

Republic of the Philippines  
SUPREME COURT  
Manila

THIRD DIVISION

LEVI STRAUSS (PHILS.), INC.,  
Petitioner,

G.R. No. 162311

- versus -

TONY LIM,  
Respondent.

Promulgated: December 4, 2008

REYES, R.T., J.:

THE remedy of a party desiring to elevate to the appellate court an adverse resolution of the Secretary of Justice is a petition for *certiorari* under Rule 65. A Rule 43 petition for review is a wrong mode of appeal.<sup>[1]</sup>

During preliminary investigation, the prosecutor is vested with authority and discretion to determine if there is sufficient evidence to justify the filing of an information. If he finds probable cause to indict the respondent for a criminal offense, it is his duty to file the corresponding information in court. However, it is equally his duty not to prosecute when after an investigation, the evidence adduced is not sufficient to establish a *prima facie* case.<sup>[2]</sup>

Before the Court is a petition for review on *certiorari*<sup>[3]</sup> of the Decision<sup>[4]</sup> and Resolution<sup>[5]</sup> of the Court of Appeals (CA), affirming the resolutions of the Department of Justice (DOJ) finding that there is no probable cause to indict respondent Tony Lim, a.k.a. Antonio Guevarra, for unfair competition.

The Facts

Petitioner Levi Strauss (Phils.), Inc. is a duly-registered domestic corporation. It is a wholly-owned subsidiary of Levi Strauss & Co. (LS & Co.) a Delaware, US Company.

In 1972, LS & Co. granted petitioner a non-exclusive license to use its registered trademarks and trade names<sup>[6]</sup> for the manufacture and sale of various garment products, primarily pants, jackets, and shirts, in the Philippines.<sup>[7]</sup> Presently, it is the only company that has authority to manufacture, distribute, and sell products bearing the LEVI'S trademarks or to use such trademarks in the Philippines. These trademarks are registered in over 130 countries, including the Philippines,<sup>[8]</sup> and were first used in commerce in the Philippines in 1946.<sup>[9]</sup>

Sometime in 1995, petitioner lodged a complaint<sup>[10]</sup> before the Inter-Agency Committee on Intellectual Property Rights, alleging that a certain establishment in Metro Manila was manufacturing garments using colorable imitations of the LEVI'S trademarks.<sup>[11]</sup> Thus, surveillance was conducted on the premises of respondent Tony Lim, doing business under the name Vogue Traders Clothing Company.<sup>[12]</sup> The investigation revealed that respondent was engaged in the manufacture, sale, and distribution of products similar to those of petitioner and under the brand name "LIVE'S."<sup>[13]</sup>

On December 13, 1995, operatives of the Philippine National Police (PNP) Criminal Investigation Unit<sup>[14]</sup> served search warrants<sup>[15]</sup> on respondent's premises at 1042 and 1082 Carmen Planas Street, Tondo, Manila. As a result, several items<sup>[16]</sup> were seized from the premises.<sup>[17]</sup>

The PNP Criminal Investigation Command (PNP CIC) then filed a complaint<sup>[18]</sup> against respondent before the DOJ for unfair competition<sup>[19]</sup> under the old Article 189 of the Revised Penal Code, prior to its repeal by Section 239 of Republic Act (RA) No. 8293.<sup>[20]</sup> The PNP CIC claimed that a “confusing similarity” could be noted between petitioner’s LEVI’s jeans and respondent’s LIVE’S denim jeans and pants.

In his counter-affidavit,<sup>[21]</sup> respondent alleged, among others, that (1) his products bearing the LIVE’S brand name are not fake LEVI’S garments; (2) “LIVE’S” is a registered trademark,<sup>[22]</sup> while the patch pocket design for “LIVE’S” pants has copyright registration,<sup>[23]</sup> thus conferring legal protection on his own intellectual property rights, which stand on equal footing as “LEVI’S”; (3) confusing similarity, the central issue in the trademark cancellation proceedings<sup>[24]</sup> lodged by petitioner, is a prejudicial question that complainant, the police, and the court that issued the search warrants cannot determine without denial of due process or encroachment on the jurisdiction of the agencies concerned; and (4) his goods are not clothed with an appearance which is likely to deceive the ordinary purchaser exercising ordinary care.<sup>[25]</sup>

In its reply-affidavit, petitioner maintained that there is likelihood of confusion between the competing products because: (1) a slavish imitation of petitioner’s “arcuate” trademark has been stitched on the backpocket of “LIVE’S” jeans; (2) the appearance of the mark “105” on respondent’s product is obviously a play on petitioner’s “501” trademark; (3) the appearance of the word/phrase “LIVE’S” and “LIVE’S ORIGINAL JEANS” is confusingly similar to petitioner’s “LEVI’S” trademark; (4) a red tab, made of fabric, attached at the left seam of the right backpocket of petitioner’s standard five-pocket jeans, also appears at the same place on “LIVE’S” jeans; (5) the patch used on “LIVE’S” jeans (depicting three men on each side attempting to pull apart a pair of jeans) obviously thrives on petitioner’s own patch showing two horses being whipped by two men in an attempt to tear apart a pair of jeans; and (6) “LEVI’S” jeans are packaged and sold with carton tickets, which are slavishly copied by respondent in his own carton ticket bearing the marks “LIVE’S,” “105,” the horse mark, and basic features of petitioner’s ticket designs, such as two red arrows curving and pointing outward, the arcuate stitching pattern, and a rectangular portion with intricate border orientation.<sup>[26]</sup>

#### DOJ Rulings

On October 8, 1996, Prosecution Attorney Florencio D. Dela Cruz recommended the dismissal<sup>[27]</sup> of the complaint. The prosecutor agreed with respondent that his products are not clothed with an appearance which is likely to deceive the ordinary purchaser exercising ordinary care. The recommendation was approved by Assistant Chief State Prosecutor Lualhati R. Buenafe.

