



L.R. IMPERIAL, INC.,
Opposer,

-versus-

S.V. MORE PHARMA CORP.,
Respondent-Applicant.

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}
} IPC No. 14-2010-00137
} Opposition to:
} Appln No. 4-2009-011713
} Date filed: 16 November 2009
} TM: "NOCARD"
}
}
}

NOTICE OF DECISION

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GREETINGS:

Please be informed that Decision No. 2014 - 287 dated November 03, 2014 (copy enclosed) was promulgated in the above entitled case.

Taguig City, November 03, 2014.

For the Director:


Atty. EDWIN DANILO A. DATING
Director III
Bureau of Legal Affairs



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IPC No. 14-2010-00137
Opposition to:
Appln. Serial No. 4-2009-011713
Date Filed : 16 November 2009
Trademark: "NOCARD"
Decision No. 2014 - 87

DECISION

L.R. IMPERIAL, INC., ("Opposer")¹ filed an opposition to Trademark Application Serial No. 4-2009-011713. The application, filed by S.V. MORE PHARMA CORP., ("Respondent-Applicant")², covers the mark "NOCARD" for use on "pharmaceutical preparation as antithrombotic" under class 05 of the International Classification of Goods and Services³.

The Opposer alleged the grounds for this Opposition as follows:

"1. The trademark 'NOCARD' so resembles the trademark 'INOCARD', owned by Opposer, which was registered by this Honorable Office on prior to the publication of the mark 'NOCARD'. The trademark 'NOCARD', which is owned by Respondent, will likely cause confusion, mistake and deception on the part of the purchasing public, most especially considering that the opposed trademark 'NOCARD' is applied for the same class and good as that of trademark 'INOCARD', i.e. Class (50) pharmaceutical preparation used in treating heart ailment.

"2. The registration of the trademark 'NOCARD' in the name of the Respondent will violate Sec. 123 of Republic Act No. 8293, otherwise known as the 'Intellectual Property Code of the Philippines' x x x.

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.

"3. Respondent's use and registration of the trademark 'NOCARD' will diminish the distinctiveness and dilute the goodwill of Opposer's trademark 'INOCARD'.

"4. Opposer, LRL, the registered owner of the trademark 'INOCARD', is engaged in the marketing and sale of a wide range of pharmaceutical products. The Trademark Application for the trademark 'INOCARD' was filed with the Intellectual Property Office on 9 August 2007 by LRI and was approved for registration by this Honorable Office on 25 February 2008 and valid for a period of ten (10) years or until 25 February 2018. The Opposer's registration of the 'INOCARD' trademark subsists and remains valid to date. x x x

¹ A corporation duly organized and existing under the laws of the Philippines with business address at 2nd Floor, Bonaventure Plaza, Ortigas Avenue, Greenhills, San Juan, Metro Manila.

² With registered address at No. 16 Scout Tuazon Cor. Roces Avenue, Quezon City.

³ The Nice Classification of goods and services is for registering trademark and service marks, based on a Multilateral treaty administered by the WIPO, called the Nice Agreement Concerning the International Classification of Goods and Services for Registration of Marks concluded in 1957.

"5. The trademark 'INOCARD' has been extensively used in commerce in the Philippines.

x x x

"6. There is no doubt that by virtue of the above-mentioned Certificate of Registration, the uninterrupted use of the trademark 'INOCARD', the Opposer has acquired an exclusive ownership over the 'INOCARD' marks to the exclusion of all others.

"7. 'INOCARD' is confusingly similar to 'NOCARD'.

x x x

"8. Moreover, Opposer's intellectual property right over its trademark is protected under Section 147 of Republic Act No. 8293.

"9. To allow Respondent to continue to market its products bearing the 'NOCARD' mark undermines Opposer's rights to its marks. As the lawful owner of the marks 'INOCARD', Opposer is entitled to prevent the Respondent from using a confusingly similar mark in the course of trade where such would likely mislead the public.

x x x

"10. By virtue of Opposer's prior and continued use of the trademark 'INOCARD', the same have become well-known and established valuable goodwill to the consumers and the general public as well. The registration and use of Respondent's confusingly similar trademark on its goods will enable the latter to obtain benefit from Opposer's reputation, goodwill and will tend to deceive and/or confuse the public into believing that Respondent is in any way connected with the Opposer.

"11. Likewise, the fact that Respondent seeks to have its mark 'NOCARD' registered in the same class (Nice Classification 5) as the trademark 'INOCARD' of oppose plus the fact that both are used for treating heart ailment, will undoubtedly add to the likelihood of confusion among the purchasers of these two goods.

The Opposer submitted the following evidence marked as Exhibits "A" to "E":

1. List of Trademarks Published for Opposition;
2. Trademark Registration No. 4-2007-008683 for INOCARD;
3. Declaration of Actual Use for INOCARD;
4. Actual Product Label; and,
5. Certificate of Product Registration.

This Bureau issued and served upon the Respondent-Applicant a Notice to Answer on 106 August 2010. Respondent-Applicant however, did not file an answer. Thus, this instant case is submitted for decision.

