

BENELUX OFFICE FOR INTELLECTUAL PROPERTY
OPPOSITION DECISION
N° 2015141
of 15 February 2021

Opponent: **Venus Berlin GmbH**
Stieffring 14
13627 Berlin
Germany

Representative: **Office Freylinger S.A.**
Route d'Arlon 234
8010 Strassen
Luxemburg

Invoked trademark: **EU trademark 14539761**
Venus Love Water

Against

Defendant: **Hubert H. Jacobus**
Oostzeedijk 316
3063 CC Rotterdam
The Netherlands

Contested trademark: **Benelux application 1391306**
LoveWater, WaterLove

I. FACTS AND PROCEEDINGS

A. Facts

1. On 1 March 2019 the defendant filed a Benelux trademark application for the word trademark LoveWater, WaterLove for goods in class 32. This application was processed under number 1391306 and was published on 6 March 2019.
2. On 30 April 2019 the opponent filed an opposition against this application. The opposition is based on the earlier European Union trademark 14539761 for the word trademark Venus Love Water, filed on 9 September 2015 and registered on 22 June 2017 for goods in class 32.
3. According to the register the opponent is the actual holder of the trademark invoked.
4. The opposition is directed against all the goods of the contested application and is based on all the goods of the trademark invoked.
5. The grounds for opposition are those laid down in Article 2.14, 2 (a) Benelux Convention on Intellectual Property (hereinafter referred to as: "BCIP").
6. The language of the proceedings is English.

B. Proceedings

7. The opposition is admissible and the Benelux Office for Intellectual Property (hereinafter referred to as: "the Office") notified the parties on 1 May 2019. During the administrative phase of the proceedings both parties filed arguments. All the documents submitted meet the requirements as stated in the BCIP and the Implementing Regulations (hereinafter referred to as: "IR"). The administrative phase of the procedure was completed on 1 November 2019.

II. ARGUMENTS OF THE PARTIES

8. The opponent filed an opposition at the Office under article 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 the relevant marks and of the goods or services concerned.

A. Opponent's arguments

9. The opponent observes that, from a visual point of view, the two trademarks coincide in the verbal elements "Love Water / LoveWater" and "WaterLove", respectively. Thus, apart from the verbal element "Venus" of the earlier trademark, the two trademarks are composed of identical words, either placed in the same order or in an inversed order.
10. The only very small difference between these elements is the space between the words "love" and "water" in the contested trademark, which however is insignificant, according to the opponent.
11. The second element of the contested trademark "WaterLove" is also identically contained in the earlier trademark, the only very small difference being the order of the words "water" and "love", which does not actually play any role when taking into account the overall impression created by the two trademarks.

12. In addition, the word "Love" retains an independent distinctive role in the contested trademark and is to be considered as the dominant element thereof. The opponent concludes that the overall visual impression created by the two trademarks is very similar.

13. From a phonetic point of view, the trademarks coincide in the words "love" and "water". The opponent points out that the fact that the words "LoveWater, WaterLove" are linked together does not have any incidence from a phonetic point of view, as the concerned words are pronounced in the same way. The opponent concludes that the trademarks must be considered as highly similar also from a phonetic point of view.

14. Regarding the conceptual comparison, the opponent is of the opinion that both trademarks will be perceived as a combination of the concepts carried out by the words "Venus", "Love" and "Water". The opponent points out that the word "Venus" refers to the Roman goddess of love so that, conceptually, the words perceived by the consumers will be finally only "Love" and "Water". The trademarks share thus the individual concepts of "water" and "love", as well as the concept of "love" carried out by the word "Venus" of the earlier trademark, so that they are to be considered as conceptually identical or at least highly similar.

15. According to the opponent, the goods of the contested trademark should be considered identical or at least highly similar to the goods *mineral and aerated waters and other non-alcoholic beverages* covered by the earlier trademark.

16. Considering the above, the opponent concludes that there exists a likelihood of confusion in the mind of the public between the trademarks at stake and he therefore asks the Office to reject the contested trademark application and to let the defendant bear the costs of the procedure.

B. Defendant's arguments

17. The defendant agrees with the opponent that the words *love* and *water* are well known common words, which the opponent however now claims he has the exclusive rights on. But the opponent has distinguished its name additionally with "Venus". The defendant wonders whether the trademark Moon LoveWater would also be opposed. Furthermore, the name Venus in front of the word *Love* has a pornographic orientation, according to the defendant.

18. The defendant does not see any familiarity with its name selling potable water, which is crystallized by the word *Love*, based on the claim that both words are common names.

III. DECISION

A.1 Likelihood of confusion

19. 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.

20. Article 2.2ter, para. 1 BCIP stipulates that "*A trademark shall, in case an opposition is filed, not be registered (...) where 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.*"

21. According to case law of the Court of Justice of the European Union (hereinafter: the "CJEU") concerning the interpretation of Directive (EU) 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 goods

22. 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).

