

BOIP



Benelux Office for
**Intellectual
Property**

BENELUX OFFICE FOR INTELLECTUAL PROPERTY
OPPOSITION DECISION
N° 2014778
of 19 December 2019

Opponent: **Koninklijke KPN N.V.**
Wilhelminakade 123 /17e etage
3072 AP Rotterdam
Netherlands

Representative: -

Invoked trademark: **Benelux trademark registration 1004505**

YES

against

Defendant: **Guangzhou Guan Su Ge Technology Co., Ltd.**
Room 502, Building 4
No. 67, Industrial North Road
Haizhu District, Guangzhou
Guangdong
China

Representative: **K.O.B. N.V.**
President Kennedypark 31c
8500 Kortrijk
Belgium

Contested trademark: **International application 1434010**

YESIDO

I. FACTS AND PROCEEDINGS

A. Facts

1. On 10 August 2018 the defendant filed an international trademark application, having effect in the Benelux, for the word mark  for goods in class 9. This application was processed under number 1434010 and was published on 15 November 2018 in the WIPO Gazette of International Marks 2018/44.

2. On 15 January 2019 the opponent filed an opposition against the registration of the application. The opposition is based on Benelux registration 1004505 of the word mark YES, filed on 19 October 2016 and registered on 6 January 2017 for goods and services in classes 9, 35, 38 and 42.

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

4. The opposition is directed against all of the goods of the contested application and is based on all of the goods and services of the trademark invoked.

5. The grounds for opposition are those laid down in article 2.18 in conjunction with 2.14 of the Benelux Convention on Intellectual Property (hereinafter: "BCIP").¹

6. The language of the proceedings is English.

B. Course of the proceedings

7. The opposition is admissible and was notified by the Benelux Office for Intellectual Property (hereinafter: "the Office") to the parties on 16 January 2019. 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 9 July 2019.

II. ARGUMENTS

8. The opponent filed an opposition at the Office under article 2.18 in conjunction with 2.14, 2 (a) BCIP, in accordance with the provisions of article 2.2ter, 1 (b) BCIP: the likelihood of confusion based on the identity or similarity of trademark and sign and the identity or similarity of the goods or services concerned.

A. Opponent's arguments

9. The opponent argues that the relevant public will dissect the contested trademark into three separate words: YES, I and DO. These words are all part of basic English vocabulary and their meaning will be immediately perceived by the relevant public. According to the opponent, the word YES included in both signs, used to give an affirmative response, does not convey any descriptive meaning in relation to the goods and services at issue. The words I DO are a conjugation of the common English verb 'to do'.

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.

The opponent is of the opinion that the distinctiveness of the words YES, as well as the words I DO is normal. Visually and aurally, the signs coincide in the distinctive element YES, which constitutes the entire earlier trademark as well as the beginning of the contested trademark. The trademarks differ in the additional letters of the contested trademark IDO. The opponent believes that the public may assume that YES and YESIDO are part of a series of related trademarks, because the first part of the signs is identical. Given the foregoing, the opponent is of the opinion that the conflicting trademarks are both visually and aurally highly similar.

10. Furthermore, the opponent explains that conceptually the contested trademark will be perceived as an affirmative response to a question or request. Despite the conceptual difference produced by the additional verbal element IDO in the contested trademark, the relevant public will perceive the semantic content of the element YES as being the same, given that the additional element of the contested trademark does not change its meaning. The trademarks should thus be considered conceptually similar, according to the opponent.

11. As regards the comparison of the goods and services, the opponent considers that there is clearly a link between the contested goods in class 9 of the contested trademark and IT telecommunication services in class 38 and 42 covered by the earlier trademark. These goods and services should be considered similar given their complementary character. The goods covered by the contested trademark all relate to devices or accessories which are being used for mobile telecommunications. They can partly be considered similar or at least complementary to IT and telecommunication covered by the earlier trademark in classes 9, 38 and 42.

12. The relevant public is the public at large which has an average level of attention. According to the opponent, there is a risk that the public might believe that the goods in question come from the opponent or, as the case may be, from economically linked undertakings, which constitutes a likelihood of confusion.

13. For these reasons, the opponent requests that the Office upholds this opposition and rejects the international application and that the defendant bears the costs of the opposition proceedings.

