

**BENELUX OFFICE FOR INTELLECTUAL PROPERTY
OPPOSITION DECISION
N° 2017722
of 24 November 2022**

Opponent: **Novartis Pharma AG**
4002 Basel
Switzerland

Representative: **Merkenbureau Knijff & Partners B.V.**
Leeuwendeldseweg 12
1382 LX Weesp
Netherlands

Invoked trademark 1: European Union trademark registration 002554756

ILARIS

Invoked trademark 2: European Union trademark registration 006291611

ILARIS

against

Defendant: **Hyloris Pharmaceuticals, société anonyme**
Boulevard de Patience et Beaujonc 3 Boîte 1
4000 Liège
Belgium

Representative: **BAP IP bv - Brantsandpatents**
Charles de Kerchovelaan 17
9000 Gent
Belgium

Contested sign: **Benelux trademark application 1453452**

HYLORIS

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

1. On 9 November 2021, the defendant filed a Benelux trademark application for the wordmark HYLORIS for goods and services in the classes 5, 40 and 42. This application was processed under the number 1453452 and was published on 10 November 2021.

2. On 7 January 2022, the opponent filed an opposition against the registration of the application. The opposition is based on the following earlier trademarks:

- European Union registration 002554756 of the wordmark ILARIS, filed 29 January 2002 and registered on 21 February 2003 for goods in class 5;
- European Union registration 006291611 of the wordmark ILARIS, filed on 10 September 2007 and registered on 2 September 2008 for goods in class 5;
- European Union registration 007470248 of the following combined word/figurative trademark ILARIS, filed on 5 December 2008 and registered on 29 July 2009 for goods in class 5:



3. According to the register the opponent is the actual holder of the two wordmarks invoked. The invoked combined word/figurative trademark ILARIS with number 007470248 has expired. Therefore, the Office cannot take this trademark into account.

4. The opposition is directed against all goods and services covered by the contested application and is based on all goods covered by the trademarks invoked. During the opposition proceedings the defendant limited the goods and services in classes 5, 40 and 42 for which the contested application is filed to the field of cardiovascular and cardiopulmonary diseases and disorders.

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. Proceedings

7. The opposition is admissible and was notified by the Benelux Office for Intellectual Property (hereinafter: "the Office") to the parties on 11 January 2022. 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 12 July 2022.

II. LEGAL GROUNDS AND ARGUMENTS OF THE PARTIES

8. The opponent filed his 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 of the goods or services concerned.

A. Opponent's arguments

9. The opponent argues that the mark ILARIS is used for pharmaceutical preparations, especially a pharmaceutical that decreases the ability of the body to fight infections, generally referred to as an 'immunosuppressant', and that is prescribed inter alia for the treatment of active Still's disease, including Adult-Onset Still's Disease (AOSD) and Systemic Juvenile Idiopathic Arthritis (SJIA). Opponent files annexes substantiating genuine use of the mark ILARIS in the relevant period. According to the opponent these annexes also show extensive and consistent use of the mark ILARIS for a longer period which supports the claim that the mark ILARIS enjoys an enlarged scope of protection.

10. With regard to the comparison of the goods and services, the opponent argues that it is evident that the respective goods in class 5 are identical for both being pharmaceuticals. The services for which the contested sign is filed in classes 40 and 42 are highly similar as they regard the custom manufacture and development of pharmaceuticals.

11. According to the opponent the signs ILARIS and HYLORIS are visually similar. Out of seven letters of the contested sign, four letters are identical: -L-RIS. Aurally, the signs are highly similar. Both signs consist of three syllables and have the same rhythm in the pronunciation: I - LA - RIS versus (H)Y - LO - RIS. The end syllable -RIS is identical and preceded by the highly similar midfixes -LA- and -LO-. The beginning of the signs is phonetically also highly similar especially in the French and Belgium speaking parts of Benelux where the letter H - if it is the first letter of a name or word - is silent and not pronounced. Furthermore the letter Y is pronounced in the same way as the letter I. The sign HYLORIS is therefore pronounced as 'ILORIS', which is very close to ILARIS. Obviously therefore the signs are aurally highly similar. Aural similarity is of paramount relevance when assessing the similarity of signs for pharmaceutical products and services, as patients are informed by their care providers and medical support in conversation in the doctor's office and treatment room. Conceptually, the signs both consist of coined terms, and as they do not represent a concept no conceptual comparison can be made.

