

BENELUX OFFICE FOR INTELLECTUAL PROPERTY
CANCELLATION DECISION
N° 3000033
of 14 May 2019

Claimant: **Heineken Brouwerijen B.V.**
Tweede Weteringplantsoen 21
1017 ZD Amsterdam
The Netherlands

Representative: **Brinkhof N.V.**
De Lairesestraat 111-115
1075 HH Amsterdam
The Netherlands

against

Defendant: **Anheuser-Busch InBev S.A.**
Grand-Place 1
1000 Brussels
Belgium

Representative: **Bird & Bird LLP**
Avenue Louise 235 box 1
1050 Brussels
Belgium

Contested trademark: Benelux registration 1029468



I. FACTS AND PROCEEDINGS

A. Facts

1. On 3 August 2018 the claimant filed an application for a declaration of invalidity with the Benelux Office for Intellectual Property (hereinafter: "the Office"), based on the absolute grounds stated under Article 2.2bis (1)(b) and (c) of the Benelux Convention on Intellectual Property (hereinafter: "BCIP")¹, namely that the contested trademark lacks distinctive character and is descriptive.

2. The cancellation application is directed against Benelux trademark registration 1029468, which was filed by the defendant on 29 December 2017 and was registered on 26 March 2018 for goods in classes 11, 20 and 32, the following semi-figurative mark:



3. The cancellation application is directed against all goods of the contested trademark.

4. The grounds for cancellation are those laid down in Article 2.30bis of the BCIP.

5. The language of the proceedings is English.

B. Course of the proceedings

6. The cancellation request is admissible and was notified by the Office to the parties on 13 August 2018. During the administrative phase of the proceedings both parties filed arguments. The course of the proceedings meets the requirements as stated in the BCIP and the Implementing Regulations (hereinafter: "IR"). The administrative phase was completed on 15 October 2018.

II. ARGUMENTS

A. Claimant's arguments

7. The claimant, in essence, claims that the contested trademark is registered contrary to Article 2.2bis (1)(b) and (c) BCIP because it is not capable of distinguishing the goods for which it is registered. He is of the opinion that the contested trademark consists exclusively of elements which are to be considered descriptive for the goods for which it is registered.

8. According to the claimant, the meaning of the words "PURE DRAUGHT" must be seen in the context of beer, which follows from the slogan "better technology for a fresher beer" and the specification of the goods for which it is registered. Within this context, he refers to the meaning of the words "draught" and "pure". He adds that the word "pure" is commonly used in the context for beer and beer related products and he refers to examples and other trademark registrations for beer in support of this

¹ This decision shall always refer to the laws and regulations applicable on the date of the decision, except in the case of provisions which have undergone a material change during the proceedings and which are relevant to the decision.

claim. The claimant states that the laudatory character of the word "pure" is obvious, which implies that it should be excluded from registration.

9. Furthermore the claimant states that the combination "PURE DRAUGHT" does not amount to anything else than just the sum of the words. It only indicates that the goods are made of draught beer only, or that the draught beer is clear, unblended and bright. The combination of the words does not add an extra meaning that would make the combination distinctive.

10. As far as the slogan "better technology for a fresher beer" is concerned, the claimant finds that it is purely descriptive and that it lacks any distinctive character. He is of the opinion that it is nothing more than just a mere descriptive, promotional formula. The language used is the simplest, correct form to convey the message that the goods, fresh beer, are made with a better technology than until recently existed. "In no way does the slogan convey an indication of commercial origin", according to the claimant.

11. Also, the graphical elements used in the contested registration are found to be "wholly indistinctive" by the claimant. First of all this applies to the black background and white lettering and the typeface, the font effects as well as the size of the typeface and the position of the words also do not add any distinctiveness. Also the claimant considers the horizontal lines not distinctive. Simple geometric devices such as circles, lines or rectangles are unable to convey any message that can be remembered by consumers and accordingly will not be seen by them as a trademark.