B. Defendant's arguments

14. The defendant argues that a comparison of the trademarks reveals a lot of differences between them. The fact that the common element YES appears as a prefix in the contested trademark does not appear to the defendant as significant now that this element only constitutes half of the contested trademark.

15. The defendant points out that the contested trademark has a very specific graphic representation. Despite the fact that the trademark of the opponent is incorporated in the contested trademark, the defendant is of the opinion that because of the extra verbal and graphical elements, the trademarks differ and cannot be considered as similar.

16. Aurally, the trademarks also differ because of the extra letters IDO in the contested trademark. The contested trademark consists of three syllables. In French the S between two vowels is pronounced as Z. In this case the trademark will thus be pronounced as YEZIDO. This is also the case when pronouncing an S between two vowels in Dutch. Therefore, the trademarks are aurally different.

17. Conceptually, the opponent's trademark refers to the affirmative response a person can give, namely YES. The contested trademark however is a fantasy word and thus totally different. Therefore, the defendant believes that a comparison is not possible.

18. According to the defendant, the goods of the contested trademark differ from the goods and services of the trademark invoked. The goods of the defendant in class 9 concern small accessories which are being used in combination with a mobile phone or pc. The services in class 38 and class 42 of the opponent concern "application and IT and Telecommunication services". These are also not similar to the goods of the defendant.

19. The defendant argues that, due to the saturation of the relevant registers with trademarks that are comparable to the trademark invoked, it must be assumed that the average consumer in the Benelux is more attuned to the recurrence of the common element YES. As a result the likelihood of confusion following the registration of the contested trademark is significantly diminished in the context of the current trademark landscape within the Benelux.

20. The defendant explains that the goods in class 9 of the contested trademark could be considered daily consumer goods. The degree of attention for these products may vary from low to average. The goods and services of the opponent however are directed at a public with a specific professional knowledge or expertise in the IT field. Thus the defendant claims that the degree of attention for these goods may vary here from average to high.

21. Although the signs share the common element 'yes', the distinctiveness of this trademark is questionable. Besides, there are some aural, visual and conceptual differences making the trademarks dissimilar in the defendant's opinion and thus this opposition must be rejected. Furthermore, the goods for which both trademarks have been registered, respectively filed, are intended for a different public (daily consumers - professionals) and can also be considered as being dissimilar. The defendant refers here to several decisions in similar opposition proceedings by the European General Court ('EGC'), the Institut National de la Propriété Industrielle ('INPI') and the European Union Intellectual Property Office ('EUIPO') to back up his claim.

22. Based on the foregoing, the defendant concludes that there will be no likelihood of confusion or association with the relevant public when confronted with these trademarks. He requests that this opposition be rejected and that the opponent is ordered to bear the costs of these proceedings.

III. DECISION

A.1 Likelihood of confusion

23. In accordance with article 2.14 BCIP, the 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 date of the application, against a trademark which in the order of priority, ranks after its own in accordance with Article 2.2ter BCIP.

24. Article 2.2ter, para. 1 BCIP stipulates that, "*A trademark shall, in case an opposition is filed, not be registered (...) where: b. because of its identity with, or similarity to, the earlier trademark and the identity or similarity of the goods or services covered by the trademarks, there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association with the earlier trademark.*"

25. According to case law of the Court of Justice of the European Union (hereinafter: the "CJEU") concerning the interpretation of Directive 2015/2436 of the European Parliament and of the Council of 16 December 2015 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, ECLI:EU:C:1998:442; Lloyd Schuhfabrik Meyer, C-342/97, 22 June 1999, ECLI:EU:C:1999:323; 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, ECLI:NL:HR:2003:AK4818; Court of Appeal Brussels, N-20060227-1, 27 February 2006).


Comparison of the signs

26. The wording of Article 5, 1 (b) of the Directive (cf. article 2.2ter, 1 (b) BCIP) according to which "there exists a likelihood of confusion on the part of the public including the likelihood of association with the earlier trademark" 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, ECLI:EU:C:1997:528).

27. 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).

28. 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, Limonchello, C-334/05 P, 12 June 2007, ECLI:EU:C:2007:333). 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, Matratzen, T-6/01, 23 October 2002, ECLI:EU:T:2002:261 and El Charcutero Artesano, T-242/06, 13 December 2007, ECLI:EU:T:2007:391).

