

BENELUX OFFICE FOR INTELLECTUAL PROPERTY
OPPOSITION DECISION
N° 2010034
of 14 December 2015

Opponent: **dm-drogerie markt GmbH + Co. KG**
Carl-Metz-Strasse 1
76185 Karlsruhe
Germany

Representative: **V.O.**
Johan de Wittlaan 7
2517 JR Den Haag
Netherlands

Invoked right 1: **International registration 979365**

Baby Love

Invoked right 2: **International registration 977306**



Invoked right 3: **International registration 935598**

babylove

against

Defendant: **Unilever N.V.**
Weena 455
3031 AL Rotterdam
Netherlands

Representative: **Baker & McKenzie Amsterdam N.V.**

Claude Debussylaan 54

1082 MD Amsterdam

Netherlands

Contested trademark: **Benelux application 1286593**




I. FACTS AND PROCEEDINGS**A. Facts**

1. On 24 March 2014 the defendant filed a trademark application in the Benelux for the combined

word/figurative mark , for goods in classes 3 and 5. This application was processed under number 1286593 and was published on 8 May 2014.

2. On 7 July 2014 the opponent filed an opposition against the registration of the application. The opposition is based on the following earlier trademarks:

- International registration 979365 of the word mark Baby Love filed on 24 January 2008 and registered on 22 October 2009 for goods in classes 3, 5, 8, 9, 10, 11, 12, 15, 16, 18, 20, 21, 24, 25, 26, 28, 29, 30 and 32.

- International registration 977306 of the combined word/figurative mark , filed on 24 January 2008 and registered on 24 September 2009 for goods in classes 3, 5, 8, 9, 10, 11, 12, 15, 16, 18, 20, 21, 24, 25, 26, 28, 29, 30 and 32.

- International registration 935598 of the word mark babylove, filed on 28 December 2006 and registered on 24 February 2011 for goods in classes 3, 5, 8, 9, 10, 11, 12, 15, 16, 18, 20, 21, 24, 25, 26, 28, 29, 30 and 32.

3. According to the register the opponent is the actual holder of the trademarks invoked.

4. The opposition is directed against all goods relating to the contested application and is based on all goods relating to the trademarks invoked.

5. The grounds for opposition are those laid down in article 2.14, 1 (a) of the Benelux Convention on Intellectual Property (hereinafter: "BCIP").

6. The language of the proceedings is English.

B. Course of the proceedings

7. The opposition is admissible and was notified to the parties on 11 July 2014.

8. The adversarial phase of the procedure started on 12 September 2014. The Benelux Office for Intellectual Property (hereinafter: "the Office") sent the notification of the commencement of the proceedings on 30 September 2014 to the parties, giving the opponent the opportunity to substantiate the opposition by submitting arguments and documents no later than 30 November 2014.

9. On 28 November 2014 the opponent submitted arguments to substantiate the opposition. These arguments were sent by the Office to the defendant on 2 December 2014, giving the defendant the opportunity to submit a reply no later than 2 February 2015.

10. The defendant filed a reply on 30 January 2015. This reply was sent by the Office to the opponent on 2 February 2015.

11. Each party filed its observations within the time limits imposed by the Office.

12. The Office has sufficient information to come to a decision on the opposition.

II. ARGUMENTS

13. The opponent filed an opposition at the Office under article 2.14, 1 (a) BCIP, in accordance with the provisions of article 2.3 (b) BCIP: the likelihood of confusion based on the identity or similarity of the relevant marks and the identity or similarity of the goods or services concerned.

A. Opponent's arguments

14. The opponent argues that the signs differ by only one letter. Therefore he finds that the signs are visually and aurally similar. With regard to the conceptual comparison, the opponent states that the identical element 'baby' refers to a young child or an infant. According to the opponent, the elements 'love' and 'dove' are both used as a pet name (i.e. an affectionate nickname, like sweetheart or darling). For this reason, the opponent concludes that the signs are also conceptually similar.

15. With regard to the comparison of the goods, the opponent only refers to classes 3, 5 and 25 of the trademarks invoked. According to the opponent, the goods relating to the contested sign are identical or (highly) similar to the goods for which the trademarks invoked are registered.

16. The opponent states that the trademarks invoked considered as a whole have no meaning in relation to any of the goods. For this reason, the opponent argues that the distinctive character of the trademarks invoked is normal. The opponent also refers to previous decisions from the Opposition Division of the Office for Harmonization of the Internal Market (hereinafter 'OHIM') and the Board of Appeal regarding the trademarks invoked. According to the opponent, these decisions show that the trademarks invoked are not considered to be descriptive.