12. Lastly, the claimant comments on the stylised letter "U" in the word "DRAUGHT". He states that this letter as such is not capable to add distinctiveness to the whole sign. First of all, he finds that it plays only a secondary, non-dominant, role within the combination of all the more strikingly present other elements of the contested registration. Secondly, the depiction of the letter is meant to represent a type of good for which the contested trademark is registered. Figurative representations which either form a true to-life portrayal of the goods or when it consists of a symbolic/stylised portrayal of the goods, are considered to be descriptive and/or not devoid of distinctive character, as per the claimant. In support of this claim, he refers to the website of the defendant which shows the design of disposable kegs. The claimant finds that it is clear that the stylised letter "U" is intended to give a stylised representation of a small keg.

13. In conclusion, the claimant finds the whole sign descriptive for the goods for which it has been filed and lacking any distinctive character. Therefore, he requests that the contested registration be declared invalid in its entirety and that the Office orders the defendant to bear the costs as provided for in Article 2.30ter, 5 BCIP.

B. Defendant's arguments

14. The defendant starts by pointing out the principles common to both grounds of invalidity invoked by the claimant. Firstly, he considers that the trademark enjoys a presumption of validity, which means that the burden of proof lies with the claimant. Secondly, the assessment as to whether a trademark should be registered or should be declared invalid must be performed on the basis of the situation as of the date of its application. Furthermore the defendant points out that the distinctive character of a trademark must be assessed by reference to the goods and services in respect of which registration is sought/secured and to the relevant public's perception of that sign. And finally, in order to assess

whether or not a trademark has any distinctive character, the overall impression given by it must be considered.

15. The defendant disputes the arguments of the claimant regarding the descriptiveness of both the individual words PURE and DRAUGHT as well as their combination. Referring to the examples submitted by the claimant regarding the common use of the word PURE within the food and beverage industry, the defendant raises two objections to the claimant's argument. First, none of the illustrations refer to the specific goods for which the trademark is registered and second, a number of manufacturers of food and beverage products referred to by the claimant have in fact sought and obtained trademark protection for signs containing the word PURE. The word element PURE is therefore not, as such, always excluded from trademark protection, according to the defendant. Furthermore, the defendant is of the opinion that the documents submitted by the claimant should be disregarded, as they are dated after the filing date of the disputed trademark.

16. The illustrations submitted by the claimant in support of his allegation that the word PURE is commonly used in a descriptive manner also within the context of beer and beer related products fail to show, according to the defendant, that the use of the word PURE makes a complex mark invalid when it relates to beer or beer products. Again, some manufacturers of beer products have sought and obtained trademark protection for signs containing the word PURE. Moreover, the existence of earlier trademark registrations show that the word PURE can – in combination with other word and/or figurative elements – be perfectly capable of fulfilling the essential function of a trademark.

17. The defendant adds that an affiliate of the claimant is the owner of a French trademark registration PURE EDITION for beer related goods in class 32, which the defendant sees as a substantiation of his position regarding the word PURE in trademarks for beer.

18. In subsidiary order, the defendant notes that the claimant does not motivate in what sense the word PURE is considered to be descriptive of a characteristic of the goods in classes 11 and 20.

19. As far as the word DRAUGHT goes, the defendant is of the opinion that it is not part of the basic English words that the Benelux public will immediately understand and that it can therefore not be considered descriptive for the relevant goods.

20. Regarding the combination PURE DRAUGHT the defendant observes that the claimant himself uses the combination as a distinctive sign and as a trademark when referring to the goods covered by the trademark.

21. Concerning the slogan "better technology for a fresher beer", the defendant finds that the claimant did not take into account that the trademark also covers goods in classes 11 and 20. The claimant only developed an argumentation regarding the descriptive character of the slogan for "fresh beer". Second, the defendant refers to the case law of the CJEU from the "VORSPRUNG DURCH TECHNIK" case. According to the defendant the slogan introduces an element of conceptual intrigue and surprise as there is no obvious causal link between technology and a fresh beer in the mind of the Benelux public. Therefore, he considers the slogan to be more than a mere ordinary advertising message and finds that it has at least some distinctive character for the goods concerned.

