

LEVI STRAUSS & CO.,	}	IPC No. 4216
Petitioner,	}	Petition for Cancellation:
	}	
vs.	}	Cert. of Regn. No. 53918
	}	Issued on: Nov. 16, 1992
ANTONIO SEVILLA,	}	
Respondent-Registrant/Licensee,	}	
	}	
	}	Trademark: "LIVE'S"
ANTONIO L. GUEVARRA	}	
Respondent-Assignee/Licensor,	}	
x-----x	}	Decision No. 2009-11

DECISION

This is a Petition for Cancellation filed by Levi Strauss & Co. ("Petitioner") seeking to cancel the registration of the mark "LIVE'S" under Certificate of Registration No. 53918 issued on November 16, 1992 for Class 25 goods, namely, jeans, jacket, polo, and t-shirt in the Principal Register of the then Bureau of Patents, Trademarks and Technology Transfer ("BPTTT") in the name of Antonio Sevilla (Respondent-Registrant/Licensee). Essentially, the ground for cancellation is that Certificate of Registration No. 53918 was obtained in violation of, or contrary to, the provisions of Section 4 (d) in relation to Section 17 of R.A. No. 166, as amended, as the subject mark "LIVE'S" consists of a mark or trade name which so resembles a mark or trade name, "Levi's", a registered in the Philippines; or a mark or trade name, "LEVI'S", previously used in the Philippines by another and not abandoned, as to be likely, when applied to or used in connection with the goods, business, or services of Respondent-Registrant/Licensee, to cause confusion or mistake, or to deceive purchaser.

The Petition for Cancellation, filed on December 13, 1995, basically alleges the following:

1. Petitioner, a corporation organized and existing under the laws of the State of Delaware, the United States of America, is not licensed to do, as it is not doing business in the Philippines;
2. Petitioner obtained registration of its mark "Levi's" under the (original) Certificate of Registration No. 8293 and the current renewal Certificate of Registration No. 002666;
3. Petitioner as the owner of the mark "Levi's" has extensively and continuously used said mark since 1946 on goods covered by Class 25, namely, men's, women's, and children's overalls, jackets, outer skirts, coats, slacks, and pants; women's and children's blouses, outer shorts, pedal pushers, vests, skirts and culottes; and women's bras, and has not abandoned said mark;
4. Petitioner's mark "Levi's" is an internationally famous mark in that it is extensively registered as a trademark worldwide, is consistently and continually used on Levi Strauss & Co.'s products, and is widely and aggressively advertised on a multi-media basis worldwide;
5. Petitioner entered into a "Trademark Technical Data and Technical Assistance Agreement" with Levi Strauss (Philippines) Inc. ("LSPI"), a domestic corporation organized and existing under Philippine laws, which agreement granted a non-exclusive license to use the former's marks in connection with LSPI's manufacture and sale of pants, jackets, and shirts in the Philippines and which agreement has been renewed a number of times, the latest of which was dated July 1, 1992 and duly approved by the BPTTT;

6. Prior to 1972, "Levi's" jeans and other articles of clothing and accessories bearing the mark "Levi's" were already available and sold locally in the Philippines;

7. The success of Petitioner's jeans business locally and internationally is based upon its reputation for quality, durability, and distinctive use accomplished largely through maintenance of the distinctive and identifiable marks, and by conveying these marks to the general public's awareness and knowledge through continuous promotion and advertising by reason of which efforts the "Levi's" mark has been identified and distinguished in the public's mind as the goods Petitioner and LSPI manufacture or deal in;

8. Respondent-Registrant/Licensee Antonio Sevilla's mark "LIVE'S" is substantially and confusingly similar to Petitioner's mark "Levi's" in the following manner: 1) Respondent-Registrant/Licensee's mark uses a five-letter word with the very same letters of which Petitioner's registered mark is composed, the only difference being the position of the letters "E" and "I" and; 2) Petitioner's "Levi's" has an apostrophe after its fourth letter which separates the letter "S" from the first four letters of the mark, and Respondent-Registrant/Licensee also uses an apostrophe to separate the first four letters of its mark from the letter "S";

