



WESTMONT PHARMA, INC.,
Opposer,

-versus-

KNOXX PHARMA, PHILS.
INCORPORATED,
Respondent-Applicant.

X-----X

} IPC No. 14-2010-00038
} Opposition to:
} Appln. Serial No. 4-2009-004890
} Date Filed: 19 May 2009
} TM: "LEVONOX"

NOTICE OF DECISION

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GREETINGS:

Please be informed that Decision No. 2013 - 115 dated June 21, 2013 (copy enclosed) was promulgated in the above entitled case.

Taguig City, June 21, 2013.

For the Director:


Atty. PAUSI U. SAPAK
Hearing Officer
Bureau of Legal Affairs



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(Filing Date: 19 May 2009)

Trademark: **"LEVONOX"**

Decision No. 2013 - 115

DECISION

WESTMONT PHARMA, INC.¹ ("Opposer") filed on 08 February 2010 an opposition to Trademark Application Serial No. 4-2009-004890. The application, filed by KNOXX PHARMA, PHILS. INCORPORATED² ("Respondent-Applicant"), covers the mark "LEVONOX" for use on "*Pharmaceutical products, namely, antibiotic*" under Class 05 of the International Classification of goods³.

The Opposer alleges that LEVONOX is confusingly similar to its registered mark LEVOX which is also used for antibacterial medicinal preparation/antibiotic. According to the Oposer, the registration of LEVONOX will violate Sec.123.1(d) of Rep. Act No. 8293, also known as the Intellectual Property Code of the Philippines ("IP Code").

To support its opposition, the Opposer submitted copies of the pertinent pages of the IPO E-Gazette, certified copy of Cert. of Reg. No.4-1998-007705 for the trademark LEVOX, certified copy of the Declaration of Actual Use, sample product label bearing the mark LEVOX, copy of certificate of sales performance involving the brand Levox, certified copy of Cert. of Product Registration issued by the Bureau of Food and Drugs for the mark LEVOX.⁴

The Respondent-Applicant filed its Answer on 18 June 2010 denying the material allegations in the opposition and contending that its mark is not confusingly similar to the Opposer's. Its evidence consists of certificate of incorporation, license to operate as a drug distributor, certificate of listing of identical drug product, registrability report, and labels actually used on goods for the mark LEVOX.

¹ A domestic corporation duly organized and existing under the laws of the Philippines with principal business address at 4th Floor Bonaventure Plaza, Ortigas Avenue, Greenhills, San Juan City.

² A domestic corporation with principal address at Unit 202 UA Bldg., 135 N. Domingo St. Brgy. Balong Bato, San Juan City.

³ The Nice Classification is a classification of goods and services for the purpose of registering trademarks and service marks, based on a multilateral administered by the World Intellectual Property Organization. This treaty is called the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks concluded in 1957.

⁴ Marked as Exhibits "A" to "II".

Then after, the preliminary conference was conducted and terminated on 19 January 2011. The Opposer filed its position paper on 14 February 2011, while the Respondent-Applicant did so on 24 February 2011.

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

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.⁵ Thus, Sec. 123.1(d) of the IP Code provides that 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;

The records and evidence show that at the time the Respondent-Applicant filed its trademark application on 19 May 2009, the Opposer has an existing registration for the mark LEVOX under Cert. of Reg. No. 4-1998-007705. The registration covers "*broad-spectrum antibacterial medicinal preparation*" under Class 5, similar and/or closely related to the goods indicated in the Respondent-Applicant's trademark application.

But are the competing marks resemble each other that confusion and deception is likely to occur?

There is no doubt that both the competing marks were derived from the generic name "*levofloxacin*". However, dropping the syllables "*floxacin*" and appending some letters to "LEVO" enabled the marks to acquire distinctive character and become registrable *albeit* as suggestive marks. In this regard, the marks' distinctive character for the purpose of registration refers to the entirety of their respective compositions, and thus, beyond the syllables LEVO.

Succinctly, the determination as to whether the competing marks are confusingly similar depends on the effect of the letters following or appended to the syllables LEVO - "X" in LEVOX as against "NOX" in LEVONOX. While LEVONOX is certainly longer than LEVOX, it is still likely that consumers will confuse one with the other. The sounds produced when pronouncing the marks

⁵ *Pribhdas J. Mirpuri v. Court of Appeals*, G. R. No. 114508, 19 Nov. 1999, citing *Etepha v. Director of Patents*, *supra*, *Gabriel v. Perez*, 55 SCRA 406 (1974). See also Art. 15, par. (1), Art. 16, par. (1), of the Trade Related Aspects of Intellectual Property (TRIPS Agreement).

are similar. To the ears, the letter "N" between two "O"s followed by the letter "X" hardly differs from "OX". The Supreme Court in *Prosource International Inc. v. Horphag Research Management, S.A.*⁶ held that it takes into account the aural effects of the words and letters contained in the marks in determining the issue of confusing similarity. And in *Marvex Commercial Co., Inc. v. Petra Hawpia & Co., et al.*⁷, cited in *McDonalds Corporation v. L.C. Big Mak Burger, Inc.*, the Court held:

"The following random list of confusingly similar sounds in the matter of trademarks, culled from Nims, Unfair Competition and Trade Marks, 1947, Vol. 1, will reinforce our view that 'SALONPAS' and 'LIONPAS' are confusingly similar in sound: 'Gold Dust' and 'Gold Drop'; 'Jantzen' and 'Jass-Sea'; 'Silver Flash' and 'Supper Flash'; 'Cascarete' and 'Celborite'; 'Celluloid' and 'Cellonite'; 'Chartreuse' and 'Charseurs'; 'Cutex' and 'Cuticlean'; 'Hebe' and 'Meje'; 'Kotex' and 'Femetex'; 'Zuso' and 'Hoo Hoo'. Leon Amdur, in his book 'Trade-Mark Law and Practice', pp. 419-421, cites, as coming within the purview of the idem sonans rule, 'Yusea' and 'U-C-A', 'Steinway Pianos' and 'Steinberg Pianos', and 'Seven-Up' and 'Lemon-Up'. In *Co Tiong vs. Director of Patents*, this Court unequivocally said that 'Celdura' and 'Cordura' are confusingly similar in sound; this Court held in *Sapolin Co. vs. Balmaceda*, 67 Phil. 795 that the name 'Lusolin' is an infringement of the trademark 'Sapolin', as the sound of the two names is almost the same."

Considering that both marks are used on similar pharmaceutical products (*anti-bacterial*) and available in similar form of administration ("tablets"), there is likelihood that information, assessment, perception or impression about LEVOX products as heard may unfairly cast upon or attributed to the Opposer, and *vice-versa*.

Aptly, 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 other⁸. Even if the consumer notices the differences in the spelling of the competing marks, the likelihood of confusion would subsist, as one mark is mistaken for as a variation of the other. The confusion is not only on the purchaser's perception of goods but on the origins thereof as held by the Supreme Court:⁹

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

⁶ G.R. No. 180073, 25 Nov. 2009.

⁷ G.R. No. L-19297, 22 Dec. 1966

⁸ *Societe Des Produits Nestle, S.A v. Court of Appeals*, G.R. No.112012, 4 Apr. 2001, 356 SCRA 207, 217.

⁹ *Converse Rubber Corporation v. Universal Rubber Products, Inc., et al.*, G.R. No. L-27906, 08 Jan. 1987.


defendant which, in fact does not exist.

In conclusion, 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. 4-2009-004890 be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

SO ORDERED.

Taguig City, 21 June 2013.



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

