



ANTONIO B. SEE,
Petitioner,

-versus-

CHENGYI CHEN,
Respondent-Registrant.

X-----X

IPC No. 14-2010-00027

Cancellation of:

Registration No. 4-2006-013165

Reg. No. 06 April 2009

TM: "XIN YI LONG AND ITS CHINESE
CHARACTERS AND LOGO"

NOTICE OF DECISION

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GREETINGS:

Please be informed that Decision No. 2012 – 146 dated August 14, 2012 (copy enclosed) was promulgated in the above entitled case.

Taguig City, August 14, 2012.

For the Director:


Atty. EDWIN DANILO A. DATING
Director III
Bureau of Legal Affairs

CERTIFIED TRUE COPY


MARILYN F. RETUTAL



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DECISION

ANTONIO B. SEE ("Petitioner")¹, filed on 28 January 2010 a Petition for Cancellation of Trademark Registration No. 4-2006-013165. The registration, issued on 06 April 2009 in favor of CHENGYI CHEN ("Respondent-Registrant")², covers the mark "XINYILONG AND ITS CHINESE CHARACTERS AND LOGO" for use on "moon cake, bread, cakes, biscuits, butchi, tikoy, hopia, siopao, quapao, short cake, rolls, pastries, pie, pizza" under Class 30 and for "bakery shop" under Class 35 of the International Classification of goods³. The Petitioner alleges among other things the following:

"3. PETITIONER is the sole owner and operator of Xin Yi Long Cake Shop, a bakery specializing in cakes, pastries, breads and other bakery products.

"4. Sometime in August 2006, PETITIONER opened the main branch of Xin Yi Long Bakeshop located at Benavidez Street, Binondo, Metro Manila.

"5. Prior to the opening of the said branch, PETITIONER had an agreement with RESPONDENT for the supply of raw materials and bakery equipment from China. Because of this arrangement, RESPONDENT sent his technical team to train the personnel and staff of PETITIONER'S bakeshop. PETITIONER paid RESPONDENT the total amount of two million, nine hundred fifty thousand, and four hundred nine and 56/100 pesos (Php 2,950,409.56) for the purchase of the said raw material and equipment.

"6. In the opening of PETITIONER'S first bakeshop in Binondo, RESPONDENT was present as a guest. During the said opening, the mark 'XIN YI LONG WITH CHINESE CHARACTERS AND DEVICE' ('XIN YI LONG') was displayed in the sign of PETITIONER'S bakeshop. The said mark was also present in the wrappers of the PETITIONER'S cakes and other bakery goods.

"7. RESPONDENT never objected to the use of the said mark by PETITIONER. In fact, PETITIONER has pictures of the bakeshop opening showing RESPONDENT was there, joining the festivities, and clearly seeing that the mark 'XINYILONG' was prominently displayed in the

¹ A Filipino citizen with address at 836 Benavidez Street, Binondo, Manila.

² With address at Shui Tou Street, Kui Feng District, Nan An City, Fukien, People's Republic of China.

³The Nice Classification is a classification of goods and services for the purpose of registering trademarks and service marks based on a multilateral treaty administered by the World Intellectual Property Organization. This treaty is called the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of Registration of Marks concluded in 1957.

premises of PETITIONER'S cake shop.

"8. PETITIONER subsequently opened another branch of Xin Yi Long cake shop in 168 Mall in Manila, also using therein XIN YI LONG mark in his store signage and product wrappers.

"9. On 7 September 2006, PETITIONER had the name of the cake shop 'XIN YI LONG Cake SHOP' registered with the Department of Trade and Industry. x x x

"10. On 6 December 2006, PETITIONER applied with the IPO for the registration of the mark 'XIN YI LONG WITH CHINESE CHARACTERS & DEVICE' for the use of the same in his cake shop. The application was given serial number 4-2006-012987. RESPONDENT filed an opposition to the said application for registration, claiming to be the real owner of the mark 'XIN YI LONG'. The Bureau of Trademarks granted RESPONDENT's Opposition. PETITIONER filed a Motion for Reconsideration but the same was denied. Thereafter PETITIONER appealed to the Office of the Director General. The case is docketed as **Appeal No. 14-09-50 (IPC NO. 14-2008-00100) entitled 'Antonio B. See vs. Chengyi Chen' ('MAIN CASE')**. x x x

"11. Prior to the filing of the said opposition, RESPONDENT noticed that in such a short period of time, PETITIONER'S cake shop became popular especially within the Filipino-Chinese community. RESPONDENT offered to establish a manufacturing facility in the Philippines, and making PETITIONER a distributor of the XINYI LONG cakes in the country. PETITIONER of course refused this offer, because it was PETITIONER who exerted effort in establishing the name and goodwill of the cake shop, as well as invested a substantial sum in the purchase of equipment and other materials for the same.