29. The signs to be compared are the following:

Opposition based on:	Opposition directed against:
YES	

30. According to relevant case-law, two marks are similar when, from the point of view of the relevant public, they are at least partially identical as regards one or more relevant aspects, inter alia the visual, aural and conceptual aspects (reference is made to Matratzen and Sabel, already cited). The fact that a mark consists exclusively of the earlier mark, to which another word has been added, is an indication that the two trademarks are similar (EGC, ECOBLUE, T-281/07, 12 November 2008, ECLI:EU:T:2008:489). This is especially the case when the element that the signs have in common still has an independent distinctive role in the composed sign (CJEU, THOMSON LIFE, C120/04, 6 October 2005, ECLI:EU:C:2005:594).

Conceptual comparison

31. The trademark invoked will be understood by the relevant public as an English word used to give an affirmative response. It can also be found in the Dutch dictionary. This word is part of the basic knowledge of the Benelux public.

32. Part of the public will perceive the contested trademark as a word with no meaning. Another part of the public will split the sign into three English words YES, I and DO. This is rather likely given the renown of each of these basic English words, as well as the renown of these words as a phrase used in the context of the pronouncement of marriage vows.

31. Conceptually, the signs are either deemed similar as they both refer to an affirmative expression, or a conceptual comparison is not relevant as no meaning is attributed to the contested trademark.

Visual comparison

33. The trademark invoked is a word mark consisting of one word of three letters YES. The contested trademark is a combined word/figurative mark consisting of one word YESIDO written in a bold black font. The letters E and S are interconnected.

34. Where a sign consists of both verbal and figurative elements, the former are, in principle, considered more distinctive than the latter, because the average consumer will more easily refer to the goods or services in question by quoting their name than by describing the figurative element of the trademark (EGC, SELENIUMACE, T-312/03, 14 July 2005, ECLI:EU:T:2005:289). The graphical aspect of the right invoked can be qualified as rather marginal, merely consisting of a specific layout of the letters, which the consumer will perceive as adornment (see EGC, Dieselit, T-186/02, 30 June 2004, ECLI:EU:T:2004:197). In any case, the relevant public will without any doubt perceive the verbal element YESIDO as the dominant element of the trademark invoked.

35. The consumer normally attaches more importance to the first part of a sign (EGC, Mundicor, T-183/02 and T-184/02, 17 March 2004, ECLI:EU:T:2004:79). In this case the trademark invoked is identically reproduced at the beginning of the contested trademark. The contested trademark differs because of the addition of the letters IDO and the use of a graphical element.

36. Visually the trademarks are similar to a certain degree.

Aural comparison

37. The trademark invoked is pronounced in one syllable as YES. The contested trademark will be pronounced in three syllables as YES-I-DO when the public recognizes the English words. If the contested trademark is perceived as a non-existent word, it will rather be pronounced in three syllables as YE-SI-DO. The S in the signs can then either be pronounced as Z or S. For those who pronounce the contested trademark in English, the pronunciation of the first three letters of the trademarks is identical. The pronunciation of the signs differs as regards the letters IDO in the contested trademark.

36. Aurally the trademarks are similar to a certain degree.

Conclusion

38. Conceptually, the signs are similar or a comparison is not relevant. Visually and aurally the signs are similar to a certain degree.

Comparison of the goods and services

39. In assessing the similarity of the goods and services concerned, all the relevant factors relating to these 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).

40. With the comparison of the goods and services of the trademark invoked and the goods against which the opposition is filed, the goods and services are considered only on the basis of what is expressed in the register or as indicated in the trademark application.

