

EDUARDO CENTENO REYES, doing Business as TIGER FIREWORKS,	}	IPC No. 14-2008-00153
	}	Case Filed : 07 July 2008
	}	Opposition to:
Opposer,	}	
	}	Appl'n Serial No. : 4-2007-0012116
	}	Date Filed : 31 Oct. 2007
-versus-	}	Trademark: "TIGER
	}	PYROTECHNICS and DEVICE"
PHONIX FIREWORKS CORP	}	
Respondent-Applicant.	}	
x-----x	}	Decision No. 2009-26

DECISION

This is an opposition to the registration of the mark "TIGER" bearing Application No. 4-2007-012116 filed on October 31, 2007 covering the goods "fireworks and pyrotechnics" under class 13 of the International Classification of goods, which application was published in the Intellectual Property Philippines (IPP) E-Gazette, officially released on May 23, 2008.

Opposer in the instant opposition is "EDUARDO CENTENO REYES" with registered business name "TIGER FIREWORKS" a Filipino citizen, with business address at Km. 38 Pulong Buhangin, Sta. Maria, Bulacan.

The Respondent-Applicant, on the other hand is "PHOENIX FIREWORKS CORPORATION" a Filipino corporation with stated address of record at 94-M Sta. Ana Street, Mag-Asawang Sapa, Sta. Maria, Bulacan.

The grounds of the opposition are as follows:

- "1. the trademark "TIGER PYRTECHNICS AND DEVICE" sought to be registered by Respondent-Applicant is identical or very similar with Opposer's registered business name and pending trademark application "TIGER FIREWORKS" covering the following goods: "Firecrackers namely Baby Rocket, Bawang, Small Triangulo, Pulling of String, Paper Cups, El Diablo, Judah's Belt, Sky Rocket; Pyrotechnic device namely Sparklers, Lucas, Fountain Jumbo, Regular and Special, Mabuhay Roman Candle, Trompillo, Airwolf, Whistle Device, Butterfly, Pailaw;" owned, used and not abandoned by Opposer, and is thus identical to or confusingly similar with Opposer's mark in the sense that the likelihood of confusion or deception among the consuming public is great.

- "2. Indeed, the identity or the confusing similarity between Respondent-Applicant's "TIGER PYROTECHNICS AND DEVICE" and the registered business name and trademark application "TIGER FIREWORKS" mark Opposer is very likely to deceive toe purchasers of goods and services on which the mark is being used, as to the origin or sponsorship of the said goods and/or services, and also as to the nature, quality, characteristics of the goods and services to which the mark is affixed.

- "3. The TIGER PYROTECHNICS AND DEVICE mark sought to be registered by Respondent-Applicant is confusingly similar to, if not identical with the TIGER FIREWORKS mark owned, used and registered business name of the Opposer. The spelling of the word portion of the mark is exactly the same resulting in the phonetic identity between the two marks, and the addition of the "tiger" device renders the competing trademarks almost identical. The striking similarity/identity between the two competing marks will surely cause confusion to the prospective

consumers and are likely the public as to the origin of the goods and/or service provided, of the sponsorship thereof.

- “4. Respondent-Applicant application to registered the identical mark “TIGER PYROTECHNICS AND DEVICE” mark for fireworks and pyrotechnics is a clear indication that Respondent-Applicant intends to ride on the goodwill that Opposer has created for its Business name and trademarks, and/or intends to confuse the public as to the origin of his goods.
- “5. Opposer is the prior adopter, user owner of the TIGER FIREWORKS business name and trademark, having used the same in commerce since 1 February 2007 or for at least one year and three months.
- “6. Opposer business name trademark have become distinctive of the business and goods or services of the Opposer through its long and exclusive use thereof in commerce.
- “7. Opposer has obtained registration of the business name TIGER FIREWORKS since 1 February 2007 and has applied registration for the mark TIGER FIREWORKS in the Intellectual Property Office on 9 April 2008 for the goods “*Firecrackers namely Baby Rocket, Bawang, Small Triangulo, Pulling of String, Paper Cups, El Diablo, Judah’s Belt, Sky Rocket; Pyrotechnic device namely Sparklers, Luces, Fountain Jumbo, Regular and Special, Mabuhay Roman Candle, Trompillo, Airwolf, Whistle Device, Butterfly, Pailaw;*” and was accorded Application Number 42008004027. Attached as Annex “C” and made an integral part hereof is the trademark record of Application Number 42008004027 as published in the IPO website.
- “8. In the local market particularly in the fireworks industry, Opposer business name and trademark TIGER FIREWORKS have established goodwill and recognition as belonging exclusively to the Opposer.
- “9. Opposer will be damaged by the registration of the mark TIGER PYROTECHNICS AND DEVICE in the name of Respondent-Applicant considering the fact that Opposer’s mark has already been established and obtained goodwill and consumer recognition.
- “10. Finally, the registration of the mark in the name of Respondent-Applicant will violate the proprietary rights/interest, business reputation and goodwill of the Opposer over its own TIGER FIREWORKS mark considering that the distinctiveness of said mark will be diluted, thereby causing irreparable injury to the Opposer.

