

BENELUX OFFICE FOR INTELLECTUAL PROPERTY
OPPOSITION DECISION
N° 2013638
of 2 November 2018

Opponent: **Red Bull GmbH**
Am Brunnen 1
5330 Fuschl am See
Austria

Representative: **Hofhuis Alkema Groen Advocaten**
Keizersgracht 212
1016 DX Amsterdam
Netherlands

Invoked right 1: **International registration 961854**

RED BULL

Invoked right 2: **International registration 1115937**

Red Bull


against

Defendant: **Rob Hoogland h.o.d.n. Rob Hoogland Beheer BV**
Dr Ariensstraat 7
7481 JL Haaksbergen
Netherlands

Representative: --

Contested trademark: **Benelux application 1362478**

Red de Boel

I. FACTS AND PROCEEDINGS


A. Facts

1. On 13 October 2017 the defendant filed an application for a trademark in the Benelux for the word mark Red de Boel for goods in classes 32 and 33. This application was processed under number 1362478 and was published on 24 October 2017.

2. On 23 November 2017 the opponent filed an opposition against the registration of the application. The opposition is based on the following earlier trademarks:

- International registration 961854 of the wordmark RED BULL, in which inter alia the Benelux has been designated, filed on 19 March 2008 and registered on 23 October 2008 for goods and services in classes 25, 28, 32, 41 and 43.



- International registration 1115937 of the combined word/figurative mark  , in which inter alia the European Union has been designated, filed on 5 May 2011 and registered on 21 August 2014 for goods and services in classes 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 29, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 42, 44, 45.

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

4. The opposition is directed against all goods of the contested application and is based on all goods in classes 32 and 33 of the trademarks invoked.

5. The grounds for opposition are those laid down in article 2.14, 1 (a) 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") to the parties on 28 November 2017. 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 26 April 2018.

II. ARGUMENTS

8. The opponent filed an opposition at the Office under article 2.14, 1 (a) BCIP, in accordance with the provisions of article 2.3 (b) BCIP: the likelihood of confusion based on the identity or similarity of the relevant marks and the identity or similarity of the goods or services concerned.

A. Opponent's arguments

9. The opponent first explains the history and success of its company and energy drink products. The opponent states that the trademarks invoked have been consistently used and advertised by the opponent since the launch of the energy drink in 1987. According to the opponent, the RED BULL brand is one of the most famous brands in the world and therefore enjoys a broad scope of protection. In order to substantiate this argument, the opponent submits evidence with regard to the reputation of the trademarks invoked. Furthermore, the opponent states that the fame of the trademarks invoked has been recognized by courts and trademark offices worldwide, including in the Benelux.

10. With regard to the comparison of the goods, the opponent argues that the goods of the contested sign are partly identical and partly (highly) similar to the goods of the trademarks invoked.

11. Regarding the comparison with the first trademark invoked, the opponent argues that both signs contain the word 'red', which creates an important point of similarity. The second part of the trademark invoked, the word 'bull', has the same length (four letters) as the last part of the contested sign 'boel'. Also, these last parts start and end with the identical consonants 'B' and 'L'. Therefore, according to the opponent, all the letters of the first trademark invoked (except for the vowel 'u') are used in the same sequence in the contested sign. The opponent states that since the signs display an identical beginning and a similar ending (with the same length and same consonants) they are highly similar from a visual point of view.

12. With regard to the aural comparison, the opponent argues that the signs share the same first syllable. The opponent also argues that the last parts of the signs 'bull' and 'boel' present the same phonetic structure and rhythm. The main difference lies within the second word of the contested sign, the word 'de', which is a commonly used article in Dutch. According to the opponent, this causes only a minor phonetic difference between the signs. The opponent also refers to case law in which it has been decided that the goods concerned (various non-alcoholic and alcoholic beverages) are often ordered orally in noisy environments, for example in bars, restaurants and pubs, where phonetic differences are not easily noticed. Therefore, the opponent concludes that the signs are aurally nearly identical.

13. The opponent states that the word elements 'de boel' of the contested sign have no meaning for the French and German speaking part of the Benelux public. The opponent also argues that the word 'red' will be understood by the Benelux public as the English word for the colour red. Therefore, according to the opponent, with regard to the French and German speaking part of the public, the signs are conceptually similar to the extent that they both refer to the colour red.

