

BENELUX OFFICE FOR INTELLECTUAL PROPERTY

OPPOSITION DECISION

N° 2010591

9 February 2016

Opponent: **Sky International AG**
Stockerhof, Dreikönigstrasse 31a
8002 Zurich
6301 Zug
Switzerland

Representative: **Olswang Belgium LLP**
Louizalaan 326 bus 26
1050 Brussel
Belgium

Right Invoked 1: (European registration 6870992)
SKY

Right Invoked 2: (European registration 8178436)
SKY

against

Defendant: **Skyeye BVBA**
Asserweg 82
3690 Zutendaal
Belgium

Representative: **Arts, Cleeren & vennoten cvba**
Jaarbeurslaan 19 bus 31
3600 Genk
Belgium

Contested trademark: (Benelux registration 966085)



I. FACTS AND PROCEEDINGS

A. Facts

1. On 6 August 2014, the defendant filed an application in the Benelux for the combined

word/figurative trademark  for goods and services in classes 9, 12 and 42. In accordance with article 2.8, 2 of the Benelux Convention on Intellectual Property (hereinafter: "BCIP"), the defendant requested an accelerated registration. The application was registered under number 966085 and was published on 27 November 2014.

2. On 26 January 2015, the opponent introduced an opposition against this accelerated registration. The opposition is based on the following earlier trademarks:

- European registration 6870992 of the word trademark SKY, filed on 18 April 2008 and registered on 8 August 2012 for goods and services in classes 3, 4, 7, 9, 11, 12, 16, 17, 18, 25, 28, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44 and 45;
- European registration 8178436 of the word trademark SKY, filed on 2 March 2009 and registered on 22 May 2014 for goods and services in classes 3, 4, 7, 9, 11, 12, 16, 17, 18, 25, 28, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44 and 45.

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

4. The opposition is directed against all the goods and services of the contested sign and is based on all the goods and services mentioned in classes 9, 12 and 42 relating to the rights invoked.

5. The grounds for the opposition are laid down in article 2.14, 1 (a) BCIP.

6. The language of the procedure is English.

B. Chronological order of the proceedings

7. The opposition is admissible and was notified to the parties on 28 January 2015.

8. The adversarial phase of the procedure commenced on 29 March 2015. The Benelux Office for Intellectual Property (hereinafter: "the Office") sent the notification of the commencement of the proceedings on 8 April 2015 to the parties, giving the opponent the opportunity to substantiate the opposition by submitting supporting arguments and documents no later than 8 June 2015.

9. On 8 June 2015 the opponent submitted supporting arguments to substantiate the opposition. These arguments were sent by the Office to the defendant on 9 June 2015, giving the defendant the opportunity to submit a response no later than 9 August 2015.

10. On 27 July 2015 Arts, Cleeren & vennoten cvba was appointed representative for the defendant and requested for suspension of the proceedings. By letter of 28 July 2015 the Office confirmed this

appointment to the parties and informed them that a suspension of the proceedings can only be taken into consideration if requested by both parties.

11. The defendant filed a reply to the arguments of the opponent on 31 July 2015. This reply was sent by the Office to the opponent on 3 August 2015.

12. Each party filed its observations within the time limits set by the Office.

13. The Office has sufficient information to come to a decision on the opposition.

II. ARGUMENTS

14. 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

15. The opponent introduces himself as the leading company in the field of pay television satellite broadcasting service in the United Kingdom. It has used the rights invoked, SKY, extensively and continuously over 25 years, as a company name, as a trade mark and as a house mark, particularly in the UK and Ireland. The opponent says its company is famous in the UK and in Ireland for inter alia advertising, retailing, telecommunications, broadcasting, entertainment, television and interactive television services, ISP and broadband services, audio visual and telecommunications apparatus and instruments and related goods and services. The trade mark SKY is protected by an extensive trade mark portfolio and, according to the opponent, it is one of the most reputed trade marks in the UK, Ireland, Germany and Italy, which has inevitably consequences on the distinctive character of said trade mark in the Benelux. From a visual point of view, the opponent states that the verbal element SKY is the dominant element in the contested sign. Indeed, it is the first part of that sign and it is being strengthened by the depiction in a white colour, which contrasts more with the black background than the other verbal element, depicted in a softer yellow colour. This dominant element is identical to the rights invoked and therefore the signs are visually highly similar, according to the opponent.

16. The opponent thinks that the consumer shall not aurally reproduce the figurative elements and hence these elements should not be taken into consideration for a phonetic comparison. The opponent finds that the pronunciation of the signs coincides in the sound of the first syllable and hence the contested sign contains the earlier rights in their entirety and in an identical way. It follows that the signs are phonetically highly similar.

17. Conceptually, both signs refer to "the sky" or "the heaven" and the opponent is of the opinion that the relevant consumer in the Benelux will undoubtedly recognize the meaning thereof. Therefore the signs are conceptually highly similar.