22. The defendant states that the methodology used by the claimant to assess the individual graphical elements is wrong in law, as he disregards the overall impression. Moreover, the defendant firmly disputes the claimant's argument that the stylized letter "U" would only play a secondary, non-dominant role in the trademark. According to the defendant it is a central and dominant element of the trademark.

23. The claimant's statement that the stylization will be perceived by the public as a figurative representation of a keg and its cap is not substantiated as a matter of fact, according to the defendant. He continues that the claimant does not provide any indication, let alone evidence, of such a perception by the relevant public. The only document provided, an extract from the website puredraught.com, should be disregarded since it is dated 10 months after the filing date of the disputed trademark.

24. The defendant adds that the stylized letter "U" is not at all a true to-life portrayal or symbolic/stylized portrayal of the goods, but that it is very stylized. The graphical elements of the trademark, taken individually and together, are distinctive, not descriptive, and they substantially add to the overall distinctiveness of the trademark as a whole.

25. According to the defendant the claimant does not consider the trademark as a whole. Even if the Office would consider that each word resp. figurative element of the trademark taken separately is indeed descriptive resp. non-distinctive (*quod non*), the combination and especially the presence of the figurative elements in the trademark, render the sign non descriptive and distinctive as a whole.

26. In conclusion the defendant finds that the claimant, who has the burden of proof, has not established by relevant evidence that all elements individually are descriptive for all the goods covered. Not only do the different elements taken separately have the minimum degree of distinctiveness required, but a proper global assessment clearly leads to the conclusion that the contested trademark is distinctive and not descriptive, as per the defendant.

27. The defendant requests the rejection of the claim for invalidation based on Article 2.30bis (1)(a) *juncto* Article 2.2bis (1)(c) BCIP and the disputed registration to be upheld. Consequently the claimant should be ordered to bear the fees and costs incurred by the defendant.

28. As the claimant has not put forward a separate argumentation regarding the lack of distinctive character – other than what has been set out under his claim as to the descriptiveness of the trademark. The defendant argues that the claim based on Article 2.30bis (1)(a) *juncto* Article 2.2bis (1)(b) must be rejected as well for the reasons set out above.

III. GROUNDS FOR THE DECISION

A.1. Legal framework

29. Pursuant to Article 2.30bis (1)(a) BCIP any interested party may file with the Office an application for invalidation based on the grounds set out in Article 2.2bis (1) BCIP.

30. It follows from the case-law that the relevant date for the purposes of examining, in the context of an application for a declaration of invalidity based on Article 2.30bis (1)(a) BCIP, the compliance of a trademark with Article 2.2bis (1) of the BCIP is that of the date of filing of the application for registration (see by analogy CJEU, *Flugbörse*, 23 April 2010, C-332/09 P, ECLI:EU:C:2010:225). The Supreme Court

of the Netherlands ruled that in the absence of transitional provisions, the assessment of the distinctive character of a registered trademark should take account of the factual situation at the time of application, but apply the law applicable at the time of assessment (Supreme Court of the Netherlands, BACH FLOWER REMEDIES, 20 January 2012, ECLI:NL:HR:2012:BU7244).

A.2. Regarding the ground set out in Article 2.2bis (1)(c) - Descriptive trademarks

31. According to Article 2.2bis (1)(c) BCIP, trademarks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or time of production of the goods or performance of the service, or other characteristics of the goods or services shall not be registered or, if registered, shall be liable to be declared invalid.

32. According to settled case-law, the prohibition of registration of descriptive signs or indications (cf. Article 2.11 (1)(c) BCIP) pursues an aim that is in the public interest, which requires that such signs and indications may be freely used by all. The provision accordingly prevents such signs and indications from being reserved to one undertaking alone because they have been registered as trademarks (see CJEU, DOUBLEMINT, 23 October 2003, C-191/01 P, ECLI:EU:C:2003:579; CHIEMSEE, 4 May 1999, C-108/97 and C-190/97, ECLI:EU:C:1999:230 and LINDE AND OTHERS (three-dimensional shape of product mark), 8 April 2003, C-53/01 to C-55/01, ECLI:EU:C:2003:206).