On appeal, then DOJ Secretary Teofisto Guingona affirmed the prosecutor’s dismissal of the complaint on January 9, 1998.<sup>[28]</sup> Prescinding from the basic rule that to be found guilty of unfair competition, a person shall, by imitation or any unfair device, induce the public to believe that his goods are those of another, Secretary Guingona stated:

In the case at bar, complainant has not shown that anyone was actually deceived by respondent. Respondent’s product, which bears the trademark LIVE’s, has an entirely different spelling and meaning with the trademark owned by complainant which is LEVI’s. Complainant’s trademark comes from a Jewish name while that of respondent is merely an adjective word. Both, when read and pronounced, would resonate different sounds. While respondent’s “LIVE’s” trademark may appear similar, such could not have been intended by the respondent to deceive since he had the same registered with the appropriate government agencies. Granting *arguendo*, that respondent’s trademark or products possessed similar characteristics with the trademark and products of complainant, on that score alone, without evidence or proof that such was a device of respondent to deceive the public to the damage of complainant no unfair competition is committed.<sup>[29]</sup>

On February 13, 1998, petitioner filed a motion for reconsideration of Secretary Guingona's resolution, alleging, among others, that only a likelihood of confusion is required to sustain a charge of unfair competition. It also submitted the results of a consumer survey<sup>[30]</sup> involving a comparison of petitioner's and respondent's products.

On June 5, 1998, Justice Secretary Silvestre Bello III, Guingona's successor, granted petitioner's motion and directed the filing of an information against respondent.<sup>[31]</sup>

WHEREFORE, our resolution dated 9 January 1998 is hereby reversed and set aside. You are directed to file an information for unfair competition under Article 189 of the Revised Penal Code, as amended, against respondent Tony Lim. Report the action taken thereon within ten (10) days from receipt hereof.<sup>[32]</sup>

Secretary Bello reasoned that under Article 189 of the Revised Penal Code, as amended, exact similarity of the competing products is not required. However, Justice Guingona's resolution incorrectly dwelt on the specific differences in the details of the products.<sup>[33]</sup> Secretary Bello's own factual findings revealed:

x x x [!] It is not difficult to discern that respondent gave his products the general appearance as that of the product of the complainant. This was established by the respondent's use of the complainant's actuate backpocket design trademark; the 105 mark which apparently is a spin-off of the 501 mark of the complainant; the patch which was clearly patterned after that of the complainant's two horse patch design trademark; the red tab on the right backpocket; the wordings which were crafted to look similar with the Levis trademark of the complainant; and even the packaging. In appropriating himself the general appearance of the product of the complainant, the respondent clearly intended to deceive the buying public. Verily, any person who shall employ deception or any other means contrary to good faith by which he shall pass off the goods manufactured by him or in which he deals, or his business, or services for those of the one having established good will shall be guilty of unfair competition.

Respondent's registration of his trademark cannot afford him any remedy. Unfair competition may still be prosecuted despite such registration.<sup>[34]</sup> (Citation omitted)

Respondent then filed his own motion for reconsideration of the Bello resolution. On May 7, 1999, new DOJ Secretary Serafin Cuevas granted respondent's motion and ordered the dismissal of the charges against him.<sup>[35]</sup>

#### CA Disposition

Dissatisfied with the DOJ rulings, petitioner sought recourse with the CA via a petition for review under Rule 43 of the 1997 Rules of Civil Procedure. On October 17, 2003, the appellate court affirmed the dismissal of the unfair competition complaint.

WHEREFORE, premises considered, the petition for review is DENIED and is accordingly DISMISSED for lack of merit.

SO ORDERED.<sup>[36]</sup>

The CA pointed out that to determine the likelihood of confusion, mistake or deception, all relevant factors and circumstances should be taken into consideration, such as the circumstances under which the goods are sold, the class of purchasers, and the actual occurrence or absence of confusion.<sup>[37]</sup>

Thus, the existence of some similarities between LIVE'S jeans and LEVI'S garments would not *ipso facto* equate to fraudulent intent on the part of respondent. The CA noted that respondent used affirmative and precautionary distinguishing features in his products for differentiation. The appellate court considered the spelling and pronunciation of the marks; the difference in the designs of the back pockets; the dissimilarity between the carton tickets; and the pricing and sale of petitioner's products in upscale exclusive specialty shops. The CA also disregarded the theory of post-sale confusion propounded by petitioner, relying instead on the view that the probability of deception must be determined at the point of sale.<sup>[38]</sup>

#### Issues

Petitioner submits that the CA committed the following errors:

I.

