



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2025 TMOB 62

Date of Decision: 2025-03-12

IN THE MATTER OF AN OPPOSITION

Opponent: Cybin Corp.

Applicant: Cybin Therapeutics Inc.

Application: 1,967,184 for Cybin Therapeutics

INTRODUCTION

[1] This is an opposition brought by Cybin Corp. (the Opponent) in respect of application number 1,967,184 filed by Cybin Therapeutics Inc. (the Applicant) for the trademark Cybin Therapeutics (the Mark).

[2] The mark is applied for in association with the following goods (the Goods):

- CI 1 (1) Chemical additives for use in the manufacture of pharmaceuticals; additives derived from fungi for use in the manufacture of pharmaceuticals.
- CI 29 (2) Dried edible fungi
- CI 31 (3) Fresh edible fungi

[3] For the reasons set out below, I reject the opposition.

THE RECORD

[4] The application for the Mark was filed on June 5, 2019 and was advertised for opposition purposes in the *Trademarks Journal* dated May 25, 2022.

[5] On November 25, 2022 the Opponent filed its statement of opposition under section 38 of the *Trademarks Act*, RSC 1985, c T 13 (the Act).

[6] The Opponent bases the opposition on sections 38(2)(a) and 30(2)(a) (goods not set out in ordinary commercial terms), 30(2)(d) (impermissible removal of disclaimer), 38(2)(d) (non-distinctiveness), and 38(2)(e) (no use or intent to use) of the Act.

[7] The Applicant filed a counterstatement denying the grounds of opposition.

[8] In support of its opposition, the Opponent filed the affidavit of Robert Mino, sworn May 30, 2023 (the Mino Affidavit).

[9] In support of the application for the Mark, the Applicant filed the affidavit of Thomas Joshua Taylor, sworn September 29, 2023 (the Taylor Affidavit).

[10] Mr. Taylor was cross-examined on his affidavit. Transcripts of the cross-examination were filed on February 27, 2024.

[11] Both parties filed written representations. Only the Opponent attended the oral hearing.

OVERVIEW OF THE EVIDENCE

The Opponent's Evidence – The Mino Affidavit

[12] Mr. Mino is the general counsel and IP counsel of Cybin Corp. The Mino Affidavit contains the following:

- the file history for the application for the Mark [Exhibits A to O];
- a description, and printouts of the results, of internet searches conducted for "Cybin Therapeutics" [Exhibits P and Q];
- the results of business name searches for "Cybin Therapeutics" [Exhibits R and S]; and
- a description of searches conducted for CYBIN THERAPEUTICS INC. in Health Canada's Clinical Trials Database and a screen shot of the results of these searches [para 24, Exhibit T]

The Applicant's Evidence – The Taylor Affidavit

[13] Mr. Taylor is the co-founder, director and Chief Executive Officer of the Applicant, positions he has held since the incorporation of the Applicant in 2019 [paras 1 and 3]. The Taylor Affidavit contains, *inter alia*, the following statements, information, and exhibits:

- Copies of the Certificate of Incorporation and Articles of Incorporation of the Applicant [para 4, Exhibit A];
- A copy of the Certificate of Continuation for the Applicant [para 5, Exhibit B]; and
- A copy of the Notice of Articles for the Applicant [para 6, Exhibit C].

[14] The Taylor Affidavit also contains a description of the Applicant's history and operations. More specifically:

- The Applicant was formed by Mr. Taylor and his business partner in 2019 for the purposes of "researching, collecting data, and

developing therapeutic protocols and future custom formulations relating to fungi, specifically psilocybin and psilocin for therapeutic purposes” [para 8];

- In sum, the Applicant is generally engaged in the research and development of the Goods for the purposes of producing, manufacturing, marketing, and/or selling of the Goods [para 9];
- Based on his knowledge, Mr. Taylor is not aware of any psilocybin-containing therapeutic products approved for consumer use in Canada. Accordingly, the Applicant and any business proposing or purporting to produce and sell a psilocybin-containing therapeutic product in Canada may only be engaged in research and development activities with an aim to eventually produce, manufacture, market and/or sell psilocybin-containing therapeutic products [para 10];
- A copy of a Government of Canada news release dated June 29, 2023 describing the state of the psilocybin-containing therapeutic product market is attached as Exhibit D [para 11];
- The Applicant owns and operates the website www.cybintherapeutics.com (the Applicant’s Website) [para 12];
- A screenshot of the earliest archived copy of the Applicant’s Website showing the Applicant’s mission and intent to use the Mark in association with the development of a psilocybin formulation is attached as Exhibit E [para 13];
- A description of legal, intellectual property, consulting services, and clinical trial services engaged by the Applicant in relation the development of the Goods [paras 14 to 25, Exhibits F to L];
- In 2022, the Applicant engaged the services of a third party to conduct a study relating to psilocybin-assisted therapy to further the Applicant’s objectives of developing, marketing, and sale of