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

24. The goods to be compared are the following:

Opposition based on:	Opposition directed against:
Class 32 Mineral and aerated waters and other non-alcoholic beverages; Fruit beverages and fruit juices; Syrups and other preparations for making beverages.	Class 32 Bottled water; Bottled drinking water; Carbonated mineral water; Carbonated water; Carbonated waters; Drinking water; Drinking water with vitamins; Drinking waters; Flavored mineral water; Flavored waters; Flavoured mineral water; Flavoured waters; Fruit flavoured waters; Glacial water; Functional water-based beverages; Mineral and aerated waters; Mineral enriched water [beverages]; Mineral water; Mineral water [beverages]; Mineral water (Non-medicated -); Mineral waters; Mineral waters [beverages]; Nutritionally fortified water; Purified drinking water; Sparkling water; Soda water; Spring water; Spring waters; Table water; Table waters; Water-based beverages containing tea extracts; Water enhanced with minerals; Waters (Table -); Drinking spring water; Drinking mineral water; Distilled drinking water

25. The goods *mineral and aerated waters* are mentioned *expressis verbis* in the list of goods of the contested trademark as well as in the list of goods of the trademark invoked and are thus identical.

26. All the other goods mentioned in the list of the contested trademark belong to the categories mineral and aerated waters and other non-alcoholic beverages of the trademark invoked and are therefore identical to them. Indeed, according to established case law, if the goods of the earlier trademark also contain goods that are mentioned in the application for the contested trademark, these goods are considered identical (see EGC, Fifties, T104/01, 23 October 2002, ECLI:EU:T:2002:262; Arthur et Félicie, T-346/04, 24 November 2005, ECLI:EU:T:2005:420 and Prazol, T-95/07, 21 October 2008, ECLI:EU:T:2008:455).

Comparison of the trademarks

27. The wording of Article 5, 1 (b) of the Directive (compare 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).

28. 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).

29. The trademarks to be compared are the following:

Opposition based on:	Opposition directed against:
Venus Love Water	LoveWater, WaterLove

Conceptual comparison

30. The trademark invoked is a purely verbal trademark, consisting of three words, Venus, Love and Water. The contested application is also a purely verbal trademark, consisting of the words LoveWater and WaterLove, separated by a comma.

31. Both parties agree that the words love and water are common English words that will be understood by the average consumer in Benelux. In the contested trademark, these words are written as one word, but the public will easily recognise the separate words. Indeed, the relevant consumers, when perceiving a trademark, will break it down into elements that suggest a specific meaning, or that resemble words that they already know (see CEU, Respicur, T-256/04, 13 February 2007, EU:T:2007:46 and Aturion, T-146/06, 13 February 2008, EU:T:2008:33). Moreover, in the contested trademark, the words Love and Water are written with a capital letter, which makes it easier for the consumer to read it as two separate words.

32. The word Venus in the trademark invoked will be understood as the name of a planet in the solar system. The opponent explains that Venus also refers to the Roman goddess of love (see point 14). For those amongst the relevant public who are familiar with this, the conceptual reference to the concept of love will still be reinforced.

33. Although the elements Love and Water are not the most distinctive elements in the trademark invoked with regard to the goods concerned, these words return twice in the contested trademark, once in

de same order and once in a reversed order. Therefore, both trademarks are conceptually similar in that they refer to the same concepts, love and water.

Visual comparison

34. Both the trademark invoked, and the contested trademark are pure verbal trademarks, the first consisting of three words, "Venus", "Love" and "Water", the latter consisting of two words, divided by a comma, "LoveWater" and "WaterLove".

35. The words "love" and "water" of the trademark invoked recur in the contested trademark, albeit written in one word with two capital letters. The second word of the contested trademark will be perceived as the inversion of the first one.

36. The trademarks are visually similar as they have two identical words in common.

Aural comparison

37. With regard to the aural comparison, it must be remembered that, in the strict sense, the phonetic reproduction of a complex sign corresponds to that of all its verbal elements, regardless of any specific graphic features, which fall more within the scope of the analysis of the sign on a visual level (EGC, PC Works, T-352/02, 25 May 2005, ECLI:EU:T:2005:176 and Thai Silk, T-361/0821, April 2010, ECLI:EU:T:2010:152).

38. The elements "Love Water" of the trademark invoked and "LoveWater" of the contested trademark are pronounced identically regardless of the space between the two words. The element "WaterLove" of the contested trademark will be perceived as an inversion of and is phonetically similar to the element "Love Water" of the trademark invoked.

39. The trademarks are aurally similar as they consist of two identically pronounced words.

Conclusion

40. The trademarks are similar from a conceptual, visual and aural point of view.

A.2 Global assessment

41. 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 trademarks are important factors.

42. The average consumer is deemed to be reasonably well-informed and reasonably observant and circumspect (case Lloyd, already cited). It should also be considered that the average consumer's level of attention is likely to vary in accordance with the category of goods or services in question. The present case concerns basic consumer goods which are targeted at the public in general. For these goods the average level of attention of the public concerned may be deemed normal.

43. The global assessment of the likelihood of confusion assumes that there is a certain degree of interdependence between the factors that have 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). In the case at hand the goods concerned are identical.

44. It should also be taken into consideration that the average consumer usually perceives a mark as a whole and does not proceed to an analysis of 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 trademarks and must place their trust in the imperfect picture of those that they have kept in their mind.

45. 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 concerned.

46. The trademarks are conceptually, visually and aurally similar and the goods concerned are identical. Based on the aforesaid, the Office comes to the conclusion that the relevant public might believe that the goods in question come from the same undertaking or from economically linked undertakings.

B. Conclusion

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

IV. CONSEQUENCE

48. The opposition with number 2015141 is justified.

49. The Benelux application with number 1391306 will not be registered.

50. 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, 15 February 2021

Willy Neys
rapporteur

Camille Janssen

Diter Wuytens



Administrative officer:

Annadina Dikken