



Benelux Office for
**Intellectual
Property**

BENELUX OFFICE FOR INTELLECTUAL PROPERTY
OPPOSITION DECISION
N° 2017177
of 19 March 2024

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

Representative: **Bird & Bird (Netherlands) LLP**
Zuid-Hollandplein 22
2596 AW Den Haag
Netherlands

Invoked right 1: **European registration 15334824**



Invoked right 2: **European registration 17923806**



Invoked right 3: **European registration 17873746**



against

Defendant: **CONSORZIO COOPERATIVE RIUNITE D'ABRUZZO - SOCIETA'
COOPERATIVA AGRICOLA**

Contrada Cucullo
66026 ORTONA (CH)
Italy

Representative: **GEVERS**
De Kleetlaan 7 A (4^{de} verdieping), Pegasus Park
1831 Diegem
Belgium

Contested sign: **International application designating the Benelux 1592079**



I. FACTS AND PROCEEDINGS**A. Facts**

1. On 17 March 2021 the defendant filed an International application designating the Benelux for the

combined word/figurative mark  for goods in class 33. This application was processed under the number 1592079 and published on 20 May 2021.

2. On 16 July 2021 the opponent filed an opposition against this trademark application. The opposition is based on the following older rights:

- European registration with number 15334824 of the combined word/figurative mark



, filed on 12 April 2016 and registered on 17 August 2016 for goods in classes 29, 30 and 33 (hereinafter: invoked trademark 1);

- European registration with number 17923806 of the combined word/figurative mark



, filed on 27 June 2018 and registered on 27 October 2018 for goods in classes 29, 30 and 33 (hereinafter: invoked trademark 2);

- European registration with number 17873746 of the combined word/figurative mark



, filed on 13 March 2018 and registered on 31 July 2018 for goods in class 32 (hereinafter: invoked trademark 3).

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

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

5. The language of the proceedings is English.

B. Proceedings

6. The opposition is admissible and was notified by the Benelux Office for Intellectual Property (hereinafter: "the Office") to the parties on 19 July 2021. On the joint request of the parties the opposition proceedings were suspended several times. The administrative proceedings commenced on 23 March 2023. During the administrative phase of the proceedings both parties filed arguments. The course of the proceedings meets the requirements as stated in the Benelux Convention on Intellectual Property

(hereinafter: "BCIP") and the Implementing Regulations (hereinafter: "IR"). The administrative phase was completed on 26 June 2023.

II. LEGAL GROUNDS AND ARGUMENTS OF THE PARTIES

7. 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: Likelihood of confusion based on the identity or similarity of trademark and sign and the identity or similarity of the goods or services concerned¹.

A. Opponent's arguments

8. Opponent mentions that in this case, the invoked trademarks enjoy a high degree of reputation in Europe, including in the Benelux and therefore also a high degree of distinctiveness, because of prolonged and intensive use of the trademarks. Opponent is the world leader in the energy drinks sector. Its energy drinks are incredibly successful. Since the launch of the first Monster energy drinks in the United States in 2002 and in Europe in 2008, sales have increased every year. Opponent markets energy drinks bearing the invoked rights in many countries in Europe, including the Benelux. Opponent submits several documents showing the enormous reputation of the trademarks amongst the general public.

9. Opponent explains that the goods in classes 29, 30 and 32 of the invoked trademarks are similar to the goods in class 33 of the contested sign and that the goods in class 33 of the trademarks invoked are identical to the goods in class 33 of the contested sign.

10. Regarding the comparison of the signs opponent indicates that the invoked trademarks consist of a stylized drawing of an imprint left by a claw, namely three parallel jagged claw scratches leading out into a sharp end. This leads to the interpretation of a three fingered claw, scratching the surface of the product on which the mark is placed. The contested sign shows the same jagged line in the scratches and leading out into the same sharp end, thereby evidently suggesting the same sharp claws used to create the scratches. Based on these considerations, the visual similarity between the signs is unmistakable. In addition, the figurative element in the contested sign is separated from and put at the top of the contested sign. The visual impact of this element is therefore intentionally increased, giving a dominant position to the scratches in relation to the verbal portion on which it is superimposed. This gives an independent function to the figurative element in the contested sign, making it the most "eye-catching" element for the consumer and, without a doubt, is destined to attract his attention and imprint itself in the memory of this consumer. As a consequence, the signs are visually similar to a high degree.