14. With regard to the Dutch speaking consumers, the opponent argues that the signs are in principle conceptually different, because the trademark invoked refers to a red bull and the contested sign translates freely into 'save the whole lot'. However, according to the opponent, it is likely that the Dutch speaking part of the Benelux public, which is well aware of the famous mark RED BULL, will understand the contested sign 'RED DE BOEL' as a comical reference to RED BULL. This means that, with regard to the Dutch speaking consumer, the contested sign has a secondary meaning, which is directly associated with the trademarks invoked and therefore creates a conceptual link between the signs. For this reason the signs are also conceptually similar for the Dutch speaking part of the Benelux.

15. The opponent also argues that, in the light of the noisy environments in which the signs are communicated, the public could easily understand the contested sign as 'red boel', which is pronounced and understood as 'red bull', which causes the signs to be conceptually identical. Or, the opponent further argues, the consumer could understand the contested sign as 'red de bull', which means 'save the bull'. In those circumstances, the signs are conceptually linked through the concept of a bull.

16. Regarding the comparison of the contested sign with the second trademark invoked, the opponent refers to the arguments mentioned before. The opponent only adds that the figurative element in the second trademark invoked plays a minor role in the overall impression of this sign and therefore does not alter the visual, aural and conceptual similarity of the signs.

17. Lastly, the opponent refers to a number of other court decisions, as well as opposition decisions, in which it was decided that other marks were confusingly similar to the trademarks invoked.

18. In the light of the above, the opponent concludes that there exists a risk of confusion and requests that the Office upholds the opposition and rejects the contested sign, with the defendant bearing the costs in accordance with article 2.16 (5) BCIP.

B. Defendant's arguments

19. The defendant agrees with the opponent that RED BULL is a very successful energy drink and that this brand is currently one of the most famous brands in the world.

20. With regard to the goods concerned, the defendant claims that the contested sign will, in fact, not be used for energy drinks. The defendant also states that he has no problem with the exclusion of this category from his application. The defendant also argues that the remaining goods are not similar.

21. The defendant states that the contested sign means 'save the lot'. The defendant explains his vision with regard to the use of the contested sign, but also indicates that he wishes this to remain confidential. Although the reasoning of the defendant is not entirely clear, the Office understands that the defendant also means to say that the conceptual meaning of the contested sign shows that this sign will not be used for the same goods as those for which the trademarks invoked are used.

22. Furthermore, due to the fact that the trademarks invoked are famous, the defendant argues that it is doubtful that the public will confuse the signs, also because, according to the defendant, the contested sign is aimed at a different consumer.

23. According to the defendant, the signs are conceptually different, because the trademarks invoked refer to a bull and the contested sign means 'save the lot'. In this regard, the defendant states that in almost all the decisions mentioned by the opponent, in which a risk of confusion was concluded, the contested sign concerned contained the word 'bull'. The defendant states that there is no reference to a bull in the contested sign.

24. The defendant also argues that the signs are clearly different, because the contested sign does not contain a figurative element in the form of a bull.

25. In the light of the above, the defendant requests that the Office rejects the opposition and registers the contested sign, with the opponent bearing the costs in accordance with article 2.16 (5) BCIP.

III. DECISION

A.1 Likelihood of confusion

26. In accordance with article 2.14, 1 BCIP, the applicant or 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 2.3 (a) and (b) BCIP.

27. Article 2.3 (a) and (b) BCIP stipulates that *“In determining the order of priority for filings, account shall be taken of rights, existing at the time of filing and maintained at the time of the litigation, in: a. identical trademarks filed for identical goods or services; b. identical or similar trademarks filed for identical or similar goods or services, where there exists on the part of the public a likelihood of confusion that includes the likelihood of association with the prior trademark.”*

28. According to case law of the Court of Justice of the European Union (hereinafter: the “CJEU”) concerning the interpretation of Directive 2008/95/EG of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trademarks (hereinafter: “Directive”), the likelihood of confusion of the public, which is defined as the risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings, must be appreciated globally taking into account all factors relevant to the circumstances of the case (CJEU, Canon, C-39/97, 29 September 1998, ECLI:EU:C:1998:442; Lloyd Schuhfabrik Meyer, C-342/97, 22 June 1999, ECLI:EU:C:1999:323; CJBen, Brouwerij Haacht/Grandes Sources belges, A 98/3, 2 October 2000; Marca Mode/Adidas, A 98/5, 7 June 2002; Supreme Court of the Netherlands, Flügel-bottle, C02/133HR, 14 November 2003, ECLI:NL:HR:2003:AK4818; Court of Appeal Brussels, N-20060227-1, 27 February 2006).