12. As the relevant goods and services in this case are pharmaceuticals as well as services in relation to pharmaceuticals such as the research and development of pharmaceuticals and custom manufacture of pharmaceuticals, the relevant public in this case are medical professionals, as well as patients suffering from a certain illness seeking treatment, being average consumers. Even though the services covered by the contested sign and the trademarks invoked are partially directed at medical professionals with specific professional knowledge, and thus a high level of attention, they are also directed at patients that are part of the public at large whose degree of attention is considered average. An average degree of attention leads to an earlier finding of a likelihood of confusion. In addition, for the goods and services that are aimed at medical professionals, an increased level of attention may be assumed. At the same time, however, account should be taken of the fact that the products and services are of a pharmaceutical and medical nature. In case of pharmaceutical and medical products and services there is a greater need to avoid any and all likelihood of confusion in view of the greater consequences when choosing the wrong pharmaceutical or treatment for certain health issues and diseases. Therefore, the assumed higher level of attention for pharmaceutical and medical products and services is offset by the higher need to avoid confusion in view of the severity of the consequences in case of confusion.

13. In the present case, the trademark ILARIS as well as the contested sign HYLORIS have no meaning for any of the goods and services in question from the perspective of the Benelux public. As argued the trademark ILARIS has obtained a reputation and well-known status as a result of years of intensive and consistent use. Consequently, the distinctive power and the reputation of the ILARIS brand has only grown further. Therefore the trademark ILARIS enjoys the broader scope of protection that is awarded to well-known marks and marks with a reputation.

14. The opponent concludes that there exists a likelihood of confusion and requests that the Office refuses the contested sign and orders the defendant to bear the costs of the proceedings.

B. Defendant's arguments

15. Regarding the provided materials substantiating genuine use the defendant concludes that there is no use for 'vaccines, diagnostic preparations for medical purposes' in class 5 as covered by EUTM registration 006291611 of the wordmark ILARIS. The question of genuine use is therefore limited to the remaining goods 'pharmaceutical preparations' in class 5 as covered by EUTM registrations 002554756 and 006291611. The materials provided only show use for a specific subcategory of pharmaceutical preparations, namely "pharmaceutical preparation for treating a chronic autoinflammatory period fever syndrome.". If genuine use of the mark ILARIS is accepted, it should be limited to this concrete subcategory.

16. With regard to the comparison of the goods in class 5 defendant mentions that the products of the contested trademark are restricted to cardiovascular and cardiopulmonary diseases and disorders. Opponent uses its trademarks for pharmaceutical preparations for treating a chronic autoinflammatory period fever syndrome. Given that the sub-categories are different, the intended purpose differs, the end-consumers differ, and the therapeutic indications differ, the similarity can only be qualified as low. The services in class 40 for which the contested sign is filed, are dissimilar to opponent's goods in class 5 given the different nature, different purpose and different distribution channels. The contested services in class 42 are also dissimilar to opponent's goods "pharmaceutical preparations, for treating a chronic autoinflammatory period fever syndrome" in class 5. The ways in which they are distributed and provided are different and they are aimed at different publics. They do not have the same nature or the same purpose, since research, design and development services take place prior to the process of manufacturing goods, whereas finished goods, like "pharmaceutical preparations" constitute the outcome of that process.

17. The level of attention of the relevant public will be very high considering the intended purpose of the products in class 5. The services in class 40 and 42 target professionals and therefore the degree of attention is also high because of their specialized nature.

18. Visually, the signs differ in the letter 'H', 'Y', and 'O' of the defendant's sign and the letters 'I' and 'A' of the opponent, which have an important impact on the overall impression conveyed by each sign, namely HY*O*** versus I*A***. The marks also differ in their lengths. Therefore the signs are at most similar to a very low degree as the similarity lies in the last three letters 'RIS'. Aurally, the signs have a different pronunciation due to the beginning of both words »ILA« and «HYLO». The pronunciation of the vowel »a« versus the vowel »o« is clearly understandable and distinct. The pronunciation can vary for Dutch, French, and English speaking parts of the Benelux. However in each case the pronunciation is not highly similar »HIELORIS« / »HIGHLORIS« versus »IELARIS« / »ILARIS«. Therefore the signs can at most be similar to a very low degree as the similarity again mainly lies in the last three letters 'RIS'. Conceptually, the signs cannot be compared as they have no meaning. Opponent states that the phonetical perspective is highly relevant in connection to pharmaceuticals, however given the nature of the products whereby the patient can only retrieve the products via prescription, the visual perspective does play an important role as well.

