CURVES INTERNATIONAL, INC.,	}	Inter Partes Case No. 14-2008-00012
Opposer,	}	Opposition to:
	}	
- versus -	}	Appln. Serial No.: 4-2007-000124
	}	Date Filed : 04 January 2007
	}	Trademark : "SEXY CURVE"
HON WEN BO,	}	
Respondent-Applicant.	}	
x----------x		Decision No. 2009-71

DECISION

For decision is the Notice of Opposition filed by Curves International, Inc., herein Opposer, a corporation organized and existing under the laws of the State of Texas, U.S.A. with address at 100 Ritchie Road, Waco, Texas 76712, U.S.A. against Application Serial No. 4-2007-000124 for the registration of the mark SEXY CURVE for use of goods falling under class 25 namely: "t-shirts, blouses, jeans, shirts, skirts, denims, undergarments, swimsuits, boots, shoes and slippers" filed by Hong Wen Ben, herein respondent-applicant, with address at 3402 Sunview Palace Condominium, M.H. Del Pilar St., Greater M.M.

The grounds for the opposition are as follows:

"1. The mark "SEXY CURVE" which Respondent-Applicant seeks to register so resembles Opposer's registered trademarks "CURVES" which when applied to or used in connection with the goods covered by the application under opposition will likely cause confusion, mistake and deception on the part of the purchasing public.

"2. The registration of the mark "SEXY CURVE" in the name of Respondent-Applicant will violate Section 123.1 (d) of Republic Act No. 8293 ("Intellectual Property Code") which categorically provides that "(a) mark cannot be registered if it:

"x x x

"(d) Is identical with a registered mark belonging to a different proprietor or 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;

x x x"

Thus, any mark is identical with a previously registered trademark should be denied registration in respect of similar or related goods, or if the mark applied for registration nearly resembles an already registered trademark that confusion or deception in the mind of the buying pubic will likely result.

"3. Respondent-Applicant's use and registration of the mark "SEXY CURVE" will diminish the distinctiveness and dilute the goodwill of Opposer's registered trademark "CURVES".

In support of the opposition, opposer presented the following evidence:

EXHIBIT	DESCRIPTION
"A"	Special Power of Attorney
"B"	Affidavit of Gary Heavin
"C"	Certified copy of Certificate or Trademark Registration No. 4-2004-007636 (Class 41)
"D"	Certified copy of Certificate of Trademark Registration No. 4-2005-009217 (Class 16 and 25)
"E"	Picture of Labels
"F"	Publication of respondent-applicant's mark in IPO Gazette

The Notice to Answer dated 4 February 2008 was sent to Precy Lao, representative of respondent-applicant and received on 3 March 2008, however, no Answer was filed. The issue is whether the mark SEXY CURVE can be registered or not in the light of Section 123 (d) of the Intellectual Property Code.

The Intellectual Property Code states:

"Section 123. *Registrability.* – 123.1 A mark cannot be registered if it:
xxx

"(d) Is identical with a registered mark belonging to a different proprietor or 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"

Evidence shows that the opposer is the registered owner of the mark CURVE in the Philippines for goods under classes 41, 16 and 25. Under class 25, Opposer is the registered owner of the mark CURVE specifically for "aprons, bathing suits, bathing trunks, belts, lingerie, braces for clothing, brassieres, coats, dressing gowns, frocks, furs, gabardines, garters, girdles, loves, hosiery, jackets, jerseys, jumpers, knitwear, namely: knitted sweaters, pullovers, vests, waistcoats, underwear, cardigans and shoulder wraps, muffs, neckties, overalls, overcoats, pyjamas, pants, parkas, petticoats, pullovers, robes, saris, sashes for wear, scarves, shawls, shirts, shoulder, wraps, shirts, stockings, suits, suspenders, sweaters, swimsuits, t-shirts, tights, top coats, trousers, underclothing, underpants, underwear, vests and waistcoats, footwear, headgear". In this enumeration, it is clear that respondent-applicant intends to adopt the mark on the same goods namely: "swimsuits, t-shirts, shirts, underwear, underclothing, footwear" for which the opposer has previously secured a registration under the name CURVES.

The law provides that a mark cannot be registered if it nearly resembles a mark as to be likely to deceive and cause confusion. In order to arrive at a just and fair conclusion, whether the

contending marks are confusingly similar, both are reproduced below for comparison and scrutiny.

