

H & K TELECOM TECHNOLOGY
Opposer,
- versus -

IPC 14-2007-000111

Opposition to:
TM Application No. 4-2006-006121
(Filing Date: 08 June 2006)

XING YI CHEN,
Respondent-Applicant.

TM: "SUN DRAGON
AND LOGO"

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Decision No. 2007 – 137

DECISION

This pertains to the Opposition filed by H & K TELECOM TECHNOLOGY CORP., a corporation organized and existing under the laws of the Republic of the Philippines, against the registration of the trademark "SUN DRAGON AND LOGO" for cellphone accessories covered under Class 09 specifically cellphone batteries and charger filed under Application Serial No. 4-2006-006121 on 08 June 2006 in the name of XING YI CHEN of 155 San Pedro St. Davao City.

The facts and grounds upon which the opposition to the registration of the Trademark SUNDRAGON AND LOGO were anchored are as follows:

1. The Opposer is the owner and proprietor of the "Flair with Dragon Symbol, MSM (Stylized Letters) Dragon Symbol and other trademarks using the "Dragon Logo" in the Philippines for Class 9 goods (Cellphone batteries, chargers. Covers and housing cases) under Registration No. 4-2006-004907 issued on March 12, 2007 and Registration No. 4-2006-002656 issued on March 05, 2007. A copy of Registration No. 4-2006-004907 is hereto attached as Exhibit "B" and made an integral part thereof.

2. "The Opposer is also the owner and proprietor of the dragon symbol is used to form part of the mark, to wit:

Trademark	:	"FLAIR WITH DRAGON SYMBOL"
Registration	:	4-2006-004907
Term	:	Ten years from 12 March 2007
Class	:	9
Goods	:	Cellphone batteries, charges, cover replacement plastic housing and cases.
Trademark	:	"MSM (Stylized Letters)"
Registration No.	:	4-2006-002656
Term	:	Ten year from 05 March 2007
Class	:	9
Goods	:	Cellphone batteries, chargers, cover Replacement plastic housing and cases.

3. "Also attached hereto as Exhibit "C" is the Affidavit of Ms. KO LIM LING, who holds the position of Corporate Secretary of the Opposer. In her Affidavit, Ms. KO LIM LING attests to the truth of foregoing allegation, specifically the Opposer's ownership of the abovementioned trademarks as well as the use by the Opposer of the "Dragon Symbol/Logo".

4. "As can be seen from the foregoing, the Opposer has clearly established its exclusive right to the "Dragon Logo" trademark.

5. "Samples of the various packaging of Opposer's products with the dragon symbol and logo in the Philippines are annexed to the Affidavit and made an integral part thereof, to wit:

Packaging	Attached as Exhibit
Charger packaging	C-1
Housing packaging	C-2
Crystal case packaging	C-3

6. "It is in light of the foregoing that the Opposer is opposing the Respondent-Applicant's application for registration of the mark "SUNDRAGON & LOGO".

7. "An analysis of the mark "SUNDRAGON & LOGO" will show that the Dragon logo with a ball of fire is very similar to that of the trademark owned by opposer.

8. "Because the mark "SUNDRAGON & LOGO" was developed through the Respondent-Applicant's use of "Dragon & logo/symbol" and the use of the Illustration of a dragon with a ball of fire, it cannot be registered as it contravenes Sections 123.1 (f) of the Intellectual Property Code (Republic Act No. 8293).

9. "It is the intention of the above-cited provision to protect a trademark owner and the public against the use of mark, which can create confusion with respect to business, source and origin. In the case of Sta. Ana vs. Maliwat, the Supreme Court stated.

"Modern law recognizes that the protection to which the owner of a Trademark is entitled is not limited to guarding his goods or business from Actual market competition with identical or similar products of the parties, But extends to all cases in which the use by a junior appropriator of a Trade-mark of trade-name is likely to lead to a confusion of source, as Where prospective purchasers would be misled into thinking that the Complaining party has extended his business into the field (see 148 ALR 56 et seq; 53 Am Jur. 576) or is in any way connected with the activities of The infringer; or when it forestalls the normal potential expansion of his business." (Emphasis supplied.)

10. "The rationale behind the protection afforded by Section 123.1 (f) of the Intellectual Property Code was further explained by the Supreme Court in the case of Converse Rubber Corp. v. Universal Rubber Products, Inc. in the said case, the Supreme Court stated:

"The similarity in the general appearance of respondent-applicant's trademark and that of petitioner would evidently create a likelihood of confusion among the purchasing public. But even assuming, arguendo that the trademark sought to be registered by respondent is distinctively dissimilar form those of the petitioner, the likelihood of confusion would still subsist, not on the Purchaser's perception of the goods but on the origins thereof. By Appropriating the word 'CONVERSE', respondent products are likely to Be mistaken as having been produced by the petitioner. The risk of Damage is not limited to a possible Confusion of goods but also includes a Confusion of reputation in the public reasonably assume that the goods of The parties originated from the same source."

