



**WESTMONT PHARMACEUTICALS INC.,**  
Opposer,

**-versus-**

**AMBICA INTERNATIONAL CORPORATION,**  
Respondent-Applicant.

x-----x

} **IPC No. 14-2015-00090**  
} Opposition to:  
} Application No. 4-2014-012147  
} Date filed: 01 October 2014  
} TM: "HAYOSPAN"  
}  
}  
}  
}  
}  
}  
}

### NOTICE OF DECISION

**OCHAVE & ESCALONA**  
Counsel for Opposer  
66 United Street  
Mandaluyong City

**GENER CABOTAJE SANSAET**  
Counsel for Respondent-Applicant  
West Tower 2005-A, PSE Centre, Exchange Road  
Ortigas Center, Pasig City

#### GREETINGS:

Please be informed that Decision No. 2015 - 235 dated October 30, 2015 (copy enclosed) was promulgated in the above entitled case.

Taguig City, October 30, 2015.

For the Director:

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



**WESTMONT PHARMACEUTICALS INC.,**  
Opposer,

- versus -

**AMBICA INTERNATIONAL CORPORATION,**  
Respondent-Applicant.

x ----- x

**IPC No. 14-2015-00090**

Opposition to:

Appln. No. 4-2014-012147

Date Filed: 01 October 2014

Trademark : "HAYOSPAN"

Decision No. 2015 - 235

## DECISION

WESTMONT PHARMACEUTICALS INC. ("Opposer")<sup>1</sup>, filed a verified opposition to Trademark Application Serial No. 4-2014-012147. The application, filed by AMBICA INTERNATIONAL CORPORATION ("Respondent-Applicant")<sup>2</sup>, covers the mark "HAYOSPAN" for use of goods under class 5<sup>3</sup> on pharmaceutical product namely NSAID.

The Opposer alleges the following grounds for opposition:

"7. The mark 'HAYOSPAN' owned by Respondent-Applicant so resembles the trademark 'HYOS' owned by Opposer and duly registered with the IPO prior to the publication for opposition of the mark 'HAYOSPAN'.

"8. The mark 'HAYOSPAN' will likely cause confusion, mistake and deception on the part of the purchasing public, most especially considering that the opposed mark 'HAYOSPAN' is applied for the same class and goods as that of Opposer's trademark 'HYOS', i.e. Class 05 of the International Classification of Goods as Pharmaceutical Preparation.

"9. The registration of the mark 'HAYOSPAN' in the name of the Respondent-Registrant will violate Sec. 123 of the IP Code.

In support of this Verified Opposition, Opposer will rely upon and prove the following facts:

"10. Opposer is the registered owner of the trademark 'HYOS'.

10.1. Opposer is engaged in the marketing and sale of a wide range of pharmaceutical and other healthcare products. The trademark application for the trademark 'HYOS' was filed with the IPO on 13 November 2009 by Opposer and was approved for registration on 01 October 2020.

10.2. Thus, the registration of the trademark 'HYOS' subsists and remains valid to date.

"11. The trademark 'HYOS' has been extensively used in commerce in the Philippines.

x x x

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

<sup>2</sup> With address at 9 Amsterdam Extension, Merville Park Subdivision, Paranaque City.

<sup>3</sup> The Nice Classification of goods and services is for registering trademark and service marks, based on a multilateral treaty administered by the WIPO, called the Nice Agreement Concerning the International Classification of Goods and Services for Registration of Marks concluded in 1957.

"12. The registration of Respondent-Applicant's mark 'HAYOSPAN' will be contrary to Section 123.1 (d) of the IP Code. 'HAYOSPAN' is confusingly similar to Opposer's trademark 'HYOS'.

x x x

"13. To allow Respondent-Applicant to continue to market its products bearing the mark 'HAYOSPAN' undermines Opposer's right to its trademark 'HYOS'. As the lawful owner of the trademark 'HYOS' Opposer is entitled to prevent the Respondent-Applicant from using a confusingly similar mark in the course of trade where such would likely mislead the public."

The Opposer's evidence consists of the following:

1. Pertinent pages of the IPO E-Gazette relating to HYOS trademark;
2. Certificate of Registration No. 4-2009-011648 for HYOS;
3. Declaration of Actual Use for HYOS;
4. Sample product packaging label bearing the trademark HYOS;
5. Certification and sales performance of HYOS; and,
3. Certificate of Product Registration by BFAD for HYOS.

