, and this jeopardizes plaintiff's very strong mark).

\textit{Id.} at 1228 (citing \textit{McGraw-Edison}, 787 F.2d at 1168; \textit{Squirtco}, 628 F.2d at 1091); \textit{see also} AHP Subsidiary Holding Co. v. Stuart Hale Co., 1 F.3d 611, 616 (7th Cir. 1993) ("None of
its analysis of the entire multi-factor test which did not indicate a clear-cut "likelihood of confusion." As a result, the Nike court reversed the district court's finding of a "likelihood of confusion."52

The Seventh Circuit's multi-factor test is designed to protect consumers against confusion or deceit when making purchases, and to protect trademark owners by preventing others from reaping the benefits of the creator's mark.53 The Seventh Circuit, however, established a limit to trademark protection in Quaker Oats Co. v. General Mills, Inc.54 In the seven confusion factors alone is dispositive in a likelihood of confusion analysis.

51. Nike, 6 F.3d at 1232-33. The Nike court summarized its analysis of the factors which did not necessarily indicate a "likelihood of confusion" by stating:

[customers purchase the [defendant's product] through the mail and must make the check payable to JUST DID IT Enterprises. We have no idea if Nike employs similar marketing. Stanard targeted a specific audience of consumers named Mike, who could exercise enough care to tell the difference. The mailed letter and order blank emphasize the "Mike" distinction. No identified customer has been confused by the prank, and Stanard intended only to parody the Nike corporate image. Whether customers would confuse MIKE and the swoosh design as affiliated with NIKE is a question of fact over which reasonable minds may differ.

52. Nike, 6 F.3d at 1233. The Nike court summarized its finding by stating:
Throughout its decision, the district court made several findings of fact, in the end finding that [the defendant's product] likely confuses consumers. Although district courts are expert in finding facts, at the summary judgment stage disputed facts must be reserved for the jury. The court erred in granting summary judgment to the plaintiff, and accordingly is reversed .

53. Mark A. Robinson, Note, 4 SETON HALL J. SPORT L. 205, 209 (1994) (discussing history and purpose of federal trademark protection). The Seventh Circuit advanced another rationale for trademark protection by asserting: "One of the reasons courts have given for protecting trademark owners against the use of confusingly similar marks . . . is to protect the owner's ability to enter product markets in which it does not now trade but into which it might reasonably be expected to expand in the future." Sands, Taylor & Wood Co. v. Quaker Oats Co., 978 F.2d 947, 958 (7th Cir. 1992) (citing Interpace Corp. v. Lapp, Inc., 721 F.2d 460, 464 (3d Cir. 1983), cert. denied, 113 S. Ct. 1179 (1993)). See also Scandia Down, 772 F.2d at 1429-30 (explaining benefits of trademark protection).

54. 134 F.2d 429 (7th Cir. 1943). In Quaker Oats, the plaintiff, the Quaker Oats Co., filed a complaint for a declaratory judgment claiming that it was entitled to use the mark "Oaties" on a prepared breakfast cereal made of oat because the mark did not infringe on the defend-
**Quaker Oats,** the Seventh Circuit upheld the district court’s decision that there was no “likelihood of confusion” between the parties’ products. In summarizing its decision, the Quaker Oats court stated that “[a]nyone deceived or confused by the plaintiff’s package into believing he was getting the defendant’s package would be careless to a degree that the law has no duty to protect.” Essentially, the court concluded that a manufacturer or provider who markets goods or services is not bound to make them “foolproof,” but rather to use reasonable means to prevent confusion.

### B. Consumer Survey Evidence

In trademark disputes, the litigants often conduct consumer surveys in an attempt to offer objective evidence of the public’s perception concerning the contested mark. As a result, survey evidence is generally considered relevant to the traditional factor of “actual confusion.”

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ant’s registered trademarks “Wheaties,” “Kornies” or “Maizies.” *Id.* at 430. The defendant, General Mills, Inc., filed a counterclaim seeking to enjoin the plaintiffs use of the mark, alleging that it infringed the defendant’s registered trademarks. *Id.*

55. *Id.* at 432-33. The Quaker Oats court came to this determination after examining the lower court’s findings concerning similarity of the products, actual confusion (through use of consumer surveys), intent and other factors. *Id.* at 431-32.

56. *Id.* at 432. The Quaker Oats court further opined, “[o]ne would have to be stupid to be misled or confused when confronted in a grocery store with the plaintiff’s and the defendant’s packages.” *Id.*

57. *Id.* at 432-33 (citing Kellogg Co. v. Nat’l Biscuit Co., 305 U.S. 111, 121 (1938); John Morrel & Co. v. Doyle, 97 F.2d 232, 237 (7th Cir. 1938)). See also Scandia Down, 772 F.2d at 1428 n.1 (rejecting Learned Hand’s view that “likelihood of confusion” standard was “careless” rather than “ordinary” consumers and stating Seventh Circuit adheres to “ordinary purchaser” standard).

58. 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32.46 (3d ed. 1992). “[A]... scientific means of evidencing mental associations is to introduce the actual responses of a group of people who are typical of the target group whose perceptions are at issue in a case. Survey evidence is often introduced for this purpose...” *Id.* See also Larry C. Jones, Developing and Using Survey Evidence in Trademark Litigation, 19 MEM. ST. U.L. REV. 471, 473 (1989) (claiming favorable results from competent survey increase probability that court will find likelihood of confusion); Jack P. Lipton, Trademark Litigation: A New Look at the Use of Social Science Evidence, 29 ARIZ. L. REV. 639, 641 (1987) (“In the trademark area, social science surveys, generally pertaining to the state of mind of prospective purchasers, have been offered as evidence of the existence of... consumer confusion.”).

59. KIRKPATRICK, supra note 33, at 7-32 to 7-33. See also McCarthy, supra note 58, at § 32.54(1)[a] (evaluating whether consumer survey data is evidence of “actual confusion”). “Several courts, when assembling the evidence within a likelihood of confusion framework of factors such as the Polaroid Eight, have put survey evidence under the heading of ‘actual confusion.’” *Id.* (footnote omitted).
Whether this characterization is proper has been the subject of much debate. The controversy concerns the appropriate weight that should be given to a consumer survey. Pertinent to this consideration, the Judicial Conference of the United States recommends that the offeror of any survey has the burden of establishing that:

1. the proper universe was selected and examined;
2. a representative sample was drawn from that universe;
3. the mode of questioning the interviewees was correct;
4. the persons conducting the survey were recognized experts;
5. the data gathered were accurately reported;
6. the sample design, the questionnaire and the interviewing were in accordance with generally accepted standards of objective procedure and statistics in the field of such surveys;
7. the sample design and the interviews were conducted independently of the attorneys; and
8. the interviewers trained in this field had no knowledge of the litigation or the purposes for which the survey was used.

A consumer survey, therefore, should be given weight only to the extent that it replicates the real world setting, from which instances of "actual confusion" can be observed. Traditionally, the Seventh Circuit has accepted legitimate consumer surveys as evidence of actual confusion. Before accepting this evi-
dence, the Seventh Circuit typically will review the administration of the survey to see that it meets factors similar to those suggested by the Judicial Conference of the United States.  A consumer survey containing some flaws will not be instantly dismissed, but the weight given to the survey will be affected accordingly. In contrast, a consumer survey

mark application, the plaintiff brought a federal trademark infringement action. Id. Following an evidentiary hearing, the district court excluded the plaintiff’s consumer survey and granted a summary judgment to the defendant. Id. at 614-15.

On appeal, the Seventh Circuit reversed the district court’s grant of summary judgment. Id. at 620. The district court had excluded the plaintiff’s survey because it had not gathered data concerning real-world incidents of actual confusion. Id. at 618. In reversing this portion of the district court’s decision, the Seventh Circuit explained that consumer surveys were acceptable as evidence indicating actual confusion. Id. As a result, the Seventh Circuit concluded that “in the present case, we believe that the district court was premature in rejecting the survey evidence proffered by [the plaintiff].” Id.

65. Union Carbide Corp. v. Ever-Ready Inc., 531 F.2d 366, 388 (7th Cir.), cert. denied, 429 U.S. 830 (1976). In Union Carbide, the plaintiff, Union Carbide, Inc., sold an extensive line of electric batteries, flashlights, and miniature bulbs under the its trademark “EVEREADY.” Id. at 370. The defendant, Ever-Ready, Inc., began importing miniature lamp bulbs having the term “Ever-Ready” stamped on their bases and selling these bulbs in packages marked with the term “Ever-Ready” in a four-sided logo. Id. at 371. In addition, the defendant also imported high-intensity lamps with the term “Ever-Ready” stamped on them or on labels attached to them. Id. The plaintiff brought a federal trademark infringement action seeking an injunction against the defendant’s use of the term “Ever-Ready.” Id. In preparation for trial, the plaintiff conducted two consumer surveys. Id. at 383. However, the district court found that the surveys “were entitled to little, if any, weight.” Id. at 386 (internal quotation marks omitted).

On appeal, the Seventh Circuit held that the district court erred in not crediting the surveys taken by the plaintiff. Id. at 387. In making this decision, the Seventh Circuit examined the factors relevant to the taking of a consumer survey, including: (1) the proper universe was selected and examined; (2) a representative sample was drawn from that universe; (3) the mode of questioning the interviewees was correct; (4) the persons conducting the surveys were recognized experts; (5) the data gathered was accurately reported; and (6) the sample design, the questionnaire and the interviewing were in accordance with the generally accepted standards of objective procedure and statistics in the field of such surveys. Id. at 387-88. For a full list of the factors recommended by the Judicial Conference of the United States concerning the proper administration of a consumer survey, see supra note 62 and accompanying text.

