



BENELUX OFFICE FOR INTELLECTUAL PROPERTY
OPPOSITION DECISION
N° 2010765
1 September 2016

Opponent: **Monster Energy Company, Delaware corporation**
Monster Way 1
Corona CA 92879
United States of America

Representative: **Bird & Bird LLP**
Zuid-Hollandplein 22
2596 AW The Hague
The Netherlands

Invoked right 1: **Benelux trademark 898751**

UNLEASH THE BEAST!

Invoked right 2: **EU trademark 5093174**

UNLEASH THE BEAST!

Invoked right 3: **EU trademark 9584244**

REHAB THE BEAST!

against

Defendant: **Unilever N.V.**
Weena 455
3013 AL Rotterdam
The Netherlands

Representative: **Baker & McKenzie Amsterdam N.V.**
Claude Debussylaan 54
1082 MD Amsterdam
The Netherlands

Contested trademark: Benelux application 1303262

RELEASE THE BEAST

I. FACTS AND PROCEEDINGS

A. Facts

1. On 23 January 2015, the defendant filed an application in the Benelux for the word mark RELEASE THE BEAST for goods in class 30. The application was dealt with under number 1303262 and was published on 27 January 2015.

2. On 26 March 2015, the opponent introduced an opposition against this application. The opposition is based on the following trademarks:

- Benelux trademark registration 898751 of the word mark UNLEASH THE BEAST!, filed on 28 February 2011 and registered on 11 July 2011 for goods in classes 30 and 32;
- EU trademark registration 5093174 of the word mark UNLEASH THE BEAST!, filed on 24 May 2006 and registered on 19 March 2007 for goods in class 32;
- EU trademark registration 9584244 of the word mark REHAB THE BEAST!, filed on 9 December 2010 and registered on 20 May 2011 for goods in the classes 5, 30 and 32.

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

4. The opposition is directed against all the goods for which the contested sign is applied for and is based on all the goods relating to the rights invoked.

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

6. The language of the procedure is English.

B. Proceedings

7. The opposition is admissible and was notified by the Benelux Office for Intellectual Property (hereinafter: "the Office") to the parties on 1 April 2015. During the administrative phase of the proceedings both parties filed arguments and at the request of the defendant proof of use was filed. All of the documents submitted meet the requirements as stated in the BCIP and the Implementing Regulations (hereinafter "IR"). The administrative phase was completed on 19 February 2016.

II. ARGUMENTS

8. 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

9. Firstly, the opponent compares the first and second invoked word marks "UNLEASH THE BEAST" with the contested sign "RELEASE THE BEAST". The opponent argues that the signs are visually similar to a high extent. Both consist of three words and have an equal length of 15 letters. The exclamation mark in the invoked rights does not detract from the identical structure of the signs. The second and third word are identical, whereas the main part of the first word consists of identical letters, namely (UN)LEAS(H) versus (RE)LEAS(E). Consequently, there is a high degree of visual similarity between the signs, according to the opponent.

10. Phonetically, the opponent is of the opinion that both signs have an identical rhythm, consisting of the syllables UN-LEASH-THE-BEAST compared with RE-LEASE-THE-BEAST. The last two syllables are pronounced identically, as well as the second syllable, -LEASH versus -LEASE, whereas the difference of one letter will not lead to a noticeable difference in the pronunciation. Phonetically, the signs are almost entirely identical or at least highly similar, according to the opponent.

11. Conceptually, the strong similarity of the signs is also clearly apparent. The first word of the contested sign, RELEASE, is mentioned literally as the first definition and synonym of the verb UNLEASH. The other words are identical and therefore the opponent concludes that the invoked rights and the contested sign must be regarded as entirely identical from a conceptual point of view.

12. For similar reasons as set out above, there is also a high degree of similarity between the third invoked right REHAB THE BEAST! and the disputed sign, states opponent.