41. The goods and services to be compared are the following:

Opposition based on:	Opposition directed against:
KI 9 Datatransmissie-apparatuur; beeldoverdrachtapparatuur; apparaten voor het overbrengen van geluid; applicatiesoftware voor cloud-computingdiensten; computerprogramma's; hardware voor computernetwerken; computerprogramma's voor telecommunicatiedoeleinden; software; computerprogramma's voor netwerkbeheer; computerservers; downloadbare computersoftware- applicaties; software op mobiele telefoons; programma's voor gegevensverwerking; hardware voor datacommunicatie; informatieverwerkende apparatuur; digitale telecommunicatieapparatuur; lokale mobiele telefoonsystemen; server hardware voor toegang tot netwerken; netwerkserver; prepaid telefoonkaarten met magneetcode; sim-kaarten; telecommunicatieapparatuur voor mobiele netwerken; telecommunicatienetwerken; antwoordapparaten; downloadbare beveiligingssoftware voor computers; draagbare telecommunicatie- apparatuur; apparatuur voor computerinterfaces; programmeerbare telecommunicatie-apparatuur; telecommunicatie-uitrusting; telecommunicatie-instrumenten voor gebruik in cellulaire radionetwerken; audioconferentie-apparaten; mobiele applicaties; applicatiesoftware voor	CI 9 Computer peripheral devices; protective films adapted for cellphone screens; interfaces for computers; mouse [computer peripheral]; covers for calculators; covers for mobile phones; network communication apparatus; diaphragms [acoustics]; covers for smartphones; cases for smartphones.

<p>draadloze toestellen; applicatiesoftware voor mobiele telefoons; applicatiesoftware voor cloud-computingdiensten.</p> <p><i>Cl 9 Apparatus for the transmission of data; image transfer apparatus; sound transmitting apparatus; application software for cloud computing services; computer software; computer networking hardware; computer programmes for use in telecommunications; computer software; computer programs for network management; computer servers; downloadable computer software applications; computer software for mobile phones; data processing programs; data communications hardware; data processing apparatus; digital telecommunications apparatus; Local mobile telephone systems; server hardware for accessing networks; network servers; prepaid telephone calling cards, magnetically encoded; SIM-cards; telecommunications apparatus for use with mobile networks; telecommunications networks; answering machines; downloadable computer security software; portable telecommunications apparatus; computer interface apparatus; programmable telecommunications apparatus; telecommunications equipment; telecommunications instruments for use in cellular radio networks; audioconferencing apparatus; mobile apps; application software for wireless devices; application software for mobile phones; application software for cloud computing services.</i></p>	
<p>KI 35 Abonnementdiensten voor telecommunicatiediensten.</p> <p><i>Cl 35 Arranging subscriptions to telecommunication services for others.</i></p>	
<p>KI 38 Telecommunicatie; automatische overdracht van digitale gegevens met behulp van telecommunicatiekanalen; overdracht van gegevens door middel van telecommunicatie; telecommunicatie via de satelliet; communicatie via computerterminals; communicatie via optische vezelnetwerken; computerondersteunde verzending van berichten en beelden; advisering op het gebied van telecommunicatie; verzending en ontvangst</p>	

van gegevens via telecommunicatiemediën; overdracht van gegevens via telecommunicatienetwerken; levering van digitale audio en/of video door middel van telecommunicatie; informatie op het gebied van telecommunicatie; diensten op het gebied van informatie en advies met betrekking tot telecommunicatie; telecommunicatie via het internet; mobiele telecommunicatienetwerkdiensten; online-informatieverstrekking met betrekking tot telecommunicatie; bedienen van telecommunicatiesystemen; telecommunicatie via glasvezels; verschaffen van toegang tot gegevensbestanden; verschaffen van toegang tot telecommunicatienetwerken; verschaffen van elektronische telecommunicatieverbindingen; verlenen van toegang aan derden, tot telecommunicatie-infrastructuren; verschaffen van telecommunicatietoegang tot video- en audio-inhoud beschikbaar via een online video-on-demand dienst; verstrekken van telefooninlichtingendiensten ter ondersteuning bij telecommunicatie; telecommunicatiediensten; telecommunicatiediensten verleend via glasvezel-, draadloze- en kabelnetwerken; telecommunicatiediensten via cellulaire radionetwerken; telefoondiensten; verzenden van korte berichten [SMS], afbeeldingen, spraak, geluid, muziek en tekstcommunicatie tussen mobiele telecommunicatietoestellen; voicemail diensten; advisering met betrekking tot communicatieapparatuur; communicatie via de televisie voor vergaderingen; communicatie via virtuele particuliere netwerken [VPN]; verschaffen van virtueel particuliere netwerk [VPN] diensten; verschaffen van diensten voor het vergaderen per telefoon; beheren van een telecommunicatienetwerk.