33. For a trademark to be refused registration under Article 2.2bis (1)(c) BCIP, it is not necessary that the signs and indications composing the mark that are referred to in that Article actually be in use at the time of the application for registration in a way that is descriptive of goods or services such as those in relation to which the application is filed, or of characteristics of those goods or services. It is sufficient, as the wording of that provision itself indicates, that such signs and indications could be used for such purposes. A sign must therefore be refused registration under that provision if at least one of its possible meanings designates a characteristic of the goods or services concerned (CJEU, Doublemint, already mentioned).

34. The descriptive character of a sign must be assessed, firstly, by reference to the goods and services concerned and, secondly, in relation to the perception of that sign by the relevant public, which is composed of consumers of those goods and services (see CJEU, judgment POSTKANTOOR, 12 February 2004, C-363/99, ECLI:EU:C:2004:86).

35. The invalidity claim is directed against all goods of the contested trademark. The goods for which the disputed sign is registered are the following:

- CI 11 Temperature-controlled beverage dispensers, and components thereof; beverage-cooling apparatus.
- CI 20 Non-metal taps for kegs; non-metal kegs; containers, not of metal for commercial use; plastic containers and covers for the food and beverage industry.
- CI 32 Alcoholic and non-alcoholic beers.

36. Regarding the relevant public, the goods and services of the contested trademark are directed at both average consumers and a professional public. The level of that public's attention therefore varies

between that of a reasonably well-informed and reasonably observant and circumspect consumer and that of a highly attentive consumer. As a matter of fact all goods can be directed at average consumers which consume beer, from a bottle, a can or a home beer dispenser or at owners of pubs and restaurants which serve beer to the end consumer.

37. A trademark consisting of a word composed of elements, each of which is descriptive of characteristics of the goods or services in respect of which registration is sought, is itself descriptive of the characteristics of those goods or services for the purposes of Article 2.2bis (1)(c), unless there is a perceptible difference between the word and the mere sum of its parts: that assumes either that because of the unusual nature of the combination in relation to the goods or services the word creates an impression which is sufficiently far removed from that produced by the mere combination of meanings lent by the elements of which it is composed, with the result that the word is more than the sum of its parts, or that the word has become part of everyday language and has acquired its own meaning, with the result that it is now independent of its components. In the latter case, it is necessary to ascertain whether a word which has acquired its own meaning is not itself descriptive for the purposes of the aforementioned provision (see CJEU, POSTKANTOOR, cited above).

38. As regards the use of the English language, it has been pointed out by Advocate General Ruiz-Jarabo Colomer in his Opinion of 14 May 2002 that *"the fact that there are many applications for trade marks composed of English words in itself shows that applicants assume a certain level of understanding of English, even where consumers have a different mother tongue"* (Opinion of Advocate General Ruiz-Jarabo Colomer of 14 May 2002, Companyline, C-104/00 P, ECLI:EU:C:2002:288). *"In other words, it is necessary to have regard not so much to whether that consumer speaks the language in which the sign is formulated as to whether, irrespective of the language or languages of the territory concerned, the consumer taken as a reference can reasonably be expected to perceive in the sign a meaning such as to enable it to qualify under Article 3(1)(b), (c) and (d)"* (Opinion of Advocate General Ruiz-Jarabo Colomer of 31 January 2002, Postkantoor, C-363/99, ECLI:EU:C:2002:65).

39. In addition, it is settled case-law that the English language is understood and spoken by a large part of the public in the Benelux². In its *Asian Delight* judgment the Brussels Court of Appeal stated that knowledge of the English language is indeed sufficiently widespread among the relevant public in this territory (the Benelux) to conclude that it is reasonable to expect the consumer to recognize the English origin of these words and to understand their exact meaning. It is also apparent from the case-law that a word sign consisting of English words, the combination of which is grammatically correct, may have meaning not only for an English-speaking public but also for a public which has sufficient knowledge of the English language (GC, LIVE RICHLY, T-320/03, 15 September 2005, ECLI:EU:T:2005:325 and NEW LOOK, T-435/07, 26 November 2008, ECLI:EU:T:2008:534).