Comparison of the goods

29. In assessing the similarity of the goods and services concerned, all the relevant factors relating to these goods or services themselves should be taken into account. These factors include, inter alia, their nature, their end-users and their method of use and whether they are in competition with each other or are complementary (Canon, already cited).

30. 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 or as indicated in the trademark application.

31. The goods to be compared are the following:

With regard to the first trademark invoked (IR 961854)

Opposition based on:	Opposition directed against:
CI 32 Non alcoholic beverages including refreshing drinks, energy drinks, whey beverages, isotonic, hypertonic and hypotonic drinks (for use	CI 32 Beverages (Isotonic-); aerated drinks; non-alcoholic beverages; flavoured carbonated beverages; carbonated non-alcoholic drinks; functional water-based

and/or as required by athletes); beer, malt beer, wheat beer, porter, ale, stout and lager; non alcoholic malt beverages; mineral water and aerated waters; fruit drinks and fruit juices; syrups, essences and other preparations for making beverages as well as effervescent (sherbet) tablets and effervescent powders for drinks and non-alcoholic cocktails.	beverages; mineral enriched water [beverages]; non-alcoholic flavoured carbonated beverages; isotonic beverages [not for medical purposes]; vitamin fortified non-alcoholic beverages; aperitifs, non-alcoholic; cocktails, non-alcoholic.
	Cl 33 Alcoholic energy drinks; alcoholic bitters; pre-mixed alcoholic beverages; low alcoholic drinks; alcoholic carbonated beverages, except beer.

Class 32

32. The Office points out that the term “*including*”, mentioned in class 32 of the trademark invoked, indicates that the specific goods are only examples of items included in the category, and that protection is not restricted to them (EGC, Nu-Tride, T-224/01, 9 April 2003, EU:T:2003:107).

33. All of the beverages mentioned in class 32 of the contested sign fall under the broad category “*non alcoholic beverages*” for which the trademark invoked is registered. 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).

Class 33

34. The contested goods “*alcoholic energy drinks*” are similar to the goods “*energy drinks*” mentioned in class 32 of the trademark invoked. Both goods are drinks and serve the same purpose, which is to give someone more energy. They differ in that the defendant’s energy drinks contain alcohol while the ‘energy drinks’ of the trademark invoked do not. However, both drinks are distributed through the same commercial channels such as supermarkets, bars and restaurants. Furthermore, they have similarities in their nature and purpose, as both may be served to consumers alongside each other, for example, at parties or other social events, in bars or in restaurants. Insofar as adult consumers are concerned, both alcoholic beverages and energy drinks target the same public and are in competition with each other. In addition, a significant part of the relevant public enjoys drinking cocktails, i.e. mixed drinks which generally consist of alcoholic beverages and other ingredients. These ingredients may include, for example, the contested ‘energy drinks’ (see also EGC, Hai/Shark, T-33/03, 9 March 2005, ECLI:EU:T:2010:152). Therefore, the goods in comparison may even be complementary to each other. For these reasons, the Office finds that the goods are highly similar.

35. The contested goods “*alcoholic bitters; pre-mixed alcoholic beverages; low alcoholic drinks; alcoholic carbonated beverages, except beer*” are different types of alcoholic beverage. These goods are highly similar to the goods “*beer, malt beer, wheat beer, porter, ale, stout and lager*” mentioned in class 32 of the trademark invoked. Although their production processes are different, these goods all belong to the same category of (alcoholic) drinks intended for human consumption. They are distributed through the same commercial channels and are usually placed on the same shelves in supermarkets or listed in the same category on a menu. Therefore, these goods are in competition. In addition, beers and alcoholic beverages (except beers) can be mixed and consumed together, for instance in cocktails. Furthermore, they can originate from the same undertakings.

Conclusion

36. The goods are partly identical, partly highly similar and partly similar.

Comparison of the signs

37. The wording of Article 4, 1 (b) of the Directive (cf. article 2.3, (b) BCIP) “there exists a likelihood of confusion on the part of the public” 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).

38. 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).

39. The signs to be compared are the following:

Opposition based on:	Opposition directed against:
RED BULL	Red de Boel

40. According to relevant case-law, two marks are similar when, from the point of view of the relevant public, they are at least partially identical as regards one or more relevant aspects, inter alia the visual, aural and conceptual aspects (reference is made to EGC Matratzen, T-6/01, 23 October 2002, ECLI:EU:T:2002:261 and Sabel, already cited).

