

BENELUX OFFICE FOR INTELLECTUAL PROPERTY
CANCELLATION DECISION
N° 3000357
of 31 August 2023

Claimant: **Hangzhou Mengku Technology Co. Ltd**
Room 721, 7th Floor, Building 2
Center, No. 1001, Yuhangtang Road,
Xihu District, Hangzhou
Zhejiang 310012
China

Representative: **Arnold & Siedsma**
Postbus 71720
1008 DE Amsterdam
Netherlands

against

Defendant: **Ilyon Dynamics Ltd**
Lev Haaretz Industrial Zone POB 731
4810602 Rosh Haayin
Israel

Representative: **Taylor Wessing N.V.**
Postbus 3
5600 AA Eindhoven
Netherlands

Contested trademark: Benelux registration 1446816



I. FACTS AND PROCEEDINGS

A. Facts

1. On 5 October 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) of the Benelux Convention on Intellectual Property (hereinafter: "BCIP"), invoking the absolute grounds stated under Article 2.2bis (1)(b) and (c) BCIP, namely that the contested trademark is devoid of any distinctive character and is descriptive.

2. The cancellation application is directed against the Benelux semi-figurative trademark 1446816



, filed on 3 July 2018 registered on 28 September 2021 (and which is based on the conversion of a European Union trademark applied for on 3 July 2018) for goods and services in classes 9 and 41.

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

4. The language of proceedings is English.

B. Course of the proceedings

5. The cancellation request is admissible and was notified by the Office to the parties on 8 October 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 11 October 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 and services for which it is registered. Claimant is of the opinion that the contested trademark is fully descriptive in relation to the goods and services in question and it does not carry any distinctive character. The bubbles are merely descriptive and lack distinctiveness as well.

7. In its preliminary remarks, the claimant points out that the contested trademark was first filed with the European Union Intellectual Property Office (hereinafter: "EUIPO") which refused to register it for the majority of goods and services on the grounds that it was descriptive and lacked distinctive character. The claimant explains that this refusal was contested by the defendant before the Board of Appeal of the EUIPO, which ultimately dismissed the appeal.

8. According to the claimant, BUBBLE and SHOOTER are both very basic words in the English language that will be understood by the average consumer in Benelux. The claimant refers to the Merriam Webster

online dictionary to define the word BUBBLE as a "small globule that is typically hollow and light" and the word SHOOTER as "someone or something that shoot" or "something that is used in shooting".

9. The claimant considers that the goods and services in question can be summarized as downloadable computer games and online computer game services, which are aimed at the public at large, namely anyone with a smart-phone, tablet and/or desktop computer. He indicates that consumers will perceive BUBBLE SHOOTER in relation to the goods as referring to a video game in which you need to shoot bubbles. The claimant relies on a screenshot, dated 15 November 2021, of the defendant's current website to confirm this assertion.

10. The claimant also refers to the decision of the Board of Appeal of the EUIPO to points out that the relevant public being confronted with the word combination BUBBLE SHOOTER on video games will immediately perceive the word combination as describing a game wherein the goal, theme or subject matter of the gaming software/programs is to shoot bubbles.

11. According to the claimant, the term BUBBLE SHOOTER was in fact used well before the application of the contested trademark, to describe a specific type of computer games, namely bubble shooter games. To support this reasoning, he provided several screenshots, taken by the Wayback Machine web archiving tool, of various websites available in the Benelux for 2017-2018. The claimant considers that these screenshots clearly show that the term BUBBLE SHOOTER was used as a generic term to describe games wherein the goal is to shoot bubbles well before the application date of the contested trademark. In another annex, the claimant provides screenshots dated 4 November 2021, from the Google Play Store and Apple App Store. He considers that these show that a search for BUBBLE SHOOTER reveals a large number of apps from different developers in which the player needs to shoot bubbles. The claimant stresses that, in the Google Play Store, the term Bubble Shooter is used as a game category. Therefore, he concludes that the word elements BUBBLE SHOOTER are merely descriptive, lack distinctive character and that the same applies to the word combination.

12. Regarding the figurative elements of the contested trademark, the claimant recalls that while the addition of distinctive elements to descriptive words may make a sign distinctive, this is not the case when the device elements are descriptive/non-distinctive as well. In the claimant's view, the fonts and colours used for depicting the respective words are both very standard/common and are non-distinctive elements. In addition, the claimant explains that the four round elements resemble bubbles and that is strengthened by the fact that they accompany the word BUBBLE. Therefore, when the public is confronted with bubbles accompanied by the word bubble on video games, it will immediately perceive it as describing a game wherein the goal, theme or subject matter of the gaming software, programs and publications, involves shooting bubbles. According to the claimant, this is further emphasized by the fact that the round elements mirror the design, meaning the look and feel' of the actual game wherein the aim is to shoot coloured bubbles. For this last statement, the claimant again refers to a screenshot of the defendant's website, dated 15 November 2021. The claimant is of the opinion that both the shapes and colours used for the round elements are common, specifically in the field of gaming, and do not render the figurative elements distinctive. The claimant again relies on the above-mentioned set of screenshots to conclude that it clearly shows use of round coloured elements in bubble shooter games, before the application date of the contested trademark, and that the latter were non-distinctive since they were commonly used in the relevant sector.