"12. On 07 December 2006, or three (3) days after PETITIONER filed his application for trademark registration, RESPONDENT surreptitiously applied for the registration of the same mark, 'XIN YI LONG AND ITS CHINESE CHARACTERS AND LOGO', without even disclosing that the same mark is already subject of an earlier application filed by PETITIONER and which was being opposed by RESPONDENT at the time RESPONDENT filed his own application.

"13. Meanwhile, RESPONDENT's own trademark application was unopposed. Thus, it was eventually granted Trademark Registration Number 4-2006-013165 on 06 April 2009.xxx

"14. Section 124.2 of Republic Act No. 8293, otherwise known as the Intellectual Property Code of the Philippines ("IP Code") states: x x x

"15. Moreover, the Rules & Regulations on Trademarks, Service Marks, Tradenames and Marked or Stamped Containers specifically requires: x x x

"16. In this case, RESPONDENT's application for the trademark 'XINYILONG AND ITS CHINESE CHARACTERS AND LOGO' was filed on 07 December 2006. Thus, RESPONDENT had until 06 December 2009 to file its Declaration of Actual Use.

"17. While it is true that RESPONDENT filed a Declaration of Actual Use last 26 October 2009, petitioner submits that the same was defective, and therefore has no legal binding effect. To date, RESPONDENT has never established any business in the Philippines and has not shown that he has used the 'XINYILONG' mark in the country.

x x x

"18. An examination of said Declaration of Actual Use filed by RESPONDENT before this Honorable Office reveals the following badges of irregularities in RESPONDENT's Declaration of

Actual Use: 1. Firstly, as regards the invoices of Hap Lee Company, Inc. attached to the Declaration of Actual Use, it must be stressed that said invoices do not visibly or legibly show the mark 'XINYILONG AND ITS CHINESE CHARACTERS AND LOGO'. What said invoices contained are handwritten note purportedly showing that certain 'XINYILONG' products were sold by Hap Lee Company, Inc. However, these invoices do not constitute credible proof that said products have been actually sold by Hap Lee Company. 2. Secondly, and the most indubitable proof that said invoices are not credible and of spurious character, is the fact that Invoice Nos. 12314 and 12316 were dated 17 October 2009 and 20 October 2009, respectively. How could have RESPONDENT attached said invoices when its Declaration of Actual Use was already notarized on 16 October 2009? Clearly, these alleged invoices are not genuine. 3. Thirdly, the other attachments are likewise dubious. There is no showing that those marks were actually used for products being distributed, sold, or marketed here in the Philippines, which is what the law requires as proof of Declaration of Actual Use. 4. Finally, there is no showing that the products bearing RESPONDENT's registered mark is actually being used in the outlet named Hap Lee Company, Inc. On the contrary, photos taken from Hap Lee Company, Inc. reveal that said establishment is not a bakery nor is it engaged in the distribution of bakery products for which its trademark has been previously registered, namely, *mooncake, bread, cakes, biscuit, butchi, tikoy, hopia, siopao, quapao, short cake, rolls, pastries, pie, and pizza*.

It is clear, therefore, that RESPONDENT never established its actual business and has never used the subject mark here in the Philippines despite its baseless claim that it has started using the subject mark as early as 01 January 1990 (for goods) and 28 August 2006 (for services).

x x x

"19. Considering the foregoing, it cannot be disputed that the Declaration of Actual Use filed by RESPONDENT is not the one contemplated under the IP Code and its implementing rules. The same has the effect of RESPONDENT having failed to file a valid Declaration of Actual Use before its due date. Its defective Declaration of Actual Use should be treated as a mere scratch of paper with no valid and legal effect. Thus, for failure of RESPONDENT to file valid Declaration of Actual Use, the registration of its trademark should be cancelled and that the trademark should be removed from this Honorable Office's Register.

x x x

"20. In the case at bar, RESPONDENT's registered mark is still being disputed between RESPONDENT and PETITIONER in the MAIN CASE which is pending before the Office of the Director General of this Honorable Office.