10. Considering that Petitioner has uninterruptedly used the marks on its jeans and other casual wear for over one hundred years beginning in 1927 for the mark "Levi's", and that such mark was first used in 1946 and registered in 1960 in the Philippines long before Respondent-Registrant/Licensee Antonio Sevilla obtained the registration now sought to be canceled, said Respondent-Registrant/Licensee's mark "LIVE'S" ought to be canceled per Section 4 in relation to Section 17 of R.A. No. 166;

11. On December 17, 1994, Respondent-Registrant/Licensee Antonio Sevilla executed a document entitled "Assignment of Registered Trademark" which was registered with this Office likewise on December 19, 1994, thereby assigning his entire right, title and interest in and to the mark "LIVE'S", the registration thereof, and the goodwill of the business in connection with which the same is used, in favor of Respondent-Assignee/Licenser Antonio L. Guevarra, conditioned on the understanding that the mark "LIVE'S" shall be licensed by Respondent-Registrant/Licensee Antonio Sevilla's favor in such a manner and under such terms and conditions as said Respondent-Assignee/Licenser Antonio L. Guevarra may prescribe in a license agreement to be executed by him;

12. On December 19, 1994, a "License Agreement" was registered with this Office by and between Respondent-Registrant/Licensee Antonio Sevilla and Respondent-Assignee/Licenser Antonio L. Guevarra whereby the latter granted the former the right to use the mark "LIVE'S" in connection with the production and sale of pants, jackets, and t-shirts, and an "Addendum" was further executed which provided that the term of the Agreement shall be for life of the registration of the mark "LIVE'S" including subsequent renewals or re-registrations;

13. On January 10, 1995, Respondent-Registrant/Licensee Antonio Sevilla withdrew his application for registration of the identical mark "LIVE'S" under Serial No. 84239 filed on February 8, 1993 in IPC No. 3999 for alleged loss of interest for which reason Petitioner's Opposition to the same was mooted;

14. Respondent-Registrant/Licensee Antonio Sevilla is fully aware of the unregistrable and infringing nature of the mark "LIVE'S", and the assignment and

licensing are but more ploys to attempt to shield himself from suits such as this one;

15. It is clear that the provision “for life” gave to Respondent-Registrant/Licensee Antonio Sevilla full use and enjoyment of the mark “LIVE’S” based, at least, on the provisions of the Agreement; and

16. It is unfortunate, though, that the mark “LIVE’S” was registered in the Principal Register despite its unregistrable and infringing character.

Petitioner prayed, thus, that Certificate of Registration No. 53918 issued on November 16, 1992 be canceled.

On June 20, 1996, Respondent-Assignee/Licensor Antonio L. Guevarra filed an Answer of Respondent-Assignee. In said pleading, Antonio L. Guevarra referred to himself as Respondent-Assignee while Antonio Sevilla was referred to as Respondent-Registrant.

Per the Answer of Respondent-Assignee, Respondent-Assignee Antonio L. Guevarra admitted Petitioner’s allegations as to Petitioner’s trademark registrations, its licensing arrangements, and business goodwill; the allegation that Petitioner’s trademark registration antedates the registration of the mark “LIVE’S” based on their respective registration dates; the assignment of the mark “LIVE’S” by Respondent-Registrant Antonio Sevilla to Respondent-Assignee Antonio L. Guevarra and the licensing agreement between them; and the fact that Respondent-Assignee Antonio L. Guevarra is the opposer in IPC Case No. 3995. Moreover, said Respondent-Assignee denied the rest of the allegations, and made the following affirmative defenses.

1. Certificate of Registration No. 53918 was issued to Respondent-Assignee Antonio L. Guevarra and not to Respondent-Registrant Antonio Sevilla;

2. Indicative of forum-shopping and contrary to Petitioner’s representation, there is an unfair competition case filed involving the subject mark “LIVE’S” as manifested by the raid on December 13, 1995 by elements of the Inter-Agency Committee on Intellectual Property Rights on Respondent-Assignee Antonio L. Guevarra’s premises resulting in the confiscation of several equipment and truckloads of finished and semi-finished products and related paraphernalia on the strength of Search Warrant No. 95-757 issued by Judge Antonio I. de Castro of the Manila Regional Trial Court, Branch 3;