18. The opponent observes that the goods and services concerned are identical or at least highly similar.

19. The opponent notices that the goods and services are directed both to the public at large and to business clients, and therefore the degree of attention of the relevant public is normal.

20. Taken into account the identical or highly similar nature of the goods and services and the high degree of similarity between the signs, the opponent concludes that there is clearly a likelihood of confusion. Therefore the opponent requests the Office to declare the present opposition well-founded, to refuse the registration of the contested sign and to declare that its decision shall constitute an order.

B. Defendant's arguments

21. The defendant points out that its company is specialized in drone-applications and –services and that its activities focus on the research and development of drone-related hardware, software and mechanics. In short, it develops and fine-tunes drone systems for professional purposes, such as surveillance, monitoring and geographical measurements.

22. Given the nature of its products, the defendant only targets a B2B market and professional customers. Consequently, the relevant public with regard to defendant's goods and services are Benelux based professionals needing drone-system solutions. Bearing in mind the specialized, costly, high-end and even custom-made nature of these goods and services, this public will be highly informed, careful and attentive and will have a very high level of attention.

23. According to its websites, the opponent on the other hand provides pay television satellite broadcasting, broadband internet and telephone services in the UK, Ireland and, on a much smaller scale, in Germany and Italy. It therefore cannot be truly stated that the rights invoked are in any way reputed outside of the UK and Ireland, nor that this would have consequences on the distinctive character of these trademarks in the Benelux.

24. Bearing in mind the activities of both parties, the defendant thinks that there is absolutely no overlap in goods or services provided by each party. The opponent wrongfully states that the goods and services are identical or at least highly similar, based solely on a comparison according to the Nice classification used for the registration of the trademarks. However, according to the defendant, the Nice classification cannot be used in order to determine the similarity of goods and services. Conversely, the defendant believes that the assessment of similarity can only be based upon the current and on-going actual activities of the parties involved.

25. Concerning the comparison of the trademarks, the defendant points out that the figurative elements of the contested sign (logo, font, colours, depicted eye) dominate the verbal elements or are at least equivalent to the latter. As the rights invoked do not have figurative aspects, the defendant finds that there are no or at most very little visual similarities to the contested sign, certainly because it cannot be considered that the part SKY is more distinctive or dominating than the part EYE.

26. Phonetically, although the pronunciation of the first syllable is the same, the contested sign contains two syllables, the second differing entirely from the rights invoked. Therefore, the defendant thinks the phonetic similarity between the signs is very low.

27. Conceptually, the rights invoked refer to the sky or the heaven. The contested sign however refers to an eye as being in the sky or heaven, looking over the earth. This concept of course closely relates to the drone-applications and –services developed and provided by the defendant and is vastly

different from the simple and trivial concept of the sky. The defendant concludes that there is no (or at most very little) conceptual similarity between the signs.

28. On these grounds the defendant requests the Office to reject the opposition and to declare that the costs of the proceedings shall be borne by the opponent.

III. DECISION

A.1 Likelihood of confusion

29. 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 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.

30. Article 2.3 (a) and (b) BCIP stipulates "*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.*"

31. 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, Lloyd Schuhfabrik Meyer, C-342/97, 22 June 1999; 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; Brussels, N-20060227-1, 27 February 2006).

Comparison of the signs


32. 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).

33. 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).

34. 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). 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 and El Charcutero Artesano, T-242/06, 13 December 2007).

35. The rights invoked are identical and thus can be dealt with together. The signs to be compared are the following:

Opposition from:	Opposition against:
SKY	

Visual comparison

36. The right invoked is a purely verbal mark, consisting of one word namely "SKY". The contested sign is a combined word/logo, consisting of a stylized representation of a yellow/black eye, "caught" by a sort of gripping instrument. On the right side of this image figures the verbal element "Skyeye", the first three letters depicted in white, the last three in yellow. The whole is placed in a black horizontal rectangle.

37. Where a trademark is composed of verbal and figurative elements, the former should, in principle, be 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 elements of the trademark (see in this sense EGC, SELENIUM-ACE, T-312/03, 14 July 2005). In the present case, the initial figurative elements of the contested sign will surely not be overlooked, but they are rather abstract and liable to different interpretations so that it is not easy to bear them in mind (if the first element is a gripping instrument indeed, the "eye" could also be a screw or a bolt). In any event, the verbal element "Skyeye" is clearly perceptible, it constitutes a significant part of the sign as compared to the figurative elements and will therefore catch the eye at least as much as the latter.

38. As a result of the two different colours of the verbal element, it can easily be seen as two words, "Sky" and "eye". The first one is identical to the right invoked and thus the latter is contained fully in the contested sign, where it holds an autonomic position due to its different colour.

39. The signs are visually similar to a certain degree.

Phonetic comparison

40. 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 (see EGC, PC WORKS, T-352/02, 25 May 2005 and Thai Silk, T-361/08, 21 April 2010). In the present case the contested sign does not contain figurative elements that could influence the pronunciation.