"21. While it is true that in the application for registration of RESPONDENT's mark, there was no opposition filed, the approval thereof should have been held in abeyance considering that the subject mark in said application, which was filed at a later date, is exactly the same as the mark subject of the separate opposition case between PETITIONER (as respondent-applicant-appellant therein) and RESPONDENT (as opposer-appellee therein). It would have been prudent for this Honorable Office to have consolidated the two applications.

"22. Thus, the granting of the application of RESPONDENT of a 'REGISTERED' status involving a mark which is exactly the same as the mark subject of a pending opposition is clearly premature.

23. The allowance if such registration has already prejudiced the rights of PETITIONER. The determination of who owns the mark 'XINYI LONG' its Chinese characters, and the logo design, have not been fully determined. Yet, Respondent is already allowed to appropriate said mark by virtue of the questioned-registration.

"24. Section 151 of the IP Code provides: x x x

"25. Considering that it is PETITIONER who actually and continually uses the mark 'XIN YI LONG' in his cake shop and bakery goods, it is therefore without doubt that he has satisfied the requirement for filing a petition for the cancellation of a registered mark under the Intellectual Property Code, specifically:

"26. PETITIONER will clearly be damaged by the granting of the application for registration of RESPONDENT and RESPONDENT's continuous use thereof, despite the fact that the determination of who owns and who is therefore entitled to the registration of the mark 'XIN YI LONG' has not yet been determined with finality.

"27. Allowing the registration of RESPONDENT's mark and RESPONDENT's continuous use thereof will create confusion in the minds of the public as to the real owner of the disputed mark.

"28. PETITIONER is clearly prejudiced by the grant of the application of RESPONDENT. It is PETITIONER who has, and is continuing, to establish the goodwill of the subject mark. Furthermore, the said grant leads to confusion with the public that it is RESPONDENT who owns the said mark, when clearly the determination of such issue has not yet been settled with finality."

The Petitioner's evidence consists of the Special Power of Attorney executed by the Respondent-Registrant to Atty. Florencio Sioson; photocopies of the printouts from IPO website of the Petitioner's Trademark Application Serial No. 42006012987, Cert. of Reg. No. 4-2006-013165, Declaration of Actual Use ("DAU") with attachment filed by the Respondent-Registrant on 28 October 2009; and photographs of products sold by Hap Lee Company, Inc.⁴

The Respondent-Registrant filed his Answer on 08 November 2010 alleging, among other things, the following:

"4.1. Last December 7, 2006, respondent-registrant, as lawful owner and prior user, filed Application Serial No. 4-2006-013165 for the registration of the trademark XINYILONG WITH ITS CHINESE CHARACTERS AND LOGO for use on moon cake, bread, cakes, biscuits, butchi, tikoy, hopia, siopao, quapao, short cake, rolls, pastries, pie, pizza falling under Class 30, and on bakery shop falling under Class 35xxx.

"4.2. On March 6, 2009, respondent-registrant's Application SN 4-2006-013165 was published in the e-Gazette xxx.

"4.3. No opposition having been filed against it, on April 6, 2009, Certificate of Registration No. 4-2006-013165 for the trademark XINYILONG WITH ITS CHINESE CHARACTERS AND LOGO for use on goods falling under Class 30, and on bakery shop falling under Class 35 was issued in favor of respondent-registrant xxx.

"4.4. Last October 28, 2009, respondent-registrant filed his Declaration of Actual Use in compliance with Section 124.2 of the IP Code xxx.

"4.5. Last April 16, 2010, respondent-registrant's Declaration of Actual Use was ACCEPTED by the Bureau of Trademarks x x x.

⁴ Marked as Exhibits "A" to "E", inclusive.