66. Henri’s Food Prods. Co. v. Kraft, Inc., 717 F.2d 352, 357-58 (7th Cir. 1983). In Kraft, the plaintiff, Henri’s Food Products, developed and marketed a spoonable salad dressing made with yogurt named “YOGOWHIP.” Id. at 354. At the same time, the defendant, Kraft, Inc., had already been marketing a spoonable salad dressing named “MIRACLE WHIP.” Id. After filing a federal registration for the trademark “YOGOWHIP” for its salad dressing, the plaintiff brought an action in federal court seeking a declaratory judgment that the trademark did not infringe the defendant’s registered trademark “MIRACLE WHIP.” Id. at 353-54. The district court granted the plaintiff a declaratory judgment, from which the defendant appealed. Id. at 353.

On appeal, the defendant argued that the consumer survey conducted for the plaintiff was flawed concerning the site of the survey, the products shown to interviewees, the manner of displaying these products and the questions asked. Id. at 356-57. According to the defendant,
containing substantial deficiencies will be rejected. Consequently, the Seventh Circuit has given deference to consumer surveys only to the extent that they evidence actual confusion. In the context of *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club, Ltd.*, it is important to emphasize that "actual confusion" is only one of the seven factors used in the "likelihood of confusion" determination.

**C. Trademark Abandonment**

In federal trademark infringement actions, the defendant charged with infringement may raise the affirmative defense that the plaintiff has
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abandoned the contested mark.\textsuperscript{70} The Lanham Act defines abandonment as non-use of a mark with an intent not to resume such use.\textsuperscript{71} If a mark is indeed abandoned, it returns to the public domain and may be seized immediately by a subsequent user.\textsuperscript{72}

The Seventh Circuit analyzes the defense of abandonment under the Lanham Act standard.\textsuperscript{73} This analysis focuses on the two prongs of the Lanham Act abandonment standard.\textsuperscript{74} The first prong, "nonuse," has

\begin{itemize}
  \item[70.] 2 J. Thomas McCarthy, \textit{McCarthy on Trademarks and Unfair Competition} § 17.01[4] (3d ed. 1992) (describing possible legal situations where alleged abandonment may become significant issue).
  \item[71.] The Lanham Act states in pertinent part:
  A mark shall be deemed to be "abandoned" when either of the following occurs:
  (1) When its use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances. Nonuse for two consecutive years shall be prima facie evidence of abandonment. 'Use' of a mark means the bona fide use of that mark made in the ordinary course of trade, and not merely to reserve a right in a mark.
  (2) When any course of conduct of the owner, including acts of omission as well as commission, causes the mark to become the generic name for the goods or services on or in connection with which it is used or otherwise to lose its significance as a mark
  \item[72.] 15 U.S.C. § 1127 (1994). This section of the Lanham Act not only defines abandonment for trademarks and litigation covered by federal law, it also creates a presumption of abandonment. \textit{McCarthy, supra} note 70, at § 17.06.
  Because trademark rights derive from the use of a mark in commerce and not from mere registration of the mark, the owner of a mark will lose his exclusive rights if he fails actually to use it . . . A mark is deemed to be thus "abandoned" when its use has been discontinued with intent not to resume such use . . . Two years of nonuse create a prima facie case of abandonment, which may be rebutted by "evidence explaining the nonuse or demonstrating the lack of an intent not to resume use."
  \item[75.] \textit{Id.} (citing Roulo v. Russ Berrie & Co., 886 F.2d 931, 938 (7th Cir. 1989), \textit{cert. denied}, 493 U.S. 1075 (1990)). For the applicable provision of Lanham Act concerning trademark abandonment, see \textit{supra} note 71.
  \item[76.] 49. These trademarks included: (1) "THIRST-AID 'First Aid For Your Thirst,"' issued in 1950 for use on non-alcoholic beverages sold as softdrinks, and the syrups used therein; (2) "THIRST-AID," issued in 1952 for use on various ice-cream toppings; and (3) "THIRST-AID," issued in 1953 for use on soda fountain syrups used to make maltless soft drinks. \textit{Id.} From 1921 to 1973, the original owner of the marks, Middleby, had used the marks "on a wide variety of beverage products and syrups." \textit{Id.} The plaintiff continued this use until 1980. \textit{Id.} at 950. In 1980, the plaintiff granted Pet, Inc. a nationwide license to use the mark "THIRST-AID" on an isotonic beverage designed to compete with the very popular "Gatorade" brand
traditionally been a simple determination for the Seventh Circuit.\textsuperscript{7} Similarly, the Seventh Circuit uses a clearly defined evaluation for the second prong of the Lanham Act standard, "intent not to resume use."\textsuperscript{9} Once a trademark is abandoned under the Lanham Act standard, how-

isotonic beverage. \textit{Id.} However, following five months of test-marketing in Columbia, South Carolina, this venture was not pursued. \textit{Id.}

Thereafter, STW assigned to L.Karp & Sons (Karp) all of the registered "THIRST-AID" marks, yet simultaneously obtained an exclusive license back for the use of the marks on bakery supplies. \textit{Id.} In 1983, the defendant, Quaker Oats, Co., purchased the company that manufactured "Gatorade." \textit{Id.} Following this purchase, Quaker Oats initiated a new advertising campaign for "Gatorade" and selected the slogan: "Gatorade is Thirst Aid for That Deep Down Body Thirst." \textit{Id.} After this advertising campaign was launched, the plaintiff filed suit alleging that the defendant's use of the new slogan constituted trademark infringement. \textit{Id.} at 951. The defendant argued that the plaintiff had abandoned the "THIRST-AID" mark by not using it for a beverage sold at retail. \textit{Id.} at 955. The district court found that there was no abandonment. \textit{Id.}

On appeal, the Seventh Circuit reviewed the district court's finding that the plaintiff had not abandoned the mark. In its review of the district court's finding, the Seventh Circuit analyzed both prongs of the Lanham Act abandonment standard, "non-use" and "intent not to resume use," and concluded that the plaintiff did not abandon the right to use the mark. \textit{Id.} at 955-56.

\textsuperscript{75} \textit{Id.} at 955. "So long as the owner [of a trademark] continues use of the 'key element' of the registered mark, courts generally will not find abandonment." \textit{Id.} (citing McCARTHY, supra note 70, at § 17.10[2]).

\textsuperscript{76} \textit{Roulo}, 886 F.2d at 938. The Seventh Circuit addressed the confusion in other federal circuits surrounding the required showing under this prong of the Lanham Act abandonment standard by stating:

Some courts require the owner of the trade[mark] not used for over two years to demonstrate the intent to resume use. Other courts require the owner to prove the presumably lesser showing of the absence of an intent to abandon. We think the proper approach is to require evidence to demonstrate the intent not to resume use. This reading comports with the language of the statute and the seeming intent of Congress to prevent hoarding of trademarks where the owner has no intent to abandon, although no intent to resume use of the trademark within the reasonably foreseeable future.

\textit{Id.} (citations omitted). In \textit{Roulo}, the plaintiff, Georgia Lee Miller Roulo, had developed a line of greeting cards known as "Feeling Sensitive" (FS) cards. \textit{Id.} at 934. The plaintiff and the defendant, Russ Berrie & Co., Inc. (Berrie), had entered into a two-year agreement whereby the "defendant would exclusively manufacture, distribute and sell FS cards," while the plaintiff would receive a percentage of the sales receipts and would also retain ownership of the trademark rights. \textit{Id.} When the two-year agreement expired, the plaintiff did not wish to renew it, prompting the defendant to develop "a comparable greeting card line." \textit{Id.}

The plaintiff brought suit for infringement of her FS line under the Lanham Act. \textit{Id.} at 934-35. Judgment was entered on a jury verdict for the plaintiff and the defendant appealed. \textit{Id.} at 935. On appeal, the Seventh Circuit held that it was within the jury's prerogative to credit the plaintiff's testimony concerning her intent to resume use, therefore signalling no abandonment. \textit{Id.} at 939.
ever, it returns to the “public domain,” where it may be utilized by a subsequent user.\textsuperscript{77}

The effect of abandonment on a trademark was recently addressed by the United States District Court for the Southern District of New York in \textit{Major League Baseball Properties, Inc. v. Sed Non Olet Denerius, Ltd.}\textsuperscript{78} In \textit{Sed Non}, the district court rejected the plaintiff’s argument that its mark “Dodgers,” standing alone without a geographical reference, was infringed by the defendant’s actions.\textsuperscript{79} While rejecting this argument, the court stressed that the plaintiff had abandoned the mark “Brooklyn Dodgers” when it changed the name of its team to “Los Angeles Dodgers.”\textsuperscript{80}

\textsuperscript{77} Dovenmuehle v. Gilldorn Mortgage Midwest Corp., 871 F.2d 697, 701 (7th Cir. 1989) (citing Defiance Button Mach. Co. v. C. & C. Metal Prods. Corp., 759 F.2d 1053, 1059 (2d Cir.), cert. denied, 474 U.S. 844 (1985); Bellanca Aircraft Corp. v. Bellanca Aircraft Eng’g, Inc., 190 U.S.P.Q. 158, 168 (T.T.A.B. 1976)). In Dovenmuehle, the plaintiffs were members of the Dovenmuehle family, who owned Dovenmuehle, Inc. \textit{Id.} at 698. In 1969, the members of the Dovenmuehle family sold all of their interest in Dovenmuehle, Inc. \textit{Id.} Following several transactions involving the company’s assets, a corporation named Gilldorn Mortgage Midwest Corporation (Gilldorn) concluded that it owned the rights to the trade name “Dovenmuehle, Inc.” \textit{Id.} As a result, Gilldorn elected to change its name to “Dovenmuehle Mortgage, Inc.” \textit{Id.} After learning of this plan, the plaintiffs brought suit. \textit{Id.} In the suit, the plaintiffs claimed that the “Dovenmuehle” trade name was abandoned after a long period of non-use, and therefore reverted back to them. \textit{Id.} at 701. However, the Seventh Circuit held that abandonment results in the trademark’s return to the public domain, rather than in reversion to its previous owners. \textit{Id.} See also McCARTHY, supra note 70, at § 17.01[1] (“Once held abandoned, a mark falls into the public domain and is free for all to use.”).