13. After referring to and analysing various refusals, issued by the Office, of trademarks which the claimant considers to be similar to the present case, he concludes that he finds the contested trademark fully descriptive and lacks distinctive character for the goods and services for which it has been applied for. For that reason, the claimant requests the Office to cancel the subject registration for all goods in class 9 and all services in class 41.

14. The defendant having submitted evidence relating to the acquisition of distinctiveness through use, the claimant submits arguments against this allegation and the related evidence, and finally concludes that some fully descriptive terms, like bubble shooter can in fact never acquire distinctiveness, particularly since many parties are using this generic term. He considers that the materials filed do not prove that the contested trademark has acquired distinctiveness. In fact, they confirm that BUBBLE SHOOTER is a generic term in relation to the goods covered by the contested mark. Moreover, the defendant does not show that the device elements would have acquired distinctiveness, in particular because they depict typical bubbles as commonly used in bubble shooters and thus only enhance the overall descriptive and non-distinctive character of the contested trademark. The claimant therefore concludes that the materials filed do not show that the contested mark has acquired distinctiveness through use.

B. Defendant's arguments

15. The defendant starts to recall that each application, or cancellation action based on absolute grounds, should be examined on its own merits. After quoting the Article 2.2bis(1)(c) BCIP, the defendant relies on case law to indicate that the descriptiveness test has to be whether or not the relevant public, upon seeing the mark, could identify the goods and services for which the mark is registered because it may serve to designate characteristics of the goods or services designated in the application.

16. According to the defendant, even considering that part of the relevant public is considered to consist of especially circumspect individuals, this especially high degree of attention does not mean that the absolute grounds for refusal should be applied to the mark in a more relaxed manner. He cannot find any valid reason to consider that the possible greater degree of attention paid by part of the public constitutes a determining factor as to whether or not the sign will be perceived as descriptive or non-distinctive. In the defendant's view, if an average consumer of computer software, hardware goods or services, mobile phones games, etcetera, were to see this device mark, he will not assume or perceive that the term relates to the goods and services. There is no direct link.

17. According to the defendant the claimant does not consider the trademark as a whole. Therefore, he considers that the contested trademark lacks a clear descriptive link or possible meaning between the goods and services. The contested trademark cannot be declared inherently unregistrable purely on the basis of the descriptive character of its separate elements. The defendant indicates that, in the present case, the impression created by the device mark on the relevant public and average consumer is sufficiently removed from the impression that would be created if they were to view the words BUBBLE and SHOOTER in isolation, or even BUBBLE SHOOTER.

18. The defendant finds that the claimant has not supported its claim with persuasive evidence that the relevant public may perceive the contested trademark as describing the intended purpose of the goods or services in question and the broad claim that the contested trademark is descriptive.

19. Regarding the descriptive character, the defendant explains that each word element has its own colour and its own font. These elements are not in any way descriptive of the goods and services. Four half circular shapes are added to the word elements. The contested trademark is a unique assembly of word and design elements, presented in specific varying colours, font styles and device elements, and those elements dominate the overall impression given by the mark. He believes that consumers would easily memorise the contested trademark, since it creates a lasting impression as a whole. To that extent, the defendant remarks that the four half circular shapes, which are not linked to each other in the contested mark, can explicitly not be considered to be descriptive, taking into account that the bubbles in the game stick to each other, as shown in screenshots produced by the defendant. The defendant then quotes various similar decisions of the Office in which the same question arose. In relation to third party use that may exist of the verbal elements of the contested trademark, the defendant submits a non-exhaustive list of those entities which have been authorised by the defendant to use the BUBBLE SHOOTER name. The defendant also provides details of those unauthorised websites that the defendant has successfully taken down for their use of the BUBBLE SHOOTER name (non-exhaustive). The defendant concludes that the contested trademark not only consists of descriptive elements and that the relevant public will not, upon seeing the mark, identify that the mark may serve to designate the goods and services for which it has been registered. Therefore, the mark is not descriptive.

20. Regarding the distinctiveness, the defendant recalls that a minimum distinctiveness is sufficient to render a sign registrable as a trademark. Registration of a sign is also not subject to any specific level of linguistic or artistic creativity. It suffices that the mark 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. Further, the defendant explains that the contested mark, assessed as a whole, will be perceived as an indication of trade origin and is therefore – just like the Office concluded when checking the absolute grounds during the filing proceedings – considered to satisfy the low hurdle of distinctiveness as required by Article 2.2bis (1)(b).