therapeutic protocols and formulation related to fungi [para 26]. Copies of the executed clinical trial agreement and an invoice for these clinical trial services is attached as Exhibits M and N [paras 27 and 28];

- To date, the Applicant has spent a total of approximately \$170,000 on research and development activities and an additional \$31,000 to set up and run clinical trials, all in furtherance of the Applicant's objective to develop, market, and sell the Goods [para 29];
- The Applicant uses and promotes the Mark to build its reputation in association the research and development of a novel therapeutic protocol and future custom formulation of psilocybin and psilocin in furtherance of the production, manufacture, marketing and/or selling the Goods [para 31];
- The Applicant provided authorization for and used the Mark in a press release for its collaboration with Filament Health Corp (Filament) [para 32]. A screenshot of the press release with Filament is attached as Exhibit O [para 33].

[15] The Mark, and the corresponding application, were assigned to the Applicant on September 28, 2023, made effective June 6, 2019 [para 36]. A copy of the assignment from Thomas Joshua Taylor to the Applicant is attached as Exhibit Q [para 37].

[16] Mr. Taylor filed three amendments to the application for the Mark in October 2019, October 2020 and September 2021 which included updates to the applicant's address, the uploading of a logo version of the Mark, a disclaimer of the right to the exclusive use of the word "Cybin Therapeutics" and logo, and a revised statement of Goods [para 38]. Copies of the amended applications for the Mark are attached as Exhibit R [para 39].

[17] Mr. Taylor states that he made the amendments to the application for the Mark himself as a cost-saving measure and did not have the assistance of a trademark agent or professional. Mr. Taylor further states that he erroneously believed that the amendments were necessary and required for the protection of his rights in the Mark [para 40]. After receiving the first examiner's report in respect of the application for the Mark in October 2021, Mr. Taylor appointed a trademark agent to respond to the examiner's report [para 41]. A copy of each of the appointment of agent, the first examiner's report, and the response filed in response to the examiner's report, are attached as Exhibits S, T and U [paras 42 to 44].

EVIDENTIAL BURDEN AND LEGAL ONUS

[18] In accordance with the usual rules of evidence, there is an evidential burden on the Opponent to prove the facts inherent in its allegations pleaded in the statement of opposition [*John Labatt Ltd v Molson Companies Ltd*, 1990 CarswellNat 1053 (FC)]. The presence of an evidential burden on the Opponent with respect to a particular issue means that in order for the issue to be considered at all, there must be sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support that the issue exists [*John Labatt*, at 298].

[19] For those allegations for which the Opponent has met its evidential burden, the legal onus is on the Applicant to show that the application does not contravene the provisions of the Act as alleged in the statement of opposition. The presence of a legal onus on the Applicant means that, if a determinate conclusion cannot be reached once all the evidence has been considered, then the issue must be decided against it.

ASSESSMENT OF GROUNDS OF OPPOSITION

Section 38(2)(a) and 30(2) Ground – Non-Conformance of Statement of Goods

[20] The Opponent pleads that the Mark does not set out the goods “additives derived from fungi for the use in the manufacture of pharmaceuticals” in ordinary commercial terms as the statement “additives for use in the manufacture of pharmaceuticals” was retired from the Goods and Services Manual and the addition of “derived from fungi” does not render this statement one that is set out in ordinary commercial terms.

[21] I disagree with the Opponent. While the statement “additives for use in the manufacture of pharmaceuticals” was retired in 2020, I note that the statement “chemical additives for use in the manufacture of pharmaceuticals” has been an acceptable statement since 2016. As I consider the qualifying language of “derived from fungi” to be at least as, if not more, specific as the word “chemicals” when added to the statement “additives for use in the manufacture of pharmaceuticals”, I see no reason why the statement currently in the subject application would not be considered an ordinary commercial term.