3. The instant case is barred by laches considering that petitioner has acquiesced to Respondent-Assignee’s use of his mark “LIVE’S”; Petitioner failed to abate said use since January 1, 1988, and to oppose its registration when it was published for opposition on July 16, 1992 or to seek cancellation since November 16, 1992 but instead waged a media campaign to disparage Respondent-Assignee’s products compelling the latter to invest substantial sums in his business and to compete openly with Petitioner in the market; and

4. The probability of confusion arising from the alleged similarity of Respondent-Assignee’s mark “LIVE’S” with that of Petitioner’s mark “Levi’s” is negligible as an ordinary purchaser of pants, jeans, jackets, polo, and t-shirts gives close attention to details such as size, style, color, design, and brand; such purchaser takes time to try on the item before deciding to buy it such that one brand could not be passed off as another different brand so easily; the price difference between the respective goods of the opposing parties is big; there is a literature on the hand tag goes with each unit of the product; and the presence of other distinctive markings including the manufacturer’s name;

Respondent-Assignee Antonio L. Guevarra prayed, thus, among others that the Petitioner be denied and dismissed.

On July 05, 1996, Petitioner filed a Reply and Opposition to Respondent-Assignee/Licensors Antonio L. Guevarra's Answer of Respondent-Assignee, basically alleging the following:

1. The Answer of Respondent-Assignee only replicates the allegations of Respondent-Assignee/Licensors Antonio L. Guevarra in his Answer in IPC No. 4217 showing, thus, that the extensions sought for respondent-applicant to file the Answer in this case were intended to delay the proceedings;
2. Respondent-Assignee/Licensors Antonio L. Guevarra knew of the incidents in IPC Case No. 3999: Barely a month after Respondent-Registrant/Licensee Antonio Sevilla and Respondent-Assignee/Licensors Antonio L. Guevarra executed the "License Agreement", Sevilla withdrew his application subject of the case for alleged loss on interest;
3. Petitioner was unaware of IPC No. 3995, an opposition case against the application for registration of the mark "LIVE'S" filed by Respondent-Assignee/Licensors Antonio L. Guevarra against Respondent-Registrant/Licensee Antonio Sevilla which has since been dismissed but this does not prove that either Petitioner or Respondent-Assignee/Licensors Antonio L. Guevarra has identical interests against Respondent-Registrant/Licensee Sevilla or that Petitioner has knowledge of, much less allowed, such application to proceed;
4. The denials of confusing similarity are barefaced and illogical: The average consumer walking in a public place cannot give close attention to details of the pants worn by the individual walking ahead of him, the probability of post-sale confusion when all the identifying sundry items on the products have been detached is immense, and the very idea of subtle imitation is to create room in the minds of consumers to believe that the product is that of another more known and more popular brand;
5. Whereas the sundry items attached to the product at the point of sale may at first glance minimize any doubt in the consumer's mind as to the confusing similarity between Respondent-Assignee/Licensors Antonio L. Guevarra's products and Petitioner's products, there is an equally confusing and false perception that Petitioner has allowed Respondent-Assignee/Licensors Antonio L. Guevarra and Respondent-Registrant/Licensee Antonio Sevilla to use its world-famous registered marks on their goods;
6. At the time of the filing of the instant subject case, Petitioner had not commenced any other action involving the same parties and the same issue of cancellation;
7. Even granting arguendo that another case was filed because of the alleged raid, the same is a criminal case different from this instant case, albeit against one Tony Lim and not against either or both Respondent-Assignee/Licensors Antonio L. Guevarra and Respondent-Registrant/Licensee Antonio Sevilla;
8. Respondent-Assignee/Licensors Antonio L. Guevarra conveniently omits to state that he was the one who brought a civil action for damages against LSPI: Civil Case No. 96-76943 entitled "Pacita L. Guevarra and Antonio L. Guevarra v. Live Strauss (Phils.), Inc." pending before Branch 49 of the Regional Trial Court of Manila;

9. Petitioner denies it ever acquiesced in the use by Respondent-Assignee/Licenser Antonio L. Guevarra of its mark: Petitioner likewise filed a petition against both Respondent-Assignee/Licenser Antonio L. Guevarra and Respondent-Registrant/Licensee Antonio Sevilla for the cancellation of Certificate of Registration No. 8868 of the "LIVE'S" Label Mark in the Supplemental Register on the same date when the instant Petition was filed; and

10. Mere failure to oppose the application for registration does not equate to acquiescence, much less laches: R.A. No. 166 and the implementing rules thereof permit the filing of a petition for cancellation of already registered marks as registration is merely confirmatory of a pre-existing right to the mark, not a conferment of a right thereto.