THE COURT OF APPEALS GRAVELY ERRED IN RULING THAT ACTUAL CONFUSION IS NECESSARY TO SUSTAIN A CHARGE OF UNFAIR COMPETITION, AND THAT THERE MUST BE DIRECT EVIDENCE OR PROOF OF INTENT TO DECEIVE THE PUBLIC.

II.

THE COURT OF APPEALS GRAVELY ERRED IN RULING THAT RESPONDENT'S LIVE'S JEANS DO NOT UNFAIRLY COMPETE WITH LEVI'S ® JEANS AND/OR THAT THERE IS NO POSSIBILITY THAT THE FORMER WILL BE CONFUSED FOR THE LATTER, CONSIDERING THAT RESPONDENT'S LIVE'S JEANS BLATANTLY COPY OR COLORABLY IMITATE NO LESS THAN SIX (6) TRADEMARKS OF LEVI'S JEANS.

III.

THE COURT OF APPEALS GRAVELY ERRED IN DISREGARDING THE EVIDENCE ON RECORD, CONSISTING OF THE SCIENTIFICALLY CONDUCTED MARKET SURVEY AND THE AFFIDAVIT OF THE EXPERT WITNESS ON THE RESULTS THEREOF, WHICH SHOW THAT RESPONDENT'S LIVE'S JEANS ARE, IN FACT, BEING CONFUSED FOR LEVI'S JEANS.

IV.

THE COURT OF APPEALS GRAVELY ERRED IN RULING THAT THE ISSUE OF CONFUSION SHOULD ONLY BE DETERMINED AT THE POINT OF SALE.

V.

THE COURT OF APPEALS GRAVELY ERRED IN FAILING TO DIRECT THE SECRETARY OF JUSTICE TO CAUSE THE FILING OF THE APPROPRIATE INFORMATION IN COURT AGAINST THE RESPONDENT.<sup>[39]</sup> (Underscoring supplied)

#### Our Ruling

In essence, petitioner asks this Court to determine if probable cause exists to charge respondent with the crime of unfair competition under Article 189(1) of the Revised Penal Code, prior to its repeal by Section 239 of RA No. 8293.

However, that is a factual issue<sup>[40]</sup> the resolution of which is improper in a Rule 45 petition.<sup>[41]</sup> The only legal issue left for the Court to determine is whether the issue of confusion should be determined only at the point of sale.

Nonetheless, there is sufficient reason for this Court to dismiss this petition merely by looking at the procedural avenue petitioner used to have the DOJ resolutions reviewed by the CA.

Petitioner filed with the CA a petition for review under Rule 43 of the 1997 Rules of Civil Procedure.<sup>[42]</sup> Rule 43 governs all appeals from [the Court of Tax Appeals and] quasi-judicial bodies to the CA. Its Section 1 provides:

Section 1. *Scope.* – This Rule shall apply to appeals from [judgments or final orders of the Court of Tax Appeals and from] awards, judgments, final orders or resolutions of or authorized by any quasi-judicial agency in the exercise of its quasi-judicial functions. Among these agencies are the Civil Service Commission, Central Board of Assessment Appeals, Securities and Exchange Commission, Office of the President, Land Registration Authority, Social Security Commission, Civil Aeronautics Board, Bureau of Patents, Trademarks and Technology Transfer, National Electrification Administration, Energy Regulatory Board, National Telecommunications Commission, Department of Agrarian Reform under Republic Act No. 6657, Government Service Insurance System, Employees Compensation Commission, Agricultural Inventions Board, Insurance Commission, Philippine Atomic Energy Commission, Board of Investments, Construction Industry Arbitration Commission, and voluntary arbitrators authorized by law.<sup>[43]</sup>

Clearly, the DOJ is not one of the agencies enumerated in Section 1 of Rule 43 whose awards, judgments, final orders, or resolutions may be appealed to the CA.

The Court has consistently ruled that the filing with the CA of a petition for review under Rule 43 to question the Justice Secretary's resolution regarding the determination of probable cause is an improper remedy.<sup>[44]</sup>

Under the 1993 Revised Rules on Appeals from Resolutions in Preliminary Investigations or Reinvestigations,<sup>[45]</sup> the resolution of the investigating prosecutor is subject to appeal to the Justice Secretary<sup>[46]</sup> who, under the Revised Administrative Code, exercises the power of control and supervision over said Investigating Prosecutor; and who may affirm, nullify, reverse, or modify the ruling of such prosecutor.<sup>[47]</sup> If the appeal is dismissed, and after the subsequent motion for reconsideration is resolved, a party has no more appeal or other remedy available in the ordinary course of law.<sup>[48]</sup> Thus, the Resolution of the Justice Secretary affirming, modifying or reversing the resolution of the Investigating Prosecutor is final.<sup>[49]</sup>

There being no more appeal or other remedy available in the ordinary course of law, the remedy of the aggrieved party is to file a petition for *certiorari* under Rule 65. Thus, while the CA may review the resolution of the Justice Secretary, it may do so only in a petition for *certiorari* under Rule 65 of the 1997 Rules of Civil Procedure, solely on the ground that the Secretary of Justice committed grave abuse of discretion amounting to excess or lack of jurisdiction.<sup>[50]</sup>

Verily, when respondent filed a petition for review under Rule 43 instead of a petition for *certiorari* under Rule 65, the CA should have dismissed it outright. However, the appellate court chose to determine if DOJ Secretaries Guingona and Cuevas correctly determined the absence of probable cause.