[22] This ground of opposition is therefore rejected.

Section 30(2)(d) – Impermissible Removal of Disclaimer

[23] The Opponent pleads that the Mark does not conform with section 30(2)(d) of the Act as a disclaimer filed by the Applicant in 2019 was impermissibly removed from the application for the Mark and was not included in the application when advertised. The Opponent states that “the Applicant may not revoke a disclaimer once made”. I note the Opponent has provided no pertinent Canadian law to support this latter statement.

[24] Section 30(2)(d) of the Act reads:

(2) The application shall contain

...

(d) any prescribed information or statement.

[25] What is considered “prescribed” content in an application is set out in sections 30 and 31 of the *Trademarks Regulations*, SOR/2018-227 (the Regulations). Neither of these sections in the Regulations mention disclaimers.

[26] As the Opponent has relied on sections of the Act that do not support the pleading, I find that the Opponent has failed to raise a valid ground of opposition.

[27] Accordingly, this ground of opposition is dismissed.

Section 38(2)(d) – Non-Distinctiveness

[28] The Opponent pleads that the Mark is not distinctive as CYBIN THERAPEUTICS is being used by multiple sources other than the Opponent and is therefore incapable of distinguishing the Goods of the Applicant from those of others. At the time the statement of opposition was filed, the named applicant in the application for the Mark was Thomas Taylor. However, the Opponent submits that at all relevant dates, the Mark was being used by Cybin Therapeutics Inc. (currently, the Applicant), including on the website cybintherapeutics.com. The Opponent further pleads that no public notice was provided to indicate that the Mark was being used under license.

[29] The material date for this ground is the filing date of the opposition, November 25, 2022 [*Metro-Goldwyn-Mayer Inc v Stargate Connections Inc*, 2004 FC 1185].

[30] There is an initial evidentiary burden on the Opponent to advance facts supporting its allegation of non-distinctiveness: *Procter & Gamble Inc v Colgate-Palmolive Canada Inc*, 2010 FC 231 at para 71; *Continental Teves AG & Co v Canadian Council of Professional Engineers*, 2013 FC 801 at para 58.

[31] In the present case, evidence of the Mark being publicly displayed prior to the material date is limited to display of the Mark on the Applicant's Website on an archived version of the site from February 2020 [Mino Affidavit, Exhibit Q; Taylor Affidavit, Exhibit E] and a press release from Filament announcing its collaboration with the Applicant dated January 2022 [Taylor Affidavit, Exhibit O].

[32] It is of note that neither the archived webpages, nor the press release, are associated with the offering of goods or services, and are rather sources of general information about the Applicant and its business activities. Accordingly, in my view, the Opponent has failed to meet its burden to show that the Mark was actually used in association with the Goods, or with any goods or services, prior to the relevant date.

[33] This ground of opposition is therefore dismissed.

Section 38(2)(e) – Non-Use/No Intent to Use

[34] The Opponent pleads that, as of the filing date, the Applicant was not using and did not intend to use the Mark in Canada. More specifically, the Opponent submits that the Applicant was not using and "had not taken serious steps" to use the Mark in connection with the Goods.

[35] The material date for this ground is the date of filing of the application, namely, June 5, 2019 [the Act, section 38(2)(e)].

[36] In support of this ground, the Opponent argues that is clear from the Applicant's evidence that neither Mr. Taylor or the Applicant "ever intended to brand goods with the Mark" and that, instead, they only intended to do drug development and clinical trials under the name CYBIN THERAPEUTICS. The Opponent surmises that the Applicant wished to register its corporate name and did not do so correctly, suggesting that the application for the Mark was filed in association with the Goods as opposed to services related to drug development and clinical trials [written representations, para 10].

[37] For the reasons set out below, I find the Opponent's suggestion that the application for the Mark was incorrectly filed in association with goods rather than services is speculation and is not supported by the evidence.

[38] First, the application for the Mark contained the required statement that the Applicant "by itself or through a licensee, or by itself and through a licensee, intend(s) to use the trademark in Canada" in association with the Goods.

[39] Second, the Applicant's evidence, namely, the Taylor Affidavit, contains several statements that describe the Applicant's business, indicating that the Applicant:

- is engaged in research and development of the Goods for the purposes of "producing, manufacturing, marketing, and/or selling" the Goods [para 9];
- engaged the services of a consultant to, among other things, further the Applicant's "objectives to develop, market, and sell the Goods and therapeutic services" [para 18]; and
- has spent approximately \$170,000 on research and development activities and approximately \$31,000 to set up and run its first

clinical trial “all to further its objectives to develop, market and sell the Goods” [para 29].