As to Respondent-Registrant/Licensee Antonio Sevilla, records show that the Notice to Answer had not been effectively served by this Office through registered mail. The address and whereabouts of said party was unknown for which reason service was effected pursuant to Section 16, Rule 14 of the Revised Rules of Court (See Order No. 96-359, June 24, 1996). Subsequently, per Order No. 96-426 dated August 6, 1996, Petitioner was granted leave to serve by publication the Notice To Answer with a copy of the Petition attached thereto upon Respondent-Registrant/Licensee Antonio Sevilla. On August 19, 1996, an Alias Notice to Answer was issued by the Bureau of Legal Affairs ("BLA"). On August 29, 1996, petitioner caused the publication of the Petition and said Alias Notice to Answer in the *Balita* paper. Petitioner thereafter filed on October 13, 1996 a Motion to Declare Respondent-Registrant in Default as to Respondent-Registrant/Licensee Antonio Sevilla which was granted per Order No. 96-567 dated October 23, 1996 (See Petitioner's Motion to Declare Respondent-Registrant in Default and Annexes "A" and "B" thereof).

On December 6, 1996, Respondent-Registrant/Licensee Antonio Sevilla filed a Motion to Set Aside Order of Default alleging that he received the default Order only on December 5, 1996 through his counsel, that said Order was addressed to his old address, and that he was not aware of the instant cancellation case as he was most of the time in the Southern provinces to attend to his business activities; and praying that said default Order be set aside. On January 13, 1997, Petitioner filed a Comment (On the Motion to Set Aside Order of Default) And Motion. Respondent-Registrant/Licensee Antonio Sevilla's Motion was granted per Order No. 2000-376 dated August 9, 2000 wherein Respondent-Registrant/Licensee Antonio Sevilla was directed to file his Answer within a non-extendible period of ten (10) days from receipt of a copy of said Order. Respondent-Registrant/Licensee Antonio Sevilla received said Order through his counsel on August 22, 2000 but did not file his Answer. Per Order No. 2000-643 dated November 28, 2000, Respondent-Registrant/Licensee Antonio Sevilla was declared in default.

Again, on December 22, 2000, Respondent-Registrant/Licensee Antonio Sevilla filed a Motion to Set Aside Order of Default (Motion for Reconsideration), alleging that a copy of his Answer was tasked by his counsel to be filed by the latter's secretary who lost it on the day she was supposed to file it but did not timely inform said counsel; and praying that the default Order be set aside and that his Answer attached to the Motion be admitted. On March 17, 2003, Office Order No. 2003-114 was issued, granting the Motion and setting aside Order No. 2000-643.

In his Answer to the Petition, Respondent-Registrant/Licensee Antonio Sevilla admitted the reference to Petitioner's legal personality, its ownership of the mark Levi's, its extensive and continued use of the mark, its success and reputation in the use of said mark in business including the licensing agreement/arrangement with LSPI, the prior registration per Certificate of Registration No. 53918 of Petitioner's mark over the subject mark herein, and the long use by Petitioner of its mark in the Philippines; denied the rest of the allegations in the Petition; and alleged the following affirmative defenses:

1. Respondent-Registrant/Licensee's mark "LIVE'S" is different from that of Petitioner's "Levi's" and would never cause confusion: 1) The spelling and the pronunciation of the respective marks are very much different; 2) The nature of the goods to which such marks are being used are not daily basic needs bought with haste: The ordinary purchaser buys clothing apparel meticulously, scrutinizing the style, color, size, design, fit, and comfort; and 3) The usual target market of the goods covered by the marks herein are the educated and mature purchasers who can easily distinguish quality and price differences;

