

**BENELUX OFFICE FOR INTELLECTUAL PROPERTY
CANCELLATION DECISION
N° 3000334
of 16 February 2023**

Claimant: **Wolf and Timber Inc.**
151 Charles St. W. Suite # 100
N2G1H6 Kitchener (Ontario)
Canada

Representative: **Brinkhof N.V.**
Grote Bickersstraat 74-78
1013 KS Amsterdam
The Netherlands

against

Defendant: **200 Fahrenheit B.V.**
Oudeweg 101
2031 CC Haarlem
The Netherlands

Representative: **RISE**
Postbus 5366
2000 GJ Haarlem
The Netherlands

Contested trademark: Benelux registration 1022151

GRIZZLY GRILL

I. FACTS AND PROCEEDINGS

A. Facts

1. On 11 August 2021 the claimant filed an application for a declaration of invalidity with the Benelux Office for Intellectual Property (hereinafter: "the Office") in accordance with Article 2.30bis (1)(a), invoking the absolute grounds stated under Article 2.2bis (1)(b), (c) and Article 2.2bis (2) of the Benelux Convention on Intellectual Property (hereinafter: "BCIP"), namely that the contested trademark is devoid of any distinctive character, is descriptive and was filed in bad faith.

2. The cancellation application is directed against Benelux trademark registration 1022151 of the wordmark GRIZZLY GRILL, which was filed by the defendant on 29 August 2017 and was registered on 26 December 2017 for goods in classes 11 and 21.

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

4. The language of the proceedings is English.

B. Course of the proceedings

5. The cancellation request is admissible and was notified by the Office to the parties on 13 August 2021. 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 13 January 2022.

II. ARGUMENTS

A. Claimant's arguments

6. The claimant claims that the contested trademark is registered contrary to Article 2.2bis (1)(b) and (c) BCIP because the trademark is not capable of distinguishing the goods for which it is registered. Claimant is of the opinion that the contested trademark consists exclusively of a sign which is to be considered descriptive for the goods in classes 11 and 21.

7. According to claimant the relevant public is the public at large and the professional consumer. All goods for which the contested trademark is registered relate to (outdoor) grilling and accessories to be used for grilling. The element GRILL, which is English for the identical and closely resembling Dutch words 'grill' and 'grillen' and the French words 'le gril' and 'griller' is commonly understood by the relevant public, as relating to outdoor grilling equipment, such as grills, barbecues and other appliances to grill food on. The element GRILL is therefore evidently non-distinctive or descriptive of goods relating to grilling, grills, barbecues and grilling accessories, as well as kitchen appliances which can be used for, inter alia, grilling.

8. The element GRIZZLY means grey. This common understanding of the meaning 'grey' of the element GRIZZLY is confirmed by the fact that the grizzly bear is named as such. This simply refers to a bear, whose fur has generally greyish tips. Therefore, the element GRIZZLY is descriptive of a characteristic of the goods the contested trademark is registered for, namely that they are in the colour grey.

9. The contested trademark merely consists of two descriptive elements, and is in itself, considered as a whole, descriptive as well. The sign GRIZZLY GRILL immediately informs consumers without further reflection that the goods the sign is registered for concern goods in the colour grey that are intended for grilling. The combination of GRIZZLY and GRILL in the contested trademark does not amount to an unusual variation that creates an impression that is sufficiently far removed from the combination of the meanings of these elements,

10. The descriptive character of the contested trademark GRIZZLY GRILL for the goods for which it is registered is reinforced by the fact that defendant actually offers for sale grizzly grills, i.e. grills in the colour grey, via its website.

11. According to European case law a word mark that is descriptive will, on that account, also be devoid of any distinctive character with regard to those same goods and services.

12. In view of the above, claimant feels that the sign GRIZZLY GRILL has been accepted for registration wrongly, while there was no acquired distinctiveness of the trademark at the date of application or after registration. Claimant respectfully requests the Office to review the registrability of Benelux registration no. 1022151 for the word mark GRIZZLY GRILL and to declare the trademark registration invalid for all goods the mark is registered for, on the ground of Article 2.2bis(1)(c) BCIP and/or Article 2.2bis(1)(b) BCIP. In addition, claimant requests the Office to order defendant to bear claimant's costs in these proceedings.