21. The defendant indicates that the bringing together of the words BUBBLE and SHOOTER is a distinctive combination itself. Consumers would not use the words BUBBLE and SHOOTER to designate a computer or mobile phone game, even if the premise of the game was shooting bubbles, contrary to a name like "shooting game" or "game which shoots bubbles" which are clear and have a more specific meaning as a whole. Even if the term SHOOTER is descriptive of actual shooting games, it is at most suggestive of the defendant's colour matching puzzle game. The defendant supports this argument with a screenshot of a Google search for "puzzle games", in order to show that the game BUBBLE SHOOTER is in fact a puzzle game, which has nothing to do with SHOOTING, and which is not classified as a "shooting game".

22. Regarding the figurative elements, the defendant explains that the contested trademark is made up of the words BUBBLE and SHOOTER in two different stylised fonts and colours, with four half circular shapes. Moreover, the defendant considers that these four shapes which the claimant views as bubbles are not actually bubbles. In his opinion, bubbles are necessarily see-through and largely without colour, whereas the four half circular shapes in the contested trademark are solid, strongly coloured, and so they are not bubbles *per se*. The relevant public can also only see half the shapes. These elements alone are sufficiently distinctive.

23. Taking all into consideration, the defendant concludes that the contested trademark does not exclusively consist of word elements. The word elements are combined with multiple other elements, such as fonts, colours, devices and design elements. The combination of all these elements is unusual and fanciful (and therefore distinctive) for the goods and services. Therefore, the contested trademark, as a whole, is not devoid of any distinctive character.

24. In addition, the defendant wishes to rely on the defence of the distinctive character acquired through its use. He produces several exhibits such as documents showing the number of downloads of the game BUBBLE SHOOTER in 2014, 2015, 2016 and 2018 in various European countries, including the Benelux territory. He then focuses on active users in 2018, particularly in the Benelux. The defendant also provides documents relating to the marketing and advertising of the brand, including the number of followers on Facebook. He also submits details of reviews from around the world and an overview of reviews from loyal players of the Benelux, from March 2013 to December 2020. Taken together, these factors lead the defendant to conclude that it is clear that any member of the relevant public would associate the provision of a computer or mobile game bearing the contested mark with the defendant and not with any other third party. Subsequent to the claimant's objection to this evidence, the defendant submitted new arguments in support of the acquisition of distinctiveness through use.

25. In conclusion, the defendant requests the Office to waive the cancellation request and to keep the contested trademark registered.

III. GROUNDS FOR THE DECISION

A.1. Legal framework

26. Pursuant to Article 2.30bis (1)(a) BCIP an application for invalidation of the registration of a trademark may be filed, with the Office, based on the grounds set out in Article 2.2bis (1) BCIP.

27. 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.¹

28. In invalidity proceedings on absolute grounds, the contested trademark is presumed to be valid, and it is up to the applicant to put before the Office the concrete elements against its validity.² The Office will therefore limit its examination to the grounds, arguments and evidence submitted by the parties (article 2.30ter (1) BCIP) and the principle of hearing both sides of the argument applies (rules 1.37 and 1.21 IR).

A.2 Regarding the grounds set out in Article 2.2bis (1)(c) and (b) BCIP

29. 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.

¹ CJEU 23 April 2010, C-332/09 P, ECLI:EU:C:2010:225, point 39 (Flugbörse).

² CJEU 13 September 2013, T-320/10, ECLI:EU:T:2013:424, point 27 (Castel).

30. 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.³

31. 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.⁴

32. The CJEU 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.⁵

33. 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 goods or services from others which have another origin.⁶

34. The distinctive 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.⁷

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

- Cl 9 Downloadable computer game programs; Computer game programmes downloadable via the internet; computer game software for use on mobile and cellular phones; computer game software; computer games; downloadable computer games; recorded computer programmes; computer game programs; games software; computer peripherals; computer games hardware; computer games software supplied from the Internet; interactive software; downloadable publications.
- Cl 41 Online entertainment services; online gaming services; game services provided on-line from a computer network; non-downloadable internet games; arcade game services; single player video

³ CJEU 23 October 2003, C-191/01 P, ECLI:EU:C:2003:579, point 31 (Doublemint) and case law mentioned there.

⁴ CJEU 12 February 2004, C-363/99, ECLI:EU:C:2004:86, point 97 (Postkantoor) and case law mentioned there.

⁵ CJEU 12 February 2004, C-363/99, ECLI:EU:C:2004:86, point 100 (Postkantoor).

