

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB                      AUG. 20 ,99

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Horphag Research Limited  
v.  
FreeLife International, LLC.

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Opposition No. 102,797  
to application Serial No. 74/712,769  
filed on August 8, 1995

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Marvin S. Gittes of Cobrin & Gittes for Horphag Research  
Limited.<sup>1</sup>

John C. Cain and Scott J. Garber of Arnold White & Durkee  
for FreeLife International, LLC.

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Before Seeherman, Quinn and Bucher, Administrative Trademark  
Judges.

Opinion by Bucher, Administrative Trademark Judge:

FreeLife International, LLC., a Connecticut limited  
liability company, has filed an application for registration  
of the mark "SOYGENOL" for "nutritional supplements,

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<sup>1</sup> Prior to a substitution of counsel in February 1999, Robert  
P. Simpson of Bilicki & Simpson, P.C. had represented opposer  
throughout the course of this trial.

ingredients sold as a component part of nutritional supplements, vitamins and minerals."<sup>2</sup> Horphag Research Limited, a corporation of the United Kingdom, filed a timely notice of opposition on July 29, 1996. As grounds for opposition, opposer asserts prior use of the registered trademark "PYCNOGENOL" for "dietary and nutritional supplements."<sup>3</sup> Opposer asserts that these marks are similar in their entirety, that the goods are similar if not identical, and that registrant is entitled to a greater degree of protection because the goods are similar to medicaments. As a result, opposer alleges that applicant's mark, as applied to applicant's goods, so resembles opposer's mark as to be likely to cause confusion within the meaning of Section 2(d) of the Lanham Act.

Applicant, in its answer, has admitted that it filed the instant application under the intent-to-use provisions of the Trademark Act, but has otherwise denied the salient allegations of the opposition.

A trial was conducted and legal briefs have been filed, but neither party requested an oral hearing.

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<sup>2</sup> Serial No. 74/712,769, in International Class 5, filed August 8, 1995, based upon an allegation of a *bona fide* intention to use the mark in commerce.

<sup>3</sup> Reg. No. 1,769,633, registered on May 11, 1993, §8 affidavit accepted.

With its brief, opposer submitted a copy of what is essentially an assignment document conveying opposer's pleaded registration from Horphag Overseas Limited, the original registrant, to opposer, Horphag Research Limited. Applicant objects to this exhibit as being untimely submitted. However, because this document merely updates the information in the record of this opposition proceeding regarding the title of opposer's registration, and the Board may, in any case, take judicial notice of current title information as shown by the records of the U.S. Patent and Trademark Office, see TBMP §703.02(a), applicant's objection is overruled.

In evidence are the pleadings; the file of the opposed application; a copy of applicant's responses to opposer's two sets of interrogatories introduced under two separate notices of reliance by opposer; and the status and title copy of opposer's subsisting registration.

Opposer's priority of use of the mark upon which it relies is not in issue inasmuch as the status and title copy of its registration shows that such is subsisting and owned by opposer. See King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974). The only real issue to be determined, therefore, is whether applicant's "SOYGENOL" mark, when used in connection with

nutritional supplements so resembles opposer's "PYCNOGENOL" mark for dietary and nutritional supplements, that confusion is likely as to the origin or affiliation of the parties' respective goods.

In the course of rendering this decision, we have followed the guidance of In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 1362, 177 USPQ 563, 567-68 (CCPA 1973), that sets forth the factors which, if relevant, should be considered in determining likelihood of confusion. In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. Federated Goods, Inc., v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

With respect to the goods of the parties, since the goods of applicant and of opposer include nutritional supplements, we agree with opposer that the goods are in part identical and otherwise closely related.

Turning to the marks, opposer stresses the identical nature of the ".genol" suffix while applicant stresses the total dissimilarity of the "soy." and "pycno." prefixes. Opposer takes the position that "... both Applicant's trademark and Opposer's trademark have a similar stress pattern with the primary accent on the first syllable." (brief of April 6, 1998, p. 3).

Applicant, on the other hand, argues that:

When compared ... the marks at issue, SOYGENOL and PYCNOGENOL, are very different. First, the two marks do not have the same number of syllables (SOY-GEN-OL versus PYC-NO-GEN-OL). Second, the primary accent on SOYGENOL is on the first syllable while, contrary to Opposer's assertions, ordinary customers would read PYCNOGENOL as having its primary accent on the second syllable (PYC-NO-GEN-OL). Third, the consonant sounds beginning the marks appear and sound very different ("P" versus "S"). Thus, comparison of these marks under the rationale applied by courts in the cases cited in Opposer's Brief, does not lead to a finding that the marks appear or sound similar.

We agree with applicant that the dissimilarity in appearance, pronunciation, and connotation of the "soy•" and "pycno•" prefixes of the parties' marks clearly outweighs this similarity in the common suffix "•genol." The beginning portion of applicant's mark is a short, three-letter word beginning with the letter "s" while opposer's beginning portion is a longer, five-letter string beginning with the letter "p." "Soy" is a common word that relates to the nature of applicant's products.<sup>4</sup> Given consumers' familiarity with this term, they will likely pronounce it as it is spelled ("Sóí"). Opposer's prefix is less common a term,"<sup>5</sup> and while there is arguably not one correct

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<sup>4</sup> Applicant's response to Interrogatory Number 13 of opposer's first set of interrogatories.

<sup>5</sup> We take judicial notice of the entry for "pycno•" from the Random House Unabridged Dictionary, Second Edition, 1983. This is "a combining form meaning 'dense,' 'close,' or 'thick,' used

pronunciation for opposer's coined mark, it would likely be "pik·no'·jen·ól." In addition to all the other obvious differences in letters, length, syllables, etc., as applicant has pointed out, this would seem to leave the primary accent on the second syllable, further accentuating the difference in pronunciation. And even if it were pronounced with the emphasis on the first syllable as opposer asserts, the differences in pronunciation between "sóí" and "pik·no" are readily apparent.

Finally, opposer also asks this Board to apply a lesser quantum of proof in reaching a finding of likelihood of confusion due to the doctrine of greater care for pharmaceuticals (i.e., that when ethical pharmaceuticals are involved, the consequences of confusion are so drastic that a mark should not be registered if there is any chance for confusion). Without entering into the debate over the correctness of a "doctrine of greater care" for pharmaceuticals, it seems clear to us that mistakes between nutritional supplements do not carry the same life-and-death risks as can mistakes between ethical pharmaceuticals. Moreover, even if we were to adopt a lesser standard of

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in the formation of compound words." The dictionary says that this prefix form is derived from the Greek word, "pyknos."

confusion in the instant case, we find that the differences in the marks is so great that confusion is not likely.

Decision: The opposition is dismissed.

E. J. Seeherman

T. J. Quinn

D. E. Bucher

Administrative Trademark  
Judges, Trademark Trial  
and Appeal Board