\textsuperscript{78} 817 F. Supp. 1103 (S.D.N.Y. 1993), \textit{vacated pursuant to settlement}, 859 F. Supp. 80 (S.D.N.Y. 1994). In \textit{Sed Non}, one of the plaintiffs was the Los Angeles Dodgers, a professional baseball team playing in Los Angeles, California since 1958. \textit{Id.} at 1109-10. Before 1958, the Los Angeles Dodgers had played in Brooklyn, New York and been known as the “Brooklyn Dodgers.” \textit{Id.} at 1110. Joining the Los Angeles Dodgers in the suit was Major League Baseball Properties (MLBP) who, by agreement with the Major League professional baseball teams, had “been granted the exclusive right to market, license, publish, publicize, promote nationally, and protect the trademarks owned by the [teams], including those owned by the Los Angeles Dodgers.” \textit{Id.} The plaintiffs brought a trademark infringement action against three corporations, as well as their owners individually, stemming from the defendant’s use of the words “The Brooklyn Dodger” as the name and mark of a bar/restaurant in Brooklyn, New York. \textit{Id.} at 1108.

\textsuperscript{79} \textit{Id.} at 1128. The plaintiff argued, unsuccessfully, that they had a protected use in the mark “Dodgers” by itself, not just “Los Angeles Dodgers,” and therefore by naming their restaurant “The Brooklyn Dodger,” the defendants infringed this protected use. \textit{Id.}

\textsuperscript{80} \textit{Id.} at 1127-28. The \textit{Sed Non} court found that the plaintiff had abandoned the mark “Brooklyn Dodgers” by noting that the plaintiff made no commercial use of the mark for over twenty years, thereby satisfying both the “non-use” requirement, and the “intent not to resume such use” requirement for abandonment under the Lanham Act. \textit{Id.} at 1126-31 (citing 15 U.S.C. § 1127 (1988)).
The *Sed Non* court concluded that the word “Brooklyn” was more than a geographic designation or appendage to the word “Dodgers.”\(^{81}\) Hence, the court found that the “Brooklyn Dodgers” was a non-transportable cultural institution separate from the plaintiff, a professional baseball team named the “Dodgers” that had moved to Los Angeles.\(^{82}\) Because the plaintiff abandoned this cultural institution by moving its team to Los Angeles, the *Sed Non* court concluded that the defendant’s use of the mark “Brooklyn Dodger” was not an infringement of the plaintiff’s mark.\(^{83}\)

**IV. Narrative Analysis**

In *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club, Ltd.*,\(^{84}\) the Seventh Circuit upheld the issuance of a preliminary injunction in a federal trademark infringement action.\(^{85}\) In its decision, the court indicated that the trademark dispute required a “likelihood of confusion” determination.\(^{86}\) As discussed above, this determination is usually made through the application of a multi-factor test.\(^{87}\) However, in this case, the court only mentioned a few of the factors that make up the multi-factor test.\(^{88}\) Further, the court never actually analyzed any of

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81. *Id.* at 1128.
82. *Id.* The *Sed Non* court pointed out that “[i]t is not simply the ‘Dodgers,’ (and certainly not the ‘Los Angeles Dodgers’), that defendants seek to invoke in their restaurant; rather defendants specifically seek to recall the nostalgia of the cultural institution that was the ‘Brooklyn Dodgers.’” *Id.*
83. *Sed Non*, 817 F. Supp. at 1134. The *Sed Non* court summarized its findings by stating: This court holds that plaintiffs’ failure to utilize the ‘Brooklyn Dodgers’ mark for any significant, commercial trademark use between 1958 and 1981 constituted an abandonment of that mark... Accordingly, the court declines to enjoin defendants’ very limited use of the ‘Brooklyn Dodger’ mark by defendants for use in connection with its local restaurants directed toward older Brooklyn Dodgers fans in the Brooklyn community in the City of New York.
84. 34 F.3d 410 (7th Cir. 1994).
85. The plaintiff, the Indianapolis Colts (along with the NFL and NFL Properties), is a professional football team located in Indianapolis, Indiana. The defendant, Metropolitan Baltimore Football Club Ltd. (along with the CFL), owns the CFL’s expansion team in Baltimore, Maryland. In the suit, the plaintiff alleged that the defendant had infringed its trademark, “Indianapolis Colts,” by choosing the name “Baltimore CFL Colts” for the expansion team. *Id.* at 411.
86. *Id.* at 414.
87. For a full discussion of the Seventh Circuit’s traditional approach in applying the multi-factor test, see *supra* notes 43-52 and accompanying text.
88. For a description of the Seventh Circuit’s cursory review of the multi-factor test used in this “likelihood of confusion” determination, see *infra* note 99-101 and accompanying text.
those factors as they applied to the facts of the case. Instead, this decision was based almost exclusively on the consumer survey evidence submitted to the lower court. At the same time, the court disregarded the district judge’s finding that the trademark at issue had been abandoned.

The court began its decision by describing the factual history surrounding the case to “frame” the dispute. Next, the court dispensed with the issues of jurisdiction and venue.

The court prefaced its treatment of the “likelihood of confusion” issue by examining whether confusion was possible between the plaintiff’s mark and the defendant’s mark. First, the court found that there was an institutional continuity of the plaintiff, the Indianapolis Colts, from the time before they moved out of Baltimore until the time of the suit. Next, the court stated that if all parties understood that there was no link between the “institutionally continuous” Indianapolis Colts and the de-

89. Geise, supra note 16, at 570. The lower court had ostensibly utilized the Seventh Circuit’s version of the multi-factor test to determine that a “likelihood of confusion” existed. Id. “Ironically, the [lower] court supported this decision with little discussion of the seven factors as applied to the facts.” Id.

90. For a description of the court’s reliance on consumer survey evidence, see infra notes 102-09 and accompanying text.

91. For a full discussion of the court’s treatment of the abandonment issue, see infra notes 110-26 and accompanying text.

92. Indianapolis Colts, 34 F.3d at 411. For a full discussion of the factual background surrounding the litigation, see infra notes 9-24 and accompanying text.

93. Indianapolis Colts, 34 F.3d at 411-12. The court held that the Indiana longarm statute reached the defendant in Maryland. Id. The longarm statute reached the defendant because the defendant chose the name “Baltimore CFL Colts,” which might be found to be confusingly similar to that of the Indianapolis Colts, and therefore assumed the risk of injuring valuable property located in Indiana. Id. Alternatively, the court suggested that the defendant’s intended broadcast of games in Indiana constituted “entering” the state because the majority of people who are likely to be confused are Indianapolis Colts fans located in Indiana. Id. The court handled the issue of venue simply by stating “[i]t is as clear or clearer that venue is proper in Indiana.” Id. at 412 (citing 28 U.S.C. § 1391 (b)(2) and McCarthy, supra note 58, at § 32.22(3)(b)(iii)).

94. Id. at 413-14.

95. Id. at 413-14. The court explained this notion of institutional continuity by stating: When Mr. Irsay transported his team, the Baltimore Colts, from Baltimore to Indianapolis in one night in 1984, the team remained, for a time anyway, completely intact: same players, same coaches, same front-office personnel. With the passage of time, of course, the team changed. Players retired or were traded, and were replaced. Coaches and other nonplaying personnel came and went. But as far as the record discloses there is as much institutional continuity between the Baltimore Colts of 1984 and the Indianapolis Colts of 1994 as there was between the Baltimore Colts of 1974 and the Baltimore Colts of 1984.

Id.
fendant, then there would be no injury whereby the Lanham Act would provide a remedy.96 Finally, the court stated, "[i]f not everyone knows [of the distinction], there is harm."97 Based on this analysis, the court determined that some people might believe that there is no affiliation between the Indianapolis Colts and the CFL's new Baltimore team; therefore, confusion is possible.98

The court followed this conclusion with the rationale that the possibility of confusion between the plaintiff and the defendant required a determination of a "likelihood of confusion" between the two.99 According to the court, the legal standard for making such a determination under the Lanham Act, is "whether it is likely that the challenged mark if permitted to be used by the defendant would cause the plaintiff to lose a substantial number of consumers."100 The court listed several factors pertinent to this determination, including "the similarity of the marks and of the parties' products, the knowledge of the average consumer of

96. Id. at 414. The court explained this idea by suggesting that everyone would have to know that there was "no continuity, no links contractual or otherwise, nothing but a geographical site in common" between the plaintiff, who was previously located in Baltimore, and the defendant. Id.

