

**BENELUX OFFICE FOR INTELLECTUAL PROPERTY  
OPPOSITION DECISION  
N° 2016060  
of 21 December 2021**

**Opponent:** **LOTUS BAKERIES N.V.**

Gentstraat 1  
9971 Lembeke  
Belgium

**Representative:** **Novagraaf Belgium S.A./N.V.**

Chaussée de la Hulpe 187  
1170 Watermael-Boitsfort  
Belgium

**1<sup>st</sup> Invoked right:** **International trademark registration 619627A**

DINOSAURUS

**2<sup>nd</sup> Invoked right:** **Benelux trademark registration 1352152**



*against*

**Defendant:** **Rigo Trading S.A.**

Route de Trèves 6 EBBC Building E  
2633 Senningerberg  
Luxembourg

**Representative:** **Rigo Trading S.A.**

Route de Trèves 6 EBBC Building E  
2633 Senningerberg  
Luxembourg

**Contested trademark:** **Benelux application 1412943**

DINOSOURS

## **I. FACTS AND PROCEEDINGS**


### **A. Facts**

1. On 6 March 2020 the defendant filed a Benelux trademark application for the wordmark "DINOSAURS" for goods in class 30. This application was processed under number 1412943 and was published on 19 March 2020.

2. On 18 May 2020 the opponent filed an opposition against the registration of the application. The opposition is based on:

- the International registration 619627A designating the Benelux of the wordmark "DINOSAURUS", filed and registered on 21 June 1994 for goods in class 30.



- the Benelux registration 1352152 of the semi figurative mark "  ", filed on 14 April 2017 and registered on 5 July 2017 for goods in class 30.

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

4. The opposition is directed against all of the goods covered by the contested application and is based on all of the goods covered by the trademarks invoked.

5. The grounds for opposition are those laid down in article 2.14, 2 (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 by the Benelux Office for Intellectual Property (hereinafter: "the Office" or "BOIP") to the parties on 19 May 2020. During the administrative phase of the proceedings both parties filed arguments and the opponent filed documents to prove use of his first trademark invoked. Upon a joint request of the parties communicated on the 26 November 2020 the proceedings were suspended until the 31 January 2021. In addition, the defendant has made a limitation of the products covered by its application alongside his arguments, submitted on the 4 August 2021. 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 5 August 2021.

## **II. ARGUMENTS**

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 trademark and sign and the identity or similarity of the goods or services concerned.

### **A. Opponent's arguments**

9. The opponent starts his arguments with the comparison of the goods covered by the trademarks. In that regard the opponent notes that the goods "Confectionery" of the contested trademark are also covered by the earlier Benelux trademark. Furthermore, the opponent notes that the term "confectionery" is broad and covers also "cereal biscuits" as covered by the first trademark invoked or is, at least, highly similar to these goods. As a result, the opponent considers the goods covered by the trademark applications to be identical or at least highly similar.

10. Considering that the goods covered by the trademarks concerned are directed at the public at large and are daily consumer goods, the opponent notes that the level of attention of the relevant public for these goods will be low to average.

11. As regards the visual comparison of the signs, the opponent notes that both signs are composed respectively of 10 letters and 4 syllables and 9 letters and 3 syllables. The signs share 8 of the letters composing them, positioned in the same order. The signs further coincide in their first part and their last letter further increasing the visual similarity between them. The opponent therefore considers there to be a high level of visual similarity between the signs.

12. Phonetically, in addition to the similarities previously mentioned, the opponent notes that the phonetic difference between the letter "A" and "O" in the respective signs is minor and that the last syllable of the contested sign, when pronounced quickly will be less noticeable. As a result, the opponent considers there to be a high level of aural similarity between the signs.

13. Conceptually, the trademarks are identical in that they refer to dinosaurs.

14. The opponent notes that the earlier trademarks in that they refer to dinosaurs, do not have any relation to the goods they cover and their distinctiveness can thus be seen as normal.

15. As a result of the above, the opponent considers that there exists a likelihood of confusion for the consumer and asks the Office not to register the contested trademark and to order that the costs be borne by the defendant.