40. The goods in question all relate to beer and a means to store and dispense beer. The word elements in the contested trademark are "PURE DRAUGHT" and the slogan/pay-off "BETTER TECHNOLOGY FOR A FRESHER BEER".

41. First, concerning the slogan, it is settled case-law that marks made up of signs or indications that are also used as advertising slogans, indications of quality or incitements to purchase the goods or services covered by those marks, registration of such marks is not excluded as such by virtue of such use

² Court of Appeal Brussels, Pronails, 14 January 2015, 2013/AR/2181; Carbon Green, 5 October 2010, 2009/AR/3023 ; Quickfilm, 13 June 2008, 2006/AR/1745 and ASIAN DELIGHT, 4 March 2008, 2006/AR/1592

(CJEU, VORSPRUNG DURCH TECHNIK, 21 January 2010, C-398/08 P, ECLI:EU:C:2010:29). However, in the present case the slogan is descriptive. As a consequence, there is no need to ascertain whether or not this sentence has a certain originality or resonance, requiring at least some interpretation by the relevant public, or setting off a cognitive process in the minds of that public. Indeed, in the "VORSPRUNG DURCH TECHNIK" judgment the CJEU (already cited) clearly stated that *"in so far as those marks are not descriptive for the purposes of Article 7(1)(c) of Regulation No 40/94, they can express an objective message, even a simple one, and still be capable of indicating to the consumer the commercial origin of the goods or services in question. That can be the position, in particular, where those marks are not merely an ordinary advertising message, but possess a certain originality or resonance, requiring at least some interpretation by the relevant public, or setting off a cognitive process in the minds of that public."* The slogan clearly indicates that the goods in question result from (for the goods in class 32) or are provided by means of (for the goods in classes 11 and 20) an improved technological solution with the purpose of serving a fresher beer. It is therefore considered to be descriptive.

42. Second, as far as the word combination "PURE DRAUGHT" is concerned, the claimant referred to the Cambridge and Oxford dictionary to substantiate his claim that both words separately, as well as combined, should be considered descriptive. The Office holds that the mere reference to English dictionaries is insufficient to prove the descriptive character of a word. As mentioned before, the perception of the relevant public should be taken into account. Notwithstanding facts which are obvious, common place or well-known, the Office cannot conclude based on a simple foreign dictionary reference that the meaning of any English word will be understood by the relevant Benelux consumer. However, the word "PURE" is, and was at the date of filing, a very common word and is closely related to its translation in both Dutch and French. Although the examples regarding the word "PURE", some of which in the context of beer and beer related products, to which the claimant refers are not dated or are from after the date of filing, they do support the conclusion that the word itself is common place and would also be understood by the relevant public at the date of filing. On the other hand, the claimant's statements lack sufficient presumptive evidence regarding the perception of the relevant Benelux consumer in order to come to the conclusion that this public will perceive the word "DRAUGHT" as a descriptive indication for the goods in question. Notwithstanding the knowledge of the English language by the Benelux public, the word "DRAUGHT", although it has a meaning in the English language in relation to the goods at hand, namely *"a system of storing and serving drinks from large containers, especially barrels"* or *"(of drinks such as beer) stored in and served from large containers, especially barrels"*³, is not a common word. Therefore, the Office comes to the conclusion that the claimant did not sufficiently substantiate that the word combination "PURE DRAUGHT" consists exclusively of signs which may serve to designate the characteristics of the relevant goods.

43. Third, the sign contains some figurative elements, namely two horizontal lines above and underneath the word "DRAUGHT". Moreover, the vowel "U" is stylized and interrupts the lower horizontal line. At the top of the U, in the middle of the upper horizontal line, there is a geometrical shape. All figurative and verbal elements are white on a rectangular black background. Contrary to the allegations of the claimant, the Office is of the opinion that the stylized letter "U" will not be perceived by the public as a descriptive element. Even when taking into account the argument of the claimant that this figurative element refers to the kegs used in the defendant's beer system, the Office concludes this should be considered a sufficient stylization. Indeed, the figurative element not only takes up a central and visually

³ <https://dictionary.cambridge.org/dictionary/english/draught>

dominant position in the sign, it is also a striking element which is stylized in such a way that it renders the sign distinctive because of the fact that the relevant public would not immediately perceive what it represents exactly.