97. Id. The court offered examples of the potential harm that might be suffered: Some people who might otherwise watch the Indianapolis Colts (or some other NFL team, for remember that the NFL, representing all the teams, is a coplaintiff [sic]) on television may watch the Baltimore CFL Colts instead, thinking they are the "real" Baltimore Colts, and the NFL will lose revenue. A few (doubtless very few) people who might otherwise buy tickets to an NFL game may buy tickets to a Baltimore CFL Colts game instead. Some people who might otherwise buy merchandise stamped with the name "Indianapolis Colts" or the name of some other NFL team may buy merchandise stamped "Baltimore CFL Colts," thinking it a kin of the NFL’s Baltimore Colts in the glory days of Jonny Unitas rather than a newly formed team that plays Canadian football in a Canadian football league.

Id.

98. Indianapolis Colts, 34 F.3d at 414. The court referred to these uninformed people, who would not be warned off as to the real identity of the CFL’s Baltimore team, as "football illiterates." Id. at 412.

99. Id. at 414. The court expressed its concern about how wide the "likelihood of confusion" determination should extend. Id. The court stated "[t]here is great variance in consumer competence, and it would be undesirable to impoverish the lexicon of trade names merely to protect the most gullible fringe of the consuming public. The Lanham Act does not cast the net of protection so wide." Id. (citing Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423, 1428 n.1 (7th Cir. 1985), cert. denied, 475 U.S. 1147 (1986); Quaker Oats Co. v. General Mills Co., 134 F.2d 429, 432 (7th Cir. 1943); McCarthy, supra note 32, at §23.27[4]).

100. Id. at 414. The court recognized that the legal standard for determining whether there is a "likelihood of confusion" under the Lanham Act has been given different formulations by the different circuits, but summarized that the different formulations all reduce to the same basic premise. Id. For a discussion of the formulations used by the different circuits, see supra note 42 and accompanying text.
the product, [and] the overlap in the parties' geographical markets..." 101

Rather than plunging into an examination of the pertinent factors, the court instead turned to the consumer survey evidence that had been submitted at trial. 102 The court began its discussion by stating that "the parties to trademark disputes frequently as here hire professionals in marketing or applied statistics to conduct surveys of consumers." 103 Before examining the specific surveys, the court expressed an overall dissatisfaction with the system by which consumer survey experts are retained, as well as quality control measures that are exercised over them. 104

Both parties submitted consumer survey studies, but the court gave little weight to the defendant's study, finding it to be lacking in its methodology. 105 The court, however, did find the plaintiff's study thorough and professional. 106 Although the court expressed

101. Indianapolis Colts, 34 F.3d at 414. This list contains only four of the seven factors used by the Seventh Circuit in making a "likelihood of confusion" determination. The court alludes to the other three in a vague statement about "other factors" that previous cases have considered. Id. For a complete list of the factors used by the Seventh Circuit in making a "likelihood of confusion" determination, see supra note 46 and accompanying text.

102. Id. at 414-16. For a discussion of the lower court's finding of "likelihood of confusion" without application of multiple-factor test, see supra note 89.

103. Id. at 414 (citing McCarthy, supra note 58, at § 32.55[2]; Jones, supra note 58; Lipton, supra note 58).

104. Id. at 415. This dissatisfaction was crystallized in the court's statement that "both experts in this case were hired and, we have no doubt, generously remunerated even though both have been criticized in previous judicial opinions." Id.

105. Id. The court described the defendants' study by stating:

The defendants' [study] was prepared by Michael Rappeport and is summarized in a perfunctory affidavit by Dr. Rappeport to which the district judge gave little weight. That was a kindness. The heart of Rappeport's study was a survey that consisted of three loaded questions asked in one Baltimore mall. Rappeport has been criticized before for his methodology, and we hope that he will take these criticisms to heart in his next courtroom appearance.

Id. (citation omitted).

106. Indianapolis Colts, 34 F.3d at 415. The court stated that "[t]he plaintiff's study, conducted by Jacob Jacoby, was far more substantial and the district judge found it on the whole credible. The 28-page report with its numerous appendices has all the trappings of social scientific rigor." Id. When administering the survey:

[i]nterviewers showed several hundred consumers in 24 malls scattered around the country, shirts and hats licensed by the defendant for sale to consumers. The shirts and hats had "Baltimore CFL Colts" stamped on them. The consumers were asked whether they were football fans, whether they watched football games on television, and whether they ever bought merchandise with a team name on it. Then they were asked, with reference to the "Baltimore CFL Colts" merchandise that they were shown, such questions as whether they knew what sport the team played, what teams it
some concern about the questions asked by the plaintiff's survey, and the selectiveness of the subsample, it ultimately agreed with the plaintiff that the survey indicated "astonishing levels of confusion."  

As a result, the court upheld the finding of a "likelihood of confusion," because it could find no clear error on the part of the district judge in crediting the major findings of the [plaintiff's] study and inferring from it that the defendants' use of the name 'Baltimore CFL Colts' was likely to confuse a substantial number of consumers. The Seventh Circuit gave little weight to the district court's finding that the plaintiff had abandoned the trademark "Baltimore Colts" after moving to Indianapolis. The defendant argued that the Indianapolis Colts' abandonment of the trademark "Baltimore Colts" allowed the defendant to appropriate the mark. The court rejected this argument, however, through a discussion of the effect of trademark abandonment, both in theory and in practice.

The court conceded that, in theory, when a trademark is abandoned, it returns to the public domain and may be adopted by a new user. In practice, however, the court insisted that "because subsequent use

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107. The court agreed with the defendant's protest that: (1) plaintiff's choice of the name "Baltimore Horses" for a second comparison survey "loaded the dice" somewhat; and (2) that some of the Plaintiff's questions were "a bit slanted."  

108. Id. The court highlighted the results of the survey which suggested that an overwhelming majority of "self-identified" football fans were confused as to who the Baltimore CFL Colts were, and whether they were somehow sponsored or authorized by the Indianapolis Colts or the NFL.  

109. Id. According to the court, this finding required that the injunction be issued.  

110. Id. at 412-13. The court treats the district judge's finding as an obvious fact by stating "[w]ell of course; [the Indianapolis Colts] were no longer playing football under the name 'Baltimore Colts,' so [they] could not have used the name as the team's trademark."  

111. Indianapolis Colts, 34 F.3d at 412-13. For a full discussion of the Indianapolis Colts' abandonment of the mark "Baltimore Colts," see infra notes 190-201 and accompanying text.  

112. Id. at 412-13. For a full discussion of the Seventh Circuit's traditional approach to issue of abandonment, see supra notes 70-77 and accompanying text.  

113. Id. at 412.
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[an] abandoned mark may well evoke a continuing association with the prior use, those who make subsequent use may be required to take reasonable precautions to prevent confusion.” 114 The court found this precept particularly important because this case involved a situation where the former owner of the abandoned mark, the Indianapolis Colts, continued to market the same product or service, professional football, under a similar name. 115 As far as the court was concerned, the fact that the plaintiff abandoned the trademark “Baltimore Colts” in order to select a very similar one did not allow the defendant to use the abandoned trademark to confuse potential consumers. 116

The court also gave very little weight to the defendant’s inclusion of the acronym “CFL” in the team name. 117 The court assumed that the inclusion was an attempt to improve the defendant’s litigating posture rather than view it as a “reasonable precaution to prevent confusion” under the abandonment standard. 118 Even if viewed as a reasonable precaution, the court still felt that the maneuver did little to dispel the confusion that might be created in “football illiterates.” 119 As a result, the court viewed the acronym as a “red herring,” that was not to distract from the real issue of whether the defendant could use the name “Baltimore Colts.” 120

Similarly, the court rejected the defendant’s abandonment argument based on Major League Baseball Properties, Inc. v. Sed Non Olet Denarius, Ltd., 121 a case from the United States District Court for the South-

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114. Id. at 412-13 (alteration in original) (quoting McCarthy, supra note 70, at § 17.01[2]).
115. Id. at 413. However, the court did note that it could not “find any previous cases of this kind.” Id.
116. Indianapolis Colts, 34 F.3d at 413. The court expressed its concern that this confusion might be felt not only by Indianapolis Colts fans, but also by “other actual or potential consumers of products and services marketed by the [Indianapolis] Colts or by other National Football League teams, with regard to the identity, sponsorship, or league affiliation of the third party, that is, the new Baltimore team.” Id.
117. Id. at 412. The court suggests that this inclusion was a concession readily given to an outraged NFL because the acronym appears in small or blurred letters on several items. Id.
118. Id. The court offered no explanation for its theory that the inclusion of the acronym “CFL” was done to better the defendant's litigating posture.
119. Id. The court suggested that the acronym “CFL” has none of the instant recognition value of the acronym “NFL.” Id. Essentially, the court worried that those who “know” football would know the difference between the two professional leagues, but those who did not know football would “not be warned off by the letters ‘CFL.’” Id.
120. Id.
ern District of New York. The defendant pointed to the finding in *Sed Non* that a team can be deemed a “nontransportable cultural institution” separate from the identity that the team assumes upon moving to another city. Therefore, the defendant contended that the “sudden and greatly resented departure of the Baltimore Colts for Indianapolis made the name ‘Baltimore Colts’ available to anyone who would continue the ‘nontransportable cultural institution’ constituted by a football team in the City of Baltimore.”