13. From a visual point of view account must be taken of the fact that the first two letters RE- are also identical. Therefore, opponent concludes that the phonetic comparison shows that three out of four syllables are identically pronounced, RE-HAB-THE-BEAST versus RE-LEASE-THE-BEAST. Furthermore, the opponent argues that from a conceptual point of view it must be noted that the verb REHAB gives the expression as a whole the meaning of "resettling the beast after its release". Opponent therefore concludes that there is also a visual, phonetic and conceptual similarity between the third invoked right and the contested sign.

14. The goods of the contested sign are highly similar to all goods of the invoked rights, according to the opponent, and are everyday goods for the average consumer.

15. Opponent concludes that the signs are visually, phonetically and conceptually identical or at least similar to a very high degree and the goods show a strong similarity.

16. The opponent requests the Office to allow the opposition in full, not to register the contested sign and order defendant to pay the costs of the proceedings.

B. Defendant's arguments

17. In reply to the opponents arguments, defendant requested the opponent to provide proof of use of the second right invoked (see paragraph 7).

18. The defendant firstly argues that the first two invoked rights, UNLEASH THE BEAST!, clearly have something to do with physical and/or emotional energy of persons or animals, and that they

therefore may serve to designate the kind, intended purpose and/or other characteristics of the goods for which the trademark is registered, namely giving energy to the user. Defendant is of the opinion that the trademarks of opponent have no or a very limited distinctive character and scope of protection.

19. The defendant admits that the signs share the same number of words, but stresses the fact that the differences between the first two invoked rights and the contested sign are eye-catching and significant and therefore outweigh the points of similarity.

20. Furthermore, the defendant questions the knowledge of the Benelux public of the English language as regarding the exact meaning of the words “unleash” and “release”. Whereas the element “un” denotes a denial, the element “re” will probably be understood as an affirmation. Therefore the defendant finds that the relevant public does not recognize any conceptual similarity as referred to by the opponent (see paragraphs 11 and 13). The beginning of the trademarks is different from a visual and phonetic point of view. Conceptually, they are also dissimilar. As a consequence, the defendant argues that there is no likelihood of confusion between the first two rights invoked and the contested sign.

21. With regard to the third right invoked, REHAB THE BEAST!, defendant argues that it is clear that the words REHAB and RELEASE are dissimilar from a visual, phonetic and conceptual point of view. The word REHAB will most likely be associated with drugs and alcohol rehabilitation clinics and therefore the relevant public will not in any way think of “resettling a beast that was released in an earlier stage” (see paragraph 13), according to the defendant.

22. The defendant concludes that the trademarks and the contested sign are dissimilar.

23. According to the defendant the goods for which the older registrations are registered are dissimilar to the goods for which the contested sign was applied for.

24. The defendant requests that the Office should reject the opposition in its entirety and that the opponent be ruled to bear the fixed costs of the opposition proceedings.

III. DECISION

A.1 Likelihood of confusion

25. 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.

26. Article 2.3 (a) and (b) BCIP stipulates “*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.*”

27. 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, Canon, C-39/97, 29 September 1998, Lloyd Schuhfabrik Meyer, C-342/97, 22 June 1999; CJBen, 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 goods and services

28. In assessing the similarity of the goods and services concerned, all the relevant factors relating to the goods or services themselves should be taken into account. These factors include, inter alia, their nature, their end-users and their method of use and whether they are in competition with each other or are complementary (Canon, already cited).

29. The comparison of the goods and services must relate to those covered by the registration of the earlier trademarks in question or by the application of the contested sign (see e.g. EGC, Arthur et Felice, T-346/04, 24 November 2005).

30. Before examining the proof of use of the second right invoked, which is exclusively registered for “beverages” in class 32, the Office deems it appropriate in these proceedings to commence the comparison of goods by taking into account all the goods of the invoked rights.