⁶ CJEU 21 October 2004, C-64/02 P, ECLI:EU:C:2004:645, point 33 (DAS PRINZIP DER BEQUEMLICHKEIT); CJEU 15 September 2005, C-37/03 P, ECLI:EU:C:2005:547, point 60 (BioID); CJEU 8 May 2008, C-304/06 P, ECLI:EU:C:2008:261, point 56 (EUROHYPO).

⁷ CJEU 12 February 2004, C-363/99, ECLI:EU:C:2004:86, point 34 (Postkantoor) and case law mentioned there.

game services; puzzle video game services; entertainment services, namely, providing an on-line computer game; entertainment services, namely, conducting contests online, and organizing, planning and executing entertainment and games events between computer game players and interest groups via a website.

36. Regarding the relevant public, the goods and services of the contested trademark target the public at large. The level of attention is considered to be average.

37. As indicated above (see point 28), a trademark can only be declared invalid pursuant to Article 2.2bis (1)(c) BCIP, where it consists 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. The contested



trademark is composed of word elements, but not only. The contested trademark also contains various figurative elements.

38. In general, terms or signs that are non-distinctive, descriptive or generic may be brought out of the scope of a refusal/cancellation based on Article 2.2bis (1)(b) and (c) BCIP when combined with other elements that make the sign as a whole distinctive. In other words, refusals/cancellations based on Article 2.2bis (1)(b) and (c) BCIP may not apply to signs consisting of a non-distinctive, descriptive or generic element combined with other elements that take the sign as a whole beyond a minimum level of distinctiveness.

39. The words BUBBLE and SHOOTER are presented in two different fonts. The word BUBBLE is presented in a stylised typeface with capital letters in a red gradient containing a few white dots. The word SHOOTER is represented below the word BUBBLE, shifted further to the right and written in italic capital letters in a blue gradient stylised typeface. Its size and stylisation are different from that of the word BUBBLE, written in rectangular shadowed letters. Furthermore, the four coloured circular shapes are stylised in different/random colours, with a few reflections, and are placed around the word BUBBLE in a way that results in two balls, one large and one smaller, on each side.

40. The Office finds the figurative aspect of the contested trademark to be distinctive and influential on the overall presentation of the trademark. Even if the expression "BUBBLE SHOOTER" could mean something, the trademark contains various stylised elements. As a whole the figurative elements of the trademark are complex and possess elaborated designs. As explained by the defendant the sign does not just consist of a simple bubble shape, nor common fonts. Due to their position, size and design, the figurative elements of the mark cannot be negligible, and neither can they be perceived as secondary elements. They are clearly noticeable or recognisable in the sign.

41. Even taking into account the defendant's argument that the four circular shapes have a direct link with the characteristics of the goods and services, the Office considers that their positioning (in relation to the first letter "B" and the last letter "E") together with the stylisation of the word BUBBLE, creates an original and distinctive rounded geometric effect, rather symmetrical, which is then disrupted by the rectangular shape of the letters composing the term SHOOTER. The Office considers this visual impression to be memorable.

42. As the figurative elements confer a minimum of distinctive character to the contested trademark, the Office sees no need to assess whether or not the verbal elements are descriptive.

43. In view of all the above, it must be concluded that the contested trademark, taken as a whole, is not descriptive in relation to the relevant goods and services in the sense of Article 2.2bis (1)(c) BCIP.

44. The claimant's arguments regarding the lack of distinctiveness of the contested trademark are the same as those mentioned above and they are based on the assumption that the sign is descriptive. However, as seen above, it cannot be concluded that the contested trademark is descriptive for the abovementioned goods and services. Therefore, no lack of distinctiveness of the contested trademark can be affirmed on account of its alleged descriptiveness as regards those goods and services. The applicant has not provided any additional arguments or evidence for the lack of distinctiveness of the contested mark.

45. The Office finds the contested mark to be sufficiently stylised in order to function as a badge of origin. As previously explained, the figurative element endows the mark with distinctiveness, at least to a minimum level. Therefore, even if the relevant Benelux consumers would consider the word elements to be descriptive, the contested trademark is not devoid of any distinctive character in the sense of Article 2.2bis (1)(b) BCIP.

B. Other factors

46. The parties have quoted various cases which they consider to be very similar to the present case. The Office is not bound by its previous decisions, as each case must be assessed individually and on its own merits. This principle is established case law in the Benelux and the European Union.

C. Conclusion

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

48. Since the contested trademark has been found to be inherently distinctive, it is not necessary to examine the evidence of acquired distinctiveness provided by the defendant.

IV. DECISION

49. The cancellation application with number 3000357 is not justified.

50. Benelux registration 1446816 will be upheld for all the goods and services for which it is registered.

51. 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, 31 August 2023



Flavie Rougier
(*rapporteur*)

Tineke Van Hoey

Pieter Veeze

Administrative officer: Vincent Munier