The court distinguished *Sed Non* by pointing to the fact that it involved the name of a restaurant, not a professional team. There was no possibility of confusion between a restaurant and a professional team in *Sed Non*, declared the court, whereas in this case there is the possibility of confusion between two professional teams playing the same sport.

V. Critical Analysis

A. Likelihood of Confusion

The generally accepted method of analyzing a trademark dispute under the Lanham Act consists of applying a multi-factor test to the facts of a particular case to determine whether there is a “likelihood of confusion.” In *Indianapolis Colts*, the court noted certain factors traditionally used in the Seventh Circuit for this analysis, yet the court never discussed their application to the facts of the case. Instead of utilizing the multi-factor test, the court relied almost exclusively on the results of the consumer survey evidence after voicing serious doubts about the consumer survey system in general and the parties’ surveys in particular.

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122. *Indianapolis Colts*, 34 F.3d at 413. The court showed its disapproval of this argument by stating, “[w]e . . . need not even try to distinguish *Sed Non Olet Denarius* since district court decisions are not authoritative in this or any court of appeals.”

123. *Id.* In *Sed Non*, the “Brooklyn Dodgers” were found to be a “nontransportable cultural institution” separate from the “Los Angeles Dodgers,” the identity the team assumed when it moved from Brooklyn, New York to Los Angeles, California.

124. *Id.*

125. *Id.*

126. *Id.* The court did address some final arguments raised by the defendant, but dismissed them as either baffling or without merit.


128. Geise, *supra* note 16, at 570. For a discussion of the lower court’s finding of a “likelihood of confusion” without apparent application of the multi-factor test, see *supra* note 89. For a complete list of the seven factors used by the Seventh Circuit in a “likelihood of confusion” analysis, see *supra* note 46 and accompanying text.
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Finally, the court disregarded the district judge's finding that the plaintiff had abandoned the trademark "Baltimore Colts," despite the fact that the Lanham Act specifically provides that abandonment is a valid defense in a trademark infringement action.\footnote{Indianapolis Colts, 34 F.3d at 415-16. For a full discussion of why the court largely accepted the plaintiff's survey over the defendant's survey, see supra notes 105-08, and accompanying text.}

A full exploration of the seven factors used by the Seventh Circuit in a "likelihood of confusion" analysis is not a mechanical process.\footnote{For a discussion of the court's disregard of the district judge's finding, see supra notes 110-16 and accompanying text. For a discussion of the abandonment defense under the Lanham Act, see supra notes 70-72 and accompanying text.} Rather, the proper approach is to weigh each factor in the context of the others to determine if, on balance, a likelihood of confusion exists.\footnote{KirKPATRICK, supra note 33, at 2-18 to 2-19. "Generally, none of the factors by itself is always decisive or even preeminent. Nor should any systematically receive undue emphasis or excessive importance. The factors are interrelated and must be considered together as an 'amalgam.' They are not to be applied serially or mechanically as if they were independent of one another." Id. at 2-18 (emphasis added) (footnotes omitted). See also AHP Subsidiary Holding Co. v. Stuart Hale Co., 1 F.3d 611, 616 (7th Cir. 1993) ("None of the seven confusion factors alone is dispositive in a likelihood of confusion analysis."); Int'l Kennel Club v. Mighty Star, Inc., 846 F.2d 1079, 1087 (7th Cir. 1988) (asserting no factor alone is dispositive of "likelihood of confusion" question); Piper Aircraft Corp. v. Wag-Aero, Inc., 741 F.2d 925, 934 (7th Cir. 1984) (stating Seventh Circuit has reversed lower court decisions that placed excessive reliance on any one factor).} A full exploration of the factors, as applied to the facts of this case, seems to suggest that the court should have reversed the district court's finding of a likelihood of confusion.\footnote{See Sands, Taylor & Wood Co. v. Quaker Oats Co., 978 F.2d 947, 959 (7th Cir. 1992), cert. denied, 113 S. Ct. 1179 (1993). In Sands, Taylor & Wood, the Seventh Circuit stated: The trial court's ultimate conclusion as to the likelihood of confusion is a finding of fact, which we review under the clearly erroneous standard. We do, however, "review the district court's statement of the law de novo for legal error and its conclusions for signs that the court's application of the law was infected with legal error." Id. (citations omitted). See also Nike, Inc. v. "Just Did It" Enters., 6 F.3d 1225, 1233 (7th Cir. 1993) (holding district court erred in granting summary judgment to plaintiff where application of multi-factor test produced no clear "likelihood of confusion"); Forum Corp. of N. Am. v. Forum, Ltd., 903 F.2d 434, 439 (7th Cir. 1990) (stating Seventh Circuit review of district court includes assuring confusion test was properly applied). One Seventh Circuit decision has even suggested that "to the extent the determination [of a 'likelihood of confusion'] is predicated on the similarity of the marks themselves, this Court is in as good a position as the trial judge to determine likelihood of confusion." Henri's Food Prods. Co. v. Kraft, Inc., 717 F.2d 352, 354 (7th Cir. 1983) (citing Union Carbide Corp. v. Ever-Ready Inc., 531 F.2d 366, 383 (7th Cir.), cert. denied, 429 U.S. 830 (1976)). For the full
The first factor, the similarity of the parties' marks, favors the defendant. An inquiry beyond the names of the two teams "displays a distinct difference between the parties' marks." The Indianapolis Colts' logo is a horseshoe, while the Baltimore CFL team's logo consists of a silhouette of a horsehead and a mapleleaf to denote CFL affiliation. In other words, visually, the Indianapolis Colts' helmet is white with a blue horseshoe, while the Baltimore CFL Colts' helmet is silver with the profile of a horse's head. The parties' marks are essentially distinct.

The second factor, the similarity of the products or services, presents a more difficult analysis. While both parties engage in a similar service, professional football, there are enough significant differences between the two to question their similarity. When compared with the game played by the NFL, the game played by the CFL has been described as more like "basketball on a football field," due to its much

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list of the seven factors used by the Seventh Circuit in a "likelihood of confusion" analysis, see supra note 46 and accompanying text.

134. See Geise, supra note 16, at 571. In properly assessing the similarity of trademarks, the two marks must be viewed separately because consumers typically rely on mental pictures or symbols of the products they desire to purchase. Epstein, supra note 25, at 313.

135. Geise, supra note 16, at 571. See also Stuart Hale, 1 F.3d at 617 (in reviewing the district court, Seventh Circuit analyzed visual similarities in parties' products); Kraft, 717 F.2d at 355-56 (citing authority that comparison of labels rather than simply trademarks is appropriate and finding visual difference between labels is factor weighing against infringement).

136. O'Neill, supra note 22, at B1. Ironically, there is some debate as to who created the plaintiff's logo. One observer wrote: "[a]s for the helmet logo, the horseshoes, the NFL and its properties division had nothing to do with that either. It's not creative enough. The horseshoes were put there by a former Colts publicity director, Sam Banks, in 1954." Steadman, supra note 10, at D1.

137. O'Neill, supra note 22, at B1. In Indianapolis Colts, the plaintiff alleged in their complaint that the defendant's logos and trademarks were "virtually identical" to those of the Indianapolis Colts. Bonkowski, supra note 21, at C10. However, "the long-standing Baltimore/Indianapolis Colts logo is of a horseshoe, [while] the CFL Colts' logo is a silhouette of a horse's head." Id.


139. The Seventh Circuit has stated that the central question in analyzing the similarity between the parties' products is "whether the products are the kind the public attributes to a single source." Int'l Kennel Club v. Mighty Star, Inc., 846 F.2d 1079, 1089 (7th Cir. 1988) (citing McGraw-Edison Co. v. Walt Disney Prods., 787 F.2d 1163, 1169 (7th Cir. 1986)).

140. Murray, supra note 15, at D1:
If you have never seen a CFL game, one of the first things you will notice is the pace. It may be the biggest difference in the American and Canadian games. It is the product of three-down football, a 20-second clock between plays, unlimited motion in the backfield and a 37-man roster. It is also the result of a field that's 11 1/2 yards wider and 30 yards longer than the NFL. Id.
quicker pace.\textsuperscript{141} In its discussion, the court recognized that the rules of Canadian football are different from those of American football.\textsuperscript{142} The court further noted that teams do not move from the NFL to the CFL, as they might move from one conference to another within the NFL.\textsuperscript{143} These differences, taken together, should have prompted the court to analyze the similarity of the parties' products.\textsuperscript{144}

The third factor, the area and manner of concurrent use, nominally favors the plaintiff.\textsuperscript{145} This factor weighs in the plaintiff's favor because the defendant's games would be broadcast nationally and merchandise sold nationally, as is done by the plaintiff.\textsuperscript{146} This overlap in the national market is not complete, however, because the defendant's nationwide broadcasts take place on cable television networks that do not broadcast NFL games.\textsuperscript{147} Moreover, the CFL season runs from June to November while the NFL season runs from August to January.\textsuperscript{148} The court carried this potential overlap to an imaginative level in expressing a concern that
an unwary fan might mistakenly purchase a ticket to a CFL instead of an NFL game.\footnote{Indianapolis Colts, 34 F.3d at 414. “One would have to be stupid to be misled or confused” as to what league and what teams were represented at a professional football game. See Quaker Oats Co. v. General Mills, 134 F.2d 429, 432 (7th Cir. 1943) (noting person making this sort of mistake “would be careless to a degree that the law has no duty to protect”).}

The fourth factor, the degree and care likely to be exercised by consumers, realistically favors neither party because “[a] factor ordinarily comes into play only to the extent that the record contains competent evidence pertaining to it.”\footnote{In short, lack of evidence on a factor may prevent any useful conclusion from being drawn. Here, the court expressed concern for “football illiterates” who might be easily confused, but the court also admitted “that people are more careful when they are laying out their money . . .” This contradiction suggests, therefore, that no useful conclusion can be drawn concerning this factor.}

The fifth factor, the strength of the complainant’s mark, arguably favors the plaintiff. The court’s observation of the institutional continuity of the Indianapolis Colts appears to support the plaintiff’s claim as to the strength of the trademark “Colts.”\footnote{When analyzing the strength of a plaintiff’s trademark, however, a court should assess the “origin-indicating” quality of the mark in the eyes of the consuming pub-}

regular season play through late December and concludes with playoffs and a championship game, the “Super Bowl,” in late January.