2. The presentation and trade dress of the mark "LIVE'S" re substantially different from that of the mark "Levi's" which has already been well-known and, could be said, of judicial notice such that any mark sought to be registered with the intention of making any colorable imitation can never pass the approval of the Bureau of Trademarks (BOT) if there is no substantial difference between the mark "LIVE'S" and the mark "Levi's"; and

3. Respondent-Registrant/Licensee Antonio Sevilla has long use of the mark which is not only for a few months but for long period in years after its registration and Petitioner not having lifted a finger, entitling said Respondent-Registrant/Licensee to perpetuation of the registration and use as the right has already been vested.

Respondent-Registrant/Licensee Antonio Sevilla prayed, thus, that the instant Petition for Cancellation be dismissed for lack of merit and legal basis.

Order No. 2006-153 dated January 19, 2006 was issued pursuant to Office Order No. 79 which took effect on September 1, 2005, giving the parties an option whether to proceed with the case under the summary rules provided by said Office Order, or to proceed under the previous procedural rules provided by the *Regulations on Inter Partes Proceedings* as amended by IPO Order No. 18, December 29, 1998. Considering that Petitioner filed a Manifestation to the effect that it is not amenable to the application of Office Order No. 79 though Respondent-Assignee/Licensors Antonio L. Guevarra manifested that he agrees to the application of said Office Order and Respondent-Registrant/Licensee Antonio Sevilla did not file a manifestation in response to Order No. 2006-153, the instant case proceeded according to the previous procedural rules provided by the *Regulations on Inter Partes Proceedings* as amended by IPO Order No. 18, December 29, 1998.

It appears from the records that copies of the Notice of Hearing setting the case for pre-trial conference on July 27, 2006 were furnished Respondent-Registrant/Licensee Antonio Sevilla, and his counsel Atty. Neptali Bulilan and Atty. Rachel Jane. Osit. It appears that the Registry Return Receipts of the respective copies of the Notice of Hearing furnished to Respondent-Registrant/Licensee Antonio Sevilla and Atty. Neptali Bulilan were returned unsigned with notations on the envelopes that said addressees moved out of their respective addresses on record (See Registry Control Nos. J-06-402 and J-06-403). Record also shows that Respondent-Registrant/Licensee Antonio Sevilla's other counsel, Atty. Rachel Jane C. Osit also moved out of its address on record as per Registry Control No. J-06-404. Since the Notice of Hearing sent by this Bureau on 11 July 2006 were based on the old business address provided by respondent-applicant and his counsel without any change of address filed, the Notice of Hearing is hereby deemed duly served. Hence, this Bureau rules that Respondent-Registrant/Licensee Antonio Sevilla is deemed to have waived his right to present evidence.

On July 27, 2006, pre-trial ensued. Petitioner and Respondent-Assignee/Licensors Antonio L. Guevarra appeared through their respective counsel. Petitioner and Respondent-Assignee/Licensors Antonio L. Guevarra made the following stipulations: 1) That Petitioner's mark "LEVI'S" and Respondent-Assignee/Licensors Antonio L. Guevarra's mark "LIVE'S" are used on the same type of goods; 2) That Respondent-Assignee/Licensors Antonio L. Guevarra's goods on which the mark "LIVE'S" is used are in direct competition with Petitioner's goods on which the

mark "LEVI'S" is used; and 3) That Petitioner "LEVI'S" is an internationally famous mark. The issues stipulated upon by the parties may be summarized as follows:

1. Whether the subject mark "LIVE'S" is confusingly similar with that of Petitioner's mark "LEVI'S", both of which are used on the same class/type of goods, such that the continued use of said subject mark would heighten the probability of dilution of Petitioner's mark "Levi's"; and
2. Whether the public will be confused as to the source of the respective goods of Petitioner, and of Respondent-Registrant/Licensee and/or Respondent-Assignee/Licensors in view of the subject trademark and Petitioner's mark "Levi's".

Logically, thus, the query as to whether Petitioner is entitled to the cancellation of the subject mark arises.