17. The opponent concludes that the opposition should be upheld and requests that the Office refuse the registration of the contested sign and rule that the defendant bears the fixed costs of these proceedings.

B. Defendant's arguments

18. The defendant states that the trademark DOVE is a well-known trademark and that DOVE products have been available on the Dutch market since 1991.

19. According to the defendant, the trademarks invoked are descriptive. The words 'baby love' clearly indicate the destination and/or intended purpose of the goods for which the trademarks invoked are registered.

For this reason, the defendant argues that the scope of protection of the trademarks invoked is very low and that a small difference between the signs may be sufficient to prevent confusion.

20. With regard to the visual comparison, the defendant argues that the signs are visually similar to the extent that they both contain the generic and descriptive word BABY. According to the defendant, the word LOVE is also descriptive. The defendant also states that the word DOVE is the most distinctive element in the contested sign. Furthermore, the defendant argues that the public will perceive the trademarks invoked as one single word and the contested sign as two separate words. The signs also differ visually in colour, composition, font and the use of figurative elements. The way the contested sign is stylized emphasizes the word DOVE and according to the defendant, the public will perceive the word DOVE as the first part of the contested sign. Furthermore, the defendant states that DOVE is a reputed trademark which offers a wide range of cosmetic products. These products are all marketed under the name DOVE, followed by a merely descriptive element.

21. Conceptually, the defendant argues that the trademarks invoked indicate that the opponent's goods are suitable for babies. According to the defendant, the contested sign merely describes a baby care variant of the defendant's well-known DOVE trademark. The defendant disputes the opponent's argument that the word DOVE is a pet name just like 'love'. For this reason, the defendant concludes that there is no conceptual similarity.

22. Regarding the phonetic comparison, the defendant argues that the contested sign is dominated by the element DOVE which will be recognized by the public. According to the defendant, the public will read the contested sign as DOVE (BABY).

23. The defendant also states that the degree of aural similarity between the signs is of less importance in the case of goods which are marketed in such a way that, when making a purchase, the relevant public usually perceives the signs designating these goods visually.

24. The defendant states that the goods mentioned in classes 3 and 5 seem to be similar to the goods relating to the trademarks invoked. However, according to the defendant, the goods mentioned in other classes are dissimilar.

25. The defendant requests that the Office reject the opposition and rule that the opponent bears the fixed costs of the opposition proceedings.

III. DECISION

A. Likelihood of confusion

26. In accordance with article 2.14, 1 BCIP, the applicant or holder of a prior trademark may submit a written opposition to the Office, within a period of two months to be calculated from the publication of the application, against a trademark which in the order of priority, ranks after its own in accordance with Article 2.3 (a) and (b) BCIP.

27. Article 2.3 (a) and (b) BCIP stipulates that *"In determining the order of priority for filings, account shall be taken of rights, existing at the time of filing and maintained at the time of the litigation, in: a. identical trademarks filed for identical goods or services; b. identical or similar trademarks filed for identical or similar goods or services, where there exists on the part of the public a likelihood of confusion that includes the likelihood of association with the prior trademark."*

28. According to case law of the Court of Justice of the European Union (hereinafter: the “CJEU”) concerning the interpretation of Directive 2008/95/EG of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trademarks (hereinafter: “Directive”), the likelihood of confusion of the public, which is defined as the risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings, must be appreciated globally taking into account all factors relevant to the circumstances of the case (CJEU decisions, Canon, C-39/97, 29 September 1998, Lloyd Schuhfabrik Meyer, C-342/97, 22 June 1999; CJBen decisions, Brouwerij Haacht/Grandes Sources belges, A 98/3, 2 October 2000; Marca Mode/Adidas, A 98/5, 7 June 2002; Supreme Court of the Netherlands, Flügel-bottle, C02/133HR, 14 November 2003; Brussels, N-20060227-1, 27 February 2006).



Comparison of the signs

29. The wording of Article 4, 1 (b) of the Directive (cf. article 2.3, (b) BCIP) “there exists a likelihood of confusion on the part of the public” shows that the perception of marks in the mind of the average consumer of the type of goods or services in question plays a decisive role in the global assessment of the likelihood of confusion. The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (CJEU, Sabel, C-251/95, 11 November 1997).

30. Global assessment of the visual, aural or conceptual similarity of the marks in question, must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components (CJEU, Sabel and Lloyd, already cited).