11. Since the figurative elements of the signs will not be pronounced, no aural comparison is made between the signs. In addition, any dissimilarity between the verbal elements will be offset by the enhanced distinctive character of the invoked rights and the lack of distinctive character of the contested sign.

12. Conceptually, the signs are similar to a high degree. The figurative elements in the signs are scratches of a three fingered claw, scratching the surface of the product on which the mark is placed. In this respect, the marks are conceptually identical conveying exactly the same message to the relevant public. The term MONSTER in one of the invoked rights enhances this conceptual similarity, because a monster could use a claw with three fingers to scratch any given surface. Any conceptual meaning of the verbal elements CODICE CITRA should be disregarded. As pointed out, the consumers attention will be drawn to the figurative element and the marks are identical in that respect. The fact that the marks are

¹ Unlike the defendant seems to assume (see below under 18), opponent does not invoke Article 2.2ter(3) (a) BCIP.

similar is also displayed by the way that defendant uses the mark. Defendant obviously uses the figurative element without the verbal elements. Opponent gives some examples in this respect.

13. The word elements CODICE CITRA in the contested sign are descriptive. CODICE is the Italian word for "code". On their Italian website, the defendant describes their work ethic as a "codice genetico", literally meaning a genetic code and thereby referring to the code of values of the Citra community. CITRA on the other hand, according to the website of the defendant, is a Latin adverb, name of one of the two regions in which the Abruzzo was divided in the eighteenth century, before the Unification of Italy.

14. Opponent concludes that the goods under the marks are identical and similar, while the signs are similar to a high degree. Since the figurative element of the contested sign is the most dominant and distinctive element, and this element is similar to a high degree to the invoked trademarks, there is an unmistakable and obvious likelihood of confusion between the signs, as the public will believe that the goods or services in question come from the same undertaking or from economically linked undertakings. In addition, the invoked trademarks enjoy a reputation and an enhanced distinctive character. Therefore, any lack of similarity between the goods or the marks that the Office considers, is offset by the enhanced distinctive character. The likelihood of confusion remains without any doubt. Opponent requests the Office to allow the opposition in full, refuse the contested sign and order the defendant to bear the costs in these proceedings.

B. Defendant's arguments

15. Defendant argues that the contested sign is a complex trademark consisting of the verbal elements CODICE and CITRA in rather standard fonts, on top of one another. The sign also contains, in its uppermost part, a device of three black lines. The words CODICE and CITRA are meaningless and have a normal degree of distinctiveness. The rather simple device lacks any strong concept and essentially serves decorative purposes. Undeniably, when observing the label of a product, and specifically a wine label, consumers take into consideration and remember the denominative element of the sign, and therefore its pronunciation, which allows them to repeat the experience during a following purchase. Consequently, the verbal element 'CITRA CODICE' has a stronger impact than the figurative element of the contested sign.

16. According to defendant the words CODICE and CITRA possess inherent distinctiveness in relation to the goods in question. The relevant public does not possess sufficient knowledge of the Italian language to understand the meaning of the Italian word "CODICE". Similarly, "CITRA" does not directly correspond to any currently recognized geographic location, nor is it commonly known as such among the relevant public. Moreover, it is important to note that "CITRA" is neither a Designation of Origin nor a Protected Geographical Indication for wines.

17. Defendant explains that the signs are visually very different and aurally not similar. Also conceptually the signs are different.

18. According to the opponent, the earlier marks on which the opposition is based have a reputation in the European Union and in the Benelux for all the goods for which they are registered. However, even if the earlier marks were considered as having a reputation, the similarity of the signs is a condition for Article 2.2ter(3) (a) BCIP to be applied. Since the signs are dissimilar, one of the necessary conditions of Article 2.2ter(3) (a) BCIP is not fulfilled, and the opposition must also be rejected on this ground.

19. Defendant concludes that no likelihood of confusion between the contested sign and the trademarks invoked should be found in light of the aforementioned factors. Indeed, overall, the signs are different, leading to no reason to believe that the average consumer (who, for the purposes of the current

assessment, is considered reasonably well informed, observant and circumspect) will confuse the marks and/or erroneously think that the goods designated by them come from the same undertaking or economically linked undertakings, even taking into account the principle of imperfect recollection. Considering all the above, even assuming that the goods are identical, there is no likelihood of confusion on the part of the public. Therefore, the defendant requests the Office to reject the opposition and to order the opponent to pay the costs in accordance with article 2.16, 5 BCIP in conjunction with rule 1.28, 3 IR, as the opposition is not justified.