149. Indianapolis Colts, 34 F.3d at 414. “One would have to be stupid to be misled or confused” as to what league and what teams were represented at a professional football game. See Quaker Oats Co. v. General Mills, 134 F.2d 429, 432 (7th Cir. 1943) (noting person making this sort of mistake “would be careless to a degree that the law has no duty to protect”). See also Murray, supra note 20, at D8 (“When you see Baltimore vs. Toronto, Baltimore vs. Las Vegas, the sports-knowledgeable public will not be confused.”).

150. KIRKPATRICK, supra note 33, at 2-20.


152. Indianapolis Colts, 34 F.3d at 412, 416. In the Seventh Circuit, the “likelihood of confusion” standard contemplates the “ordinary” consumers, rather than “careless” consumers. Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423, 1428 n.1 (7th Cir. 1985) (rejecting Learned Hand’s formulation of standard as careless, rather than ordinary, consumer), cert. denied, 475 U.S. 1147 (1986). Those “football illiterates” whom the court worries might accidentally buy a ticket to a CFL game instead of an NFL game, or watch a CFL game broadcast thinking they are watching the NFL, clearly seem to fall in the careless consumer category, therefore making the court’s concern for them immaterial. See Quaker Oats Co. v. General Mills, 134 F.2d 429, 432 (7th Cir. 1943) (“Anyone deceived or confused by the plaintiff’s package into believing he was getting the defendant’s package would be careless to a degree that the law has no duty to protect.”).

153. Nike, 6 F.3d at 1230-31.

154. Geise, supra note 16, at 571 (“The strength of the plaintiff’s mark is also conceded.”).

155. Indianapolis Colts, 34 F.3d at 413-14. For a full discussion of the court’s observation of the Indianapolis Colts’ institutional continuity, see supra note 95 and accompanying text.
Therefore, the defendant should be able to rely on the district court's finding that the Indianapolis Colts abandoned the trademark "Baltimore Colts" to refute the plaintiff's claim as to this factor.

The sixth factor, actual confusion, is generally shown through the use of consumer surveys. Instead of evaluating the other six factors, the court based its decision primarily on evidence pertinent to this factor. Even before examining this factor, however, the court voiced serious concerns about the overall consumer survey system and the system's so-called "experts."

Thereafter, the court dismissed the defendant's survey, while, at the same time, accepting the plaintiff's survey despite its many weaknesses. It seems that the court expressed enough apprehension about the plaintiff's survey that the survey should not have received the substantial weight it was given. In this light, the sixth factor should also be deemed to favor the defendant. However, if the sixth factor does not clearly favor the defendant, the court attributed excessive weight to

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156. Sands, Taylor & Wood Co. v. Quaker Oats Co., 978 F.2d 947, 959 (7th Cir. 1992), cert. denied, 113 S. Ct. 1179 (1993). In Sands, Taylor & Wood, the Seventh Circuit characterized this factor by stating "[t]he term 'strength' as applied to trademarks refers to the distinctiveness of the mark, or more precisely, its tendency to identify the goods sold under the mark as emanating from a particular . . . source." Id. (alterations in original) (quoting McGregor-Doniger, Inc. v. Drizzle, Inc., 599 F.2d 1126, 1131 (2d Cir. 1979)). See also Epstein, supra note 25, at 312 (suggesting strength of trademark reflects "origin-indicating" quality in eyes of purchasing public).

157. For a full discussion of the defendant's argument pertaining to the district court's finding of trademark abandonment, see supra notes 111-26 and accompanying text.

158. For a discussion of the use of consumer survey evidence to demonstrate actual confusion, see supra notes 58-63 and accompanying text.

159. Geise, supra note 16, at 570 ("The court of appeals devoted much of its opinion to the importance of a survey in proving a likelihood of confusion."). For a full discussion of the excessive weight the court placed on the plaintiff's survey, see infra notes 175-89 and accompanying text.

160. For a description of the court's overall dissatisfaction with the consumer survey system, see supra note 104 and accompanying text.

161. See supra notes 105-06 and accompanying text (describing court's dissatisfaction with defendant's survey).

162. For a full discussion of the weaknesses that the court notes in the plaintiff's survey, see supra note 107 and accompanying text.

163. See AHP Subsidiary Holding Co. v. Stuart Hale Co., 1 F.3d 611, 618 (7th Cir. 1993) (maintaining shortcomings in survey results go to proper weight of survey); McGraw-Edison Co. v. Walt Disney Prods., 787 F.2d 1163, 1172 (7th Cir. 1986) ("[judicial] concern regarding the manner of presentation to the interviewee goes to the weight to be accorded to the survey results"); see also Geise, supra note 16, at 572 (asserting Seventh Circuit's criticism was serious enough to question survey's reliability).

164. Geise, supra note 16, at 572 (maintaining plaintiffs may not have shown factor of actual confusion due to questionable reliability of survey).
the survey evidence in what should have been a full analysis of the multifactor test.\textsuperscript{165}

The seventh factor is the intent on the part of the alleged infringer to "palm off" his products as those of another.\textsuperscript{166} The court conveyed a certain suspicion that the defendants used the name "Colts" as part of an intent to "palm off" the new team as related to the plaintiffs.\textsuperscript{167} In contrast, the court had to explicitly concede that in the defendant's naming of the new team, "there is no evidence that [this intent] was the dominant or even a major consideration."\textsuperscript{168} Additionally, the fact that the defendant picked the name "Baltimore CFL Colts" only after discovering and verifying that the plaintiff had failed to renew its federal registration for the name "Baltimore Colts" also suggests no intentional infringement on the part of the defendant.\textsuperscript{169} Taken together, the fact that the court could find no evidence of an illegitimate intent on the part of the defendant and that the defendant took affirmative steps to properly register the name "Baltimore CFL Colts," suggests that the defendant did

\textsuperscript{165} See Stuart Hale, 1 F.3d at 618 (asserting consumer surveys are evidence of actual confusion, but actual confusion is only one factor in "likelihood of confusion" determination). "None of the seven confusion factors alone is dispositive in a likelihood of confusion analysis." Id. at 616; see also Int'l Kennel Club v. Mighty Star, Inc., 846 F.2d 1079, 1087 (7th Cir. 1988) (asserting no one factor alone dispositive of "likelihood of confusion" question); Piper Aircraft Corp. v. Wag-Aero, Inc., 741 F.2d 925, 934 (7th Cir. 1984) (stating Seventh Circuit reversed lower court decisions placing excessive reliance on any one factor). For a full discussion of the excessive weight given to the plaintiff's consumer survey evidence, see infra notes 175-89 and accompanying text.

\textsuperscript{166} The Seventh Circuit has held that, "the defendant's intent is relevant to the issue of likelihood of confusion only if he intended 'to palm off his products as those of another,' thereby profiting from confusion." Sands, Taylor & Wood Co. v. Quaker Oats Co., 978 F.2d 947, 961 (7th Cir. 1992) (quoting Forum Corp. of N. Am. v. Forum, Ltd., 903 F.2d 434, 439 (7th Cir. 1990)), cert. denied, 113 S. Ct. 1179 (1993).

\textsuperscript{167} Indianapolis Colts, 34 F.3d at 412, 414. The court voiced its suspicion by stating: "Certainly the [NFL's] Baltimore Colts had a national following, and we do not doubt that the resonance of the name, and not merely the clamor of the Baltimoreans, motivated the Baltimore team's choice of 'Colts,' out of all the appealing animals in the ark." Id. at 412. Similarly, when expressing a concern that potential consumers might mistakenly purchase Baltimore CFL Colts merchandise thinking it somehow related to the NFL's "glory days" Baltimore Colts, the court stated that "[i]t would be naive to suppose that no consideration of such possibilities occurred to the owners of the new Baltimore team when they were choosing a name." Id. at 414.

\textsuperscript{168} Id. (emphasis added). The owner of the new CFL team, James L. Speros, raised an interesting point concerning his intent, which the court never considered, by stating: "[t]here has been a lot of bitterness and anger . . . If I'm associated in any way with the NFL in Baltimore it does nothing but hurt me and my organization." Morgan, supra note 13, at 11C.