This Bureau issued and served upon the Respondent-Applicant a Notice to Answer on 11 March 2015. The Respondent-Applicant filed on 11 May 2015 a Verified Answer via registered mail without attaching a Special Power of Attorney and/or Secretary's Certificate.<sup>4</sup> However, despite the opportunity given to submit the same<sup>5</sup>, Respondent-Applicant's Compliance was filed out of time. Thus, Respondent-Applicant is declared in default and this case is deemed submitted for decision.<sup>6</sup>

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

Sec. 123.1 (d) R.A. No. 8293, otherwise known as the Intellectual Property Code ("IP Code") provides:

A mark cannot be registered if it:

x x x

(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 for HAYOSPAN on 01 October 2014,<sup>7</sup> the Opposer has already an existing trademark registration for the mark HYOS bearing Registration No. 4-2009-011648 issued on 01 October 2010,

<sup>4</sup> Order No. 2015-893 dated 18 June 2015.

<sup>5</sup> Id.; Rule 2, Sec. 9, par. (d) of the Amended Rules and Regulations on Inter Partes Processing, as amended by Office Order No. 14-068 s. 2014.

<sup>6</sup> Order No. 2015-35 dated 21 October 2015.

<sup>7</sup> Filewrapper records.

which was filed on 13 November 2009<sup>8</sup>. Unquestionably, the Opposer's application preceded that of Respondent-Applicant's.

Nevertheless, the competing marks are hereby reproduced for comparison:

**Hyos**

Opposer's Trademark

**HAYOSPAN**

Respondent-Applicant's Trademark

The HAYOSPAN trademark of the Respondent-Applicant contain all the letters in the Opposer's HYOS trademark. Such that, if either of the marks are spoken, they create an apparent aural similarity creating the likelihood of confusion of one mark as against the other.

Further, a scrutiny of the goods covered by the mentioned marks show the relatedness of the pharmaceutical products covered by the marks in classification no. 5. Opposer's HYOS particularly covers pharmaceutical preparation for the symptomatic relief of **gastrointestinal and genitourinary disorders characterized by smooth muscle spasms** and spasms and dyskinesia of the biliary system; whereas, the Respondent-Applicant's HAYOSPAN covers pharmaceutical preparations namely NSAID or Non-steroidal Anti-inflammatory Drug. It appears that the illness treated by both drugs are related. Anti-inflammatory drugs promote inflammation that is necessary for healing, but also results in **pain**, and fever; support the blood clotting function of platelets; and **protect the lining of the stomach from the damaging effects of acid.**<sup>9</sup>

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.<sup>10</sup> Colorable imitation does not mean such similitude as amount 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.<sup>11</sup>

Succinctly, because the coverage of the Respondent-Applicant's trademark application would allow using the mark HAYOSPAN on goods or pharmaceutical products that are already dealt in by the Opposer using the mark HYOS, the changes in spelling did not diminish the likelihood of the occurrence of mistake, confusion, or even deception. HAYOSPAN and HYOS have 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.

<sup>8</sup> Exhibit "B" of Opposer.

<sup>9</sup> NSAIDs available at [http://www.medicinenet.com/nonsteroidal\\_antiinflammatory\\_drugs/article.htm](http://www.medicinenet.com/nonsteroidal_antiinflammatory_drugs/article.htm).

<sup>10</sup> Societe Des Produits Nestle, S.A. v. Court of Appeals, G.R. No. 112012, 04 April 2001, 356 SCRA 207, 217.

<sup>11</sup> Emerald Garment Manufacturing Corp. v. Court of Appeals, G.R. No. 100098, 29 December 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, 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.<sup>12</sup> 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:<sup>13</sup>

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 on 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 of the former reflects adversely on the plaintiff's reputation. The other is the confusion of business. Hence, 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.

It must be emphasized that the Respondent-Applicant was given opportunity to defend its trademark application. It, however, failed to do so. 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. 4-2014-00012147 be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

SO ORDERED.

Taguig City 30 October 2015.

  
**Atty. NATHANIEL S. AREVALO**  
*Director IV / Bureau of Legal Affairs*

---

<sup>12</sup> American Wire and Cable Co. v. Director of Patents, et al., 31 SCRA 544, G.R. No. L-26557, 18 February 1970.

<sup>13</sup> Converse Rubber Corporations v. Universal Rubber Products, Inc. et al., G.R. No. L-27906, 08 January 1987.