IV
AFFIRMATIVE AND/ OR SPECIAL DEFENSES

x x x

"6. Respondent-Registrant is entitled to the registration of the trademark 'XINYILONG WITH ITS CHINESE CHARACTERS AND LOGO' in his name for use on moon cake, bread, cakes, biscuits, butchi, tikoy, hopia, siopao, quapao, short cake, rolls, pastries, pie and pizza falling under Class 30, and on bakery shop falling under Class 35.

"6.1 Based on the evidence submitted by the parties in IPC No. 14-2008-00100, the Bureau of Legal Affairs found out and concluded that respondent-registrant (oppose therein), is the owner and prior user of the mark trademark 'XINYILONG WITH ITS CHINESE CHARACTERS AND LOGO'. x x x

"6.2 In said IPC No. 14-2008-00100, the BLA Director sustained respondent-registrant's (oppose therein) opposition to, and rejected petitioner's Application SN 4-2006-012987 filed on December 4, 2006 for the registration of the identical mark trademark 'XIN YI LONG WITH CHINESE CHARACTERS AND DEVICE'. x x x

"6.3 In the same Decision 2009-01, the BLA Director found out and concluded that petitioner filed his Application SN 4-2006-012987 for the registration of the identical mark trademark 'XIN YI LONG WITH CHINESE CHARACTERS AND DEVICE' fraudulently and in bad faith. x x x

"6.4. Petitioner filed a Motion for Reconsideration of Decision No. 2009-01 without the required Notice of Hearing.

"6.5 On March 23, 2009, respondent-registrant filed a Motion to Declare Decision 2009-01 Final and Executory contending that the Petitioner's Motion for Reconsideration was a 'mere scrap of paper' as it does not comply with the requirements of Section 4 and 5 of Rule 15 of the Rules of Court re Notice of Hearing. In addition, petitioner's Motion for Reconsideration merely repeated and rehashed the same arguments contained in his previous pleadings.

"6.6. On May 4, 2009, the BLA Director promulgated Resolution No. 2009-33(D) x x x dismissing petitioner's Motion for Reconsideration as a mere scrap of paper and declaring Decision No. 2009-01 final and executory.

"6.7 Thereafter, the Bureau of Trademarks examined respondent-registrant's Application SN 4-2006-013165. Finding said application to conform with the IP Code and the Implementing Rules and Regulations and with the respondent-registrant being entitled to the registration of the mark 'XINYILONG AND ITS CHINESE CHARACTERS AND LOGO' in his name, Application SN 4-2006-013165 was approved for publication and eventually published for opposition on March 6, 2009 x x x.

"6.8 Petitioner did not bother to file his opposition to respondent-registrant's Application SN 4-2006-013165 within the period provided in Section 134 of the IP Code.

In accordance with Section 136 of the IP Code, on April 6, 2009, respondent-registrant was issued Certificate of Registration No. 4-2006-013165 x x x.

"7. Respondent-registrant has complied with Section 124.2 requiring the submission of Declaration of Actual Use within three years from the date of the filing of the application.

"7.1. Respondent-registrant filed his Application SN 4-2006-013165 on December 7, 2006 x x x.

"7.2. On October 29, 2009, within the three year period from December 7, 2006, respondent-registrant filed the required Declaration of Actual Use x x x.

"7.3. Attached to the Declaration of Actual Use were representative wholesale invoices of Hap Lee Company, Inc. dated October 10, 17, and 20, 2009 and packagings/labels showing how respondent-registrant's registered mark trademark "XINYILONG AND ITS CHINESE CHARACTERS AND LOGO" was actually being used, x x x.

"7.4. The Bureau of Trademarks ACCEPTED respondent-registrant's DAU as filed. Pursuant to the Decision in Appeal No. 14-06-01, the authority to pass upon the merits or sufficiency of declaration of actual use is within the jurisdiction of the Director of Trademarks.

"7.5. On April 16, 2010, the Bureau of Trademarks mailed to respondent-registrant a copy of the Declaration of Actual Use bearing the stamp of its ACCEPTANCE x x x."