\textsuperscript{169} Geise, supra note 16, at 572. "[T]he defendants did not intend to sell their services as those of the NFL, as they merely chose a name desired by their fans that was not already registered." Id.
not intend to profit from confusion by "palming off" its product as that of the plaintiff.\textsuperscript{170}

As illustrated, a full exploration of the multi-factor test used by the Seventh Circuit shows that the majority of the factors favor the defendant.\textsuperscript{171} The Seventh Circuit's decision in \textit{Indianapolis Colts} was flawed because the court only focused on evidence pertinent to one of these factors to uphold the conclusion of a "likelihood of confusion."\textsuperscript{172} A more reasoned approach by the Seventh Circuit would have included analyzing all of the factors as applied to the facts of the case.\textsuperscript{173} A complete analysis would have led the Seventh Circuit to conclude that the district court's finding of a "likelihood of confusion" was clearly erroneous.\textsuperscript{174}

\textbf{B. Consumer Survey Evidence}

In basing its decision primarily on the plaintiff's consumer survey, the court mistakenly gave excessive weight to this factor.\textsuperscript{175} The modern trend in trademark law considers surveys useful but not indispensable.\textsuperscript{176} Moreover, "[m]any courts . . . are skeptical when it comes to survey evidence, recognizing that it is difficult to assess the true reactions of con-

\textsuperscript{170} Sands, Taylor & Wood, 978 F.2d at 961. These two facts taken together also suggest that the seventh factor favors the plaintiff. Geise, \textit{supra} note 16, at 572 (claiming seventh factor favors defendant).

\textsuperscript{171} Geise, \textit{supra} note 16, at 572 ("Of the seven factors apparently utilized by the district court, at least four arguably favor the defendants and a finding of no likelihood of confusion.").

\textsuperscript{172} For a discussion of the court's excessive reliance on the sixth factor, actual confusion, see \textit{supra} notes 102-09 and accompanying text.

\textsuperscript{173} Nike, Inc. v. "Just Did It" Enters., 6 F.3d 1225, 1228 (7th Cir. 1993) ("[T]he court is required to consider several factors when assessing whether or not there is a likelihood of confusion by the general public."); AHP Subsidiary Holding Co. v. Stuart Hale Co., 1 F.3d 611, 616 (7th Cir. 1993) ("None of the seven confusion factors alone is dispositive in a likelihood of confusion analysis."); Int'l Kennel Club v. Mighty Star, Inc., 846 F.2d 1079, 1087 (7th Cir. 1988) (asserting no one factor alone is dispositive of "likelihood of confusion" question); Piper Aircraft Corp. v. Wag-Aero, Inc., 741 F.2d 925, 934 (7th Cir. 1984) (stating Seventh Circuit reversed lower court decisions placing excessive reliance on any one factor).

\textsuperscript{174} For a description of the Seventh Circuit's standard of review for a district court's "likelihood of confusion" analysis, see \textit{supra} note 133.

\textsuperscript{175} See, e.g., Nike, 6 F.3d at 1228 (cautioning no one factor ends judicial inquiry into "likelihood of confusion"). For a list of Seventh Circuit decisions criticizing the excessive placement of weight on any one factor of the multi-factor test, see \textit{supra} note 50. See also Kirkpatrick, \textit{supra} note 33, at 2-18 (warning no one factor should receive undue emphasis); McCarthy, \textit{supra} note 32, at § 24.06[4][a] (declaring no one "likelihood of confusion" factor is determinative).

\textsuperscript{176} Kirkpatrick, \textit{supra} note 33, at 7-33 (citing \textbf{Restatement (Third) of Unfair Competition} § 23 cmt. c (1995)).
sumers in an artificial setting.” Consequently, the court’s overemphasis on the plaintiff’s consumer survey seems to contradict the Trademark Trial and Appeal Board’s pronouncement that survey evidence is only one factor to be considered in the overall determination of likelihood of confusion.

Additionally, the amount of weight given to the plaintiff’s consumer survey seems excessive in light of the considerable criticism that the court voiced. First, the court expressed a broad dissatisfaction with the manner in which consumer surveys are conducted. The court described the battle of experts that occurs between the parties to a trademark dispute as “frequently unedifying.” The court’s most serious concern, however, stems from its suggestion that “[m]any experts are willing for a generous . . . fee to bend their science in the direction from which their fee is coming.” This concern is particularly troublesome in this case because the plaintiff paid a seventy-five thousand dollar fee for its consumer survey. Curiously, the court recognized this fact as well as the fact that both parties’ experts had been criticized in previous judicial opinions, yet it was still willing to place ample faith in the plaintiff’s expert. Second, the court expressed apprehension about some of the

177. Helene D. Jaffe, Avoiding the Pitfalls: Use of Consumer Surveys in Lanham Act Cases, ANTITRUST, Summer 1994, at 30. This artificial setting is apt to make consumers pay closer attention than they might otherwise, overstate their reactions and be misled by subtle suggestions contained in the questions. Id.

178. KIRKPATRICK, supra note 33, at 7-33. The Trademark Trial and Appeal Board (TTAB) is an administrative body affiliated with the Patent and Trademark Office. McCarthy, supra note 32, at § 21.01. The TTAB acts as fact-finding decision-maker in cases arising out of conflicts between private parties concerning the federal registration of a trademark. Id. The TTAB acts as an appellate tribunal in cases arising out of conflicts between a private applicant for registration and the Patent and Trademark Office. Id.

179. For a discussion of the court’s general criticisms of the consumer survey system and particular criticisms of the plaintiff’s survey, see supra notes 104, 107 and accompanying text.

180. Indianapolis Colts, 34 F.3d at 415.

181. Id. The court was critical of the market which provides consultant services for lawyers and commented that the market obviously has little control over the dubious practices of some of its consultants. Id. The court supported this view by pointing to the fact that both the plaintiff’s and defendant’s consumer survey experts in this case had been judicially criticized in previous cases. Id. In spite of this, the court expressed that it had no doubt that both experts were being generously renumerated for their suspect services. Id.

182. Id. (emphasis added).

183. Morgan, supra note 13, at C11 (“The NFL produced a $75,000 survey of 726 people in 24 cities that asserted consumers would be confused by having teams in different football leagues with the same name.”). Ironically however, “[s]ince 1954, . . . [there have been] two teams called the Lions, one in the CFL and one in the NFL, and nobody has ever mistaken British Columbia for Detroit.” CFL Colts Vow To Keep Name Despite NFL Suit, WASH. POST, May 1, 1994, at D2 (quoting Baltimore Mayor Kurt Schmoke).

184. Indianapolis Colts, 34 F.3d at 415. The court stated:
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particular aspects of the plaintiff’s survey.\textsuperscript{185} Third, the court stated that it had no doubt that it was inadvertently overlooking other tricks of the survey researcher’s “black arts.”\textsuperscript{186}

In effect, the court seemed to choose the lesser of two evils, the plaintiff’s survey. The court then offered the justification that judicial constraints on expert testimony are inherently weak because judges do not have the necessary training or expertise in the relevant fields of expert knowledge.\textsuperscript{187} The court complacently accepted this rationale because, in its view, the existence of inherently weak judicial constraints on expert testimony “is the system we have.”\textsuperscript{188} Instead of accepting this situation, the court should have responded to its general and particular uneasiness with the consumer survey evidence by placing considerably less weight on the plaintiff’s survey, and placing greater consideration on the other factors that are part of the multi-factor test.\textsuperscript{189}

C. Trademark Abandonment

The court erred by disregarding the district judge’s finding that the plaintiff abandoned the trademark “Baltimore Colts.” Instead of giving weight to this finding, the court focused on the contention that the plaintiff continued to market the same product or service under a similar name.\textsuperscript{190} This contention is clearly contrary to the Lanham Act.\textsuperscript{191} The

\begin{footnotesize}
185. For a full discussion of the defects and biases that the court pointed to in the plaintiff’s study, see supra note 107.

186. \textit{Indianapolis Colts}, 34 F.3d at 416. The court indicated that it did not know what these other tricks were. \textit{Id}.

187. \textit{Id} at 415. The court’s concern was not simply that judges lack the requisite knowledge to understand the expert testimony, but rather that judges lack the proper understanding to be able to control tendentious, or purposely slanted, expert testimony. \textit{Id}.

188. \textit{Id}. The court did mention a federally authorized alternative approach involving the use of a third, neutral expert to conduct the surveys, but acknowledged that it had not been utilized in the case. \textit{Id}.

189. \textit{See} AHP Subsidiary Holding Co. v. Stuart Hale Co., 1 F.3d 611, 618 (7th Cir. 1993) (maintaining shortcomings in survey results go to proper weight of survey); McGraw-Edison Co. v. Walt Disney Prods., 787 F.2d 1163, 1172 (7th Cir. 1986) ("[judicial] concern regarding the manner of presentation to the interviewee goes to the weight to be accorded to the survey results.").

190. \textit{Indianapolis Colts}, 34 F.3d at 412-13. For a full discussion of this contention, see supra notes 115-116 and accompanying text.

Lanham Act states that nonuse for two years is prima facie evidence of abandonment. Here, the plaintiff had failed to use the trademark "Baltimore Colts" for seven years after leaving Baltimore for Indianapolis. Furthermore, the plaintiff had allowed the federal registration that it held for the trademark to lapse, indicating that they had actually abandoned the mark. Consequently, these facts suggest that the defendant was entitled to the affirmative defense of abandonment under the Lanham Act.

