

**BENELUX-OFFICE FOR INTELLECTUAL PROPERTY****OPPOSITION DECISION****N° 2015316****of 16 October 2020****Opponent:** **The a2 Milk Company Limited**

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1010 Auckland
New Zealand

Representative: **NautaDutilh, SPRL**

Chaussée de la Hulpe 120
1000 Brussels
Belgium

Invoked trademark 1: **EU trademark 10097939****Invoked trademark 2:** **EU trademark 14406326****Invoked trademark 3:** **EU trademark 3974623***against***Defendant:** **MJN U.S. Holdings LLC IN**

West Lloyd Expressway 2400
47721-0 Evansville
United States of America

Representative: **Bird & Bird (Netherlands) LLP**


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Contested trademark: Benelux application 1394727




ProAffinity[®]

I. FACTS AND PROCEEDINGS

A. Facts

1. On 26 April 2019 the defendant filed a Benelux trademark application for the combined word/figurative trademark  for goods in classes 5 and 29. This application was processed under number 1394727 and was published on 6 May 2019.

2. On 1 July 2019 the opponent filed an opposition against this application. The opposition is based on the following earlier trademarks:

- European Union trademark 10097939 for the combined word/figurative trademark  , filed on 5 July 2011 and registered on 11 August 2012 for goods in classes 5 and 29;
- European Union trademark 14406326 for the combined word/figurative trademark  , filed on 22 July 2015 and registered on 12 September 2016 for goods in classes 5 and 29;
- European Union trademark 397462 for the combined word/figurative trademark  , filed on 13 August 2004 and registered on 28 November 2005 for goods in class 29.

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

4. The opposition is directed against all the goods of the contested application and is based on all the goods of the trademarks 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").¹

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 2 July 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 22 January 2020.

II. ARGUMENTS OF THE PARTIES

¹ This decision refers to the laws and regulations applicable at the date of the decision, unless it concerns provisions that have undergone a material change relevant to the decision during the proceedings.

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 trademarks invoked are dominated by the "a2" element, as the "milk" word in the second trademark invoked and the figurative elements in the third trademark invoked are descriptive.

10. In the opposed trademark, the element "pro" has no distinctive character, as it merely refers to advanced or "professional" features of the goods concerned. The element "Affinity" introduces the "A2" element. Due to the visual emphasis on the distinctive "A2" element in a droplet shape, this element clearly has an autonomous distinctive position in the opposed mark. The use of a letter A followed by the numeral 2, either in superscript or in standard form, makes the trademarks visually very similar, according to the opponent. The letter, as well as the number juxtaposed to it, are identical.

11. Due to the presence of this common "A2" element, the trademarks overlap and are partially, but decisively identical from a phonetic point of view. The addition of the descriptive word element "ProAffinity" is not sufficient in itself to rule out any similarity

12. The opponent finds that the trademarks at hand have no meaning for the public. Accordingly, the conceptual comparison can have no influence on the assessment of the similarity of the trademarks at issue and therefore, only the visual and aural comparison should be taken into consideration.

13. According to the opponent, all goods covered by the contested Benelux application are identical or at least highly similar to those for which opponent's trademarks are registered because they either share the same nature or method of use, are interchangeable and, therefore, target the same consumers, which can find them in the same shops or aisles thereof.

14. Considering the above, the opponent concludes that there exists a likelihood of confusion. 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

15. According to the defendant, it becomes immediately clear that visually the trademarks are not similar at all. In the contested trademark, the element "ProAffinity" immediately catches the eye and is the dominant element, with "A²" merely mentioned after and depicted as a visual "twist" on the merely descriptive indication "A2". Moreover, the contested trademark uses a capital letter A, whereas the trademarks invoked comprise a lowercase "a", which are visually dissimilar. The dissimilarity is further emphasized by the completely different colour schemes and other figurative elements.

16. Phonetically the trademarks are also dissimilar. "ProAffinity" is the more dominant element, and the consumer will perceive the contested trademark as such.