The Respondent-Registrant's evidence consists of certified copies of Decision 2009-01 promulgated on 12 Jan. 2009 in IPC No. 14-2008-00100, Resolution No. 2009-33 issued on 04 May 2009, and his Trademark Application Serial No. 4-2006-013165, Cert. of Reg. No. 4-2006-013165, DAU filed on 28 Oct. 2009, business permits for 2009 and 2010 of Hap Lee Co., Inc. and said company's representative wholesale invoices. He also submitted a printout of the "electronic Gazette" released on 16 Mar. 2009, duplicate original of the DAU filed on 28 Oct. 2009 and attachments, representative packagings/labels, photographs of Hap Lee Co., Inc.'s display of XINYILONG products, and the duly notarized Affidavit of Simon Tsang who is the duly appointed attorney-in-fact and resident agent of the Respondent-Registrant.⁵

The preliminary conference was conducted and terminated on 24 August 2011. Then after, the parties filed their respective position papers on 02 September 2011.

Should Trademark Reg. No. 4-2006-013165 be cancelled?

Sec. 138 of Rep. Act No. 8293, also known as the Intellectual Property Code of the Philippines ("IP Code") provides:

Sec. 138. Certificates of Registration. - A certificate of registration of a mark shall be *prima facie* evidence of the validity of the registration, the registrant's ownership of the mark, and of the registrant's exclusive right to use the same in connection with the goods or services and those that are related thereto specified in the certificate. (Emphasis supplied)

In *Berris v. Norvy Abyadang*⁶, the Supreme Court held:

The ownership of a trademark is acquired by its registration and its actual use by the manufacturer or distributor of the goods made available to the purchasing public. Section 122 of R.A. No. 8293 provides that the rights in a mark shall be acquired by means of its valid registration with the IPO. A certificate of registration of a mark, once issued, constitutes *prima facie* evidence of the validity of the registration, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the same in connection with the goods or services and those that are related

⁵ Marked as Exhibits "1" to "9".

⁶ G.R. No. 183404, 13 Oct. 2010.

thereto specified in the certificate. R.A. No. 8293, however, requires the applicant for registration or the registrant to file a declaration of actual use (DAU) of the mark, with evidence to that effect, within three (3) years from the filing of the application for registration; otherwise, the application shall be refused or the mark shall be removed from the register. In other words, the *prima facie* presumption brought about by the registration of a mark may be challenged and overcome, in an appropriate action, by proof of the nullity of the registration or of non-use of the mark, except when excused.^{7[23]} Moreover, the presumption may likewise be defeated by evidence of prior use by another person, *i.e.*, it will controvert a claim of legal appropriation or of ownership based on registration by a subsequent user. This is because a trademark is a creation of use and belongs to one who first used it in trade or commerce.

Moreover, the issue of ownership was already resolved by this Bureau in its decision in IPC No. 14-2008-000100, dated 12 January 2009. The cited case involved the same parties and the same mark and which was decided in favor of Chengyi Chen, to wit:

“A review of the arguments of Opposer [Chengyi Chen] vis-à-vis the evidence he presented would show that he is the owner of the mark XIN YI LONG WITH CHINESE CHARACTERS AND DEVICE being applied for registration by herein Respondent-Applicant [Antonio B. See].

“Opposer presented overwhelming evidence of his ownership of the XIN YI LONG WITH CHINESE CHARACTERS AND DEVICE mark. He presented Certificate of Registration No. 1193192 for the trademark XIN YI LONG WITH CHINESE CHARACTERS AND DEVICE issued on July 21, 1998 in China; various brochures showing his XIN YI LONG Pastry House Shop and flyers with listings of the branches including the branch in Benavidez Street, Binondo, Manila; advertisement announcing the opening of the branch in Manila of the Xin Yi Long Bakery as well as plastic bags used in the operation of the bakeshop that were also submitted was made in China as well as in the Philippines as early as 2006. Opposer also presented photographs of him during the inauguration of the Manila branch of the Xin Yi Long Pastry Shop.

“What is more, the admission by Respondent-Applicant in his Answer that he personally knew Opposer as the latter supplied to him various bakery equipment and sent his technical team to train his staff on how to use these equipment bolster the fact that Respondent-Applicant knew Opposer's mark before he filed his own application and that he merely copied the mark from Opposer who owned the mark XIN YI LONG WITH CHINESE CHARACTERS AND DEVICE. As in all other cases of colorable imitations, the unanswered riddle is why, of the millions of terms and combinations of letters and designs available, the Respondent had to choose those so closely similar to another's trademark if there was no intent to take advantage of the goodwill generated by the other mark. It has been aptly said that ‘when a trademark copycat adopts the word portion of another's trademark as his own, there may still be some doubt that the adoption is intentional. But if he copies not only the word but also the word's exact font and lettering style, the slightest doubt vanishes. It is then replaced by the certainty that the adoption was deliberate, malicious and in bad faith.’