In rejecting the defendant's abandonment argument, the court quoted a treatise on trademarks and intellectual property which states that a subsequent user of an abandoned mark is required to take reasonable precaution to prevent confusion with the previous user. However, the court explicitly admitted that it could find no precedent on this point. In dismissing the defendant's attempt to clarify the team name by inserting "CFL" between "Baltimore" and "Colts," the court implied that the defendant failed to use the required reasonable precaution. Additionally, the court suggested that the acronym "CFL" has none of the instant recognition value of the acronym "NFL," and therefore would not serve to ward off confusion. It does appear inconsistent that the court, in the same paragraph, expressed concern for "football illiterates" who would be easily confused by acronyms, yet credited the in commerce and not from mere registration of the mark, the owner of a mark will lose his exclusive rights if he fails actually to use it." Id. (emphasis added) (citing 15 U.S.C. § 1127). For a full discussion of the abandonment standard under the Lanham Act, see supra notes 70-72 and accompanying text.


194. Geise, supra note 16, at 572-73. For a discussion of how this trademark came to be unregistered, see supra note 20 and accompanying text.

195. Geise, supra note 16, at 573. See Dovenmuehle v. Gilldorn Mortgage Midwest Corp., 871 F.2d 697, 701 (7th Cir. 1989) ("Once a trademark or trade name is abandoned, it returns to the public domain.").

196. Indianapolis Colts, 34 F.3d at 412-13 (citing McCarthy, supra note 70, at § 17.01[2]).

197. Id. at 413.

198. Id. at 412. The court failed to offer an example of a reasonable precaution the Baltimore CFL team could have taken in the alternative. This failure was caused by the court's inability to find any precedent addressing the issue of reasonable precautions taken by a subsequent user of an abandoned mark where the former owner continues to market the same product or service under a similar name. Id. at 413.

199. Id. at 412.
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The acronym “NFL” with instant recognition value. The court also never considered the defendant’s choice of a visual logo that naturally accompanies a team’s name. Taken together, the inclusion of the acronym “CFL” and the selection of a different logo and color scheme seem to suggest that the defendant took the reasonable precaution required to prevent confusion with the plaintiff, and therefore made proper use of an abandoned mark.

VI. IMPACT

The crisis developing in professional football, known as “Franchise Free Agency,” sets the stage for future trademark disputes over valuable team logos and other trademarks. An NFL franchise that relocates to another city, possibly hundreds of miles away, will not necessarily retain its former name or logo. At the same time, the CFL is aggressively pursuing expansion plans into major cities in the United States, including cities that may be abandoned by the NFL. Owners of any CFL expansion team in a city with a solid football-fan tradition will no doubt feel heavy pressure to defer to these fans’ wishes concerning the team name or logo in order to make the team as successful and profitable as possible. Naturally, the NFL will seek to block the CFL from

200. Id.
201. For a full discussion of the difference between the plaintiff’s and the defendant’s visual logo, see supra notes 135-38 and accompanying text.
202. For a full discussion of the professional football teams in the NFL considering relocation and the consequential coining of the phrase “Franchise Free Agency,” see supra notes 2-4 and accompanying text.
203. King, supra note 2, at 32 (referring to NFL’s Houston Oilers franchise, which is considering relocation to Nashville, as “Nashville Somethings” because “they won’t be called the Oilers”).
204. Ken Murray, Speros Vows Fight Over Colts Name, BALTIMORE SUN, May 1, 1994, at 1C. The CFL’s Baltimore team owner, James L. Speros, stated: “[The CFL’s] expansion program is going to move into many major cities. In the near future, we’ll be in a number of NFL cities.” Id. Speros added that the CFL had already had talks about placing franchise teams in Boston and Chicago. Id. Both Chicago and Boston (even though the New England Patriots play twenty-five miles from the city) are cities whose NFL franchises are considering relocation. For a discussion of the NFL franchises that are currently considering relocation, see supra note 2.
205. This heavy pressure to defer to fans’ wishes played the dominant role in Speros’ selection of the name “Baltimore CFL Colts” for his expansion team. Ken Murray, Colts Suit to Be Heard in Indiana, BALTIMORE SUN, June 13, 1994, at Cl (quoting Speros: “I gave the team the name the people chose . . . I’m sticking to it. If they had picked Rhinos, I would’ve gone with Rhinos.”); see also Sottile, supra note 18, at 1 (explaining Speros “listened” to Baltimore area fans and retained counsel to avoid legal battle with NFL); cf. Jean Marbella, Root First, Ask Questions Later Is Rallying Cry of Un-Colts Fans, BALTIMORE SUN, June 29,
initiating any action that may infringe upon its trademarks, past or present.\textsuperscript{206}

In \textit{Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club, Ltd.},\textsuperscript{207} the Seventh Circuit had the unique opportunity to establish a workable legal framework through which these types of trademark disputes would be litigated. Unfortunately, the court failed to take advantage of this opportunity. As a result, the Seventh Circuit's decision will likely provide improper guidance in similar sports trademark disputes. The \textit{Indianapolis Colts} decision focused primarily on consumer surveys, instead of focusing on the proper multi-factor test to determine whether there was a "likelihood of confusion."\textsuperscript{208} Additionally, the court's disregard of a valid affirmative defense will further obscure the matter.\textsuperscript{209}

This lack of proper guidance could lead to erroneous conclusions concerning trademark law's governance of sports trademarks. Instead of taking the precautionary steps to meet the multi-factor test, a potential litigant in a similar dispute may simply conclude that victory is ensured by securing an expensive consumer survey that "has all the trappings of social scientific rigor."\textsuperscript{210}

As an ironic example, it is conceivable that one of the defendants in \textit{Indianapolis Colts} could be a potential litigant in a similar, future dispute. The NFL's Houston Oilers have announced their intent to move to Nashville.\textsuperscript{211} As a result, the owner of the CFL's Baltimore team, one

\begin{itemize}
\item \textsuperscript{1994}, at 1C (describing several hundred person rally in Baltimore to protest federal preliminary injunction ordering CFL team to stop using name “Colts”).
\item \textsuperscript{206} The trademark “Baltimore Colts” had not been used as the name of an NFL team for over ten years when the NFL brought its trademark infringement action against the CFL's Baltimore franchise. Ken Murray, \textit{NFL Sues to Block Use of “Colts,” Canadian Expansion Team in Baltimore Want the Nickname}, \textit{Pittsburgh Post-Gazette}, May 1, 1994, at D1 (“The NFL believes it retains trademark rights to the name Colts, even though the team left Baltimore 10 years ago.”).
\item \textsuperscript{207} 34 F.3d 410 (7th Cir. 1994).
\item \textsuperscript{208} For a full discussion of the court's overemphasis on the consumer survey evidence submitted to the lower court, see \textit{supra} notes 175-89 and accompanying text. For a full discussion of the court's deficient analysis of the multi-factor test, see \textit{supra} notes 127-74 and accompanying text.
\item \textsuperscript{209} For a complete discussion of the court's disregard of the defendant's affirmative defense of abandonment, see \textit{supra} notes 190-201 and accompanying text.
\item \textsuperscript{210} \textit{Indianapolis Colts}, 34 F.3d at 415. The court explicitly voiced its concern that "experts are willing for a generous . . . fee to bend their science in the direction from which their fee is coming." \textit{Id.} This concern lends credence to the assumption that the more expensive the study, the better the chance of victory. For a full discussion of the court's concern about the consumer survey system in general, and the parties' surveys in particular, see \textit{supra} notes 104-05, 107 and accompanying text.
\item \textsuperscript{211} Hinton, \textit{supra} note 148, at 42, 45. On November 16, 1995, the Houston Oilers announced their intent to move to Nashville. Hinton, \textit{supra} note 148, at 45.
\end{itemize}
of the defendants in *Indianapolis Colts*, has met with civic officials in Houston concerning possible relocation.\(^{212}\) This situation leaves a very real possibility of a trademark dispute similar to the one in *Indianapolis Colts*.\(^{213}\) The lesson that *Indianapolis Colts* seems to teach the CFL's Baltimore team, or any other CFL team expanding into a former NFL city, is that a "likelihood of confusion" can be avoided merely by obtaining an expensive consumer survey.\(^{214}\)

In deciding *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club, Ltd.*, the Seventh Circuit departed from its traditional approach in a trademark infringement action. This aberration is "likely to confuse" future litigants in anticipated disputes over valuable trademarks in the professional football industry.

\(^{212}\) Hinton, *supra* note 148, at 45.

\(^{213}\) See King, *supra* note 2, at 32 (suggesting NFL's Houston franchise will not retain name "Oilers" after moving to Nashville). The long-standing professional football fan tradition in Houston will no doubt bring to bear pressure on the owner of a CFL team to use the name "Oilers," much the same as the Baltimore fans' cry for the name "Colts" when the CFL granted their city an expansion team. For a discussion of the heavy pressure to defer to fans' wishes in selecting the name of a professional team, see *supra* note 205 and accompanying text. See also Lord, *supra* note 4, at 41 (quoting Baltimore Sun columnist as writing: "The Browns name belongs in Cleveland, just as the Colts name belonged in Baltimore."); Rushin, *supra* note 3, at 60 (relaying fans' wish that when Cleveland franchise relocates, it leaves "noble" name in Ohio).

\(^{214}\) For a quotation of the court's concern about the reliability of survey evidence, from which an inference can be drawn, see *supra* note 209.