Petitioner presented as evidence the respective affidavits of Mercedes R. Abad, President and General Manager of TNS-Trends, a corporation engaged in the general field of marketing research and consumer behavior, and of Flordeliza B. Pinlac, Purchasing Officer and Brand Protection Coordinator of LSPI which are the testimonies on direct examination of said persons as witnesses (Exhibits "A", "A-1", "F" and "F-1"); Mercedes R. Abad's resume (Exhibit "B"); sample questionnaire for the market survey "Project Cherokee 5" (Exhibit "C"); ten (10) accomplished questionnaires for the market survey "Project Cherokee 5" (Exhibits "D" to "D-9"); the "Final Report On Project Cherokee 5 Live's 105 Jeans" by Trends-MBL, Inc." (Exhibit "E"); The Trademark, Technical Data, And Technical Assistance Agreement Between Levi Strauss & Co. and Levi Strauss (Phil.), Inc. (Exhibit "G"); Certificate of Registration No. R-2666 for the mark "Levi's" (Exhibit "H"); Certificate of Registration No. 35048 for the mark "Levi's" (Exhibit "I"); photographs of samples of "Levi's" jeans, shirts, and other products (Exhibit "J" to "J-7"); pictures of "Levi's" outlets/shops (Exhibit "K"); pictures of a pair of "LIVE'S" jeans (Exhibits "L" to "L-3"); a V-like shape or arcuate design drawn on legal-sized yellow pad and identified by witness Richard Go (Exhibit "M") copy of Petition for Review on Certiorari filed by LSPI against Tony Lim in G.R. No. 162311 (Exhibit "N"); and a copy of Comment on the Petition filed by Tony Lim in G.R. No. 162311 (Exhibit "O").

Meanwhile, Respondent-Assignee/Licensors Antonio L. Guevarra presented as evidence the affidavits of Danilo A. Soriano which served as his testimony on direct examination (Exhibits "1" and "2"); and pictures of five (5) product samples of "LIVE'S" jeans (Exhibits "3" to "7").

On July 12, 2007, Petitioner filed a Manifestation and Motion, indicating that it intends to present rebuttal evidence. On September 24, 2007, Petitioner presented rebuttal evidence which consisted of its Exhibits "M", "N" and submarkings, and "O". Counsel for Respondent-Assignee/Licensors Antonio L. Guevarra orally commented that said party submits to the authenticity, materiality, and relevance of said documents but reiterated the meaning and significance of said documents from said party's point of view that was manifested during the presentation of the respective evidence-in-chief of the parties. Respondent-Assignee/Licensors Antonio L. Guevarra did not present sur-rebuttal evidence Exhibits "M", "N" and submarkings, and "O" and directing the parties to file their respective position papers and, if desired, draft decisions within a non-extendible period of ten (10) days from receipt of their respective copies of said Order. Petitioner received a copy of said Order on 16 October 2007 and filed a Position Paper and Draft Decision on November 05, 2007 which is beyond the reglementary period. Petitioner's Position Paper and Draft Decision are, thus, deemed not filed. Meanwhile, Respondent-Assignee/Licensors Antonio L. Guevarra received a copy of said Order on October 18, 2007 and filed a Decision on October 30, 2007 which is also beyond the reglementary period. Respondent-Assignee/Licensors Antonio L. Guevarra's Decision is, thus, deemed not filed.

Before the core issue of confusing similarity between Petitioner's mark "LEVI'S" and the subject mark "LIVE'S", as well as other pertinent issues are discussed, it shall be stressed here that there is no question as to the similarity and/or relatedness of the respective goods of

Petitioner and Respondent-Assignee/Licensors upon which Petitioner's mark "LEVI'S" is used and the subject mark, Respondent-Assignee/Licensors Antonio L. Guevarra's mark "LIVE'S" is used: Class 25 goods. It shall be stressed here, too that this case shall be decided based on the legal parameters of Republic Act No. 166, the old Trademarks Law, as the subject mark "LIVE'S" was registered under said law and that this Petition for Cancellation was filed also under the same law.

