



SOCIETE DES PRODUITS NESTLE S.A.,  
Opposer,

-versus-

AMPRO PET NUTRITION, INC.,  
Respondent- Applicant.

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}  
} IPC No. 14-2011-00026  
} Opposition to:  
} Appln. Serial No. 4-2009-001091  
} Date Filed: 03 February 2009  
} TM: "BUDDY'S CHOW"  
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**NOTICE OF DECISION**

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**GREETINGS:**

Please be informed that Decision No. 2014 - 212 dated August 15, 2014 (copy enclosed) was promulgated in the above entitled case.

Taguig City, August 15, 2014.

For the Director:

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





**SOCIETE DES PRODUITS NESTLE S.A.,**

Opposer,

-versus-

IPC No. 14-2011-00026

Opposition to Trademark

Application No. 4-2009-001091

Date Filed: 03 February 2009

Trademark: **"BUDDY'S CHOW"**

**AMPRO PET NUTRITION, INC.,**

Respondent-Applicant.

X ----- X

Decision No. 2014- 2/2

### DECISION

Societe Des Produits Nestle S.A.<sup>1</sup> ("Opposer") filed an opposition to Trademark Application Serial No. 4-2009-001091. The contested application, filed by Ampro Pet Nutrition, Inc.<sup>2</sup> ("Respondent-Applicant"), covers the mark "BUDDY'S CHOW" for use on "*dogfood only (adult dogfood, puppy food, hipro dogfood, canned dogfood)*" under Class 31 of the International Classification of Goods<sup>3</sup>.

Opposer maintains that it is the first to adopt, use and register worldwide, including in the Philippines, the "PURINA DOG CHOW", "PUPPY CHOW" and "CHOW" trademarks and their derivatives for, among others, dog food, animal feeds for rats, mice, dogs, cats, monkeys, hamsters, poultry and cattle, foodstuffs for animals falling Class 31. It contends that there is likelihood of confusion between its "CHOW" trademarks and Respondent-Applicant's mark "BUDDY'S CHOW".

According to the Opposer, its "CHOW" marks were first used in United States of America (USA) in 1914. In the Philippines, animal feeds bearing the "CHOW" mark were first sold in 1940's as indicated in its Certificate of Registration No. 8554 issued on 01 December 1960, which states that the said mark was first used in the country of 11 September 1941. It also avers that it was able to register its products with the Bureau of Animal Industry, which also granted it importation permit. These registrations and permits were allegedly in the then distributors of Purina Pet Food, namely, Eveready Battery, Inc. and subsequently Energeizer Philippines, Inc. prior to its acquisition of Purina Pet Food. In addition, it claims that its company and its predecessor have gained international goodwill over its "CHOW" line of animal food through massive advertising campaigns.

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

<sup>1</sup> A corporation duly formed under the laws of Switzerland with business address at Vevey, Switzerland.

<sup>2</sup> With known address at 4F Arcel Building, N. Domingo St., Metro Manila.

<sup>3</sup> 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.

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1. affidavit of Mr. Nestor Ponce;
2. copy of the application for registration of the mark "DOG CHOW";
3. copy of the approved applications for registration with the Bureau of Animal Industry starting 1996;
4. import permits granted by the same bureau;
5. letter by Energizer Philippines, Inc. dated 13 February 2002 to Bureau of Animal Industry stating Opposer's acquisition of Purina Pet Food;
6. original copy of Certificate of Registration No. 8554 issued on 01 December 1960;
7. copy of the cover of the first edition of "The Philippine Dog" and its pertinent pages, including the receipts for payment of the advertisements; and,
8. copies of invoices since 1996.<sup>4</sup>

This Bureau issued a Notice to Answer on 14 July 2011 and served a copy thereof upon the Respondent-Applicant. The Respondent-Applicant, however, did not file its Answer. Accordingly, the Hearing Officer issued on 02 April 2012 Order No. 2012-481 declaring the Respondent-Applicant in default and the case submitted for decision.

The issue to be resolved in this case is whether the trademark application by Respondent-Applicant should be allowed.

Section 123.1 (d)) of the IP Code provides that:

***"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; xxx."***

Records reveal that the trademark "CHOW" was issued in favor of Balston Purina Company by the then Philippine Patent Office (PPO) as early as 01 December 1960. Then on 01 December 1980, the Opposer was able to register the same mark in its name under Certificate of Registration No. 002451. On the other hand, Respondent-Applicant filed the application for the mark "BUDDY'S CHOW" only on 03 February 2009.

To determine whether the marks of Opposer and Respondent-Applicant are confusingly similar, the competing marks are reproduced below for comparison:

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<sup>4</sup> Marked as Exhibits "A" to "I", inclusive.