Opposer relied on the following facts:

- “1. Opposer is the registered owner of the business name TIGER FIREWORKS in the department of Trade and Industry with Certificate of Business Name Registration Number 0038000 issued 1 February 2007 in Malolos City, Philippines. (see Annex “A”)
- “2. Opposer has always been the prior and exclusive user and owner of the mark TIGER FIREWORKS. Receipts showing prior use of the mark in the name of TIGER FIREWORKS are attached and made an integral part hereof i.e. Annex “H” –Receipt No. 038 dated 11 December 2007 issued to Ding’s Fireworks; Annex “I” – Receipt No. 035 dated 7 December 2007 issued to St. Michael Fireworks; Annex “J” – Receipt No. 030 dated 22 November 2007 issued to Ding’s Fireworks.

- “3. Opposer mark TIGER FIREWORKS has earned valuable goodwill as a result of the usage of the mark on its products. Affidavits of consumers and distributors are attached and made an integral part hereof, show proof of the popularity and goodwill of the Opposer’s mark to wit: Annex “K” – Affidavit of Michael V. Dinglasan, proprietors of Ding’s Fireworks and dealer of Tiger Fireworks; Annex “L” – Affidavit of Evelyn Mendoza, proprietors of St. Michael Fireworks and dealer of Tiger Fireworks; Annex “M” – Affidavit of Allan L. Lu, proprietor of Tosako Trading and a dealer of Tiger Fireworks.
- “4. The Opposer’s TIGER FIREWORKS mark has acquired popularity from the advertising and promotions of the goods and services bearing said mark. Attached as Annex “M”, Annex “N” and Annex “O” and made an integral part hereof are pictures of the store signage, copy of pamphlets and flyer advertisements of Tiger Fireworks and advertisement page of Tiger Fireworks respectively.
- “5. Because of the popularity of the Opposer’s TIGER FIREWORKS business name trademark in the Philippines, there is no doubt that Opposer shall be damaged by the registration of Respondent-Applicant’s TIGER PYROTECHNICS AND DEVICE mark. This would create confusion and deception in the minds of purchasers and consumers and would lead them to believe that Opposer and Respondent-Applicant have the sponsorship of the Opposer, to the great disadvantage of the latter.
- “6. It is true obvious that the registration of the Respondent-Applicant’s TIGER PYROTECHNICS AND DEVICE which is identical or confusingly similar to Opposer’s TIGER FIREWORKS business name and trademark will not only prejudice the Opposer, but will cause the Respondent-Applicant to unfairly benefit from, and get ride on the goodwill of Opposer’s business name and trademark.

Opposer submitted the following in support of his opposition.

Annex	Exhibit
Annex “A”	Certificate of Business Name Registration
Annex “B”	Publication page in the IPO E-Gazette
Annex “C”	Copy of search for the application for the mark “TIGER FIREWORKS”
Annex “D”	Actual label for the mark “TIGER FIREWORKS”
Annex “E”	Actual label for the mark “TIGER FIREWORKS”
Annex “F”	Actual label for the mark “TIGER FIREWORKS”
Annex “G”	Actual label for the mark “TIGER FIREWORKS”
Annex “H”	Sales Invoice No. 038 dated December 11, 2007
Annex “I”	Sales Invoice No. 035 dated December 11, 2007
Annex “J”	Sales Invoice No. 030 dated December 11, 2007
Annex “K”	Affidavit of Michael v. Dinglasan
Annex “L”	Affidavit of Evelyn Mendoza
Annex “M”	Affidavit of Alan L. Lu
Annex “N”	Picture of Tiger and the word “tiger” presented in the wall of a house
Annex “O”	Label of the mark TIGER FIREWORKS
Annex “O-1”	Actual label of the mark “TIGER FIREWORKS”

On October 7, 2008, Respondent-Applicant filed its Verified Answer denying all the material allegation of the verified opposition and further alleged the following as its special and affirmative defenses.