“On the other hand, Respondent-Applicant's argument that Opposer acquiesced and did not object to his use of the mark XIN YI LONG WITH CHINESE CHARACTERS AND DEVICE in his bakery shop is ludicrous and preposterous. There is no iota of evidence presented by Respondent-Applicant to prove that Opposer did not object to his using of the latter's mark. On the contrary, the acts of Opposer in filing an application of the mark XIN YI LONG WITH CHINESE CHARACTERS AND DEVICE under his name as well as the filing the instant opposition belie such allegation of acquiescence by Opposer of the use of Respondent-Applicant of

the mark. As such, this Bureau finds that since Respondent-Applicant is not the owner of the mark XIN YI LONG WITH CHINESE CHARACTERS AND DEVICE", he has no right to apply for registration thereof."

There is no cogent reason for this Bureau to decide the instant case otherwise notwithstanding the fact that the Petitioner appealed the cited decision to the Director General. The Petitioner failed to submit evidence to overcome the presumption of ownership of the contested mark accorded to the Respondent-Registrant. Significantly, the Director General already dismissed the Petitioner's appeal in IPC No.14-2008-00100 in a Decision promulgated on 03 February 2012.

Corollarily, this Bureau finds untenable the Petitioner's contention that the registration of the Respondent-Registrant's mark was premature and therefore should be cancelled. The records show that when the Respondent-Registrant's erstwhile trademark application was published for opposition on 16 March 2009, the Petitioner did not file an opposition. Consequently, the Bureau of Trademarks ("BOT") issued a certificate of registration to the Respondent-Registrant pursuant to Sec. 136 of the IP Code which states:

Sec.136. Issuance and Publication of Certificate.- When the period for filing the opposition has expired, or when the Director of Legal Affairs shall have denied the opposition, the Office upon payment of the required fee, shall issue the certificate of registration. Upon issuance of a certificate of registration, notice thereof making reference to the publication of the application shall be published in the IPO Gazette.

Under the above-quoted provision of law, if no opposition is filed or if the opposition is denied, the issuance of a certificate of registration follows as a matter of course. It must be emphasized that it is the Petitioner's trademark application, not the Respondent-Registrant's, which was the subject of IPC No. 14-2008-00100.

Finally, on the Petitioner's contention that Reg. No. 4-2006-013165 should be cancelled because the DAU filed by Respondent-Registrant is invalid, Sec. 124.2 of the IP Code provides that the applicant or the registrant shall file a DAU of the mark with evidence to that effect as prescribed by the Regulations within three (3) years from the filing date of the application, otherwise the application shall be refused or the mark shall be removed from the Register by the Director. Corollary thereto, Rule 204 of the Trademark Regulations reads, as follows:

RULE 204. Declaration of Actual Use.-The Office will not require any proof of use in commerce in the processing of trademark applications. However, without need of any notice from the Office, all applicants or registrants shall file a declaration of actual use of the mark with evidence to that effect within three years, without possibility of extension, from the filing date of the application. Otherwise, the application shall be refused or the mark shall be removed from the register by the Director *motu proprio*.

Under the law and the regulations, it is the Director of Trademarks who has the authority to remove registered trademarks from the Trademark Register on the ground of failure of the registrant to file the required DAU. Appurtenant to the said authority is the determination of whether a DAU submitted is in order or not. In this regard, the Respondent-Registrant filed

his DAU on 28 October 2009, which is within the reglamentary period. The DAU was accepted by the BOT.

WHEREFORE, premises considered the instant petition for the cancellation of Trademark Registration No. 4-2006-013165 is hereby **DENIED**. Let the filewrapper of the subject trademark registration be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

SO ORDERED.

Taguig City, 14 August 2012.



Atty. **NATHANIEL S. AREVALO**
Director IV, Bureau of Legal Affairs