Now, even if We brush aside technicalities and consider the petition for review filed with the CA as one under Rule 65, the petition must fail just the same.

While the resolution of the Justice Secretary may be reviewed by the Court, it is not empowered to substitute its judgment for that of the executive branch *when there is no grave abuse of discretion.*<sup>[51]</sup>

Courts are without power to directly decide matters over which full discretionary authority has been delegated to the legislative or executive branch of the government.<sup>[52]</sup> The determination of probable cause is one such matter because that authority has been given to the executive branch, through the DOJ.<sup>[53]</sup>

It bears stressing that the main function of a government prosecutor is to determine the existence of probable cause and to file the corresponding information should he find it to be so.<sup>[54]</sup> Thus, the decision whether or not to dismiss the criminal complaint against respondent is necessarily dependent on the sound discretion of the investigating prosecutor and ultimately, that of the Secretary of Justice.<sup>[55]</sup>

A prosecutor, by the nature of his office, is under no compulsion to file a particular criminal information where he is not convinced that he has evidence to prop up its averments, or that the evidence at hand points to a different conclusion. This is not to discount the possibility of the commission of abuses on the part of the prosecutor. But this Court must recognize that a prosecutor should not be unduly compelled to work against his conviction. Although the power and prerogative of the prosecutor to determine whether or not the evidence at hand is sufficient to form a reasonable belief that a person committed an offense is not absolute but subject to judicial review, it would be embarrassing for him to be compelled to prosecute a case when he is in no position to do so, because in his opinion he does not have the necessary evidence to secure a conviction, or he is not convinced of the merits of the case.<sup>[56]</sup>

In finding that respondent's goods were not clothed with an appearance which is likely to deceive the ordinary purchaser exercising ordinary care, the investigating prosecutor exercised the discretion lodged in him by law. He found that:

First, the LIVE'S mark of the respondent's goods is spelled and pronounced differently from the LEVI'S mark of the complainant.

Second, the backpocket design allegedly copied by the respondent from the registered arcuate design of the complainant, appears to be different in view of the longer curved arms that stretch deep downward to a point of convergence where the stitches form a rectangle. The arcuate design for complainant LEVI's jeans form a diamond instead. And assuming *arguendo* that there is similarity in the design of backpockets between the respondent's goods and that of the complainant, this alone does not establish that respondent's jeans were intended to copy the complainant's goods and pass them off as the latter's products as this design is simple and may not be said to be strikingly distinct absent the other LEVI'S trademark such as the prints on the button, rivets, tags and the like. x x x Further, the presence of accessories bearing Levi's trademark was not established as there were no such accessories seized from the respondent and instead genuine LIVE'S hangtags, button and patches were confiscated during the search of latter's premises.

Second, the design of the patches attached to the backpockets of the respondent's goods depicts three men on either side of a pair of jeans attempting to pull apart said jeans, while the goods manufactured by complainant with patches also attached at the right backpockets depicts two horses being whipped by two men in an attempt to tear apart a pair of jeans. It is very clear therefore that the design of the backpocket patches by the respondent is different from that of the complainant, in the former the men were trying to pull apart the pants while in the latter horses are the ones doing the job. Obviously, there is a great difference between a man and a horse and this will naturally not escape the eyes of an ordinary purchaser.

Third, the manner by which Levi's jeans are packed and sold with carton tickets attached to the products cannot be appropriated solely by complainant to the exclusion of all other manufacturers of same class. It frequently happens that goods of a particular class are labeled by all manufacturer[s] in a common manner. In cases of that sort, no manufacturer may appropriate for himself the method of labeling or packaging [of] his merchandise and then enjoin other merchants from using it. x x x.

Fourth, evidence shows that there is a copyright registration issued by the National Library over the backpocket design of the respondent. And this copyright registration gives the respondent the right to use the same in his goods x x x.<sup>[57]</sup>

The determination of probable cause is part of the discretion granted to the investigating prosecutor and ultimately, the Secretary of Justice. Courts are not empowered to substitute their own judgment for that of the executive branch.<sup>[58]</sup>

The court's duty in an appropriate case is confined to a determination of whether the assailed executive or judicial determination of probable cause was done without or in excess of jurisdiction or with grave abuse of discretion amounting to want of jurisdiction.<sup>[59]</sup> For grave abuse of discretion to prosper as a ground for *certiorari*, it must be demonstrated that the lower court or tribunal has exercised its power in an arbitrary and despotic manner, by reason of passion or personal hostility, and it must be patent and gross as would amount to an evasion or to a unilateral refusal to perform the duty enjoined or to act in contemplation of law.<sup>[60]</sup>

In the case at bar, no grave abuse of discretion on the part of the DOJ was shown. Petitioner merely harps on the error committed by the DOJ and the CA in arriving at their factual finding that there is no confusing similarity between petitioner's and respondent's products. While it is possible that the investigating prosecutor and Secretaries Guingona and Cuevas erroneously exercised their discretion when they found that unfair competition was not committed, this by itself does not render their acts amenable to correction and annulment by the extraordinary remedy of *certiorari*. There must be a showing of grave abuse of discretion amounting to lack or excess of jurisdiction.<sup>[61]</sup>

We are disinclined to find that grave of abuse of discretion was committed when records show that the finding of no probable cause is supported by the evidence, law, and jurisprudence.