III. DECISION

A Likelihood of confusion

20. Article 2.2ter, 1 BCIP stipulates insofar as relevant 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."*²

21. A likelihood of confusion within the meaning of this provision exists if the public may believe that the goods or services designated by that trademark and those covered by the trademark applied for come from the same undertaking or, where appropriate, from undertakings which are economically linked.³

22. According to settled case-law of the Court of Justice of the European Union (hereinafter: "CJEU"), the existence of a likelihood of confusion in the mind of the public must be assessed globally, considering all the relevant circumstances of the individual case, including the degree of similarity between the signs at issue and the goods or services concerned, the degree of recognition of the earlier trademark and the degree of distinctiveness – inherent or acquired through use – of the earlier trademark.⁴

Comparison of the goods

23. In assessing the similarity of the goods and services concerned, account must be taken of all the relevant factors which characterise the relationship between them. 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.⁵

24. Goods and services are complementary when they are closely connected in the sense that one is indispensable or important for the use of the other, so that consumers may think that the same undertaking is responsible for both.⁶

25. In comparing the goods and services, the goods and services shall be considered in the terms set out in the register, and not the actual or intended use.⁷

26. The goods to be compared are the following:

² Art. 2.2ter, 1, b BCIP implements art. 5, 1, b 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. A similar provision can be found in art. 8, 1, b Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trademark.

³ CJEU 11 June 2020, C-115/19 P, ECLI:EU:C:2020:469, point 54 (China Construction Bank).

⁴ CJEU 4 March 2020, C-328/18 P, ECLI:EU:C:2020:156, point 57 and the case-law mentioned there (Equivalenza).

⁵ CJEU 29 September 1998, C-39/97, ECLI:EU:C:1998:442, point 23 (Canon).

⁶ General Court (EU) 24 September 2008, T-116/06, ECLI:EU:T:2008:399, point 52 (O STORE).

⁷ General Court (EU) 16 June 2010, T-487/08, ECLI:EU:T:2010:237, point 71 (Kremezin).

Opposition based on:	Opposition directed against:
<p><u>Invoked trademark 1:</u> Class 29 Dairy-based beverages and milk-based beverages containing coffee, chocolate and/or fruit juice; shakes.</p> <p><u>Invoked trademark 2:</u> Class 29 Dairy-based beverages and milk-based beverages containing coffee, chocolate and/or fruit juice; shakes.</p>	
<p><u>Invoked trademark 1:</u> Class 30 Coffee, tea, cocoa and artificial coffee; coffee-based beverages; tea-based beverages; chocolate-based beverages; rice; tapioca and sago; flour and preparations made from cereals; bread, pastry and confectionery; ices; sugar, honey, treacle; yeast, baking-powder; salt; mustard; vinegar, sauces (condiments); spices; ice.</p> <p><u>Invoked trademark 2:</u> Class 30 Coffee, tea, cocoa and artificial coffee; coffee-based beverages; tea-based beverages; chocolate-based beverages; rice; tapioca and sago; flour and preparations made from cereals; bread, pastry and confectionery; edible ices; sugar, honey, treacle; yeast, baking-powder; salt; mustard; vinegar, sauces (condiments); spices; ice.</p>	
<p><u>Invoked trademark 3:</u> Class 32 Non-alcoholic beverages, including carbonated drinks and energy drinks; syrups, concentrates, powders and preparations for making beverages, including carbonated drinks and energy drinks.</p>	
<p><u>Invoked trademark 1:</u> Class 33 Alcoholic beverages except beers.</p> <p><u>Invoked trademark 2:</u> Class 33</p>	<p>Class 33 Wine; sparkling wines; distilled spirits; liqueurs; bitters; sparkling alcoholic beverages; alcoholic fruit beverages; alcoholic beverages, except beer.</p>

Alcoholic beverages except beers.	
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27. Opponent argues that the goods in class 33 of the contested sign are partly identical and partly similar to goods for which the trademarks invoked are registered (see above under 9). Defendant did not dispute this. Given the principle of hearing both sides (Article 2.16(1) BCIP and Rule 1.21 IR), the examination of the opposition is limited to the arguments, facts and evidence submitted by the parties. The Office will therefore assume that the goods are partly identical and partly similar.