11. "Similar to the above-cited case, the Opposer firmly believes that it will be damage by Respondent-applicant's use of the "SUNDRAGON & LOGO" Trademark since the use thereof will likely cause confusion or a mistaken belief by the public as to the origin of the mark. In addition, such confusion that will be brought about by the use of the mark "SUNDRAGON & LOGO" will also cause damage to the reputation and goodwill that the Opposer has established with the public over the years.

12. "Clearly, therefore, Respondent-applicant's use of Dragon symbol and Logo" was meant to take advantage to the goodwill established by the Opposer with the public. The this is so is bolstered by the fact that there can be no rational explanation for the use of "Dragon Symbol and Logo" by Respondent-applicant other than to copy the distinctive method by which Opposer identifies its goods and services apart from other goods and services. As aptly stated by the Supreme Court in the case of American Wire and Cable Co. vs. Director of Patents:

"Why of the million of terms and combination of letters and designs available the appellee had to choose a mark so closely similar to another's Trademark if there was no intent to take advantage of the goodwill generated by the other mark"

13. "Considering that the goods belong to the same Class 9 goods the Registration of said Respondent-applicant's mark is proscribed and prohibited by the Intellectual Property Code.

The Notice to answer dated 03 May 2007 was sent to Respondent-Applicant through DHL courier on 10 May 2007 directing him to file his Verified Answer within a prescribed period from receipt. For failure of Respondent-Applicant to file the required Answer, this Bureau in Order No. 2007-1236 considered Respondent to have waived his right to file the same and accordingly submitted this instant suit for decision based on the Opposition, affidavits of the Witnesses and documentary evidence submitted by Opposer.

Filed as evidence for the Opposer, based on the records, are the following:

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| 1. | Certificate of Registration of Flair with Dragon Symbol | - | Exhibit "A" |
| 2. | Certificate of Registration of MSM (Stylized letters) | - | Exhibit "B" |
| 3. | Affidavit of Ko Kim Ling, Corporate Secretary of H & K Telecom Technology Corporation | - | Exhibit "C" |
| 4. | Sample charger packaging | - | Exhibit "C-1" |

For consideration in particular is the propriety of Application Serial No. 4-2006-006121. The issue hinges on the determination of whether or not Respondent-Applicant is entitled to register the trademark SUNDRAAGON AND LOGO on *cellphone accessories falling under Class 09 namely cellphone batteries and charger.*

The Opposer's main arguments pivot or delve on the issue of confusing similarity between trademarks. In determining the existence of confusing similarity, it becomes imperative for this forum to make a careful comparison and scrutiny of the marks involved; to determine the points where these labels as they appear on the goods to which they are attached are similar, in spelling, sound and manner of presentation or general appearance. Both marks bear the DRAGON device and Respondent's use or adoption of the same DRAGON Device for use on the same goods covered under Class 9 was Opposer's basis in bringing this action. For a better appreciation of the argument posited, the two marks are reproduced hereunder exactly as it appears in the application or the facsimile copy of the registration records filed with this Office;

Opposer's Dragon Device
Filed: 10 May 2006
Goods: Class 09

Respondent's Dragon Device
Filed: 08 June 2006
Goods: Class 09

A comparison of the competing marks reveals that the DRAGON device Appears in both labels of the contending parties. However, the adoption of DRAGON device in Respondent's mark which forms the dominant or main feature of Opposer's mark has created or was the source of confusion. With different types of dragon that may be applied, surprisingly however,

Respondent-Applicant had to pick the same or identical DRAGON type, a sun or fire dragon with its head facing the same direction with a pearl at the tip of its nose apparently in flame. There are numerous pictorial representation of animals, or for that matter a dragon for a device comes in many shape and color that Respondent may choose or may elect to adopt from a variety of this kind but why the same identical sun dragon and arrangement for a trademark to be used on the same product? The DRAGON logo remains the prominent and distinctive feature in both marks, the DRAGON logo standing alone has continued to create confusion between the competing marks, under similar circumstances as may be gleaned from the case of Clarke vs. Manila Candy Co., 36 Phil 100, the court Ruled in this wise:

“xxx why, with all the birds in the air, and all fishes in the sea, and all the animals on the face of the earth to choose from, the defendant company (Manila Candy Co,) elected two roosters as its trademark. Although its Directors and managers must have been well aware of the long continued use of a rooster by the plaintiff with the sale and achievement of its goods? X x x a cat, dog, a carabao, a shark, or an eagle stamped upon The container in which candies are sold would serve as well as rooster for The product of defendants factory. Why did defendant select two roosters as its trademark?”