Petitioner's mark "LEVI'S" as it appears in Certificate of Renewal Registration No. 002666 is as follows:



LEVI'S

Meanwhile, Respondent-Assignee/Licensors Antonio L. Guevarra's mark "LIVE'S" as appearing in Certificate of Registration No. 53918 is as follows:



LIVE'S

The Supreme Court has held that likelihood of confusion is a relative concept to be determined only according to the particular, and sometimes peculiar, circumstances of each case. The wisdom of the likelihood of confusion test lies in its recognition that each trademark case presents its own unique set of facts. All the relevant factual circumstances must be examined vis-à-vis the factors by which likelihood of confusion between two competing marks must be gauged. (ESSO Standard Eastern, Inc. v. Court of Appeals et al., G.R. No. L-299971, August 31, 1982).

After a circumspect perusal and evaluation of Respondent's mark LIVE'S subject matter of this cancellation proceedings and Petitioner's LEVI'S mark as well as the evidence presented in this cancellation proceedings, this Bureau finds and so holds that they are not confusingly similar for the following reasons:

Although both marks contain the same five (5) letters LEVIS and LIVES, when used separately and independently, they have both different sounds and spelling. The word LEVI'S is composed of two syllables with emphasis on the first syllable LE while LIVE'S is a word with only one syllable and therefore when pronounced, the emphasis is on the whole word LIVE'S. Hence, LEVIS and LIVES are pronounced differently they are also different in spelling, i. e. L-E-V-I-S and L-I-V-E-S.

Likewise, Respondent-Registrant's LIVES and petitioner's LEVIS have different meanings. The Webster's Third New International Dictionary define the word LIVES as "the plural

of life”, “akin to life”, “the quality that distinguishes a vital and functional being from a dead body or purely chemical matter”. On the other hand, LEVIS is defined as “used for heavy blue denim that are reinforced at strain points with copper rivets and have a close fitting legs.” Clearly, both LIVES and LEVIS have different meanings.

There is also a difference in the designs of the backpockets. 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, while the arcuate design for complainant LEVI'S jeans form a diamond.

Moreover, there is a difference in pricing. Respondent-Assignee/Licenser Antonio L. Guevarra has asserted that the price/cost of the maong pants/jeans made by said party is considerably lower than that of Petitioner's maong pants/jeans (Paragraph 6, Affidavit of Richard Go). This was not rebutted by Petitioner.

Finally, the place where the products are being sold is different. Although LEVI'S and LIVE'S are being sold in malls, the former is usually found in a specialty shop or boutique or outlet clearly depicting the mark “LEVI'S” while the latter is usually displayed with other brands of low cost jeans, hence, the possibility of confusion is very unlikely.

In this instant case, this Bureau is aware of a Petition for Review on Certiorari filed in the Supreme Court by Petitioner, entitled Levi Strauss (Phils.), Inc. Petitioner versus Tony Lim, Respondent, G.R. No. 162311 and presented by Petitioner as Exhibits “N” and “O”. This case was spawned by the complaint filed by the Philippine National Police Criminal Investigation Command (PNP CIC) with the Department of Justice (DOJ) against Tony Lim for unfair competition under the old Article 189 of the Revised Penal Code prior to its repeal by Section 239 of the Intellectual Property Code. Succinctly, the complaint was filed as a result of the items seized from the premises of Tony Lim, who was doing business under the name Vogue Traders Clothing Company, by the PNP Criminal investigation Unit by virtue of search warrants, after surveillance was conducted on said premises which revealed that Tony Lim was engaged in the manufacture, sale, and distribution of products similar to those of Levi Strauss (Phils.), Inc. and under the brand name “LIVE'S”. The DOJ dismissed the complaint, which dismissal was affirmed by the Court of Appeals and the Supreme Court in its decision promulgated on December 4, 2008. It is to be noted that the mark “LIVE'S” subject matter of the Supreme Court decision is the same mark subject of the instant Petition for Cancellation.

The Supreme Court in its decision in G.R. No. 162311 promulgated December 4, 2008 affirmed the findings of the Department of Justice and the Court of Appeals that there can be no likelihood of confusion between Petitioner's LEVI'S and Respondent-Registrant's LIVE'S marks.