Conclusion

28. The goods are partly identical and partly similar.

Comparison of the signs

29. To assess the degree of similarity between the conflicting signs, their visual, phonetic and conceptual similarity should be determined. The comparison must be based on the overall impression given by those signs. In the assessment, the perception of the signs by the average consumer plays a decisive role. The average consumer normally perceives a mark as a whole and does not engage in an analysis of its various details.⁸

30. Although the comparison must be based on the overall impression made by those signs on the relevant public, account must nevertheless be taken of the intrinsic qualities of the signs at issue.⁹ The overall impression created in the mind of the relevant public by a complex trademark may, in certain circumstances, be dominated by one or more of its components. Regarding the assessment whether this is the case, account must be taken, in particular, of the intrinsic qualities of each of those components by comparing them with those of other components. In addition and accessorially, account may be taken of the relative position of the various components within the arrangement of the complex mark.¹⁰





31. The assessment of the similarity between the signs, regarding the visual, phonetic and conceptual similarity of the signs, must be based on the overall impression created by them, taking into account, inter alia, their distinctive and dominant components.

32. The signs to be compared are the following:

⁸ CJEU 4 March 2020, C-328/18 P, ECLI:EU:C:2020:156, point 58 and the case-law mentioned there (Equivalenza).

⁹ CJEU 4 March 2020, C-328/18 P, ECLI:EU:C:2020:156, point 71 and the case-law mentioned there (Equivalenza).

¹⁰ General Court (EU) 23 October 2002, T-6/01, ECLI:EU:T:2002:261, points 34 and 35 (Matratzen) and 13 December 2007, T-242/06, ECLI:EU:T:2007:391, point 47 (El Charcutero Artesano).

Opposition based on:	Opposition directed against:
<p data-bbox="217 241 472 271"><u>Invoked trademark 1:</u></p>  <p data-bbox="217 501 472 530"><u>Invoked trademark 2:</u></p>  <p data-bbox="217 801 472 831"><u>Invoked trademark 3:</u></p> 	

33. The invoked trademark 1 is a figurative mark consisting of three vertically displayed stylized black lines meant to represent an imprint left by a claw. Invoked trademark 2 is a combined word-/figurative mark consisting of the same figurative element as invoked trademark 1 but in the colour green against a black background. Below the figurative element the word elements MONSTER and in smaller letters ENERGY are depicted in white (MONSTER) and green (ENERGY) stylized letters. Invoked trademark 3 is a figurative mark consisting of the figurative element of invoked trademark 1 a little bit rotated to the right and with shadows.

34. The contested sign is a combined word-/figurative mark consisting of the word elements CODICE CITRA, in black stylized letters. The word CITRA is shown in a larger font below the word CODICE. Above the word elements a figurative element of three stylized black lines is represented, which are shown almost horizontal.

Visual comparison

35. 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.¹¹ In this case, the figurative elements in the invoked trademark 2 and contested sign will not go unnoticed to the average customer. However, the attention of the public in these signs will particularly be focused on the word element MONSTER and ENERGY and CODICE CITRA. In the invoked trademarks 1

¹¹ General Court (EU) 9 November 2016, T-290/15, ECLI:EU:T:2016:651, point 36 and the case-law mentioned there (Smarter Travel).

and 3 the attention will be focused on the figurative elements, since these trademarks do not contain word elements.

36. The word elements of invoked trademark 2 and the contested sign are not similar. The figurative elements of these signs, to which less attention will be paid, are similar to the extent that they both contain three stylized black lines. However, the direction and stylization of these lines differ. Given the above, the Office is of the opinion that invoked trademark 2 and the contested sign are similar to a (very) low degree.

37. Invoked trademarks 1 and 3 and the contested sign are similar to the extent that they both contain three stylized black lines. However, the direction and stylization of these lines differ. In addition, in the contested sign the attention of the public will be focused on the word elements CODICE CITRA which do not appear in the invoked trademarks 1 and 3. Given the above, the Office is of the opinion that invoked trademarks 1 and 3 and the contested sign are similar to a low degree.

Aural comparison

38. Invoked trademarks 1 and 3 are figurative marks which will not be pronounced.¹² Invoked trademark 2 will be pronounced as: MONSTER ENERGY. The contested sign will be pronounced as CODICE CITRA.

39. The signs are, thus, aurally not similar.

Conceptual comparison

40. According to opponent the figurative elements in the signs are scratches of a three fingered claw, scratching the surface of the product on which the mark is placed. Therefore the signs are conceptually identical to the relevant public (see above under 12). The Office is however not convinced that the relevant Benelux public will perceive both signs as scratches of a three fingered claw, scratching the surface of the product on which the mark is placed, as opponent also did not substantiate this.