17. The trademarks invoked are conceptually dissimilar to the contested trademark. The latter one has "ProAffinity" as the dominant element, whereas the elements "a2" in the trademarks invoked have a defined meaning in relation to milk. The defendant explains that A2 is a type of milk that is free, or predominantly free, of A1 beta-casein protein. Such milk is commonly known as A2 milk. Most milk contains two forms of protein beta-casein, known as A1 and A2. A2 milk comes from specially bred cows that

produce milk that only or primarily contain the A2 protein. According to the defendant, the term A2 in relation to milk and milk-related supplementary and complimentary products in classes 5 and 29 is, therefore, descriptive. In that respect, the defendant refers to two earlier decisions of the Office.

18. Consequently, the a2 part of the trademarks invoked being descriptive, that part will not be regarded as distinctive and dominant in the overall impression. As a result, the scope of protection of these trademarks is limited to the design elements. This is however not the case for AII, as it creates a recognisably different overall impression due to the unusual use of roman numerals. Hence, the defendant concludes that the trademarks are conceptually dissimilar.

19. The mere statement of the opponent that "the" goods are identical, or at least highly similar does not substantiate or prove anything. For example, it is absurd that one would even consider poultry as a "highly similar" good to milk products. So, the defendant concludes that not all the goods concerned are similar.

20. With regard to food impacting health and especially food for babies, the level of attention will be necessarily higher, the latter as it concerns goods which may impact the development, health and wellbeing of babies. This means that the relevant public is even less likely to be confused, according to the defendant.

21. Based on the above, the defendant concludes that the relevant public, which has a high degree of attention, will not be confused and will not think that its products originate from the same company as the opponent's products and will not think they are dealing with the same or a similar trademark. Consequently, the opposition must be rejected.

III. DECISION

A. Likelihood of confusion

22. 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.

23. 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.*"

24. 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 trademarks and the goods


25. 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).

26. 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).

27. 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, C334/05 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).

28. The trademarks and goods to be compared are the following:

Opposition based on:	Opposition directed against:
 <p>Class 5 Infant foods; milk and milk powder for infants. Class 29 Milk and milk products in this Class; other goods in this Class which include milk or milk products as ingredients.</p>	 <p>Class 5 Pharmaceutical, veterinary and sanitary preparations; dietetic substances adapted for medical use, food for babies; infant formula; nutritional supplements; vitamin and mineral supplements; food adapted for medical purposes; electrolyte replenishment preparations; plasters, materials for dressings; material for stopping teeth, dental wax; disinfectants; preparations for destroying vermin; fungicides, herbicides. Class 29 Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams; eggs, milk and milk products; powdered preparations for making milk beverages; milk powder; milk based drinks; milk substitutes; edible oils and fats.</p>
	
<p>Class 5 Food for infants; powdered milk for babies; dietetic beverages adapted for medical use. Class 29 Milk powder; milk; butter; cheese; yoghurt; milk beverages, milk predominating.</p>	

	
<p>Class 29 Milk and milk products, full cream, milk powder, full cream milk powder, skim milk powder, whey and whey products, butter, cheese, milk beverages, other goods in this class which include milk or milk products as ingredients.</p>	

29. The trademarks invoked are combined word/figurative trademarks. The first trademark invoked consists of the characters "a2", which are depicted in a white curved font and surrounded by an asymmetrical circle which gradually becomes more vague towards the outside against its black backdrop. Within the "a", a white stripe in the shape of a droplet is visible. The second trademark invoked consists of the characters "a2" written in lowercase purple, curved letters, with directly below the word "Milk", written in the same purple, curved font. The third trademark invoked consists of the characters "a2", with the "a" depicted in a bold font, and the "2" depicted in a slim font, within a design element of a white liquid splashing on these characters (or a black liquid against a white background), and the whole trademark is framed by a black outline.

30. The contested trademark is also a combined word/figurative trademark, consisting of the words "Pro" in blue and "Affinity" in gold, joined together, and directly thereafter the letters "A²" in gold. These final two characters are depicted within a golden drop falling downwards.

