SYGENTA PARTICIPATIONS, AG, Opposer, **-versus-** **IRVITA PLANT PROTECTION** **A Branch of Celsius Property BV,** Respondent –Applicant.	}	**IPC No. 14-2011-00497** Opposition to: Appln. Serial No. 4-2011-501076 Date Filed: 27 July 2011 **TM: "APROPO"**

NOTICE OF DECISION

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GREETINGS:

Please be informed that Decision No. 2014 - 77 dated March 20, 2014 (copy enclosed) was promulgated in the above entitled case.

Taguig City, March 20, 2014.

For the Director:

Atty. PAUSI U. SAPAK
Bureau of Legal Affairs

SYGENTA PARTICIPATIONS, AG,
Opposer,

-versus-

IRVITA PLANT PROTECTION
A Branch of Celsius Property BV,
Respondent-Applicant.
x ---------- x

IPC No. 14-2011-00497
Opposition to Trademark
Application No. 4-2011-501076
Date Filed: 27 July 2011
Trademark: **"APROPO"**

Decision No. 2014-77

DECISION

Syngenta Participations AG[1] ("Opposer") filed on 02 January 2012 an opposition to Trademark Application Serial No. 4-2011-501076. The application, filed by Irvita Plant Protection[2] (Respondent-Applicant), covers the mark "APROPO" for use on *"pesticides, insecticides, herbicides and fungicides"* under Classes 05 of the International Classification of Goods[3].

The Opposer anchors its opposition on Section 123.1 (d) of R.A. No. 8293, also known as the Intellectual Property Code of the Philippines ("IP Code"). It asserts that the Respondent-Applicant's mark is confusingly similar with its own registered mark "APRON" mainly because the first four letters of the competing marks are identical. It avers that the last letter of its mark, i. e. N, vis-à-vis the last syllable, PO, in Respondent-Applicant's does not negate the possibility of confusing similarity considering that the competing marks cover very similar goods, which are sold in the same channels of business and trade.

The Opposer also alleges that its mark is registered in different jurisdictions worldwide. In the Philippines, it applied for registration of its mark "APRON" as early as 15 July 1996 and was eventually granted registration on 28 April 2006. Thereafter, on 07 January 2005, it also sought the registration of its mark "APRON (AND DEVICE)" and was granted registration on 26 May 2006. As the Respondent-Applicant only filed its application on 27 July 2011, the Opposer maintains its right to use its registered marks to the exclusion of the former.

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[1] A corporation duly organized and existing under and by virtue of the laws of Switzerland, with business address at Schwarzwaldallee 215, 4058 Basel, Switzerland.
[2] A corporation duly organized and existing under and by virtue of the laws of Curacao, with principal address at Pos Cabai Office Park, Unit 13, Curacao.
[3] The Nice Classification is a classification of goods and services for the purpose of registering trademark and services marks, based on the multilateral treaty administered by the World Intellectual Property Organization. The treaty is called the Nice Agreement Concerning the International Classification of Goods and Services for the Purpose of the Registration of Marks concluded in 1957.

Furthermore, the Opposer avers that its mark's active ingredient is "metalaxyl", a compound used as a fungicidal seed treatment, which increases the yield and vigor of its crops. It alleges that its marks have become popular in crop protection industry since their introduction in 1982 in the United States and on 11 February 1985 in the Philippines. According to the Opposer, its product "Apron 35 SD" was granted full registration as early as 14 November 1979 by the Fertilizer and Pesticide Authority (FPA) of the Department of Agriculture. Later on in 1985, "Apron XL 350 ES" was registered, allegedly signifying the improvement of the active ingredient of the product. Opposer claims that its APRON products are widely marketed and distributed by its local subsidiary, Syngenta Philippines.