31. The overall impression created in the memory of the relevant public by a complex mark might, in certain circumstances, be dominated by one or more components of that mark (CJEU decision, Limonchello, C-334/05 P, 12 June 2007). With regard to the assessment of the dominant characteristics of one or more components of a complex trademark, account must be taken, in particular, of the intrinsic qualities of each of these components by comparing them with those of other components. In addition, account may be taken of the relative position of the various components within the arrangement of the complex mark (EGC decisions, Matratzen, T-6/01, 23 October 2002 and El Charcutero Artesano, T-242/06, 13 December 2007).

32. The signs to be compared are the following:

Opposition based on:	Opposition directed against:
Baby Love	
	

babylove	
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Visual comparison

33. The first and third trademarks invoked are purely verbal marks and contain the words “baby” and “love”. The second trademark invoked and the contested sign are combined verbal/figurative marks. The second trademark invoked is a black and white sign which displays a combination of the words “baby” and “love” on a black background which has a ‘wavy’ shape. The contested sign contains the words “baby”, in light blue letters and “Dove”, in dark blue letters. The word “baby” is positioned above the last three letters of the word “Dove” and is displayed in a smaller and different font than the word “Dove”. The letter D of the word “Dove” is capitalised.

34. The purely verbal trademarks invoked, as well as the figurative trademark invoked, all contain the word elements “Baby” and “Love”. The contested sign contains the word elements “Baby” and “Dove”. The trademarks invoked and the contested sign share the descriptive word “baby”. The words “Love” and “Dove” are visually slightly different in respect to the first letters.

35. Normally the consumer attaches more value to the first part of a sign (EGC decision, Mundicor, T-183/02 and T-184/02, 17 March 2004). This is because the consumer normally reads from left to right (or in this case, from top to bottom). However, in this case, the Office considers that word element “Dove” clearly stands out, compared to the word element “baby”, because it is larger and displayed in a darker colour. For this reason, the Office is of the opinion that the public will attach more importance to the word “Dove”. Therefore, it cannot be ruled out that part of the public could perceive the sign as DOVE BABY instead of BABY DOVE.

36. For the reasons mentioned above, the signs are visually similar to a certain degree.

Aural comparison

37. The trademarks invoked and the contested sign all consist of two words and three syllables. Furthermore, the pronunciation of the signs has the same rhythm and intonation. The only aural difference between the signs lies in the first letter of the second word of the contested sign, which is a D instead of an L. Although, as mentioned above, it cannot be ruled out that part of the public will pronounce the sign as “Dove Baby” instead of “Baby Dove”, in the light of the above, the Office is of the opinion that the signs are aurally similar.

Conceptual comparison

38. The trademarks invoked contain the English words ‘baby’ and ‘love’. Conceptually, the trademarks invoked have a clear meaning. The public which understands the English language will understand the trademarks invoked in the sense of the ‘love for a baby’. The contested sign contains the words ‘baby’ and ‘dove’. A dove is a type of bird, like a pigeon. This word is not frequently used by the public in the Benelux. Furthermore, contrary to the opponent’s argument (paragraph 14), the Office is of the opinion that it is not a common nickname in the Benelux. The Office also considers that the persons who know the word “dove” could understand “baby dove” as a reference to an infant pigeon.

39. The trademarks invoked and the contested sign all include the word “baby”. Generally, the public will not consider a descriptive element forming part of a complex mark as the distinctive and dominant element of the

overall impression conveyed by that mark (EGC, Budmen, T-129/01, 3 July 2003). The word element 'baby' clearly refers to the goods at hand, since it may refer to goods that are meant for babies and children, as displayed below, and is therefore descriptive.

40. In the light of the above, the Office is of the opinion that the signs, since they only share the descriptive word "baby", are conceptually similar to a low degree.

Conclusion

41. It is established case-law that visual and phonetic similarities between the signs can be neutralized by semantic differences. To assume such a neutralization, at least one of the two signs involved has to have a clear and fixed meaning which the relevant public will understand immediately. It is sufficient that only one of these signs has such a meaning, notwithstanding the fact that the other sign has a different meaning or has no meaning at all, in order to highly neutralize the visual and phonetic similarities between the trademarks (see to ECG decision, Bass, 14 October 2003 and ZIRH, 3 March 2004, as well as CJEU decision, Picasso-Picaro, C-361/04, 12 January 2006). In this case, as mentioned above, the word elements of the trademarks invoked have a clear meaning. Furthermore, the trademarks invoked and the contested sign only share a descriptive element.

