

TTAB

Mailed:  
October 24, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Wyeth  
v.  
David M. Graham

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Opposition No. 91124967  
to application Serial No. 761479801

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Marie V. Discoll of Fross Zelnick Lehrman & Zissu, P.C.,  
and Bret I. Parker of Wyeth, for Wyeth

David M. Graham, *pro se*

CORRECTION

By the Board:

A copy of the attached decision was entered in the Board's electronic records with a mailing date of October 13, 2005, but the decision was inadvertently not mailed on that date. As indicated on the attached copy, the decision is being mailed on October 24, 2005. The period for requesting reconsideration or filing an appeal will run from October 24, 2005.



**THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT  
OF THE TTAB**

Mailed:  
October 13, 2005  
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Wyeth<sup>1</sup>

v.

David M. Graham

Opposition No. 91124967  
against Serial No. 76147801

Marie V. Driscoll of Fross Zelnick Lehrman & Zissu, P.C.,  
and Bret I. Parker of Wyeth, for Wyeth.

David M. Graham, *pro se*.

Before Walters, Bucher and Drost, Administrative Trademark  
Judges.

Opinion by Bucher, Administrative Trademark Judge:

David M. Graham seeks registration on the Principal  
Register of the mark **AdvaLife** for goods identified in

<sup>1</sup> The opposition was originally filed by American Home Products Corporation. However, on March 11, 2002, American Home Products Corporation changed its corporate name to Wyeth.

the application as "vitamins, minerals and nutritional dietary supplements," in International Class 5.<sup>2</sup>

Registration has been opposed by Wyeth (formerly American Home Products Corporation). As its ground for opposition, opposer asserts that applicant's mark when used in connection with applicant's goods so resembles opposer's previously used and registered mark, **ADVIL**, as to be likely to cause confusion, to cause mistake or to deceive under Section 2(d) of the Lanham Act.

Applicant, in its answer, has denied the salient allegations in the opposition.

By operation of the rules, the record includes the pleadings and the file of the opposed application. Opposer has also made of record its pleaded registrations by submitting certified status and title copies of the following registrations:

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REGISTRATION No. 1298347      **ADVIL**      (STANDARD CHARACTER DRAWING)  
for "an Analgesic Preparation" in International Class 5;<sup>3</sup>

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<sup>2</sup> Application Serial No. 76147801 was filed on October 16, 2000 based upon applicant's allegation of a *bona fide* intention to use the mark in commerce.

<sup>3</sup> Registration No. 1298347 issued on October 2, 1984, claiming first use anywhere and first use in commerce at least as early as July 14, 1983; renewed.

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REGISTRATION No. 1635943      **ADVIL**      (STANDARD CHARACTER DRAWING)  
for "anti-pyretic and anti-inflammatory preparations and  
preparations for the treatment of juvenile arthritis,  
rheumatoid arthritis and osteoarthritis" in International  
Class 5;<sup>4</sup> and

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REGISTRATION No. 1942746      **ADVIL**      (STANDARD CHARACTER DRAWING)  
for "cold and sinus relief medicines" in International Class 5.<sup>5</sup>

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Opposer, as part of its case-in-chief, has also made  
of record, pursuant to a notice of reliance, the  
testimonial deposition of Kevin Homler, Group Product  
Director in charge of marketing products under the  
ADVIL brand, and exhibits thereto. Applicant submitted no  
evidence in this proceeding and did not file a brief.

As noted above, opposer has shown that its pleaded  
registrations are valid, subsisting and owned by opposer.  
Thus, this proof removes the issue of priority from this  
case. See King Candy Co. v. Eunice King's Kitchen, Inc.,  
496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Accordingly, as to the claim of priority of use and  
likelihood of confusion, the focus of our determination is  
on the issue of whether applicant's mark, when used in  
connection with the goods set forth in his application, so

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<sup>4</sup> Registration No. 1635943 issued on February 26, 1991,  
claiming use anywhere and use in commerce at least as early as  
July 14, 1983; renewed.

<sup>5</sup> Registration No. 1942746 issued on December 19, 1995,  
claiming first use anywhere and first use in commerce at least  
as early as November 1991; renewed.

resembles opposer's ADVIL mark as to be likely to cause confusion, to cause mistake or to deceive as to source or sponsorship.

The record demonstrates that opposer is a leading company in the development and marketing of pharmaceutical products, including analgesics and multi-vitamin, mineral, and nutritional preparations. Opposer's ADVIL brand of products has been in use for over twenty years. This line of products began with an analgesic, but has steadily grown over the years to meet new consumer health care needs (e.g., ORIGINAL ADVIL, ADVIL COLD AND SINUS, ADVIL MIGRAINE, ADVIL FLU AND BODYACHE, ADVIL ALLERGY SINUS, ADVIL MULTI-SYMPOM COLD, and three formulations of CHILDREN'S ADVIL). These products are intended for a variety of uses, including relief of pain, cold and sinus pain, migraine pain, flu symptoms, allergy and pain relief, sneezing and runny nose.

According to the testimony of Mr. Homler, ADVIL products are sold in virtually every consumer outlet in which over-the-counter analgesics are sold including pharmacies, chain drug stores, food stores and convenience stores. They are also available in foil envelopes in smaller retail outlets and dispensing machines.

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