In support of its Opposition, the Opposer submitted the following as its evidence:

1. Exhibit "A" – Certificate of Registration No. 4-1996-127918 for the trademark "APRON";
2. Exhibit "B" – Certificate of Registration No. 4-2005-0002111 for trademark "APRON and Device";
3. Exhibit "C" – Opposer's worldwide trademark portfolio for the marks APRON, APRON and Device and APRON in combination with other word(s) and/or device(s);
4. Exhibit "D" – List of Registered Agriculture Pesticide Products as of 31 December 2007 downloaded from the official website of the FPA, www.fpa.da.gov.ph, showing that APRON XL 350 ES is duly registered with the FPA;
5. Exhibit "E" – Status of application for pesticide registration issued by the FPA for APRON XL 350 ES;
6. Exhibit "F" – Invoices showing sakes of products baring the mark "APRON";
7. Exhibits "H" to "H-2" – Duly notarized and legalized General Counsel's Corporate Legal' Certificate authorizing Mr. Mile Dammann to represent the Opposer in the instant case;
8. Exhibit "I" to "I-6" – Duly notarize and legalized affidavit-testimony f Mr. Mike Dammann; and
9. Exhibit "J" – Syngenta AG's Full Year Results 2010.

On the other hand, the Respondent-Applicant vehemently denies that its applied mark "APROPO" is confusingly similar with the Opposer's "APRON" marks. According to the Respondent-Applicant, the Opposer relied heavily on the similarity of the first four letters. It repudiates the assertion that the competing marks have first and second syllables, arguing that its mark is pronounced as /A-PRO-PO/ while that of the Opposer's as /AP-RON/. Also, the Respondent-Applicant alleges that it does not use a device like that in the Opposer's mark. Aside from these distinctions,

the labels bearing the respective trademarks are entirely different in size, background, colors, contents and pictorial arrangement.

The Respondent-Applicant contends that "APRON" is not a strong and distinctive mark as it simply refers to an outer protective garment that covers primarily the front of the body. Further, it cites that "APRON" may also refer to: (1) a raised section of ornamental stonework below a window ledge, stone tablet or monument; (2) an airport apron, another name for an apron ramp, where aircraft are parked and serviced; (3) the flexible lower container of the air cushion of a hovercaft is also called an apron or skirt; (4) another term for linkspan, and is used as a ramp to connect shoreside facilities with a barge or ferry at a ferry slip; (5) an apron stage is any part of a stage that extends past the proscenium arch and into the audience or seating area; (6) an apron of a racetrack is the part going around the track below the yellow line; and (7) Zingel asper is a species of fish sometimes known as an apron. It maintains that the Opposer cannot complain of damage or injury or deception as a result of its registration as the "APRON" mark is not "affirmative and definite, significant and distinctive, cable to indicate origin.

Furthermore, the Respondent-Applicant alleges that the Opposer's mark is not well-known and that it is not among the enumerated major brands in Syngenta AG's Full Year Results 2010. It defends its mark stating that the Opposer's mark is specific for "fungicide for seed treatment", which is used before drilling and is usually applied during the pelleting of vegetable seeds. In view of the nature of the product involved, the chances of mistake or confusion are more imagined than real, if not impossible. Moreover, it has obtained trademark registration in Australia, claiming the same has a persuasive effect in the Philippines.

The Respondent-Applicant's evidence consists of the following:

1. Exhibit "1" – Affidavit-Testimony of Iddo Sheffer, and
2. Exhibit "2" – Printout of Trademark: 1432761.

The case was referred to mediation pursuant to Office Order No. 154, s. 2010. The parties, however, refused to mediate.

On 31, July 2012, a Preliminary Conference was conducted where only counsel of Respondent-Applicant was present. For failure of the Opposer and/or its representative to appear, the Hearing Officer issued Order No. 12-1139 on 31 August 2012 officially terminating the Preliminary Conference and declaring the Opposer as having waived its right to file a position paper. Upon submission by Respondent-Applicant of its position paper, the case was deemed submitted for resolution.

The issue to be resolved in this case is whether the Respondent-Applicant's mark "APROPO" should be allowed registration.