Conceptual comparison

41. The trademark invoked consists of two words, 'red' and 'bull'. In juxtaposition with 'bull', the Office finds that the word 'red' will be understood by the public in the Benelux as an English word referring to the colour red. The English word 'bull' will be understood as the denomination of an uncastrated male bovine animal.¹ In the trademark invoked, the word 'red' acts as the adjective to the noun 'bull'. Therefore, it is likely that the public will understand that the bull is coloured red. Therefore, the Office finds that in this case the word red will not be considered descriptive for the goods concerned. However, it has to be pointed out that the adjective 'red' acts as a qualifier of the noun 'bull' and therefore, on a semantic level, the element 'bull' is considered the dominant element in the trademark invoked.

42. Parties agree that the Dutch-speaking part of the public will understand the contested sign as a short sentence, meaning 'save the (whole) lot' (paragraph 14 and 23). This constitutes a semantic difference between the signs. However, the Office also has to take into consideration that the French and German speaking part of the public in the Benelux is unfamiliar with the meaning of the words 'de Boel' in Dutch.

43. Although the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (Sabel and Lloyd, already cited), the fact remains that, when perceiving a verbal sign, he or she will break it down into elements which, for him or her, suggest a concrete meaning or which resemble words known to him (EGC, Respicur, T-256/04, 13 February 2007, ECLI:EU:T:2007:46; Aturion, T-146/06, 13 February 2008, ECLI:EU:T:2008:33; Galvalloy, T-189/05, 14 February 2008, ECLI:EU:T:2008:39 and Ecoblue, T-281/07, 12 November 2008, ECLI:EU:T:2008:489). The word 'red' is a basic English word. For this reason, the Office finds that the non-Dutch speaking part of the public in the Benelux that is confronted with the contested sign recognizes this word and could perceive it as a reference to the colour red. This part of the public will associate both signs with the colour red and they will not perceive the Dutch idiomatic expression of the contested sign.

44. Although the French and German speaking part of the public will not be familiar with the meaning of the words 'de Boel', the Office finds that it is possible that the combination of the words 'red' and 'boel', could create an identical conceptual association with the trademark invoked, due to the aural similarity and the reputation of the trademark invoked as discussed below (see paragraphs 52 and 59).

45. For a part of the public, the signs are conceptually dissimilar. For the other part of the public, in the light of the above, the Office finds that the signs are conceptually similar to a low degree.

Visual comparison

46. Both signs are purely verbal marks. The trademark invoked consists of two words of three and four letters, RED BULL. The contested sign consists of three words of three, two and four letters, Red de Boel.

47. In both signs, the first word is 'red'. Therefore, the first part is identical. The fact that the trademark invoked is represented in capital letters, whereas the contested sign is represented in capital and lower-case letters, is irrelevant for the purposes of a visual comparison of these marks (see BOIP, opposition decision HY-BOND RESIGLASS, 2000572, 8 April 2008 and EGC, babilu, T-66/11, 31 January 2013, ECLI:EU:T:2013:48).

¹ <https://en.oxforddictionaries.com/definition/bull>

48. Furthermore, it must be taken into account that the consumer normally attaches more importance to the first part of a sign (EGC, Mundicor, T-183/02 and T-184/02, 17 March 2004, ECLI:EU:T:2004:79).

49. In both signs, the last word begins with the letter B and ends with the letter L. On the other hand, the contested sign also contains several differences, namely the addition of the second word 'de' and the letters O and E in the last part. These differences will not be overlooked by the public.

50. In the light of the above, the Office finds that the signs are visually similar to a certain extent.

Aural comparison

51. The trademark invoked consists of two words and two syllables. The contested sign consists of three words and three syllables. The first word 'red' [rɛd] is pronounced identically. Even if the public in the Benelux will pronounce the word 'red' in the contested sign as a Dutch word [ret], instead of an English word, this pronunciation is still strongly similar to the pronunciation of the word 'red' in the trademark invoked.

52. In addition, the words 'bull' [bʏl] and 'boel' [bul] are aurally nearly identical. It is likely that the French-speaking part of the public, which is not familiar with the correct pronunciation of the Dutch word 'boel', would pronounce this word slightly different. In any case, this possible pronunciation is also strongly similar to the pronunciation of the word 'bull'.