Cl 38 Telecommunication services; automatic transfer of digital data using telecommunications channels; communication of data by means of telecommunications; communication services by satellite; communications by computer terminals; communications by fibre optic networks;

<p><i>computer aided transmission of messages and images; consultancy in the field of telecommunications; data transmission and reception services via telecommunication means; data transmission services over telecommunications networks; delivery of digital audio and/or video by telecommunications; information about telecommunication; information and advisory services relating to telecommunication services; internet based telecommunication services; mobile telecommunication network services; on-line information services relating to telecommunications; operation of telecommunication systems; optical fibre telecommunications services; providing access to databases; providing access to telecommunication networks; providing electronic telecommunication connections; providing third party users with access to telecommunication infrastructure; provision of telecommunication access to video and audio content provided via an online video-on-demand service; provision of telephone directory information to assist in telecommunications; telecommunication services; telecommunication services provided via fibre optic, wireless and cable networks; telecommunications services using cellular radio networks; telephone services; transmission of short messages [SMS], images, speech, sound, music and text communications between mobile telecommunications devices; voice mail services; advisory services relation to communications equipment; communications by television for meeting; communication via virtual private networks; providing virtual private network (VPN) services; teleconferencing services; manage a telecommunications network.</i></p>	
<p>KI 42 Elektronische opslagdiensten voor het archiveren van gegevensbestanden, afbeeldingen en andere elektronische gegevens; computerprogrammering voor telecommunicatie; advisering met betrekking tot software voor communicatiesystemen; advisering met betrekking tot het ontwerp en de ontwikkeling van computerprogramma's; advisering met betrekking tot hardware;</p>	

advisering met betrekking tot cloud computing en -toepassingen; ontwerpen en ontwikkelen van data-opslagsystemen; ontwerp en ontwikkeling van besturingssoftware voor toegang tot en gebruik van cloud computing netwerken; ontwerp van kantoorautomatiseringsapparatuur en van communicatiesystemen, alsmede van telecommunicatie-apparatuur en -instrumenten; hosting en ter beschikking stellen van software (SaaS) en verhuur van software; advisering op het gebied van informatietechnologie; installatie, onderhoud, updating en upgrading van computer software; IT consultancy, advies- en informatiediensten; IT-beveiliging, -bescherming en -bewaking; onderhoud en updating van software voor communicatiesystemen; verhuur van besturingssoftware voor toegang tot en gebruik van cloud computing netwerken; programmering van telecommunicatiesoftware; onderzoek op het gebied van communicatietechnologie; onderzoek op het gebied van telecommunicatietechnieken; hosting van servers; advisering op het gebied van software; ontwikkeling van software; installatie van software; onderhoud van software; advisering op het gebied van telecommunicatie-engineering; advisering op het gebied van telecommunicatietechnologie; testen, analyseren en monitoren van telecommunicatiesignalen; webhosting; analyse van telecommunicatiesignalen; ontwerpen van software voor omzetting van gegevens en multimediamateriaal van en naar verschillende protocollen; controle op afstand van computersystemen; monitoring van telecommunicatiesignalen; informatie met betrekking tot it en programmering via websites; IT-diensten; elektronische data-opslag; hosting van platforms op het internet; cloud computing; hosting van digitale inhoud op internet; verschaffing van virtuele computersystemen via cloud computing.; technisch ontwerp en ontwikkeling van telecommunicatienetwerken.

Cl 42 Electronic storage devices for archiving databases, images and other electronic data;

computer programming for telecommunications; consultancy relating to software for communication systems; consultancy relating to the design and development of computer software programs; consultation services relating to computer hardware; consulting in the field of cloud computing networks and applications; design and development of data storage systems; design and development of operating software for accessing and using a cloud computing network; design of office automation equipment, communication systems, telecommunication apparatus and telecommunication instruments; hosting and providing of software as a service [SaaS] and rental of computer software; information technology consulting; installation, maintenance, updating and upgrading of computer software; IT consultancy, advisory and information services; IT security, protection and restoration; maintenance and updating of software for communication systems; rental of operating software for accessing and using a cloud computing network; programming of telecommunications software; research in the field of communications technology; research in the field of telecommunications technology; server hosting; computer software consultancy; software development; installation of computer software; maintenance of computer software; telecommunications engineering consultancy; telecommunications technology consultancy; testing, analysis and monitoring of telecommunications signals, hosting web sites, analysis of telecommunication signals; design of software for data and multimedia content conversion from and to different protocols; monitoring of computer systems by remote access; monitoring of telecommunication signals; providing information on computer technology and programming via a web site; IT services; electronic data storage; hosting platforms on the internet; cloud computing; hosting of digital content on the internet; providing virtual computer systems through cloud computing; technical design and planning of telecommunications networks.