B. Defendant's arguments

13. According to defendant the Office correctly decided to accept the registration of the sign GRIZZLY GRILL, since it does not, in any way, refer to the kind, quality, intended purpose, geographical origin or other characteristics of the goods in classes 11 and 21. While the element GRILL refers to an apparatus for grilling food, the relevant public will not have any kind of understanding of the word GRIZZLY in relation to the goods in question.

14. In view of the goods of the contested trademark, the relevant public is the average consumer, normally informed and reasonably observant and circumspect. Even though English is a language commonly known by the Benelux public, it has an average knowledge of this language and will not recognize the meaning of a typical British word that is lesser known and not even often used by native English speakers.

15. Even if it may be the case that an online dictionary assigns to GRIZZLY the meaning "grayish" "somewhat grayish" or "strikes of gray", this does not mean that this meaning is also grasped by the relevant public in relation to the goods in question. When the term GRIZZLY is used, the relevant public will exclusively think of a "grizzly bear", which, has no connection whatsoever with the goods in question. This reasoning is confirmed by the definitions and use of the word GRIZZLY on the Internet. Most online lexicons define grizzly as "an animal of a large race of the brown bear native to North America.". The word can also be used in the following context: "If children are grizzly, they complain or cry a lot, often because they are unwell or tired."

16. Incidentally, online dictionaries refer to 'grizzly' meaning 'somewhat grayish' or 'strikes of gray'. If we take a closer look at the British meaning of the word grizzly, it becomes clear that it is obviously used (exclusively) in reference to the colour of hair or fur, e.g. to indicate that someone is ageing. "Grizzly" or

"grizzled" connotes age or weariness. In any case, it will not be understood by the relevant public as any kind of reference to the colour of products or even the colour of a barbecue.

17. The assumption that the relevant public would understand the combination of 'grizzly' and 'grill' to mean 'grey grill' is therefore incorrect and disputed. It is also incorrect that this colour is common to grills. The word GRIZZLY has no connection whatsoever with grills, barbecues, barbecuing itself or barbecue parts and accessories.

18. Defendant concludes that the application of invalidity must be rejected and requests the Office to reject the application of claimant and to order the claimant to pay the costs of the proceedings.

III. GROUNDS FOR THE DECISION

A.1 Scope of the claim

19. The cancellation request is also based on the provision set out in Article 2.2bis (2) BCIP ('filing in bad faith') (see paragraph 1). The claimant however did not provide any arguments supporting his claim based on this ground. Consequently the Office will not examine this ground of the initial claim.

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

20. 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.

21. According to settled case law of the Court of Justice of the European Union (hereinafter: CJEU), the prohibition of registration of descriptive signs or indications pursues an aim which is in the public interest, namely 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.¹

22. The CJEU clarified that it is not necessary that the signs and indications composing the trademark actually be in use at the time of the application for registration in a way that is descriptive of goods or services. It is sufficient that such signs and indications *may* be used for such purposes. A sign must therefore be refused registration if at least one of its possible meanings designates a characteristic of the goods or services concerned.²

23. The ECJ further pointed out that 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 those characteristics, unless there is a perceptible difference between the word and the mere sum of its parts.³

¹ CJEU 23 October 2003, C-191/01 P, ECLI:EU:C:2003:579, point 31 (Doublemint) and case law mentioned there.

² CJEU 12 February 2004, C-363/99, ECLI:EU:C:2004:86, point 97 (Postkantoor) and case law mentioned there.

³ CJEU 12 February 2004, C-363/99, ECLI:EU:C:2004:86, point 100 (Postkantoor).