[40] The fact that the Applicant is engaged in research for the purposes of the development of the Goods in no way leads to the conclusion that the Applicant never intended to use the Mark in association with the Goods, as is suggested by the Opponent.

[41] In support of this ground, the Opponent also points to the following statements derived from the cross-examination of Mr. Taylor:

- When Mr. Taylor filed the Trademark, he never anticipated that he personally would be formulating a drug product (Q. 54, p. 15);
- Neither Mr. Taylor nor CTI ever intended to sell a chemical additive branded CYBIN THERAPEUTICS (Q. 62-66, p. 17-18); and
- Mr. Taylor never used the term CYBIN THERAPEUTICS between June 5, 2019 to September 23, 2023, but instead that trademark was used by CTI (Q. 24-27, p. 8-9)

[42] With respect to the first statement above, the application for the Mark contained the language that the original applicant (being Mr. Taylor) intended to use the Mark itself or through a licensee, or by itself and through a licensee. The statement from Mr. Taylor that he did not personally anticipate formulating drug product does not negate the statement contained in the application at the time of filing since there was a stated option that the Mark may be used by a licensee. Further, Mr. Taylor’s statement on cross-examination relates to a service that is not covered by the application.

[43] Regarding the second cross-examination statement raised by the Opponent, a review of the cross-examination transcript of Mr. Taylor reveals that the actual answers given relate to the clinical trial the Applicant began

with Filament. The following transcript excerpt demonstrates that Mr. Taylor only responding in the context of the collaboration with Filament:

64 Q. I need you to be a little more specific in your answer. You never intended to sell drug additives that were called Cybin Therapeutics. For example, if you're going to make a pill, you might put starch in the pill, and the starch could be a chemical additive. Let's make that assumption. So my question is you never intended to sell a starch or some sort of filler or some other chemical additive branded as Cybin Therapeutics' chemical additive; did you?

A. No. There's been no discussion with Filament in that regard.

[44] The cross-examination continues:

65 Q. And when you applied for the Trademark, you personally back in 2019, that was never the plan; was it?

A. The plan, never the plan for what? Sorry?

66 Q. To mark the starch or the filler or the chemical additive as Cybin Therapeutics' brand additive; correct?

67 A. No.

[45] While the Opponent points to this latter exchange as supporting its submission that neither the Applicant (nor the original applicant Mr. Taylor) had any intention of using the Mark with the Goods, I find in the context of the cross-examination, and considering the evidence in its entirety, I cannot conclude that the single exchange above is definitive evidence that there was no intention to use the Mark in association with the Goods, particularly considering that earlier in the cross-examination Mr. Taylor admitted he did not know what a chemical additive was [Q 38].

[46] Finally, the third cross-examination statement made by Mr. Taylor the Opponent relies on as an admission that the Mark was used by the Applicant and not Mr. Taylor (who was the original applicant), is merely an admission

that Mr. Taylor did not use the Mark personally. While there is a statement that the company (presumably the Applicant, Cybin Therapeutics Inc.) was using the name Cybin Therapeutics, there is no statement that the Mark was used by the Applicant as the Opponent suggests.

[47] Overall, I am of the view that none of the statements made by Mr. Taylor on cross-examination negate or contradict the numerous, clear statements in the Applicant's evidence that state that the Applicant intends to use the Mark with the Goods in Canada. Considering these statements in the Taylor Affidavit in conjunction with the statements regarding the intention to use the Mark set out in the application, and the actual steps taken since the filing of the application to develop the Goods, I am satisfied that the Applicant has met its legal burden in respect of this ground.

[48] Accordingly, this ground of opposition is dismissed.

DISPOSITION

[49] Pursuant to the authority delegated to me under section 63(3) of the Act, I reject the opposition pursuant to section 38(12) of the Act.

Leigh Walters
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

Appearances and Agents of Record

HEARING DATE: 2025-02-27

APPEARANCES

For the Opponent: Kenneth Clark

For the Applicant: No one appearing

AGENTS OF RECORD

For the Opponent: Aird & Berlis LLP

For the Applicant: Nexus Law Group LLP