19. Opponent refers to the proof of use to substantiate reputation of the invoked trademarks. However, when submitting proof of use this cannot equally serve as evidence of reputation. In addition, the proof of use documents do not support the reputation claim since they are not sufficient to conclude that the invoked trademarks have a reputation (no documents relating to market share, market survey, etc.).

20. For the above mentioned reasons, the defendant respectfully requests that the Office rejects the opposition, registers the contested sign, and decides that the opponent should bear the costs.

III. DECISION

A. Likelihood of confusion

21. 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.

22. 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."*¹

23. 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.²

24. According to settled case-law of the 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.³

Comparison of the signs

25. 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.⁴

¹ 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.

² CJEU 11 June 2020, C-115/19 P, ECLI:EU:C:2020:469, point 54 (China Construction Bank).

³ CJEU 4 March 2020, C-328/18 P, ECLI:EU:C:2020:156, point 57 (Equivalenza) and the case-law mentioned there.

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

26. 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.⁵ 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.⁶

27. The assessment of the similarity between the signs, regarding the visual, aural 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.

28. The signs to be compared are the following:

Opposition based on:	Opposition directed against:
ILARIS	HYLORIS

Visual comparison

29. The trademarks invoked are wordmarks. The marks both consist of one word with six letters: ILARIS.

30. The contested sign is also a wordmark. It consists of one word with seven letters: HYLORIS

31. According to established caselaw, the consumer normally attaches more importance to the first part of a sign.⁷ The first part of the signs differs: ILA versus HYLO. The last part of the signs, -RIS, is the same.

32. Based on the above the Office finds that the signs are visually similar to a low degree.

Phonetic comparison

33. The trademarks invoked consist of three syllables (I-LA-RIS). The contested sign also consists of three syllables (HY-LO-RIS). The pronunciation of the signs matches in length and rhythm. The pronunciation, however, differs in the sound of the first two dominant syllables, even taking into account that in the French and Belgium speaking parts of the Benelux the letter H is pronounced softly.

34. Given the above the Office is of the opinion that the signs are aurally similar to a low degree.

Conceptual comparison

35. As the signs have no meaning, a conceptual comparison is not relevant.

⁵ CJEU 4 March 2020, C-328/18 P, ECLI:EU:C:2020:156, point 71 and the case-law mentioned there (Equivaleza).

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

⁷ General Court EU 17 March 2004, T-183/02 en T-184/02, ECLI:EU:T:2004:79, point 81 (Mundicor).

Conclusion

36. The trademarks invoked and the contested sign are visually and aurally similar to a low degree. A conceptual comparison is not possible.

37. Since there is a low degree of similarity between the signs, an overall assessment of the likelihood of confusion in the light of the other relevant factors must be carried out.⁸

Comparison of the goods and services

38. 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.⁹

39. Complementarity only exists where the products and/or services are so closely related to each other that one is indispensable or important for the use of the other so that consumers may believe that the same undertaking is responsible for those products.¹⁰

40. 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.¹¹

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

Opposition based on:	Opposition directed against:
<p><i>EU 002554756</i> CI 5 Pharmaceutical preparations.</p> <p><i>EU 006291611</i> CI 5 Pharmaceutical preparations, vaccines, diagnostic preparations for medical purposes.</p>	<p>CI 5 Cardiovascular pharmaceuticals; Cardiovascular pharmaceutical preparations; Pharmaceutical preparations and substances for the treatment of cardiovascular and cardiopulmonary diseases and disorders; Pharmaceutical preparations for the treatment of heart rhythm disorders; Medicines for the treatment of cardiovascular diseases.</p>
	<p>CI 40 Custom manufacture of cardiovascular pharmaceuticals and medicines for the treatment of cardiovascular diseases; Custom manufacture of cardiovascular pharmaceuticals and medicines for the treatment of cardiovascular diseases by pharmaceutical compounders; providing technical information in the field of pharmaceutical manufacturing of cardiovascular pharmaceuticals; biomanufacturing for others, namely, manufacturing</p>

⁸ CJEU 4 March 2020, C-328/18 P, ECLI:EU:C:2020:156, point 60 and the case-law mentioned there (Equivalenza).