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. Based on the above discussion, Respondent-Applicant's trademark fell short in meeting this function. The latter was given ample opportunity to defend its trademark application but Respondent-Applicant did not bother to do so. Thus, Section 123.1 (d) of the IP Code provides that:

"Section 123.1. 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 x x x"

As culled from the records, the Opposer filed an application for of its mark "APRON" as early as 15 July 1996, which eventually ripened into registration under Certificate of Registration No. 4-1996-127918 issued on 26 March 2006. Later on, it applied for registration for its mark "APRON (AND DEVICE)", which was also granted on 07 January 2005 under Certificate of Registration No. 4-2005-000211. The Opposer's mark "APRON" is used on *"fungicide for treatment of seeds"* under Class 01 while the "APRON (AND DEVICE)" is used on *"chemicals used in agriculture, horticulture and forestry, seed treatment preparations"* and *"preparations for destroying vermin, fungicides, herbicides, nematicides, insecticides, pesticides"* under Classes 01 and 05, respectively. These goods are similar and/or closely related to those indicated in Respondent-Applicant's application which filed only on 27 July 2011.

For purposes of comparison, the competing marks reproduced below:

APRON 

Opposer's marks

APROPO

Respondent-Applicant's mark

The competing marks begin with four similar letters, i.e. "A", "P", "R" "O". Thus, even with the differences in the last letters and/or added device in Opposer's mark, the likelihood of confusion between the marks persists considering that both are attached to fungicides. The first four letters, "APRO", does not comprise a word that describes or refers to fungicides. Even if taken together with the last letter "N", the word formed is "APRON" which has no relation to fungicides. Thus, the Opposer's mark is unique and highly distinctive. Confusion cannot be avoided by merely adding, removing or changing some letters of a registered mark. Confusing similarity exists when there is such a close or ingenuous imitation as to be calculated to deceive ordinary persons, or such resemblance to the original as to deceive ordinary purchased as to cause him to purchase the one supposing it to be the other.[4]

Corollarily, the determinative factor in a contest involving registration of trade mark is not whether the challenged mark would *actually* cause confusion or deception of the purchasers but whether the use of such mark would *likely* cause confusion or mistake on the part of the buying public.[5] This stands regardless whether the competing marks pertain to products that have distinct purposes in agriculture as pointed out by the Respondent-Applicant for a consumer may be led to believe that the Opposer merely expanded business or introduced a new brand name.

Furthermore, it is settled that the likelihood of confusion would not extend not only as to the purchaser's perception of the goods but likewise on its origin. Callman

[4] Societe des Produits Nestle,S.A. vs. Court of Appeals, GR No. 112012, 04 April 2001.
[5] American Wire & Cable Company vs. Director of Patents, G.R. No. L-26557, 18 February 1970.

notes two types of confusion. The first is the confusion of goods "in which event the ordinarily prudent purchaser would be induced to purchase one product in the belief that he was purchasing the other." In which case, "defendant's goods are then bought as the plaintiff's, and the poorer quality of the former reflects adversely on the plaintiff's reputation." The other is the confusion of business: "Here though the goods of the parties are different, the defendant's product is such as might reasonably be assumed to originate with the plaintiff, and the public would then be deceived either into that belief or into the belief that there is some connection between the plaintiff and defendant which, in fact, does not exist."[6]

Accordingly, this Bureau finds and concludes that the Respondent-Applicant's trademark application is proscribed by Sec. 123.1(d) of the IP Code.

WHEREFORE, premises considered, the instant opposition is hereby **SUSTAINED**. Let the filewrapper of Trademark Application Serial No. 4-2011-501076 be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

SO ORDERED.

Taguig City, 20 March 2014.

ATTY. NATHANIEL S. AREVALO
Director IV
Bureau of Legal Affairs

[6] Societe des Produits Nestle, S.A. vs. Dy, G.R. No. 172276, 08 August 2010.