16. Following the request by the defendant, the opponent submitted proof of use.

## **B. Defendant's arguments**

17. In the first place the defendant asks the opponent to provide proof of use for his trademark.

18. In that regard the defendant considers that the proof submitted by the opponent is insufficient to prove genuine use of the first invoked trademark. More specifically, he notes that some of the annexes enumerated by the opponent were not communicated. In addition according to the defendant, the only evidence provided containing an indication on the time of use are some of the invoices and the price list submitted, while all other documents either fall outside the relevant time period or are not dated. Furthermore, the defendant notes that the documents submitted do not show sufficient indication as regards the place of use. Also, the defendant observes that while some of the documents are provided in French, there is no reason to believe that this would mean that they are destined for Belgium or Luxembourg rather than France. Any documents provided in Dutch are also provided in other additional languages which, according to the defendant, makes it difficult to reach a conclusion as to the place of use. As regards the invoices, the defendant notes that these mainly concern the Belgian market with only minimal proof in relation to the Dutch market. The extent of the use is furthermore, according to the defendant, very low considering the industry and merely constitutes token use for the Benelux.

19. In his arguments addressing the likelihood of confusion invoked by the opponent, the defendant starts with the comparison of the trademarks.

20. In the first place, the defendant notes that the word "DINOSAURUS" and the abbreviation "DINO" of the invoked trademarks is descriptive for dinosaur shaped goods in class 30 and thus not distinctive. The defendant argues that the invoked trademarks have only been registered due to the distinctive figurative elements on the one hand and the very limited goods covered on the other.

21. Visually comparing the trademarks, the defendant notes that the second trademark differs from the contested trademark in its figurative elements and only coincides in the descriptive abbreviation "DINO". The latter is also the case for the first invoked trademark. The defendant notes that for the contested right, the consumer would immediately perceive the play on words, namely "DINO" and "SOUR". As a result, the defendant notes that the trademarks concerned differ in their dominant elements and are thus visually dissimilar.

22. Phonetically the defendant notes that the trademarks are composed of a differing number of syllables, namely 3 for the contested trademark and 4 for the invoked trademarks. Based on this the pronunciation of the trademarks will differ in rhythm and intonation emphasizing the differences existing between the trademarks according to the defendant.

23. Conceptually the defendant notes that in view of the descriptive nature of the verbal element "DINO" the play on words contained in the contested trademark with "SOUR" will be especially obvious to the consumer and render the trademarks conceptually different.

24. Regarding the comparison of goods, the defendant notes, that compared to the revised list of goods and services, the goods "*Biscuit, bakery and pastry products; industrial confectionery; gingerbread; caramelised biscuits; waffles; biscuits; spreads based on biscuits, caramelised biscuits, coffee or chocolate.*" differ from the goods covered in the contested trademark as the former are intended to relieve hunger whereas the latter are to be considered treats. As such the goods covered differ in their purpose, nature and distribution channels. According to the defendant these goods are neither complementary nor in competition. As a result, these goods have to be considered dissimilar.

25. In addition, the defendant notes that he owns trademarks for the sign "DINOZOURR" in class 30 which are coexisting with the invoked trademarks outside the Benelux.

26. In that regard and considering the arguments above, the defendant finds that the proof of use submitted is insufficient to prove a genuine use of the first invoked trademark. Furthermore, there exists no risk of confusion for consumers confronted with these trademarks due to the lack of similarity between the signs and goods covered. Thus, he asks the Office to register the contested trademark and to order that the costs be borne by the opponent.

### **III. DECISION**

27. The Office will start with the assessment concerning the likelihood of confusion between the contested trademark and the second trademark invoked.

#### **A.1 Likelihood of confusion**

28. 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.