Generally, unfair competition consists in employing deception or any other means contrary to good faith by which any person shall pass off the goods manufactured by him or in which he deals, or his business, or services for those of the one having established goodwill, or committing any acts calculated to produce such result.<sup>[62]</sup>

The elements of unfair competition under Article 189(1)<sup>[63]</sup> of the Revised Penal Code are:

- (a) That the offender gives his goods the general appearance of the goods of another manufacturer or dealer;
- (b) That the general appearance is shown in the (1) goods themselves, or in the (2) wrapping of their packages, or in the (3) device or words therein, or in (4) any other feature of their appearance;
- (c) That the offender offers to sell or sells those goods or gives other persons a chance or opportunity to do the same with a like purpose; and
- (d) That there is actual intent to deceive the public or defraud a competitor.<sup>[64]</sup>

All these elements must be proven.<sup>[65]</sup> In finding that probable cause for unfair competition does not exist, the investigating prosecutor and Secretaries Guingona and Cuevas arrived at the same conclusion that there is insufficient evidence to prove all the elements of the crime that would allow them to secure a conviction.

Secretary Guingona discounted the element of actual intent to deceive by taking into consideration the differences in spelling, meaning, and phonetics between “LIVE’S” and “LEVI’S,” as well as the fact that respondent had registered his own mark.<sup>[66]</sup> While it is true that there may be unfair competition even if the competing mark is registered in the Intellectual Property Office, it is equally true that the same may show *prima facie* good faith.<sup>[67]</sup> Indeed, registration does not negate unfair competition where the goods are packed or offered for sale and passed off as those of complainant.<sup>[68]</sup> However, the mark’s registration, coupled with the stark differences between the competing marks, negate the existence of actual intent to deceive, in this particular case.

For his part, Justice Cuevas failed to find the possibility of confusion and of intent to deceive the public, relying on *Emerald Garment Manufacturing Corporation v. Court of Appeals*.<sup>[69]</sup>

In *Emerald*, the Court explained that since *maong* pants or jeans are not inexpensive, the casual buyer is more cautious and discerning and would prefer to mull over his purchase, making confusion and deception less likely.

We cannot subscribe to petitioner’s stance that *Emerald Garment* cannot apply because there was only one point of comparison, i.e., “LEE” as it appears in Emerald Garment’s “STYLISTIC MR. LEE.” *Emerald Garment* is instructive in explaining the attitude of the buyer when it comes to products that are not inexpensive, such as jeans. In fact, the *Emerald Garment* rationale is supported by *Del Monte Corporation v. Court of Appeals*,<sup>[70]</sup> where the Court explained that the attitude of the purchaser is determined by the cost of the goods. There is no reason not to apply the rationale in those cases here even if only by analogy.

The rule laid down in *Emerald Garment* and *Del Monte* is consistent with *Asia Brewery, Inc. v. Court of Appeals*,<sup>[71]</sup> where the Court held that in resolving cases of infringement and unfair competition, the courts should take into consideration several factors which would affect its conclusion, to wit: the age, training and education of the usual purchaser, the nature and cost of the article, whether the article is bought for immediate consumption and also the conditions under which it is usually purchased.<sup>[72]</sup>

Petitioner argues that the element of intent to deceive may be inferred from the similarity of the goods or their appearance.<sup>[73]</sup> The argument is specious on two fronts. *First*, where the similarity in the appearance of the goods as packed and offered for sale is so striking, intent to deceive may be inferred.<sup>[74]</sup> However, as found by the investigating prosecutor and the DOJ Secretaries, striking similarity between the competing goods is not present.

*Second*, the confusing similarity of the goods was precisely in issue during the preliminary investigation. As such, the element of intent to deceive could not arise without the investigating prosecutor’s or the DOJ Secretary’s finding that such confusing similarity exists. Since confusing similarity was not found, the element of fraud or deception could not be inferred.

We cannot sustain Secretary Bello’s opinion that to establish probable cause, “it is enough that the respondent gave to his product the general appearance of the product”<sup>[75]</sup> of petitioner. It bears stressing that that is only one element of unfair competition. All others must be shown to exist. More importantly, the likelihood of confusion exists not only if there is confusing similarity. It should also be likely to cause confusion or mistake or deceive purchasers.<sup>[76]</sup> Thus, the CA correctly ruled that the mere fact that some resemblance can be pointed out between the marks used does not in itself prove unfair competition.<sup>[77]</sup> To reiterate,



the resemblance must be such as is likely to deceive the ordinary purchaser exercising ordinary care.<sup>[78]</sup>

The consumer survey alone does not equate to actual confusion. We note that the survey was made by showing the interviewees actual samples of petitioner's and respondent's respective products, approximately five feet away from them. From that distance, they were asked to identify the jeans' brand and state the reasons for thinking so.<sup>[79]</sup> This method discounted the possibility that the ordinary intelligent buyer would be able to closely scrutinize, and even fit, the jeans to determine if they were "LEVI'S" or not. It also ignored that a consumer would consider the price of the competing goods when choosing a brand of jeans. It is undisputed that "LIVE'S" jeans are priced much lower than "LEVI'S."