Should the Respondent-Applicant be allowed to register the trademark NOCARD?

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 or 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.⁴

Thus, Section 123.1 paragraph (d) of Rep. Act No. 8293, also known as the Intellectual Property Code of the Philippines (“IP Code”) provides that a mark cannot be registered if it is identical with a registered mark belonging to a different proprietor or a mark with an earlier filing or priority date, in respect of the same goods or services or closely related goods or services or if it nearly resembles such mark as to be likely to deceive or cause confusion.

The records and evidence show that at the time the Respondent-Applicant filed its trademark application on 16 November 2009, the Opposer has already an existing trademark registration for the mark INOCARD bearing Registration No. 4-2007-008683 issued on 25 February 2008.⁵

But, are the contending marks, depicted below, resemble each other such that confusion, even deception, is likely to occur?

Inocard

Opposer’s Trademark

NOCARD

Respondent-Applicant’s Trademark

The foregoing marks show visual and aural similarities. The entire word NOCARD of Respondent-Applicant is contained in Opposer’s INOCARD. The identical letters are located in the same position with only the additional letter “I” in the beginning of the latter mark. Thus, the contending marks do not only appear similar in its visual representation but likewise sounds almost the same when pronounced.

A scrutiny of the contending marks’ goods show that both products intended to address or apply to illnesses or diseases connected to heart function, which is related to each other. Opposer’s INOCARD acts as antithrombotic agent⁶ which prevents or interferes with the formation of thrombus or blood clotting.⁷ On the other hand Respondent-Applicant’s NOCARD acts as dual-acting inotropic agent⁸ which alters the force or strength of the heart’s muscular contractions.⁹

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 purchaser as to cause him to purchase the one supposing it to be the other.¹⁰ Colorable imitation does not mean such similitude as amount to identify, nor does it require that all details be literally copied. Colorable imitation refers to such similarity in form, context, words, sound, meaning, special arrangement or general appearance of the trademark or tradename with that of the other mark or tradename in their over-all presentation or in their essential substantive and distinctive parts as would likely to mislead or confuse persons in the ordinary course of purchasing the genuine article.¹¹

⁴ Pribhdas J. Mirpuri v. Court of Appeals, G.R. No. 114508, 19 Nov. 1999.

⁵ Exhibit “B” of Opposer.

⁶ Filewrapper Records.

⁷ The Free Dictionary by Farlex, available at <http://medical-dictionary.thefreedictionary.com/antithrombotic> (last accessed 04 November 2014).

⁸ Id. at 5.

⁹ Inotropic Drugs: What You Need to Know, available at <http://health.howstuffworks.com/medicine/medication/inotropic-drug.htm> (last accessed 04 November 2014).

¹⁰ Societe Des Produits Nestle, S.A. v. Court of Appeals, G.R. No. 112012, 04 April 2001, 356 SCRA 207, 217.

¹¹ Emerald Garment Manufacturing Corp. V. Court of Appeals, G.R. No. 100098, 29 December 1995.

Succinctly, because the coverage of the Respondent-Applicant's trademark application would allow using the mark on goods or pharmaceutical products that are already dealt in by the Opposer, the changes in spelling did not diminish the likelihood of the occurrence of mistake, confusion, or even deception. The contending marks have identical sounds which make it not easy for one to distinguish one mark from the other. Trademarks are designed not only for the consumption of the eyes, but also to appeal to the other senses, particularly, the faculty of hearing. Thus, when one talks about the Opposer's trademark or conveys information thereon, what reverberates is the sound made in pronouncing it. The same sound, however, is practically replicated when one pronounces the Respondent-Applicant's mark. There is the likelihood therefore that information, assessment, perception or impression about -marked products delivered and conveyed through words and sounds and received by the ears may unfairly cast upon or attributed to INOCARD-denominated products of the Opposer, and vice-versa.

It is stressed that the determinative factor in a contest involving trademark registration is not whether the challenged mark would actually cause confusion or deception of the purchasers but whether the use of such mark will likely cause confusion or mistake on the part of the buying public. To constitute an infringement of an existing trademark, patent and warrant a denial of an application for registration, the law does not require that the competing trademarks must be so identical as to produce actual error or mistake; it would be sufficient, for purposes of the law, that the similarity between the two labels is such that there is a possibility or likelihood of the purchaser of the older brand mistaking the newer brand for it.¹² The likelihood of confusion would subsist not only on the purchaser's perception of goods but on the origins thereof as held by the Supreme Court:¹³

Callman 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. Hence, 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 belief that there is some connection between the plaintiff and defendant which, in fact does not exist.

The Respondent-Applicant in the instant opposition was given the opportunity to explain its side and to defend its trademark application. However, it failed to do so. Accordingly, 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 file wrapper of Trademark Application Serial No. 4-2009-011713 be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

SO ORDERED.

Taguig City, 03 November 2014.


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

¹² American Wire and Cable Co. v. Director of Patents, et al., (31 SCRA 544) G.R. No. L-26557, 18 February 1970.
¹³ Converse Rubber Corporation v. Universal Rubber Products, Inc., et al., G.R. No. L-27906, 08 January 1987.