Opposer's mark	Respondent-Applicant's mark
CURVES	

It appears that the mark of respondent-applicant appropriates the word CURVE which is almost identical to opposer's mark CURVES, except for the additional letter "S" in opposer's mark. Although the respondent-applicant, additionally includes he word SEXY, the word CURVE dominantly appears in his mark. Moreover, the style, lettering and form of respondent's mark SEXY CURVE is depicted in the same way as opposer's mark CURVE as it appear in the pictorial representation of the labels attached to its goods (Exhibits "E" to "E-4").

In Marvex Commercial Co., Inc. vs. Petra Hawpia & Co. (18 SCRA 1178), the Supreme 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 "Jazz-Sea"; "Celluloid" and "Cellonite"; "Charteuse" and "Charseurs"; "Cutes" and "Cuticlean"; "Hebe" and "Meje"; "Kotex" and "Femetex"; "Zuso" and "Hoo-hoo" Leon Amdur in his book "Trademark law and Practice", pp/ 419-421, cites, a 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 "Condura" 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.
>
> In the case at bar, "SALONPAS" and "LIONPAS" when spoken sound very much alike. Similarity of sound is sufficient ground for this court to rule that the two are confusingly similar when applied to merchandise of the same descriptive properties. (See Celanese Corporation of America vs. E.I. Du Pont, 154 F. 2d. 146, 148).

In American Wire & Cable Company v. Director of Patents [G.R. No. L-26557. February 18, 1970], the Supreme Court held:

> "Earlier rulings of the Court seem to indicate its reliance on the dominancy test or the assessment of the essential or dominant features in the competing labels to determine whether they are confusingly similar. It has been consistently held that the question of infringement of n trademark is to be determined by the test of dominancy. Similarity in size, form, and color, while relevant, is not conclusive. If the competing trademark contains the main or essential or dominant features of another, and confusion and deception is likely to result, infringement takes place. Duplication or imitation is not necessary, nor is it necessary that the infringing label should suggest an effort to imitate. (C. Neilman Brewing Co. vs. Independent Brewing Co., 191 F. 489, 496, citing Eagle White Lead Co. vs. Pflugh [[CC] 180 Fed. 579). The question at issue in cases of infringement of trademarks is whether the use of the marks involved would be likely to cause

confusion or mistakes in the mind of the public or deceive purchasers." (Co Tiong vs. Director of Patents, 95 Phil. 1, cited in Lim Hoa vs. Director of Patents, 100 Phil. 214).

In fact, even their similarity in sound is taken into consideration, where the marks refer to merchandise of the same descriptive properties, for the reason that trade idem sonans constitutes a violation of trade mark patents.

The High Court in Societe des Produits Nestle v. Court of Appeals [G.R. No. 112012. April 4, 2001.] affirms the Court's reliance on the dominancy test. It held:

"Moreover, the totality or holistic test is contrary to the elementary postulate of the law on trademarks and unfair competition that confusing similarity is to be determined on the basis of visual, aural, connotative comparisons and overall impressions engendered by the marks in controversy as they are encountered in the realities of the marketplace. 23 The totality or holistic test only relies on visual comparison between two trademarks whereas the dominancy test relies not only on the visual but also on the aural and connotative comparisons and overall impressions between the two trademarks."

In the instant case, the word CURVE is the most predominant feature of the marks. The word SEXY appended to the word CURVES is merely descriptive and is presented above the word CURVES. Respondent-Applicant's presentation of the SEXY CURVES mark copies the opposer's mark CURVE as it appears in opposers labels and given that the mark is applied also for goods under class 25, confusion and deception is likely to occur.

WHEREFORE, premises considered the OPPOSITION filed by Curves International Inc. is hereby SUSTAINED. Accordingly, Application Serial No. 4-2007-000124 for the trademark SEXY CURVE for goods under Class 25 namely: fruit products namely: "t-shirts, blouses, jeans, shirts, skirts, denims, undergarments, swimsuits, boots, shoes and slippers" filed on 4 January 2007 by Hong Wen Ben, is as it is, hereby REJECTED.

Let the filewrapper of "SEXY CURVE" subject matter of this case together with this Decision be forwarded to the Bureau of Trademarks (BOT) for appropriate action.

SO ORDERED.

Makati City, 2 June 2009.

ESTRELLITA BELTRAN-ABELARDO
Director, Bureau of Legal Affairs
Intellectual Property Office