The Court's observations in *Emerald Garment* are illuminating on this score:

First, the products involved in the case at bar are, in the main, various kinds of jeans. x x x Maong pants or jeans are not inexpensive. Accordingly, the casual buyer is predisposed to be more cautious and discriminating in and would prefer to mull over his purchase. Confusion and deception, then, is less likely. In *Del Monte Corporation v. Court of Appeals*, we noted that:

... Among these, what essentially determines the attitudes of the purchaser, specifically his inclination to be cautious, is the cost of the goods. To be sure, a person who buys a box of candies will not exercise as much care as one who buys an expensive watch. As a general rule, an ordinary buyer does not exercise as much prudence in buying an article for which he pays a few centavos as he does in purchasing a more valuable thing. Expensive and valuable items are normally bought only after deliberate, comparative and analytical investigation. But mass products, low priced articles in wide use, and matters of everyday purchase requiring frequent replacement are bought by the casual consumer without great care.<sup>[80]</sup> (Emphasis supplied)

We find no reason to go beyond the point of sale to determine if there is probable cause for unfair competition. The CA observations along this line are worth restating:

We also find no basis to give weight to petitioner's contention that the "post sale confusion" that might be triggered by the perceived similarities between the two products must be considered in the action for unfair competition against respondent.

No inflexible rule can be laid down as to what will constitute unfair competition. Each case is, in the measure, a law unto itself. Unfair competition is always a question of fact. The question to be determined in every case is whether or not, as a matter of fact, the name or mark used by the defendant has previously come to indicate and designate plaintiff's goods, or, to state it in another way, whether defendant, as a matter of fact, is, by his conduct, passing off defendant's goods as plaintiff's goods or his business as plaintiff's business. The universal test question is whether the public is likely to be deceived.

In the case before us, we are of the view that the probability of deception must be tested at the point of sale since it is at this point that the ordinary purchaser mulls upon the product and is likely to buy the same under the belief that he is buying another. The test of fraudulent simulation is to be found in the likelihood of deception, or the possibility of deception of some persons in some

measure acquainted with an established design and desirous of purchasing the commodity with which that design has been associated.<sup>[81]</sup>

In sum, absent a grave abuse of discretion on the part of the executive branch tasked with the determination of probable cause during preliminary investigation, We cannot nullify acts done in the exercise of the executive officers' discretion. Otherwise, We shall violate the principle that the purpose of a preliminary investigation is to secure the innocent against hasty, malicious and oppressive prosecution, and to protect him from an open and public accusation of crime, from the trouble, expense and anxiety of a public trial, and also to protect the State from useless and expensive trials.<sup>[82]</sup>

WHEREFORE, the petition is DENIED and the appealed Decision of the Court of Appeals AFFIRMED.

SO ORDERED.

RUBEN T. REYES  
Associate Justice

WE CONCUR:

CONSUELO YNARES-SANTIAGO  
Associate Justice  
Chairperson

MA. ALICIA AUSTRIA-MARTINEZ  
Associate Justice

MINITA V. CHICO-NAZARIO  
Associate Justice

ANTONIO EDUARDO B. NACHURA  
Associate Justice

#### A T T E S T A T I O N

I attest that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

CONSUELO YNARES-SANTIAGO  
Associate Justice  
Chairperson

#### C E R T I F I C A T I O N

Pursuant to Section 13, Article VIII of the Constitution and the Division Chairperson's Attestation, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

REYNATO S. PUNO  
Chief Justice

#### FOOTNOTES:

<sup>[1]</sup> *Alcaraz v. Gonzalez*, G.R. No. 164715, September 20, 2006, 502 SCRA 518.

<sup>[2]</sup> *Monfort III v. Salvatierra*, G.R. No. 168301, March 5, 2007, 517 SCRA 447, 459-460.

<sup>[3]</sup> Under Rule 45 of the 1997 Rules of Civil Procedure.

<sup>[4]</sup> *Rollo*, pp. 95-103. Dated October 17, 2003. Penned by Associate Justice Eubulo G. Verzola, with Associate Justices Remedios Salazar-Fernando and Edgardo F. Sundiam, concurring.

<sup>[5]</sup> *Id.* at 105-106. Dated February 20, 2004.

<sup>[6]</sup> LS & Co.'s registered trademarks and trade names in the Philippines are as follows:

1. "Levi's" issued on August 10, 1982, renewed on August 10, 2002.
2. "Levi Strauss & Co." issued on March 21, 1978.
3. "Arcuate Stitching Design" issued on October 8, 1973, renewed on October 8, 1993.
4. "Two Horse Design" issued on February 12, 1974, renewed on February 12, 1994.
5. "Two Horse Patch" issued on December 27, 1988.
6. "Two Horse Label with Patterned Arcuate Design" issued on October 9, 1985.
7. "Tab Design" issued on May 12, 1976, renewed on May 12, 1996.
8. "Composite Mark (Arcuate, Tab, Two Horse Patch)" issued on December 12, 1988.
9. "501" issued on March 3, 1989.
10. "Levi's Salmon Ticket & Design" issued on February 13, 1976, renewed on February 13, 1996.
11. "Levi's and Device" issued on May 22, 1981, renewed on May 22, 2001.

<sup>[7]</sup> *Rollo*, pp. 25-26.

<sup>[8]</sup> *Id.* at 29.

<sup>[9]</sup> *Id.* at 30.

<sup>[10]</sup> *Id.* at 307, 341. Dated November 22, 1995.