29. 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.*"

30. 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 trademarks**

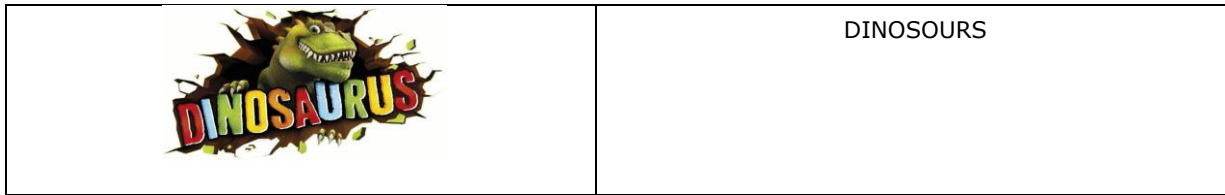
31. The wording of Article 5, 1 (b) of the Directive (cf. article 2.2ter, 1 (b) BCIP) according to which "there exists a likelihood of confusion on the part of the public including the likelihood of association with the earlier trademark" shows that the perception of marks in the mind of the average 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).

32. 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).

33. 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).

34. The trademarks to be compared are the following:

<b>Opposition based on:</b>	<b>Opposition directed against:</b>
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#### *Visual comparison*

35. The invoked trademark consists of the word element "DINOSAURUS" written in different colours and a figurative element of a Dinosaur's head and fingers above the verbal elements, the whole sign is placed in what resembles a hole in a wall with fissures emanating from that hole. The contested trademark is composed of the word element "DINOSAURS".

36. Where a sign consists of both verbal and figurative elements, the former are, in principle, given more attention by the consumer since he 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, SELENIUM-ACE, T-312/03, 14 July 2005, ECLI:EU:T:2005:289). The figurative element of the trademark invoked in this case would probably not go unnoticed to the average customer, nonetheless, considering its central and prominent position within the sign, the verbal element will still be perceived, as the dominant element of the trademark.

37. In the case at hand, the verbal elements of the trademarks concerned are composed of 10 and 9 letters respectively of which 8 are identically present in both trademarks. The verbal elements of both trademarks have the same beginning, namely "DINOS" and differ only in 2 letters rendering the overall visual impression of both trademarks similar.

38. The trademarks are visually similar.

#### *Aural comparison*

39. Concerning the aural comparison, it must be pointed out that, in the strict sense, the aural reproduction of a complex sign corresponds to that of all its verbal elements, regardless of their 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-361/08, 21 April 2010, ECLI:EU:T:2010:152).

40. The trademarks each consist of one word composed respectively of 4 syllables ([DI] [NO] [SAU] [RUS]) and 3 syllables ([DI] [NO] [SOURS]). While the two first syllables of the signs are identical between both signs, the second part of the trademarks, "SAURUS" and "SOURS", while being composed of different amounts of syllables is still phonetically similar due to containing the same consonants placed in the same order and similar sounding vowels. As a result, the overall phonetical impression of the trademarks on the consumer will be highly similar.

41. Thus, the Office considers the trademarks to be aurally similar to a high degree.

#### *Conceptual comparison*

42. The word elements of the trademarks concerned both refer to the concept of dinosaurs.

43. In addition, part of the relevant public may recognize the play on words in the contested sign with the particle "SOUR" in the word element "DINOSOUR" alluding to the sour taste of the goods concerned. Nonetheless, the contested trademark still refers to the concept of dinosaurs. Furthermore, the play on words in the contested trademark will, according to the Office, not be perceived by the entire relevant public of the Benelux. For those consumers which do not recognize the second meaning conveyed, the contested trademark will merely be perceived as a reference to dinosaurs.

44. As a result, for the part of the public which will not perceive this additional element in the contested sign the trademarks will be conceptually identical, whereas for the part of the public which recognizes this additional element the trademarks will be similar.

45. The trademarks are conceptually identical for part of the relevant public.

#### *Conclusion*

46. The trademarks in question are visually similar, and phonetically highly similar and conceptually identical for part of the relevant public.

#### **Comparison of the goods**

47. 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 (CJEU, Canon, already cited).

48. With the comparison of the goods of the trademark invoked and the goods against which the opposition is filed, the goods are considered only on the basis of what is expressed in the register.

49. Due to the limitation of the list of products claimed by the defendant during the procedure (see paragraph 7), the following comparison will take into account the goods listed in the register after this limitation.