31. The goods to be compared are the following:

Opposition based on:	Opposition directed against:
CI 5 Nutritional supplements in liquid form in Class 5. <i>(EU trademark 9584244)</i>	
CI 30 Nutritional supplements, not for medical use, as far as not included in other classes. <i>(Benelux trademark 898751)</i> CI 30 Ready to drink tea, iced tea and tea based beverages; ready to drink flavoured tea, iced tea and tea based beverages in Class 30. <i>(EU trademark 9584244)</i>	CI 30 Ice cream; water ices; frozen yoghurt; frozen confectionery.
CI 32 Non-alcoholic beverages. <i>(Benelux trademark 898751)</i> CI 32 Beverages	

<p>(EU trademark 5093174)</p> <p>Cl 32 Beverages, namely, carbonated soft drinks; non-alcoholic carbonated and non-carbonated drinks enhanced with vitamins, minerals, nutrients, proteins, amino acids and/or herbs; energy or sports drinks; fruit juice drinks in Class 32.</p> <p>(EU trademark 9584244)</p>	
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32. The contested goods are “*ice cream; water ices; frozen yoghurt; frozen confectionery*” in class 30. These goods differ by nature from the goods “*nutritional supplements in liquid form in Class 5*” and “*nutritional supplements, not for medical use, as far as not included in other classes*”. Nutritional or food supplements are products which serve as an addition to a normal diet, for humans or animals. These goods therefore serve a different purpose than the contested goods and the fact that they might be added to certain foodstuffs does not warrant a finding of similarity between the goods. They not only differ in nature, but also in their purpose and method of use. Market reality shows that the relevant goods are usually fabricated by different producers. Furthermore, nutritional supplements are mainly sold in retail stores which specialize in the selling of, and advice on, food supplements (often containing minerals, vitamins and/or bioactive substances). Finally, these goods cannot be considered to be in competition with the contested goods, nor are they complementary.

33. The contested goods can also not be considered similar to the goods “*non-alcoholic beverages, beverages and beverages, namely carbonated soft drinks; non-alcoholic carbonated and non-carbonated drinks enhanced with vitamins, minerals, nutrients, proteins, amino acids and/or herbs; energy or sports drinks and fruit juice drinks in Class 32.*” These goods are different by nature as their primary function is to quench thirst and/or to be consumed as a liquid stimulant, whereas the contested goods, namely “*ice cream; water ices; frozen yoghurt; frozen confectionery*” are edible goods, which are merely consumed as a treat or as dessert. The nature, purpose and method of use are different, the goods are not interchangeable. Nor is there any complementary relationship between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for the production of those goods lies with the same undertaking.

34. Lastly, the Office does not consider the goods “*ready to drink tea, iced tea and tea based beverages; ready to drink flavoured tea, iced tea and tea based beverages in Class 30*” as being similar to the contested goods in accordance with the reasoning mentioned in the foregoing paragraph. The mere fact that these beverages are called “iced tea” cannot lead to the conclusion that they are therefore similar to other products containing the word “ice”. Neither does the observation that these goods are best served when cooled contribute to the conclusion of a similarity of the goods. The fact that they are all foodstuffs which are sold through the same distribution channels to the public at large is not enough to establish a similarity between them, since they are generally displayed in different areas or on different shelves in retail stores, supermarkets and department stores and the public does not expect such goods to originate from the same companies. Therefore the Office holds the contested goods to be dissimilar by their nature and purpose. Neither are the goods supplementary or competitive.

Conclusion

35. The contested goods are dissimilar to the goods covered by the invoked rights.

Comparison of the signs

36. The goods are dissimilar. Therefore the Office does not examine the similarity of the signs, nor does it examine the proof of use for the second right invoked. After all, a likelihood of confusion cannot be established if the relevant goods or services are not at least similar (see: GCEU, easyHotel, T-316/07, 22 January 2009 and YOKANA, T-103/06, 13 April 2010).

B. Conclusion

37. Based on the foregoing the Office is of the opinion that there is no likelihood of confusion.

IV. DECISION

38. The opposition with number 2010765 is rejected.

39. Benelux application with number 1303262 will be registered for all the goods for which it has been applied.

40. 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 rejected in its entirety. This decision constitutes an enforceable order pursuant to article 2.16, 5 BCIP.

The Hague, 1 September 2016

Tomas Westenbroek
(*rapporteur*)

Saskia Smits

Diter Wuytens

Administrative officer: Ingvild van Os