Moreover, the goods involved are the same, they pertain to cellphone accessories specifically cellphone batteries, charger cover replacement, plastic housing and cases falling under Class 09 of the International Classification of goods (i.e., electronic devices). Thus, considering that these competing marks are being used on the same goods which passed through the same channels of trade and marketed similarly, the simultaneous use of the same may lead to confusion in trade and would damage Opposer’s goodwill or reputation which it has painstakingly earned for a considerable period of time. Thus, Opposer will be damage by the registration of the mark SUNDRAGON AND LOGO in favor of Respondent-Applicant as it has a priority or better right to this particular DRAGON logo for cellphone accessories being equipped with a certificate of registration issued on 12 March 2007 (Exhibit “A”, Opposer).

A cursory reading of paragraph (d) of R.A. 8293 with emphasis on prior Registration and/or application of the same mark involving same or similar goods states that:

“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 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;’*

xxx

The preceding section provides that it is the owner of a registered mark or an owner of a mark with an earlier filing date or priority sate can oppose an application for registration of another mark involving the same or related products. The purpose of the trademark Law is to provide protection not only to the owner of the trademark or proprietor of a mark with an earlier filing or priority date in exact adherence to the First-to-First Rule as one important factor of registrability under R.A. 8293, likewise, and more importantly, to the unwary public that the may not be confused, mistaken or deceived by goods they buy.

The right to register trademarks, trade names and service marks is based on ownership. Only the owner of the mark may apply for its registration (*Bert R.Begano v. Director of Patents,*

et. al., G.R. No. L-20170, August 10, 1965). And where a trademark application is opposed, the Respondent-Applicant has the burden of providing ownership (*Marvex Commercial Co., Inc. v. Peter Hawpia and Co.*, 18 SCRA 1178). In the instant case, Respondent-Applicant did not present any evidence to prove its ownership over the subject DRAGON logo, despite being given the opportunity to do so. Likewise, this Bureau cannot take for granted the inaction of Respondent-applicant in defending its claim over the Trademark "SUNDRAGON AND LOGO" Such inaction of Respondent-Applicant is evidenced by its failure to file its answer despite receipt of the Notice to Answer The Notice of Opposition, contrary to the disputable presumption that "a person takes ordinary care of his concern", enunciated in Section 3(d) of Rule 131 of the Rules of Court.

It was the Respondent-applicant's option not to defend its case, contrary to the declared policy of the Supreme Court to the effect that "it is precisely the intention of the law to protect only the vigilant, not those guilty of laches." Finally, as provided for under Sec. 230 of R.A. 8293, otherwise known as the Intellectual Property Code of the Philippines:

"Sec. 230. *Equitable Principles to Govern Proceedings.* – In all inter partes proceedings in the Office under this Act, the equitable principles of laches, estoppel, and acquiescence where applicable, may be considered and applied."

Opposer, H & K Telecom Technology Corporation, on 10 May 2006 filed with the Intellectual Property Philippines (IPP) an application for the registration of the mark FLAIR WITH DRAGON SYMBOL for the cellphone accessories under Class 09. Respondent-applicant, on its part, filed its application for registration of the mark SUNDRAGON & LOGO on 08 June 2006 for the same cellphone Accessories under Class 09. As it now stand, we may safely deduce that it is the Opposer, not the Respondent-applicant, who can claim priority either of an earlier filing or registration pursuant to Section 123 of R.A 8293. Respondent-Applicant not a prior applicant or the subject trademark.

The Opposer having sufficiently corroborated its claim, the inevitable conclusion is that Opposer is the first adopter and prior registrant of the SUNDRAGON logo for cellphone accessories under Class 09 and that the mark SUNDRAGON & LOGO bearing Application Serial No. 4-2006-006121 cannot have any right superior to Opposer's trademark FLAIR WITH DRAGON SYMBOL to be used on goods falling under Class 09.

WHEREFORE, premises considered, the Notice of Opposition is, as it is hereby SUSTAINED. Consequently, Application bearing Serial No. 4-2006-006121 filed by XING YI CHEN on 08 June 2006 for the registration of the mark SUNDRAGON AND LOGO for use on cellphone accessories covered under Class 09 is, as it is hereby REJECTED.

Let the filewrapper of SUNDRAGON AND LOGO, subject matter of this case together with a copy of this Decision be forwarded to the Bureau of trademarks for appropriate action.

SO ORDERED.

Makati City, 27 September 2007

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