To determine whether the marks of Opposer and Respondent-Applicant are confusingly similar, the competing marks are reproduced below for comparison:

*Opposer's Marks*

**CHOW**

PUPPY CHOW

Purina  
**DOG  
CHOW**

*Respondent-Applicant's Mark*

**BUDDY'S CHOW**

Looking at the Opposer's marks, it can be observed that their common denominator is the word "CHOW". This is the prevailing feature of its marks whether the said word is used alone or adjunct to other words. The term "CHOW", however, is generic and/or descriptive of food products as it connotes the noun "food" and/or the verb "eat." Generally, generic and/or descriptive words cannot be registered as trademarks except when the word has acquired secondary meaning. In the case of **Philippine Nut Industry, Inc. vs. Standard Brands Incorporated**<sup>5</sup>, the Supreme Court explained this doctrine as follows:

*"The doctrine of secondary meaning is found in Sec. 4 (f), Chapter II-A of the Trade-Mark Law, viz:*

*Except as expressly excluded in paragraphs (a), (b), (c) and (d) of this section, nothing herein shall prevent the registration of a mark or trade-name used by the applicant which has become distinctive of the applicant's goods, business or services. The Director may accept as prima facie evidence that the mark or trade-name has become distinctive, as applied to or used in connection with the applicant's goods, business or services, proof*

<sup>5</sup> G.R. No. L-23035, 31 July 1975.



***of substantially exclusive and continuous use thereof as a mark or trade-name by the applicant in connection with the sale of goods, business or services for the five years next preceding the date of the filing of the application for its registration. (As amended by Sec. 3, Rep. Act No. 638.)***

***This Court held that the doctrine is to the effect that a word or phrase originally incapable of exclusive appropriation with reference to an article on the market, because geographically or otherwise descriptive, might nevertheless have been used so long and so exclusively by one producer with reference to his article that, in that trade and to that branch of the purchasing public, the word or phrase has come to mean that the article was his product.***

***By way of illustration, is the word 'Selecta' which according to this Court is a common ordinary term in the sense that it may be used or employed by any one in promoting his business or enterprise, but which once adopted or coined in connection with one's business as an emblem, sign or device to characterize its products, or as a badge of authenticity, may acquire a secondary meaning as to be exclusively associated with its products and business, so that its use by another may lead to confusion in trade and cause damage to its business."***

Succinctly, the provisions of Section 4(f) of the Trademark Law are adopted in Section 123.2 of the IP Code, to wit:

***"Section 123.2. As regards signs or devices mentioned in paragraphs (j), (k), and (l), nothing shall prevent the registration of any such sign or device which has become distinctive in relation to the goods for which registration is requested as a result of the use that have been made of it in commerce in the Philippines. The Office may accept as prima facie evidence that the mark has become distinctive, as used in connection with the applicant's goods or services in commerce, proof of substantially exclusive and continuous use thereof by the applicant in commerce in the Philippines for five (5) years before the date on which the claim of distinctiveness is made."***

In the instant case, the Opposer has registered the mark "CHOW" in its name way back 01 December 1980. Its predecessor-in-interest registered the said mark even earlier on 01 December 1960 under Certificate of Registration No. 8554<sup>6</sup>, with an attached statement<sup>7</sup> that the "CHOW" mark was first used in the Philippines on 11 September 1941. Besides its registrations, the Opposer proved that it has been in continuous use of its marks as evidenced by the sample advertisements, import permits and approved applications<sup>8</sup> by the Bureau of Animal Industry. Thus the doctrine of secondary meaning applies as it is sufficiently supported by documentary

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<sup>6</sup> Exhibit "F".

<sup>7</sup> Exhibit "F-2".

<sup>8</sup> Exhibits "C", "D" and "I" series.



evidence showing that the word "CHOW" has been used by and closely associated with the Opposer for animal food since 1941 in this country.

Hence, if some other party, such as Respondent-Applicant in this case, will appropriate the word "CHOW" for its marks covering animal food products, it is highly likely that the consumers will be misled to believe that the goods came from the same source. 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.<sup>9</sup>

This is especially so since the Respondent-Applicant will also use or uses the mark "BUDDY'S CHOW" to goods likewise covered by the Opposer's registrations. After all, 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.<sup>10</sup>

Moreover, 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 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."<sup>11</sup>

Finally, 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.<sup>12</sup> Based on the above discussion, Respondent-Applicant's trademark fell

<sup>9</sup> Societe des Produits Nestle, S.A. vs. Court of Appeals, GR No. 112012, 04 April 2001.

<sup>10</sup> American Wire & Cable Company vs. Director of Patents, G.R. No. L-26557, 18 February 1970.

<sup>11</sup> Societe des Produits Nestle, S.A. vs. Dy, G.R. No. 1772276, 08 August 2010.

<sup>12</sup> Pribhdas J. Mirpuri vs. Court of Appeals, G.R. No. 114508, 19 November 1999.



short in meeting this function. The latter was given ample opportunity to defend its trademark application but Respondent-Applicant failed to do so.

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. 4-2009-001091 be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

**SO ORDERED.**

Taguig City, 15 August 2014.

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