- “1. Section 122 of the Intellectual Property Code of the Philippine (Republic Act No. 8293) specifically mandates that: “The rights in a mark shall be acquired through registration made validly in accordance with the provisions of this law”;
- “2. in the light of the foregoing, Respondent-Applicant respectfully submits that it had become entitled to all the rights and protection accorded by law over its trademark “TIGER PYROTECHNICS & DEVICE” at the moment of filing of its application for trademark registration on October 31, 2007, particularly so, considering that the registrability of Respondent-Applicant’s trademark was already passed upon by this Honorable Office;
- “3. In opposing Respondent-Applicant’s trademark registration, Opposer maliciously attributes bad faith on the part of the herein Respondent-Applicant. Lamentably for the Opposer, “(B)asic is the principle that goods faith is presumed and he who alleges bad faith had the duty to prove the same.” [Chau vs. Court of Appeal, 312 Phil. 405, 411 (1995)]. “It is axiomatic that good faith is always presumed unless convincing evidence to the contrary is adducted. It is incumbent upon the party alleging bad faith to sufficiently prove such allegation. Absent enough proof thereof, the presumption of good faith prevails.” [Andrew vs. Court of Appeals, 432 Phil. 30, 43; Heirs of Severa P. Gregorio vs. Court of Appeals, 360 Phil. 753, 764-765 (1998)];
- “4. In his Opposition, Opposer imputes bad faith on the part of the Respondent-Applicant using as basis therefor, the purported long use and established goodwill of its business name and trademark “TIGER FIREWORKS”. This supposition is a blatant fabrication. Be it noted, that on October 31, 2007 (filing date of Respondent-Applicant’s trademark application), Opposer’s business name had only been registered with the Department of Trademark and Industry (DTI) for barely nine (9) months – his DTI Certificate of Business Name Registration was only issued on February 1, 2007 (see Annex “A” of Opposition), which conclusively disputes Opposer’s self-serving claim of long use and established goodwill;
- “5. Moreover, perusal of Opposer’s documentary attachments/evidence reveals that the same are all fabricated to create a semblance of validity to his Opposition, which in actuality are all devoid of factual and legal merit;
- “6. Firstly, please consider Opposer’s samples, advertising and promotional materials (i.e. Annexes “D”, “E”, “F” and “G”). A glancing scrutiny thereof readily discloses the following:
 - a. Opposer’s trademark “TIGER FIREWORKS AND DEVICE”, which is the subject of Application No. 42008004027 filed on April 9, 2008 (see Annex “C” of Opposition), does not actually appear in any of Opposer’s samples. Rather, varying trademarks appear on the attached advertising and promotional materials of the Opposer.
 - b. Opposer’s advertising and promotional materials (i.e. Annexes “D”, “E”, “F” and “G”) violate Republic Act No. 7183 (“An Act Regulating the Sale, Manufacture, Distribution and Use of Firecrackers and Other Pyrotechnic Devices”, particularly Section 8 thereof, mandating:

“SEC. 8. Labeling of Firecrackers and Pyrotechnic Packages – *Firecrackers and Pyrotechnic device shall bear labels indicating the name and address of their manufacturers and warning instructions in Filipino and English.*”

- c. Opposer’s product “Original Piccolo” (Annex “D” of Opposition) is an illegal/prohibited firecracker under R.A. 7183. No less than DOH Secretary Francisco Duque made corresponding declaration of its prohibition, which appeared in the following news articles:
- a. “Here’s how to steer clear of the ER tonight” – published in the online edition of Malaya on December 31, 2007, the screen capture of which is attached hereto as Annex “1”, the pertinent portion of which states: “Duque also noted that under R.A. 7183, or the law on firecrackers and pyrotechnic devices, piccolo is considered to be an illegal firecracker because it is imported and unregistered.”; and
 - b. “DOH calls for ban of “Piccolo” – Published in the on-line edition of Malaya on December 30, 2007, the screen capture of which is attached hereto as Annex “2”, the pertinent portion of which states: “Duque noted that piccolo is considered an illegal firecracker under Republic Act No. 7183, since it is imported and unregistered, and the number of persons it has injured so far warrants a ban.”;
- d. Suffice it to state, Opposer’s foregoing violation of Republic Act No. 7183 render him criminally liable under Section 11 of the statute, to wit:
- “SEC. 11. Penalties – Any person who manufactures, sells, distributes or uses firecrackers and other pyrotechnic devices in violation of the provisions of this Act shall be punished by a fine of not less than twenty thousand pesos (P 20,000.00) nor more than Thirty thousand pesos (P 30,000.00), or imprisonment of not less than six (6) months nor more than (1) year, or both such fine and imprisonment, at the discretion of the court in addition to the cancellation of his license and business permit and the confiscation by the government of his inventory or stock.”;
- e. Under the premises, Opposer did not come to this Honorable Office with clean hands and he cannot therefore be allowed to stake a claim upon his own wrongdoing. This is in consonance with the established principle that “he who comes to court must come with clean hands” (Abacus Securities Corporation vs. Ampil, G.R. No. 160016, 27 February 2006);
- “7. Secondly, please reflect on Opposer’s Sale Invoices (Annexes “H”, “I” and “J” of Opposition), on the basis of which Opposer claim prior and exclusive use of his trademark “TIGER