31. According to the opponent, the element "A²" clearly plays an autonomous distinctive position in the opposed trademark, due to the visual emphasis on it in a droplet shape (see paragraph 10). According to him, the use of a letter A followed by the numeral 2, either in superscript or in standard form, makes the trademarks visually very similar. However, even if the letter as well as the number juxtaposed to it, are the same, the visual representation in the trademarks invoked and in the contested trademark is very different. For example, the presentation A² in the contested trademark will be reminiscent of an algebraic formula.

32. Moreover, this element A² is depicted at the very end of the trademark in another figurative element. It is preceded by another word/figurative element of 11 letters and is depicted in a smaller font. In this context, it is generally known that it is the first part of a trademark, to which the consumer normally attaches more value (EGC, Mundicor, T-183/02 and T-184/02, 17 March 2004, ECLI:EU:T:2004:79)

33. Furthermore, as the defendant has explained (see points 17 and 18), in relation to the goods at hand, the indication A2 (or a2) has a mere descriptive meaning. A2 milk is provided by cows with two copies of the A2 gene from beta-casein. This differs from regular milk, which is referred to as A1. The idea is supposedly that the A2 gene is a more original (less inbred) variant. The milk of these cows is also referred to as "primal-milk". Therefore, mainly the older and more authentic cow breeds, such as the Jerseys and Guernseys, produce A2 milk. Positive characteristics are attributed to A2 milk. For example, people supposedly have less intolerance symptoms (particularly in digestion, bloating, etc.) when consuming A2 milk, in contrast to A1 milk. These alleged beneficial properties of A2 milk form an important sales argument.² The Office finds that in the particular branche of milk

² See (amongst others):

<http://www.local2local.nl/blog/a2-melk-eeen-wonder/> and <https://oermelk.nl/> and <http://www.semex.nl/i?lang=nl&viewnews=1457017994> and <http://www.milkstory.nl/artikel/is-a2-melk-de-oplossing-voormelkallergie-en-intolerantie> and <http://edepot.wur.nl/248064> and

and milk products both consumers and producers are generally well aware of the fact that A2 refers to a specific characteristic of the product. Therefore the Office must conclude that the indication "a2" or "A2" is a descriptive indication for a type of milk and for (dairy) products derived from it. The element therefore has no distinctive character as such. See in that respect also the opposition decisions 2012190 and 2012212 of 17 August 2017.

34. In the trademarks invoked, the verbal element will be interpreted by the public as non-distinctive, whereas it describes a characteristic of the relevant goods which concern goods relating to milk and milk products (EGC, Budmen, T-129/01, 3 July 2003, ECLI:EU:T:2003:184). Because the respective word elements "a2" and "a2 milk" are not to be considered distinctive and (therefore) dominant in the global impression of the trademarks, more weight should be given to the figurative elements.

Conclusion

35. The verbal element in the trademarks invoked is exclusively to be found in a descriptive element. Due to the differences in the graphic components, the other and much longer word/figurative element in the contested trademark and the unusual use of a mathematically looking formula in the contested trademark, the Office considers that the overall impression of the trademarks is not similar or in any case insufficient to be able to justify the finding of likelihood of confusion.

B. Conclusion

36. Since it has been established that the trademarks invoked do not correspond to the contested trademark, the Office will not proceed to the comparison of the goods for reasons of procedural economy. Indeed, there can be no likelihood of confusion if the trademarks are not sufficiently similar, even if the goods were identical (see in this sense: EGC, easyHotel, T-316/07, 22 January 2009, ECLI:EU:T:2009:14 and YOKANA, T-103/06, 13 April 2010, ECLI:EU:T:2010:137).

IV. CONSEQUENCE

37. The opposition with number 2015316 is not justified.

38. The Benelux application with number 1394727 will be registered for all the goods applied for.

39. The opponent shall pay the defendant 1,045 euros in accordance with article 2.16, 5 BCIP in conjunction with rule 1.28, 3 IR, as the opposition is not justified. This decision constitutes an enforceable order pursuant to article 2.16, 5 BCIP.

The Hague, 16 October 2020

Willy Neys
rapporteur

Pieter Veeze

Tomas Westenbroek



Administrative officer:

Rémy Kohlsaet