44. As a result, the Office cannot come to the conclusion that the sign – considered as a whole – is descriptive for the goods at hand.

A.3. Regarding the ground set out in Article 2.2bis (1)(b) - Trademarks devoid of distinctive character

45. The marks referred to in Article 2.2bis (1)(b) BCIP are those that are regarded as incapable of performing the essential function of a trademark, namely that of identifying the commercial origin of the goods or services in question, thus enabling the consumer without any possibility of confusion, to distinguish the product or service from others which have another origin (see CJEU, *DAS PRINZIP DER BEQUEMLICHKEIT*, 21 October 2004, C-64/02 P, ECLI:EU:C:2004:645; *BioID*, 15 September 2005, C-37/03 P, ECLI:EU:C:2005:547 and *EUROHYPO*, 8 May 2008, C-304/06 P, ECLI:EU:C:2008:261).

46. The distinctive character of a mark must be assessed, first, by reference to the products or services in respect of which registration has been applied for and, second, by reference to the perception of the relevant public (see e.g. CJEU, *VORSPRUNG DURCH TECHNIK*, already cited; *Procter & Gamble v OHIM* (three-dimensional tablets for washing machine or dishwashers), 29 April 2004, C-473/01 P, ECLI:EU:C:2004:260, and judgments *EUROHYPO* and *POSTKANTOOR*, both already cited).

47. Furthermore, it is settled case-law that a sign's lack of distinctive character cannot arise merely from the finding that it does not look unusual or striking. Registration of a sign as a trademark is not subject to a finding of a specific level of linguistic or artistic creativity or imaginativeness on the part of the proprietor of the trademark. It suffices that the trademark should enable the relevant public to identify the origin of the goods or services protected thereby and to distinguish them from those of other undertakings (see CJEU, *SAT.2*, 16 September 2004, C-329/02 P, ECLI:EU:C:2004:532).

48. As regards a composite trademark, such as that at issue in the present case, the assessment of its distinctive character cannot be limited to an evaluation of each of its words or components, considered in isolation, but must, on any view, be based on the overall perception of that mark by the relevant public and not on the presumption that elements individually devoid of distinctive character cannot, on being combined, have a distinctive character (see, to that effect, CJEU, *SAT.2*, already cited). The mere fact that each of those elements, considered separately, is devoid of any distinctive character does not necessarily mean that their combination cannot present such character (see, CJEU, *BioID* and *EUROHYPO*, both cited above).

49. It is in the light of the aforementioned considerations that it must be ascertained whether the sign at issue lacks distinctive character, as claimed by the claimant.

50. As mentioned above (see paragraph 43) the contested registration contains a non-descriptive and distinctive figurative element. Therefore, even if the relevant Benelux consumers would consider the word elements to be descriptive, a fact which has been however insufficiently substantiated by the claimant (see paragraph 42), the disputed trademark is not devoid of any distinctive character in the sense of Article 2.2bis 1(b) BCIP.

B. Conclusion

51. Based on the foregoing the Office is of the opinion that the contested trademark considered as a whole is not descriptive and is not devoid of any distinctive character.

IV. DECISION

52. The cancellation application with number 3000033 is rejected.

53. The claimant shall pay the defendant 1,420 euros in accordance with Article 2.30ter, 5 BCIP in conjunction with rule 1.44, 2 IR, as the cancellation application is rejected in its entirety. This decision constitutes an enforceable order pursuant to Article 2.30ter, 5 BCIP.

The Hague, 14 May 2019

Diter Wuytens
(*rapporteur*)

Camille Janssen

Pieter Veeze

Administrative officer: Diter Wuytens