FIREWORKS". A fleeting look therefore instantly reveals the following:

- a. Sales Invoices Nos. 038, 035 030 are evidently fabricated. They do not bear the "Authorized Signature" of the Opposer or his agent, and its "Received By:" and "Delivered By:" portions are completely in blank;
- b. Granting without conceding that said Sales Invoices are not fabricated still, the same can never support Opposer's claim of prior and exclusive use of its trademark considering, that on October 31, 2007 (filing date of Respondent-Applicant's trademark application), all three (3) sale transactions covered by said invoices are inexistent, the same having been consummated only on December 11, 2007 (i.e. Sales Invoice No. 038), December 7, 2007 (i.e. Sales Invoice No. 035) and November 22, 2007 (i.e. Sales Invoice No. 030), subsequent to Respondent-Applicant's filing date;
- c. Plainly, on the date of filing of Respondent-Applicant's application for registration of its trademark "TIGER PYROTECHNICS & DEVICE" on October 31, 2007, the Opposer had no yet used his-so called trademark;

"8. Thirdly, please asses Opposer's Affidavit of Consumers and Distributors (Annexes "K", "L" and "M" of Opposition), on purported strength of which Opposer declares his alleged "earned valuable goodwill". A passing examination thereof immediately shows that:

- a. The said Affidavits, with their bank portions, are apparently fabricated for the sole purposes of lending credence to Opposer's unmeritorious Opposition;
- b. The declaration of Mr. Michael V. Dinglasan of having entered into a dealership/distributorship agreement with Opposer on August 3, 2007 id belied by Opposer's Sale Invoice No. 030 (Annex "j" OF Opposition), showing that said dealer had transacted with the Opposers only on November 22, 2007;
- c. The declaration of Ms. Evelyn Mendoza of having entered into a dealership/distributorship agreement with Opposer on July 26, 2007 is negated by Opposer's Sales Invoice No. 035 (Annex "i" of the Opposition,) showing that said dealer had initially transacted with the Opposer on December 7, 2007;

"9. Fourthly, anent Opposer's pictures of store signage, copy of pamphlets and flyer advertisements (Annexes "M", "N" and "O" of the Opposition), the same are incompetent to support Opposer's opposition. Be it note that a "Mark" means any visible sign capable of distinguish the goods (trademark) or service (service mark) of an enterprise and shall include a stamped or marked container of goods (Sec. 121.1 of Intellectual Property Code of the Philippines). Suffice it to state, Opposer's signage, pamphlets and flyers do not fall within this definition;

“10. In summation, the Opposer is hereby reminded that it is elementary in procedural law that bare allegations do not constitute evidence adequate to support a conclusion. It is basic in the rule of evidence that he alleges a fact bears the burden of proving it by the quantum of proof required. Bare allegations, unsubstantiated by evidence, are not equivalent to proof. (Filipinas Ports Services, Inc., vs. Go, G.R. No. 161886, March 16, 2007).

Respondent-Applicant submitted copy of eh Malaya Newspaper stating therein:

1. “Duque also noted that under Republic Act No. 7183 or the law on firecrackers and other pyrotechnic devices, *piccolo* is considered to be an illegal firecracker because it is imported and unregistered.” (Annex “1”)
2. Online edition of Positive News Media on December 30, 2007 (Annex “2”)
3. Picture of Bureau of Customs Commissioner Napoleon Morales inspecting Opposer’s illegally imported and banned firecrackers (Annex “3”)
4. Picture of Bureau of Customs Official inspecting Opposer’s illegally imported and banned firecrackers (Annex “4”).
5. Photocopy of returned letter envelop (Annex “5”).

The issue to be resolved is:

WHETHER OR NOT RESPONDENT-APPLICANT IS ENTITLED TO THE REGISTRATION OF THE MARK “TIGFER PYROTECHNICS & DEVICE”.

The contending trademarks are reproduced below for comparison and scrutiny and fro better understanding and appreciation.