N.B. The original language of this registration is Dutch. The translation is only added to improve the readability of this decision.	
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42. The goods *interfaces for computers* of the defendant are identical to the goods *computer interface apparatus* of the opponent.

43. The goods *computer peripheral devices; mouse [computer peripheral]* of the defendant are identical to the goods *computer interface apparatus* of the opponent. The defendant's peripheral devices are auxiliary computer devices intended to be connected to a computer and used on a computer system. The opponent's interface apparatus concern all hardware components that allow a person to interact with a computer and therefore including the specific hardware components of the defendant. According to established case law, if the goods of the earlier trademark also contain goods that are mentioned in the contested trademark, these goods are considered identical (see EGC, *Fifties*, T-104/01, 23 October 2002, ECLI:EU:T:2008:399 and EGC, *Arthur et Felicie*, T-346/04, 24 November 2005, ECLI:EU:T:2005:420). As the opponent's goods cover the specific goods of the defendant they can be considered identical.

44. The goods *protective films adapted for cellphone screens; covers for calculators; covers for mobile phones; covers for smartphones; cases for smartphones* of the defendant are similar to the goods *apparatus for the transmission of data; data processing apparatus; digital telecommunications apparatus; portable telecommunications apparatus; telecommunications equipment* of the opponent. The defendant's goods are accessories for smartphones or calculators. The opponent's goods are in general devices that can transmit or process data, like for example smartphones and calculators. The goods of the defendant and the opponent can be considered complementary. The producer of a smartphone or a calculator will also offer accessories as they are specifically made to fit or match a certain type of phone or calculator. The defendant's goods are thus so closely linked to the opponent's apparatus that the consumer may think that a single undertaking is responsible for the production of those goods (EGC, *Flaco*, T-74/10, 11 May 2011, ECLI:EU:T:2011:207; EGC, *Artis*, T-558/11, 21 November 2012, ECLI:EU:T:2012:615; EGC, *T-504/11, Dignitude*, 04 February 2013, ECLI:EU:T:2013:57). All of these goods can be produced and distributed by the same companies through the same channels. These goods are thus deemed similar.

45. The goods *network communication apparatus* of the defendant are identical to the goods *network servers* of the opponent. A network server is a computer system used as the central repository of data and various programs that are shared by users in a network. Considering that the goods of the opponent concern a particular type of network communication apparatus and that the goods of the defendant relate to network communication apparatuses in general, these goods can be considered identical. Indeed, according to established case law, if the goods of the contested sign also contain goods that are mentioned in the earlier trademark, these goods are considered identical (see EGC, *Metabiomax*, T-281/13, 11 June 2014, ECLI:EU:T:2014:440).

46. The goods *diaphragms [acoustics]* of the defendant are identical to the goods *sound transmitting apparatus* of the opponent. A diaphragm is a transducer that is intended to inter-convert mechanical vibrations to sounds, or vice versa and it is thus a specification of the broader term sound transmitting apparatus of the trademark invoked and therefore identical to the latter. According to established case law, if the goods of the earlier trademark also contain goods that are mentioned in the contested trademark, these goods are considered identical (see EGC, *Fifties* and *Arthur et Felicie*, already cited).

Conclusion

47. The goods of the defendant are either identical or similar to the goods of the opponent.

A.2 Global assessment

48. When assessing the likelihood of confusion, in particular the level of attention of the relevant public, the similarity of the goods and services in question and the similarity of the signs are important factors.

49. The global assessment of the likelihood of confusion assumes that there is a certain degree of interdependence between the factors to be taken into account, particularly between the level of similarity of the signs and of the goods or services which they cover. A lesser degree of similarity between the relevant goods or services can be offset by a greater degree of similarity between the trademarks, and vice versa (Canon and Lloyd, already cited).

