FLUKE CORPORATION, Opposer,	}	**IPC No. 14-2010-00044** Opposition to:
	}	
-versus-	} }	Appln. No. 4-2007-013523 Date filed: 07 December 2007
	}	
FRENWAY PRODUCTS, INC., Respondent-Applicant.	} }	**Trademark: "AMPRO & DEVICE"**

x--x

NOTICE OF DECISION

VERA LAW (DEL ROSARIO BAGAMASDAD & RABOCA)
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GREETINGS:

Please be informed that Decision No. **2013 – 93** dated May 23, 2013 (copy enclosed) was promulgated in the above entitled case.

Taguig City, May 28, 2013.

For the Director:

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

CERTIFIED TRUE COPY
SHARON S. ALCANTARA
Records Officer II
Bureau of Legal Affairs, IPO

FLUKE CORPORATION,
Opposer,

-versus-

FRENWAY PRODUCTS, INC.,

Respondent-Applicant.
x -- x

IPC No. 14-2010-00044
Opposition to Trademark
Application No. 4-2007-013523
Date Filed: 07 December 2007
Trademark: **"AMPRO & DEVICE"**

Decision No. 2013- 93

DECISION

Fluke Corporation[1] ("Opposer") filed on 16 February 2010 an opposition to Trademark Application No. 4-2007-013523. The application, filed by Frenway Products, Inc.[2] ("Respondent-Applicant"), covers the mark "AMPRO & DEVICE" for use on *"machines and machine tools", "hand tools and implements (hand-operated)* and *"measuring instruments, measuring apparatus, measures, rules (measuring instruments), rulers (measuring instruments), compasses (measuring instruments), surveying apparatus and instruments, indicators, verniers, pressure gauges"* under Classes 07, 08 and 09, respectively, of the International Classification of Goods[3].

The Opposer alleges, among other things, that it would suffer damages as AMPRO & DEVICE is confusingly similar to its registered mark "AMPROBE". It points out that its own mark has been used in the United States of America as early as 08 October 1962, and is registered in the Philippines since 31 October 1968 under Reg. No. 014325. According to the Opposer, AMPROBE is likewise registered and/or is pending registration in various countries, including Argentina, Australia, Benelux, Brazil, Canada, Chile, People's Republic of China, Community Trademark, France, Germany, Hong Kong, India, Israel, Japan, Mexico, Peru, South Africa and Sweden; and is a well-known mark and has become one of the world's most recognized in the "*testing and measuring instruments*" industry. To support its Opposition, the Opposer submitted as evidence the following as evidence:

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[1] A corporation organize and existing under and by virtue of the laws of Spain with principal office address at 6920 Seaway Boulevard, Everett, Washington 98203 USA.
[2] With given address at 6F-6, No. 130, SEC. 2, Chung Hsiao E. Rd. Taipei, Taiwan.
[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.

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1. printout of Respondent-Applicant's application details;
2. printout of Registration No. 014325 covering the mark "AMPROBE";
3. printout of Opposer's website; and,
4. Affidavit-direct testimony of James M. Rupp with annexes.

This Bureau issued a Notice to Answer and served a copy thereof upon the Respondent-Applicant on 16 March 2010. The Respondent-Applicant, however, did not file an Answer despite an extension of time granted to it. Accordingly, the Hearing Officer issued on 03 August 2012 Order No. 2012-1081 declaring the Respondent-Applicant in default and the case submitted for decision.

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

It is emphasized that the essence of the trademark registration is to give protection to the owners of the trademarks. The function of a trademark is to point out distinctly the origin or ownership of the goods to which it is applied; to secure to him who has been instrumental in bringing into the market a superior article of merchandise; the fruit of hi, 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 article as his product[4].Sec. 123.1 of the IP Code provides that 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 is nearly resembles such a mark as to be likely to deceive or cause confusion

Records show that at the time the Respondent-Applicant filed its trademark application, the Opposer already has an existing registration for the mark AMPROBE. The Opposer filed the trademark application as early as 12 April 1967, and obtained Cert. of Reg. No. 014325 on 31 October 1968. The trademark registration, the last renewal of which was on 21 November 2008, covers goods that are similar and/or closely related to those indicated in the Respondent-Applicant's trademark application, namely, "*electrical, measuring recording and indicating instruments and accessories therefor, namely, voltmeters, ammeters, null-balance measuring instruments, devices for amplifying measuring instruments, output and automatic instruments controlling switches, electrical temperatures measuring instruments*" under Class 9.

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

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

AMPROBE

The marks are almost identical. The presence of a device and the deletion of the letters "BE" in the Respondent-Applicant's applied mark do not diminish the likelihood of confusion. The marks still look and sound the same. 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[5]. Colorable imitation does not mean such similitude as amounts 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[6].

Succinctly, because the Respondent-Applicant will use or uses the mark AMPRO on goods that are similar and/or closely related to those covered by the Opposer's registered trademark, the changes in the spelling did not diminish the likelihood of the occurrence of mistake, confusion, or even deception. AMPROBE and AMPRO produce 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 that information, assessment, perception or impression about AMPRO products delivered and conveyed through words and sounds and received by the ears may unfairly cast upon or attributed to the AMPROBE products and the Opposer, and *vice-versa*.

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[5] *Societe Des Produits Nestle , S.A v. Court of Appeals*, G.R. No.112012, 4 April 2001, 356 SCRA 207, 217.

[6] *Emerald Garment Manufacturing Corp. v. Court of Appeals*. G.R. No. 100098, 29 Dec. 1995.

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.[7] 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:[8]

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

Accordingly, this Bureau finds 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. 4-07-013523 be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

SO ORDERED.

Taguig City, 23 May 2013.

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

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7 *American Wire and Cable Co. v. Director of Patents et al.,* (31 SCRA 544) G.R. No. L-26557, 18 Feb. 1970.

8 *Converse Rubber Corporation v. Universal Rubber Products, Inc., et al.,* G.R. No. L-27906, 08 Jan. 1987.