53. The beginning and ending of the signs are strongly similar. The only difference lies in the middle, due to the word 'de' in the contested sign. The Office finds this difference insufficient to evoke a different global aural impression. Furthermore, as also considered with regard to the visual comparison, the consumer attaches more importance to the first part of a sign.

54. For these reasons, the Office concludes that the signs are aurally similar.

Conclusion

55. The signs are visually similar to a certain extent and aurally similar. For the Dutch speaking part of the public, the signs are conceptually different, however this is insufficient to neutralize the visual and aural similarities. For the other part of the public, the signs are similar to a low degree.

A.2 Global assessment

56. 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.

57. 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. Although certain types of alcoholic beverages will be purchased more often than others, the goods concerned are targeted at the public in general. Therefore, the Office finds that for these goods the average level of attention of the public concerned may be deemed normal.

58. 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 or services which they cover. A lesser degree of similarity between the relevant goods or services can be offset by a greater degree of similarity between the trademarks, and vice versa (Canon and Lloyd, already cited). In the present case, the goods are identical and (highly) similar. The signs are visually similar to a certain extent and aurally similar. The use of the signs will, by the nature of the goods, often take place in bars and restaurants which are usually noisy establishments, as also argued by the opponent (paragraph 12). For this reason, the aural similarity must not be underestimated and plays an important role in the assessment. Conceptually the signs are either similar to a low degree or dissimilar. In this context, the Office points out that risk of confusion with part of the public is sufficient to justify the opposition (see EGC, Hai/Shark, already cited).

59. The more distinctive the earlier trademark, the greater the likelihood of confusion. Marks with a highly distinctive character, either *per se* or because of the reputation they possess on the market, enjoy broader protection than marks with a less distinctive character (Canon, Sabel and Lloyd, already cited). In the present case, the trademark invoked has a normal distinctiveness, as it is not descriptive of the goods and services concerned. In addition, parties agree that the trademarks invoked have a reputation for energy drinks (paragraph 9 and 19). This causes an enhanced distinctiveness which only increases the likelihood of confusion. Furthermore, because the public knows the sign 'red bull', the French and German speaking part of the public could perceive the word 'boel' in the contested sign as (an alternative spelling of) 'bull', and think that it concerns the trademark invoked.

60. Based on the abovementioned circumstances, the Office is of the opinion that the relevant public might believe that the goods in question come from the same undertaking or from economically-linked undertakings.

B. Other factors

61. The defendant states that he has no problem with the exclusion of the goods 'energy drinks' (paragraph 20). Irrespective of whether this statement could be accepted as an explicit request for limitation of the list of goods of the contested sign, the Office finds that this limitation has no influence on the outcome of these proceedings.

62. The defendant argues that it is not likely that the signs will be confused by the public, because the trademark invoked is famous (paragraph 22). Although it is possible that in this situation the differences between the signs may be more noticeable, such a proposition runs counter to the fundamental principle in trademark law, which is part of the established case law of the CJEU, namely that a well-known trademark has an extended scope of protection.

63. The defendant argues that the contested sign will not be used for the same goods for which the trademarks invoked are used and is not aimed at the same audience (paragraph 21 and 22). The Office points out that the opposition procedure leaves no room for considerations concerning the actual or future use of the signs concerned or any other signs. The comparison of the signs is solely based on the trademark and sign as registered (see to that effect: CJEU, Quantum, C-171/06, 15 March 2007, ECLI:EU:C:2007:171; O2 Holdings Limited, C-533/06, 12 June 2008, ECLI:EU:C:2008:339 and EGC, Ferromix e.a., T-305/06-T-307/06, 15 October 2008, ECLI:EU:T:2008:444).

C. Conclusion

64. Based on the foregoing the Office is of the opinion that there exists a likelihood of confusion.
65. Since the opposition is already justified based on the first trademark invoked, it is not necessary to discuss the second trademark invoked.

IV. DECISION

66. The opposition with number 2013638 is justified.
67. Benelux application with number 1362478 will not be registered.
68. The defendant shall pay the opponent 1,030 euros in accordance with article 2.16, 5 BCIP in conjunction with rule 1.32, 3 IR, as the opposition is justified in its entirety. This decision constitutes an enforceable order pursuant to article 2.16, 5 BCIP.

The Hague, 2 November 2018

Eline Schiebroek
(rapporteur)

Pieter Veeze

Tomas Westenbroek

Administrative officer: Rudolf Wiersinga