41. According to the Office, the relevant Benelux public will however be familiar with the words MONSTER and ENERGY in the invoked trademark 2 and will understand the meaning of these words.

42. Opponent furthermore argued that the word elements CODICE and CITRA in the contested sign are descriptive since CODICE is the Italian word for "code" and CITRA refers to one of the two regions in which the Abruzzo was divided in the eighteenth century. The Office is not convinced that the relevant Benelux public is aware of these meanings of CODICE CITRA as defendant also did not substantiate this.

43. Given the above, invoked trademark 2 and the contested sign are conceptually not similar. With regard to invoked trademarks 1 and 3 and the contested sign a conceptual comparison is not relevant.

Conclusion

44. The signs are visually similar to a (very) low degree. Aurally and conceptually the signs are not similar or a conceptual comparison is not relevant. The low visual similarity results from a figurative element to which little attention will be paid in the contested sign.

¹² General Court (EU) 12 December 2019, T-266/19, ECLI:EU:T:2019:854, points 38-39 (Gastivo) and the case-law mentioned there.

Global assessment

45. The global assessment must be made by reference to the average consumer, who is reasonably well-informed and reasonably observant and circumspect about the goods or services in question. However, account must be taken of the fact that the average consumer only rarely has the opportunity to make a direct comparison between the different trademarks but relies on the imperfect impression left upon him. It must also be borne in mind that the average consumer's level of attention may vary depending on the type of goods or services at issue.¹³ In the present case the goods concerned are aimed at the public at large for which the level of attention is deemed to be normal.

46. The greater the degree of distinctiveness of the earlier trademark, the greater the likelihood of confusion. Trademarks with a highly distinctive character, either by their nature or because of their reputation on the market, enjoy greater protection than trademarks with a weak distinctive character.¹⁴ According to the Office the trademarks invoked have to be considered as having normal distinctiveness per se for the goods concerned as they do not describe the characteristics of the goods. Opponent argued and substantiated that the invoked trademarks have an enhanced distinctive character through use for energy drinks. The Office will however not assess this argument, since it does not matter to the outcome of this case (see below under 48).

47. The global assessment of the likelihood of confusion presupposes a certain coherence between the factors to be taken into account and, in particular, between the similarity of the conflicting signs and the goods or services to which they relate. Thus, a low degree of similarity between the goods or services in question may be offset by a high degree of similarity between the signs, and vice versa.¹⁵

48. In this case the signs are visually similar to a (very) low degree. This low similarity results from a figurative element to which little attention will be paid in the contested sign. Aurally and conceptually the signs are not similar or a conceptual comparison is not relevant. The relevant goods are partly identical and partly similar. On the basis of these and the other factors mentioned above, and considering their interdependence, the Office considers that there will be no likelihood of confusion in the sense that the public may believe that the goods designated by the invoked trademarks and the contested sign come from the same undertaking or, as the case may be, from undertakings which are economically linked, even assuming the invoked trademarks would have an enhanced distinctive character through use for energy drinks.

Other factors

49. Opponent argued that defendant obviously uses the figurative element without the verbal elements and gives some examples in this respect (see above under 12). However, actual use cannot be taken into account in opposition proceedings, as the comparison of the signs and goods and services is solely based on the trademark and sign as registered. Thus, matters such as marketing and sales formulas, which can also change over time, play no role in the context of an opposition.¹⁶

C. Conclusion

50. Based on the foregoing, the Office concludes that there is no likelihood of confusion.

¹³ CJEU 22 June 1999, C-342/97, ECLI:EU:C:1999:323, point 26 (Lloyd Schuhfabrik Meyer).

¹⁴ CJEU 29 September 1998, C-39/97, ECLI:EU:C:1998:442, point 18 (Canon).

¹⁵ CJEU 4 March 2020, C-328/18 P, ECLI:EU:C:2020:156, punt 59 and the case-law mentioned there (Equivalenza).

¹⁶ CJEU 15 March 2007, C-171/06 P, ECLI:EU:C:2007:171, point 59 (Quantum).

IV. DECISION

51. The opposition with number 2017177 is rejected.

52. The International trademark application with number 1592079 will be registered in the Benelux for all the goods for which it has been applied.

53. 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, 19 March 2024

Marjolein Bronneman
(*rapporteur*)

Eline Schiebroek

Camille Janssen

Administrative officer: Vincent Munier