24. The descriptive character of a sign must be assessed, first, by reference to the goods and services concerned and, second, in relation to the perception of the relevant public, which consists of average consumers of those goods and services in question who are reasonably well informed and reasonably observant and circumspect.⁴

25. Claimant basically argues that the contested trademark is descriptive because the trademark consists of the elements GRIZZLY and GRILL which immediately inform consumers without further reflection that the goods the sign is registered for concern goods in the colour grey that are intended for grilling. The invalidity claim is directed against all goods of the contested trademark. The goods for which the disputed sign is registered are the following:

- Cl 11: Cooking appliances including barbecues, barbecue grills and parts and accessories thereof, namely: grill hoods, grills, gas connections, grill grates, warming racks, buffet warmers, charcoal grills, side burners, plates of cast iron and steel, gas burners for barbeque grillers, regulators for barbeque grillers.
- Cl 21: Household, kitchen and barbecue utensils and crockery (not of precious metal nor gold-plated or silverplated); Brushes (except paint brushes); glassware, porcelain and earthenware, not included in other classes; spice holders; holders for grill accessories; cutting boards; brushes for basting meat; turners [kitchenware]; cutlery for meat; grill tongs; drip pans; pizza scoops, woks for barbeque grill apparatus; pans for barbeque grill apparatus; skewers.⁵

26. As the claimant has pointed out (see paragraph 7) and defendant not disputed (see paragraph 13), the word GRILL is descriptive for these goods. However, the Office is of the opinion that the word GRIZZLY is not. According to the Office the relevant Benelux public, consisting of the public at large and the professional consumer, will not know the meaning of the word GRIZZLY. Although the Benelux public generally has a more than average knowledge of the English language, GRIZZLY is not a term from a basic everyday vocabulary. According to the Office the Benelux public will, hearing the word GRIZZLY, at most think of a grizzly bear, which, as argued by defendant (see paragraph 15) is not descriptive for the goods involved, and not of the colour grey. The claimant also did not demonstrate that a significant part of the relevant Benelux public will understand the word GRIZZLY as referring to the colour grey. In this respect the Office recalls that in invalidity proceedings it is up to the claimant to call the validity of the contested trademark into question and to sufficiently substantiate this claim.⁶

⁴ CJEU 12 February 2004, C-363/99, ECLI:EU:C:2004:86, point 34 (Postkantoor) and case law mentioned there.

⁵ The original language of the list of goods is in Dutch. For reasons of clarity the Office has provided a non-official translation. The original list reads as follows:

Cl 11 Kooktoestellen waaronder barbecues, barbecue-grilltoestellen en onderdelen en accessoires daarvan, te weten grillkappen, grilltoestellen, aansluitingen voor gashouders, grillroosters, warmhoudroosters, buffetwarmers, houtskoolroosters, zijbranders, platen van gietijzer en staal, gasbranders voor barbecue-grilltoestellen, regelaars voor barbecue-grilltoestellen.

Cl 21 Gerei en vaatwerk voor de huishouding, de keuken en de barbecue (niet van edele metalen noch verguld of verzilverd); Borstels (uitgezonderd penselen); glas-, porselein- en aardewerk, voor zover niet begrepen in andere klassen; specerijhouders; houders voor grillaccessoires; snijplanken; kwasten voor het bedruipen van vlees; wentelaars [keukengerei]; vleesbestek; grilltangen; druppelschalen; pizzascheppen, woks voor barbecue-grilltoestellen; pannen voor barbecue-grilltoestellen; grillspiezen.

⁶ General Court 19 October 2022, T-486, ECLI:EU:T:2022:642, point 76 (Swisse).

A.3 Regarding the ground set out in Article 2.2bis (1)(b) – Non distinctive trademarks

27. Claimant argues that a descriptive trademark will also be devoid of any distinctive character in the meaning of Article 2.2bis (1)(b) BCIP (see paragraph 11). Since it has not been shown that the contested trademark is descriptive (see paragraph 26), the reliance on Article 2.2bis (1)(b) BCIP also fails.

B. Conclusion

28. Based on the foregoing the claim for cancellation of the contested trademark shall be rejected.

IV. DECISION

29. The cancellation application with number 3000334 is not justified.

30. Benelux registration 1022151 will be upheld for all the goods for which it is registered.

31. 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, 16 February 2023



Marjolein Bronneman
(*rapporteur*)

Eline Schiebroek

Camille Janssen

Administrative officer: Rémy Kohlsaat