50. The average consumer is deemed to be reasonably well-informed and reasonably observant and circumspect. It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question (case Lloyd, already cited). The goods at hand are intended either for a professional public with an average or above average level of attention, depending on the goods in question, or for the public at large whose level of attention is deemed to be normal.

51. The more distinctive the earlier trademark, the greater the likelihood of confusion. Marks with a highly distinctive character, either *per se* or because of the reputation they possess on the market, enjoy broader protection than marks with a less distinctive character (Canon, Sabel and Lloyd, already cited). In the present case, the trademark invoked has a normal distinctiveness, as it is not descriptive of the goods and services concerned. However, even if the Office assumed that the trademark invoked has a rather weak distinctive character as it concerns the generally known word 'yes', it is of importance that, according to European case law, a weak distinctive character does not, by definition, mean that there is no likelihood of confusion. Although the distinctive character of the marks must be taken into account with the assessment of the likelihood of confusion, it is only one of a number of elements concerning that assessment (CJEU, Ferromix, C-579/08, 15 January 2010, ECLI:EU:C:2010:18). Even in a case involving an earlier mark of weak distinctive character, there may be a likelihood of confusion, particularly because of a similarity between the signs and between the goods or services covered (EGC, Flexi Air, T-112/03, 16 March 2005, ECLI:EU:T:2005:102).

52. Account must also be taken of the circumstance that normally, the average consumer perceives a mark as a whole and does not proceed to analyse its various details (Sabel and Lloyd, already cited). Furthermore, it is of importance that the average consumer only rarely has the chance to make a direct comparison between the different marks but must place his trust in the imperfect picture of them that he has kept in his mind. Finally, a likelihood of confusion among part of the relevant public is sufficient to grant an opposition (EGC, Hai/Shark, T-33/03, 9 March 2005, ECLI:EU:T:2005:89).

53. The goods of the defendant are identical or similar to the goods of the opponent. Furthermore, the signs are visually and aurally similar to a certain degree and conceptually they are similar or a comparison is not relevant. Notwithstanding a possible higher level of attention of the public for part of the goods, based on the foregoing, the Office is of the opinion that the relevant public might believe that the goods in question come from the same undertaking or from economically-linked undertakings.

B. Other factors

54. Regarding the defendant's observation concerning the saturation of the relevant registers with trademarks that are comparable to the trademark invoked (point 19), the Office admits that the possibility cannot be entirely excluded that, in certain cases, the coexistence of earlier marks on the market could reduce the likelihood of confusion between the two marks at issue. However, that possibility can be taken into consideration only if, at the very least, during the proceedings, the defendant has duly demonstrated that such coexistence was based upon the absence of any likelihood of confusion on the part of the relevant public between the earlier marks upon which it relies and the opponent's earlier mark on which the opposition is based, and provided that the earlier marks concerned and the marks at issue are identical (see EGC, Top iX, T-57/06, 7 November 2007, ECLI:EU:T:2007:333 and LIFE BLOG, T460/07, 20 January 2010, ECLI:EU:T:2010:18). In this case, however, no such evidence has been provided by the defendant.

55. The defendant refers to similar proceedings before EUIPO, the EGC and INPI in order to support his arguments in this case (point 21). It must however be recalled that the Office is not bound by other and/or its previous decisions. Each case has to be dealt with separately and with regard to its particularities (see, by analogy with, EGC, Curon, T-353/04, 13 February 2007, ECLI:EU:T:2007:47).

C. Conclusion

56. Based on the foregoing the Office is of the opinion that there exists a likelihood of confusion.

IV. DECISION

57. The opposition with number 2014778 is justified.

58. International application with number 1434010 will not be registered in the Benelux.

59. The defendant shall pay the opponent 1,045 euros in accordance with article 2.16, 5 BCIP in conjunction with rule 1.28, 3 IR, as the opposition is justified in its entirety. This decision constitutes an enforceable order pursuant to article 2.16, 5 BCIP.

The Hague, 19 December 2019

Tineke Van Hoey
(*rapporteur*)

Diter Wuytens

Pieter Veeze



Administrative officer: Gerda Veltman