<sup>[11]</sup> *Id.* at 9.

<sup>[12]</sup> *Id.* at 31.

<sup>[13]</sup> *CA rollo*, pp. 71-72.

<sup>[14]</sup> Now the Criminal Investigation and Detection Group (CIDG).

<sup>[15]</sup> Search Warrant No. 95-757 dated December 12, 1995 in *People v. Tony Lim of Vogue Traders Clothing Company*, 1082 Carmen Planas Street, Tondo, Manila, and Search Warrant No. 95-758 dated December 12, 1995 in *People v. Tony Lim of Vogue Traders Clothing Company*, 1042 Carmen Planas Street, Tondo, Manila, both issued by Judge Antonio I. de Castro, Regional Trial Court of Manila, Branch 3.

<sup>[16]</sup> Pursuant to Search Warrant No. 95-757 implemented at 1082 Carmen Planas Street, Tondo Manila:

- 100 Sacks of Live's pants (20 pants/sack);
- 1 Box containing 500 sets of Live's buttons;
- 12 Sacks of Live's Hangtags (2,000/sack);
- 2 Sewing Machines; and
- 2 Riveter Machines.

Pursuant to Search Warrant No. 95-758 implemented at 1042 Carmen Planas Street, Tondo Manila:

- 151 pcs. of unfinished pants with arcuate design;
- 160 pcs. of finished Westside jeans with arcuate design;
- 725 pcs. of Live's Patches;
- 520 pcs. of Live's Buttons;
- 900 pcs. of Live's Rivets;
- 261 pcs. of back pocket with arcuate design;
- 1 Singer Sewing Machine with SN-U4884707342;
- 1 Singer Sewing Machine with SN-U86400783;
- 1 Juki Sewing Machine with SN-A555-59278;
- 1 Juki Sewing Machine with SN-A555-2-24344;
- 1 Juki Sewing Machine with SN-A227-03839;
- 1 Juki Sewing Machine with SN-D555-38961; and
- 1 Riveter.

<sup>[17]</sup> *Rollo*, pp. 222-223.

<sup>[18]</sup> Through a letter dated December 28, 1995.

<sup>[19]</sup> Entitled *PNP-CIS/Levi Strauss (Phils.), Inc. v. Tony Lim*, docketed as I.S. No. 95-799.

<sup>[20]</sup> The Intellectual Property Code of the Philippines. Effective January 1, 1998.

<sup>[21]</sup> *Rollo*, pp. 282-285.

<sup>[22]</sup> Under Certificate of Registration No. 53918 dated November 16, 1992 (Principal Register, Bureau of Patents, Trademarks and Technology Transfer) and SR 8868 dated November 3, 1992 (Supplemental Register, same office).

<sup>[23]</sup> Covered by Certificate of Copyright Registration No. I-3838 dated September 25, 1991 issued by the National Library.

<sup>[24]</sup> IPC Case Nos. 4216 and 4217, Bureau of Patents, Trademarks, and Technology Transfer; and Civil Case No. 96-76944, RTC Manila, Branch 50.

<sup>[25]</sup> *Rollo*, pp. 282-283.

<sup>[26]</sup> *Id.* at 294-295.

<sup>[27]</sup> *Id.* at 222-226.

<sup>[28]</sup> *CA rollo*, pp. 4-7. Resolution No. 052, Series of 1998.

<sup>[29]</sup> *Id.* at 73-74.

<sup>[30]</sup> *Rollo*, pp. 375-404.

<sup>[31]</sup> *Id.* at 358-360.

<sup>[32]</sup> *Id.* at 450.

<sup>[33]</sup> *Id.* at 449.

<sup>[34]</sup> *Id.* at 450.

<sup>[35]</sup> *CA rollo*, pp. 8-12.

<sup>[36]</sup> *Rollo*, p. 15.

<sup>[37]</sup> *Id.* at 13.

<sup>[38]</sup> *Id.* at 14-15.

<sup>[39]</sup> *Id.* at 47.

<sup>[40]</sup> *Asia Brewery, Inc. v. Court of Appeals*, G.R. No. 103543, July 5, 1993, 224 SCRA 437, 443.

<sup>[41]</sup> See *Cosmos Bottling Corporation v. National Labor Relations Commission*, G.R. No. 146397, July 1, 2003, 405 SCRA 258.

<sup>[42]</sup> *CA rollo*, p. 19.

<sup>[43]</sup> As amended by Section 11 of Republic Act No. 9282 entitled "An Act Expanding the Jurisdiction of the Court of Tax Appeals (CTA), Elevating its Rank to the Level of a Collegiate Court with Special Jurisdiction and Enlarging its Membership, Amending

for the Purpose Certain Sections or Republic Act No. 1125, As Amended, Otherwise Known as the Law Creating the Court of Tax Appeals, and for Other Purposes.” Approved on March 30, 2004.

<sup>[44]</sup> *Alcaraz v. Gonzalez*, supra note 1, at 529; *Orosa v. Roa*, G.R. No. 140423, July 14, 2006, 495 SCRA 22; *Santos v. Go*, G.R. No. 156081, October 19, 2005, 473 SCRA 350, 361.

<sup>[45]</sup> Now the 2000 National Prosecution Service Rules on Appeals.