50. The goods to be compared are the following:

<b>Opposition based on:</b>	<b>Opposition directed against:</b>
Cl 30 Biscuiterie-, bakkerij- en banketbakkerijproducten; industrieel gebak; suikergoed; peperkoek; speculoos; wafels; koekjes; smeerpasta's op basis van koekjes, speculoos, koffie, of chocolade.  <i>Cl 30 Biscuit, bakery and pastry products;            industrial pastries; confectionery; gingerbread;            caramelised biscuits; waffles; biscuits; spreads            based on biscuits, caramelised biscuits, coffee            or chocolate.</i>	Cl 30 Sugar confectionery, namely gummy candy, liquorice, sweet foam, non-medical chewing gum.
<i>(N.B.: The original language of the mark            concerned is Dutch. The English translation of</i>	<i>(N.B: The list of goods used for the purposes of this            decision is the revised list following the restrictions</i>

<i>the list of goods and services has been added to increase the readability of this decision).</i>	<i>recorded in class 30 upon the request of the applicant.)</i>
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51. The goods "Sugar confectionery, namely gummy candy, liquorice, sweet foam, non-medical chewing gum" of the contested application are included in "confectionery" of the invoked trademark in as far as they describe the same goods or present a subclass of the latter. Indeed, according to established case law, if the goods and services of the earlier trademark also contain goods and services that are mentioned in the application for the contested sign, these goods and services are considered identical (see EGC, Fifties, T-104/01, 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 ).

#### *Conclusion*

52. The goods covered by the trademarks concerned are identical.

#### **A.2 Global assessment**

53. 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.

54. The average consumer is deemed to be reasonably well-informed and reasonably observant and circumspect (case Lloyd, already cited). 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. The defendant does not contest the opponent's assertion that the level of attention for the goods at stake would be low to average, seen as they are consumer goods destined for daily use (paragraph 10).

55. 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 they cover. A lesser degree of similarity between the relevant goods can be offset by a greater degree of similarity between the trademarks, and vice versa (Canon and Lloyd, already cited).

56. 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).

57. In the present case the distinctiveness of the verbal elements is rather low as a reference to a dinosaur could be indicative of a characteristic like the shape of the goods covered. Nonetheless, it is important to note that in the context of assessing a likelihood of confusion, following established European case law, the distinctiveness of a trademark is only one element among others involved in this assessment. Thus, even in the presence of an earlier trade mark of low distinctiveness, there may be a likelihood of confusion, in particular, because of the similarity of the signs and the goods or services referred to (see ECJ, Pages Jaunes judgment, T-134/06, 13 December 2007, ECLI:EU:T:2007:387).

58. 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.

59. 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).

59. Based on the abovementioned, the Office finds that due to both trademarks covering identical goods, the low to medium level of attention of the relevant public and the signs being visually similar, phonetically highly similar and conceptually identical for part of the relevant public, the relevant public might believe that the identical goods in class 30 could come from the same undertaking or from economically-linked undertakings.

#### **B. Other factors**

60. The Office, in the context of an opposition, will only consider the marks invoked in that context. Therefore, an invoked coexistence in the European Union based on trademarks which predate the relevant trademark application are not relevant in the present opposition (see paragraph 25).

61. In an opposition procedure there is no question of the other party being ordered to bear the costs incurred (see paragraphs 15 and 26). Only a referral of the costs set at the established opposition fee in case the opposition is totally rejected (or justified) is provided for.

#### **C. Conclusion**

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

63. As the opposition is justified on the basis of the second trademark invoked, there is no need to make an assessment on the basis of the other trademark invoked. Therefore, the proof of use submitted for this trademark and the defendant's claim that he did not receive all of the elements submitted do not need to be examined as they are irrelevant for the outcome of the decision.

#### **IV. DECISION**

64. The opposition with number 2016060 is justified.

65. The Benelux application with number 1412943 will not be registered

66. 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. This decision constitutes an enforceable order pursuant to article 2.16, 5 BCIP.



*François Châtellier*  
(rapporteur)

*Pieter Veeze*

*Eline Schiebroek*

Administrative officer: Raphaëlle Gerard