The Court held that-

“xxx Thus, the CA correctly ruled that the mere fact that some resemblance can be pointed out between the marks used does not of itself prove unfair competition. To reiterate, the resemblance must be such as is likely to deceive the ordinary purchaser exercising ordinary care.

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 the distance, they were asked to identify the jeans brand and state the reasons for thinking so. 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. xxx” (Emphasis supplied)

Respondent-Assignee/Licenser Antonio L. Guevarra has asserted that the price/cost of the maong pants/jeans made by said party is considerably lower than that of Petitioner's maong pants/jeans (Paragraph 6, Affidavit of Richard Go). This was not rebutted by Petitioner. In the same decision, the Supreme Court noted the considerable discrepancy in the price/cost of the respective maong pants/jeans of Petitioner and Respondent-Assignee/Licenser Antonio L. Guevarra. It stated, thus-

“xxx It is undisputed that ‘LIVE’S’ jeans are priced much lower than ‘LEVI’S’.

x x x 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.” (Amphasis supplied)

In thr above quoted decision, the Supreme Court stressed that the Emerald Garment rationale is supported by the decision in the case of Del Monte Corporation versus Court of Appeals where the Court explained that the attitude of the purchaser is determined by the cost of the goods. Thus, there is no possibility of confusion or deception of the buying public when the cost of goods where the competing marks are affixed differ, i.e. one is considerably lower while the other is expensive or considerably high, as in the instant case.

Aside from the price/cost, there is absence of striking similarity between the two marks which negate the likelihood of confusing petitioner's and Respondent-Assignee/Licenser Antonio L. Guevarra's respective goods and/or business through the simultaneous use in the market of their respective marks on said goods.

In this regard, after carefully going over the records and evidence in the instant case, this Bureau agrees with the findings made by the investigating prosecutor and the DOJ Secretary in G.R. No. 162311 with respect to the competing marks LEVI'S and LIVE'S:

“First, the LIVE'S mark of respondent's goods is spelled and pronounced differently from the LEVI'S mark of 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 from a rectangle. The arcuate design for complainant LEVI's jeans from a diamond instead. xxx

Third, 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.

Fourth, 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 appropriated for himself the method of labeling or packaging [of] his merchandise and then enjoin other merchants fro using it. x x x"

With the discrepancies in the features of the marks as this Bureau has earlier discussed. The difference in the price/cost of the goods, and the factors considered in determining the existence of confusing similarity such as the age, training, and education of the buyers of high-end and low-end maong pants/jeans, there is no likelihood of confusing LEVI's goods with that of the LIVE'S goods that can arise even at the point of sale, notwithstanding Petitioner's consumer survey.

It is also worthy to mention at this point that this case is a proceeding for the cancellation of trademark registration filed by Petitioner after Certificate of Registration No. 53918 was issued by the Bureau of Trademarks on November 16, 1992 to herein Respondent, Antonio L. Guevarra. The application has undergone formal as well as substantive examinations by the Examiner-in-charge of the application to ensure compliance with the law and the rules. A review of the records revealed that during the examination of Respondent's application for LIVE'S, the Trademark Examiner in her official action has cited Petitioner's LEVI'S renewal registration R 2666 for allegedly being confusingly similar. Despite such finding and after a reply was made by respondent refuting the Examiner's finding, the same Trademark Examiner recommended the allowance of the mark LIVE'S for publication and there being no opposition filed against the mark LIVE'S, it proceeded to the issuance of Certificate of Registration No. 53918 in favor of Antonio L. Guevarra.

In view of the absence of a likelihood of confusion of goods and/or confusion of business that may be caused by Respondent-Assignee/Licensors, Antonio L. Guevarra's use of the registered mark "LIVE'S" on maong pants/jeans, the answer to the query as to whether Petitioner is entitled to the cancellation of registration of the subject mark "LIVE'S", this Bureau rules in the negative.

WHEREFORE, the instant Petition for Cancellation is, as it is hereby, DENIED. Consequently, Certificate of Registration No. 53918 issued on November 16, 1992 in the name of Antonio L. Guevarra remains VALID AND SUBSISTING.

Let the filewrapper of this case together with this Decision be forwarded to the Bureau of Trademarks for appropriate action.

SO ORDERED.

Makati City, 29 January 2009

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