<sup>[46]</sup> *Filadams Pharma, Inc. v. Court of Appeals*, G.R. No. 132422, March 30, 2004, 426 SCRA 460, 466-467.

<sup>[47]</sup> *Alcaraz v. Gonzalez*, supra note 1, at 529.

<sup>[48]</sup> See *Filadams Pharma, Inc. v. Court of Appeals*, supra note 46.

<sup>[49]</sup> *Alcaraz v. Gonzalez*, supra note 1, at 529.

<sup>[50]</sup> *Id.*

<sup>[51]</sup> *Public Utilities Department v. Guingona, Jr.*, 417 Phil. 798, 805 (2001).

<sup>[52]</sup> *Id.*

<sup>[53]</sup> See *Buan v. Matugas*, G.R. No. 161179, August 7, 2007, 529 SCRA 263, 270.

<sup>[54]</sup> *R.R. Paredes v. Calilung*, G.R. No. 156055, March 5, 2007, 517 SCRA 369, 395.

<sup>[55]</sup> *Alcaraz v. Gonzalez*, supra note 1, at 529.

<sup>[56]</sup> *R.R. Paredes v. Calilung*, supra at 395-396.

<sup>[57]</sup> *Rollo*, pp. 224-225.

<sup>[58]</sup> *Alcaraz v. Gonzalez*, supra note 1, at 529.

<sup>[59]</sup> *First Women's Credit Corporation v. Baybay*, G.R. No. 166888, January 31, 2007, 513 SCRA 637, 644-645.

<sup>[60]</sup> *R.R. Paredes v. Calilung*, supra note 54, at 397, citing *Sarigumba v. Sandiganbayan*, G.R. Nos. 154239-41, February 16, 2005, 451 SCRA 533, 549.

<sup>[61]</sup> See *R.R. Paredes v. Calilung*, supra note 54, at 396-397.

<sup>[62]</sup> Reyes, L., *The Revised Penal Code*, Book II, 13<sup>th</sup> ed., p. 264.

<sup>[63]</sup> Art. 189. *Unfair competition, fraudulent registration of trade-mark, trade-name or service mark, fraudulent designation of origin, and false description.* – The penalty provided in the next proceeding article shall be imposed upon:

1. Any person who, in unfair competition and for the purposes of deceiving or defrauding another of his legitimate trade or the public in general, shall sell his goods giving them the general appearance of goods of another manufacturer or dealer, either as to the goods themselves, or in the wrapping of the packages in which they are contained or the device or words thereon or in any other features of their appearance which would be likely to induce the public to believe that the goods offered are those of a manufacturer or dealer other than the actual manufacturer or dealer or shall give other persons a chance or opportunity to do the same with a like purpose.

<sup>[64]</sup> *Sony Computer Entertainment, Inc. v. Supergreen, Incorporated*, G.R. No. 161823, March 22, 2007, 518 SCRA 750, 757; *NBI-Microsoft Corporation v. Hwang*, G.R. No. 147043, June 21, 2005, 460 SCRA 428, 445, citing L. Reyes, *The Revised Penal Code*, Vol. II, 15<sup>th</sup> ed., p. 282.

<sup>[65]</sup> *Mendoza-Arce v. Office of the Ombudsman (Visayas)*, G.R. No. 149148, April 5, 2002, 380 SCRA 325, 336.

<sup>[66]</sup> *CA rollo*, p. 73.

<sup>[67]</sup> Agpalo, *The Law on Trademark, Infringement and Unfair Competition*, 2000 ed., pp. 189-190, citing *R.F. Alexander & Co. v. Ang*, 97 Phil. 157 (1955); *Parke Davis & Co. v. Kim Foo & Co.*, 60 Phil. 928 (1934).

<sup>[68]</sup> *Id.*

<sup>[69]</sup> G.R. No. 100098, December 29, 1995, 251 SCRA 600.

<sup>[70]</sup> G.R. No. 78325, January 25, 1990, 181 SCRA 410.

<sup>[71]</sup> G.R. No. 103543, July 5, 1993, 224 SCRA 437.

<sup>[72]</sup> *Id.* at 455.

<sup>[73]</sup> *Rollo*, pp. 51-52.

<sup>[74]</sup> See note 67, at 190, citing *Rueda Hermanos & Co. v. Felix Paglinawan & Co.*, 33 Phil. 196 (1916); *U.S. v. Gaw Chiong*, 23 Phil. 138 (1912); *Inchausti & Co. v. Song Fo & Co.*, 21 Phil. 278 (1912).

<sup>[75]</sup> *CA rollo*, p. 459.

<sup>[76]</sup> See *Societe Des Produits Nestlé, S.A. v. Court of Appeals*, G.R. No. 112012, April 4, 2001, 356 SCRA 207, 215.

<sup>[77]</sup> *Rollo*, p. 100.

<sup>[78]</sup> *Pro Line Sports Center, Inc. v. Court of Appeals*, G.R. No. 118192, October 23, 1997, 281 SCRA 162, 173.

<sup>[79]</sup> *Id.* at 380.

<sup>[80]</sup> *Emerald Garment Manufacturing Corporation v. Court of Appeals*, supra note 69.

<sup>[81]</sup> *Rollo*, pp. 101-102.

<sup>[82]</sup> *R.R. Paredes v. Calilung*, supra note 54, at 395.