

PEDIATRICA, INC.,

IPC NO. 14-2010-000171

Opposer,
-versus-

Opposition to:
Appln. Ser. No. 4-2008-003563
(Filing Date: 28 March 2008)
TM: "NUTRIMIN-C"

ROBERTO S. BRIONES,
Respondent.
x-----x

Decision No. 2011- 88

DECISION

PEDIATRICA, INC., ("Opposer") filed on 16 August 2010 an opposition to Trademark Application No. 4-2008-003563, filed by ROBERTO S. BRIONES ("Respondent-Applicant") and which covers the mark "NUTRIMIN-C in stylized form" for use on fruit juices.

The Opposer alleges, among other things, the following;

"1. The mark 'NUTRIMIN-C' owned by Respondent-Applicant so resembles the trademark 'NUTRILIN' owned by Opposer and duly registered with this Honorable Bureau prior to the publication for opposition of the mark 'NUTRIMIN-C'. Hence, the mark 'NUTRIMIN-C' will likely cause confusion, mistake and deception on the part of the purchasing public.

"2. The registration of the mark 'NUTRIMIN-C' in the name of the Respondent - Applicant will violate Sec. 123 of the IP Code, which provides, in part, that a mark cannot be registered if it:

"3. Under the above-quoted provision, any mark, which is similar to a registered mark, shall be denied registration in respect of similar or related goods or if the mark applied for nearly resembles a registered mark that confusion or deception in the mind of the purchasers will likely result.

The Opposer's evidence consists of the following:

1. Exh. "A" to "A-1" – copies of the pertinent pages of the IPO E-Gazette;
2. Exh. "B" – certified true copy of Cert. of Reg. No. 18566 for the mark "NUTRILIN"
3. Exh. "C", "D", "E", "F", "G" and "H" – certified true copies of the Affidavits of use filed for the mark NUTRILIN;
4. Exh. "I" – sample product label bearing the mark NUTRILIN;
5. Exh. "J" – copy of the certification and sales performance issued on 16 July 2010 by Romeo Z. Castro, Country Manager IMS Health Philippines, Inc.; and
6. Exh. "K" – certified true copy of the Cert. of Product Registration issued by the Bureau of Food and Drugs for the mark NUTRILIN.

The Respondent-Applicant filed on 01 October 2010 his Verified Answer denying all the material allegations of the opposition and arguing that his trademark is not confusingly similar to the Opposer's. He submitted as evidence the separate affidavits of Norito L. Alamares, Marlon M. Singian and Lucila Paras, all executed on 22 September 2010 each one attesting, to wit: "I am working as a DEALER with registration trademark 'NUTRIMIN-C' under 'APPROVET ENTERPRISES' from October 10, 2007 up to present. Also, the Respondent-Applicant, submitted the Declaration of Actual Use for the mark NUTRIMIN-C filed on 19 June 2008.

Should the Respondent-Applicant trademark application be allowed?

Sec. 123.1 (d), of the IP Code provides that a mark cannot be registered if it:

(d) Is identical with a registered mark belonging to a different proprietor or a mark with an earlier filing or priority date, in respect of:

- (i) The same goods or services, or
- (ii) Closely related goods or services, or
- (iii) If it nearly resembles such a mark as to be likely to deceive or cause confusion;

The records show that at the time the Respondent-Applicant filed his trademark application in 2008, the Opposer has an existing trademark registration for NUTRILIN under Reg. No. 18566, issued on 29 March 1973 and subsequently renewed up to 29 March 2013. This notwithstanding, this Bureau finds no confusing similarity between the marks NUTRIMIN-C and NUTRILIN.

A practical approach to the problem of similarity or dissimilarity is to go into the whole of the two trademarks pictured in their manner of display. Inspection should be undertaken from the viewpoint of prospective buyer. The trademark complained should be compared and contrasted with the purchaser's memory (not in juxtaposition) of the trademark said to be infringed. Some factors such as sound; appearance; form; styles; shape; size or format; color, idea connoted by the mark; the meaning, spelling and pronunciation of the words used; and the setting in which the words appear may be considered, for indeed, trademark infringement is a form of unfair completion.

The first two syllables of the Respondent-Applicant's mark – forming the prefix "NUTRI" – are the same with the Opposer's. "NUTRI" is obviously derived from the words "nutrition" or "nutrients", and thus, is not really unique if used as a trademark or as a part of a trademark for food or food-based health care products. What would make such trademark distinctive are the suffixes or appendages to the prefix "NUTRI" and/or the devices, if any. In this regard, the last syllable in the Opposer's mark ("LIN") is different from the last syllable in the Respondent-Applicant's mark ("MIN-C"). The dash ("-") and the letter "C" in the Respondent-Applicant's mark assured a fine distinction between it and the Opposer's with respect to composition, visual presentation and sound.

Moreover, the goods on which NUTRIMIN-C is used are actually different from the goods covered by the mark NUTRILIN. The Opposer's mark is used on syrup food supplement and may be taken as prescribed by the physician and fall under Class 5. On the other hand, the Respondent-Applicant's mark is used on fruit juices under Class 32, thus, appears to be an ordinary grocery item. The differences in the kinds of goods on which the opposing marks are used on, and in the manner by which these goods are accessed to by the consumers, render confusion unlikely.

It is emphasized that the essence of trademark registration is to give protection to the owners of trademarks. The function of a trademark is to point out distinctly the origin or ownership of the goods to which it is affixed; to secure to him who has been instrumental in bringing into the market a superior article of merchandise, the fruit of his industry and skill; to assure the public that they are procuring the genuine article; to prevent fraud and imposition; and to protect the manufacturer against substitution and sale of an inferior and different article as his product.

In this case, "NUTRIMIN-C" satisfies the "function test", as it points out distinctly the origin or ownership of the goods to which the mark is affixed.

WHEREFORE, premises considered, the instant opposition is hereby DENIED. Let the filewrapper of Trademark Application no. 4-003563 be returned, together with a copy of this Decision, to the Bureau of Trademark (BOT) for information and appropriate action.

SO ORDERED.

Taguig City, 14 November 2011.