42. For the reasons mentioned above, the Office is of the opinion that the conceptual differences are sufficient to neutralize the visual and phonetic similarities. This means that the signs, considered as a whole, are not similar, or at least are not similar enough, that there could exist a likelihood of confusion.

Comparison of the goods

43. For reasons of procedural economy, the Office will not conduct a comparison of the goods. This comparison will not influence the outcome of this decision. Even if the goods are identical, there is no likelihood of confusion, because the signs are dissimilar. Only for the purpose of the readability and the scope of this opposition, the goods concerned are listed below consolidated.

Opposition based on:	Opposition directed against:
Cl 3 Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, essential oils, body care preparations, cosmetics, hair lotions; dentifrices; moist tissues, moist toilet tissues, cotton buds; oils and lotions, creams, powders, skin care tissues, bath preparations, not for medical purposes, shampoos, sun protection preparations, the aforementioned goods in particular for babies, infants, pregnant women and mothers; shampoos.	Cl 3 Soaps, detergents, body powder, hair and body lotions, hair care preparations, shampoo-conditioners, hair moisturizing conditioners, hair moisturizers, non-medicated scalp treatment creams, hair oils, hair tonic and hair creams; preparations for the care of the scalp and hair; shampoo and hair conditioners; hair care products for removing and preventing tangles, toothpaste, non-medicated cleaning products for mouth and teeth; toilet care products, beauty care products for bath and shower; non-medicated baby care products, skin care products, oils, creams and lotions for hair, body and skin care; cosmetic oils and creams, cosmetics, talcum powder, impregnated cleansing pads, tissues and wipes for cosmetic use, wetted or impregnated cleansing pads, tissues or wipes; skin tonics, all aforementioned goods intended for babies and / or children.

<p>CI 05 Pharmaceutical and veterinary preparations; sanitary preparations for medical purposes; dietetic substances adapted for medical use, food for babies; dietetic foods for health care on the basis of vitamins, minerals, trace elements, either alone or in combination; vitamin preparations; medical teas; medical herb infusions; plasters, materials for dressings; disinfectants; preparations for destroying vermin; breast-nursing pads; creams, powders, skin care tissues, sun protection preparations, bath preparations, the aforementioned goods for medical purposes, and in particular for babies, infants, pregnant women and mothers; baby milk.</p>	<p>CI 5 Diapers (baby napkins); medicinal preparations for treatment of head and skin ointments and creams and lotions to diaper rash, medicated creams and lotions for the skin petroleum jelly for medical purposes; all aforementioned goods intended for babies and / or children.</p>
<p>CI 25 Clothing, footwear, headgear; baby diaper-pants (clothing); baby diapers of textile material; baby undergarments; baby clothes; rain capes; neck scarves; brassieres; breast feeding brassieres; inner soles for shoes; bibs, not of paper.</p>	

B. Other factors

44. Regarding the opponent's references to decisions from OHIM concerning, in his view, similar oppositions (paragraph 16), the Office points out that it is obliged to render a decision based on regulation and case law applicable in the Benelux. The Office is not bound by decisions from other offices, whether they refer to similar cases or not (see, by analogy with, EGC decision, Curon, T- 353/04, 13 February 2007).

45. The defendant argues that in the light of his reputation, the signs are not similar (paragraph 20 – 22). However, it has been established that the contested sign is younger than the trademarks invoked. For this reason, the defendant's argument that there could not exist a likelihood of confusion between the signs, because of the reputation of the contested sign is not relevant (see CJEU decision, La Española, C-498/07 P, 3 September 2009).

C. Conclusion

46. The overall impression of the signs is not similar. For this reason, it is not necessary that the Office conducts a comparison of the goods. After all, there could not exist a likelihood of confusion if the signs are not similar, even if the goods and services were to be found to be identical (see EGC decisions, easyHotel, T-316/07, 22 January 2009 en YOKANA, T-103/06, 13 April 2010).

IV. DECISION

47. The opposition with number 2010034 is refused.

48. Benelux application with number 1286593 will be registered for all goods for which it has been applied.

49. The opponent shall pay the defendant 1,000 euro in accordance with article 2.16, 5 BCIP in conjunction with rule 1.32, 3 Implementing Regulations, as the opposition is refused in its entirety. This decision constitutes an enforceable order pursuant to article 2.16, 5 BCIP.

The Hague, 14 December 2015

Eline Schiebroek
(*rapporteur*)

Saskia Smits

Diter Wuytens

Administrative officer: Rémy Kohlsaet