⁹ CJEU 29 September 1998, C-39/97, ECLI:EU:C:1998:442, point 23 (Canon).

¹⁰ General Court (EU) 24 September 2008, T-116/06, ECLI:EU:T:2008:399, point 52 (O STORE).

¹¹ General Court (EU) 16 June 2010, T-487/08, ECLI:EU:T:2010:237, point 71 (Kremezin).

	of cardiovascular pharmaceuticals using biological organisms in the manufacturing process.
	KI 42 Pharmaceutical research and development services in the field of cardiovascular and cardiopulmonary diseases and disorders; Development of cardiovascular pharmaceutical preparations and medicines for the treatment of cardiovascular diseases; Cardiovascular pharmaceutical products development; Laboratory research services in the field of cardiovascular pharmaceuticals; conducting early evaluations in the field of new cardiovascular pharmaceuticals; testing, inspection and research of cardiovascular pharmaceuticals; research and development in the biotechnology fields in relation to cardiovascular and cardiopulmonary diseases and disorders; technical consulting services in the field of pharmaceutical research and development laboratory testing, diagnostics, and biotechnology, all the aforementioned in relation to cardiovascular and cardiopulmonary diseases and disorders.

42. For reasons of procedural economy, the Office will not undertake a full comparison of the goods and services listed above. The examination of the opposition will proceed as if all the contested goods and services were identical to those of the earlier trademarks which, for the opponent, is the best light in which the opposition can be examined.

Global assessment

43. 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.¹² In the present case, the Office assumes a higher than average level of attention of the relevant public. This is because the goods and services in question, which are aimed at both the general public and specialists in the medical field, have an impact on health which means there is an increased level of attention.

44. The higher 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.¹³ In this case, the Office finds that the trademarks invoked have a normal distinctiveness. The Office agrees

¹² CJEU 22 Juni 1999, C-342/97, ECLI:EU:C:1999:323, point 26 (Lloyd Schuhfabrik Meyer).

¹³ CJEU 29 September 1998, C-39/97, ECLI:EU:C:1998:442, point 18 (Canon).

with the defendant (see para 19) that the provided materials do not show enhanced distinctiveness through use.

45. The global assessment of the likelihood of confusion presupposes a certain coherence between the factors to be considered 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.¹⁴

46. In this case, the signs are visually and aurally similar to a low degree. The signs differ in the first part, ILA versus HYLO. This notable difference combined with the higher level of attention of the public for the goods and services concerned is in the opinion of the Office sufficient to conclude that the relevant public would not assume that the goods and services bearing the disputed sign originate from the same or from economically-linked undertakings as the trademarks invoked, even assuming the goods and services are identical.

47. Therefore, in the light of the foregoing, the Office considers that there will be no likelihood of confusion.

B. Other factors

48. Opponent argues that in case of pharmaceutical and medical services there is a greater need to avoid any and all likelihood of confusion in view of the greater consequences when choosing the wrong pharmaceutical or treatment for certain health issues and diseases. Although the Office acknowledges the importance to avoid any and all likelihood of confusion in case of pharmaceuticals, the Office finds that this importance is taken into account in the context of the higher level of attention of the public given the severity of the consequences in case of confusion (see also under 43 above).

C. Conclusion

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

50. Since the opposition will be rejected it is not necessary to further assess the submitted proof of use.

IV. CONSEQUENCE

51. The opposition with number 2017722 will be rejected.

¹⁴ CJEU 4 March 2020, C-328/18 P, ECLI:EU:C:2020:156, point 59 and the case-law mentioned there. (Equivalenza)

52. The Benelux application with number 1453452 will be registered for all the goods and services 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, 24 November 2022



Marjolein Bronneman
(*rapporteur*)

Pieter Veeze

Eline Schiebroek

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