TIGER FIREWORKS

Opposer’s mark



Respondent-Applicant’s mark

It is observed that the contending trademarks contained the word “Tiger” which is the dominant feature of both and the same in spelling, pronunciation and composition as well, therefore, they are confusingly similar.

Now, the remaining issue to be resolved is:

“WHO BETWEEN THE PARTIES HAS A BETTER RIGHT OVER THE MARK “TIGER” for use on firecrackers/fireworks under class 13 on the International Classification of goods.

The right to registered trademarks, trade-name and device mark is based on ownership. Only the owner of the mark may apply for its registration. (Bert R. Bagano vs. Director of Patents et. al., G.R. No. L-20170, August 10, 1965)

Adoption alone of a mark or trade-name is not sufficient to acquired ownership thereof nor give exclusive right thereto. Such right grows out of its actual use in commerce. Adoption is not use. One may make advertisements, issue circulars, give out price lists on certain goods, but these alone would not give exclusive right to use, unless the goods or services on which the mark or trade-name is used are sold in the market. For trademark is a creation of use. The underlying reason for all these is that purchasers have come to understand the mark as indicating the origin of the wares. Flowing from this principle is the trader’s right to protection of the mark or trade-name built up and the goodwill he has accumulated from the use of the mark or trade-name. (Sterling Products International, Inc., vs. Farbenfabriken Bayer Aktiengesellschaft, 27 SCRA 1214 (1969))

Evidence of use of a mark is shown by the sale of the goods or wares bearing the mark to the public. Sales invoices provide the best proof that there were actual sales of the trade’s products in the market.

Since the exclusive right to use a mark or trade-name is independent on priority of adoption and use in commerce, the question now to be asked is: WHO BETWEEN THE OPPOSER AND THE RESPONDENT-APPLICANT IS THE FIRST TO ACTUALLY ADOPT AND USE THE MARK “TIGER” IN COMMERCE IN THE PHILIPPINES?

Opposer submitted in evidence the affidavits of his witnesses purported to be his distributors/customers alleging therein the dates of their transactions, however, no proof having submitted to this effect except photocopies of sales invoices which are contrary to Office Order No. 79, Series of 2005, the same being not original or certified true copy.

In People Bank and Trust Company vs. Leonidas, G.R. N.o. L-47815, March 11, 1992, the Supreme Court said:

“Affidavits are classified as hearsay evidence since they are not generally prepared by the affiant but by another who use his own language in writing the affiant’s statements, which may thus be either omitted or misunderstood by the one writing them. Moreover, the adverse party is deprived of the opportunity to cross-examine the affiants. For this reason, affidavits are generally rejected for being hearsay, unless the affiant themselves are placed on the witness stand to testify thereon.”

However, Opposer submitted a certified true copy of Certificate of Business Name Registration No. 00038000 for “TIGER FIREWORKS” issued on February 1, 2007 by the Department of trade and Industry (DTI) and valid until February07,2012 (Annex “A”).

Opposer likewise submitted actual labels for his trademark “TIGER FIREWORKS” namely Annexes “D”, “E”, “F”, “G”, “N”,”O” and “O-1”.

The evidence above-stated submitted by the Opposer which has not been contraindicated or disputed by the Respondent-Applicant will clearly show that it was the Opposer who first adopted and used the trademark “TIGER FIREWORKS” in the Philippines as early as February 1, 2007 (Annex “A”) as against the filing date of the Respondent-Applicant on October 31, 2007, as said party did not submit any document in support of its trademark

application being opposed, such as testimony of its witnesses and sales invoices as proof of its actual use.

Considering therefore, that there is no testimony as well as proof of date of use of the mark of the Respondent-Applicant, said party is limited to the filing date of its application as the date of its first use. This is in line with the decision of the Supreme Court in the case of "Sy Ching vs. Gaw Liu (44 SCRA 143)" were, the Supreme Court said:

"In case no testimony is taken as to the date of use, the party will be limited to the filing date of the application as the date of its first use" [trademark "LION and TIGER" for dyestuff]

WHEREFORE, in view of all the foregoing, the opposition is, as it is hereby SUSTAINED. Consequently, Trademark Application No. 4-2007-012116 filed on October 31, 2007 for the mark "TIGER PYROTECHNICS AND DEVICE" by Respondent-Applicant PHOENIX FIREWORKS CORPORATION is, as it is hereby REJECTED.

Let the file wrapper of the trademark "TIGER PYROTECHNICS AND DEVICE", subject matter of this case together with copy of this DECISION be forwarded to the Bureau of Trademarks (BTO) for appropriate action.

SO ORDERED.

Makati City, 18 February 2009.

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