41. Aurally, the pronunciation of the signs coincides in the sound of the word SKY, present identically in both signs, and to that extent the signs are aurally similar. The pronunciation differs in the sound of the word EYE of the contested sign, which has no counterpart in the right invoked.

42. The signs are phonetically similar to a certain degree.

Conceptual comparison

43. Conceptually, the term SKY in the rights invoked will be understood by the relevant public as “the region of the atmosphere and outer space seen from the earth” (Oxford Dictionary). Although the word SKYEYE in the contested sign has no meaning in its entirety, it is likely that the public will split the word into different parts: SKY and EYE (see paragraph 38). Indeed, although the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (Lloyd, already cited), the fact remains that, when perceiving a verbal sign, he will break it down into elements which, for him, suggest a concrete meaning or which resemble words known to him (EGC, Respicur, T-256/04, 13 February 2007; Aturion, T-146/06, 13 February 2008 and Galvalloy, T-189/05, 14 February 2008). The word ‘SKY’ will be understood as defined previously, and the term EYE will be understood as “the organ of sight in humans and animals” (Oxford English Dictionary).

44. Although the element EYE in the contested sign has a different meaning, it is considered that the common word SKY refers to the same concept and therefore the signs are conceptually similar to a certain degree.

45. The signs are conceptually similar to a certain degree.

Conclusion

46. The signs resemble visually, phonetically and conceptually to a certain degree.

Comparison of the goods and services

47. In assessing the similarity of the goods and services concerned, all the relevant factors relating to the 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).

48. The comparison of the goods and services must relate to those covered by the registration of the earlier trademarks in question or by the application of the contested sign (see e.g. EGC, Arthur et Felice, T-346/04, 24 November 2005).

49. The goods and services to be compared are the following, taking into account the extent of the opposition:

Opposition based on:	Opposition directed against:
<p>Class 9 Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, radio, television, sound recording, sound reproducing, telecommunications, signalling, checking (supervision) and teaching apparatus and instruments; apparatus for recording television programmes; apparatus for recording, transmission, reproduction or reception of sound, images or audio visual content; electrical and electronic apparatus for use in the reception of satellite, terrestrial or cable broadcasts; televisions; LCD and plasma screens; home cinema systems; amplifiers; speakers; radios; wireless audio and/or audio visual devices; portable wireless audio and/or audio visual devices; remote controls; games controllers; wireless gaming controllers; wireless keypads; television receivers including a decoder; set-top boxes; digital set-top boxes; high definition set top boxes; personal video recorder; set-top boxes for use in decoding and reception of satellite, terrestrial and cable broadcasts; apparatus for decoding encoded signals including set top boxes for television reception; set top box apparatus including a decoder and an interactive viewing guide, set top box apparatus including a decoder and a recorder for recording television and audio programmes; set top box apparatus including a decoder and a recorder programmable to transfer stored recordings to storage and also to delete the older recordings; satellite dishes; low noise blocks; satellite meters; computer software to enable searching of data; encoded programs for computers and for data processing and telecommunications; telephones; mobile telephones; PDAs; telephone and radio modems; television receivers including a decoder; set top boxes for use in decoding and reception of satellite, terrestrial cable and digital subscriber line (DSL), Internet or other electronic broadcasts; apparatus for decoding encoded signals; recorded television and radio programmes; recorded programmes for broadcasting or other transmission on television, radio, mobile telephones, PDAs and on PCs; video recordings; multimedia apparatus and instruments; portable or hand-held computers; DVD players; computers; computer hardware; computer hardware, apparatus and instruments all for transmitting, displaying, receiving, storing and searching electronic information; computer programs; electronic computer games; electronic interactive computer games; computer software; computer software and telecommunications apparatus to enable connection to databases and the Internet; computer software supplied from the Internet; network termination equipment; wired and/or wireless computer network routers, modems, firewalls and/or bridges; computer software and computer programs for distribution to, and for use by, viewers of a digital television channel for the viewing and purchase of goods and services; computer games software and computer quiz software; computer video games and/or quizzes adapted for use with</p>	<p>Class 9 Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; compact discs, DVDs and other digital recording media; mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment, computers; computer software; fire-extinguishing apparatus.</p>

<p>television receivers and screens or with video monitors or with computer screens; computer programs for interactive television and for interactive games and/or quizzes; electronic apparatus adapted for use with television receivers in playing games; games consoles; interactive video game devices comprised of computer hardware and software and accessories, namely game consoles, game controllers and software for operating game controllers; portable and/or hand-held electronic devices for interactive computer and video games; portable and/or hand-held electronic devices for receiving, playing and transmitting music, sounds, images, text, signals, information and code; electronic publications; computer games; computer video games; video screens; video projectors; tapes, discs and wires, all being magnetic; cassettes and cartridges, all adapted for use with the aforesaid tapes; blank and pre-recorded audio and video cassettes, tapes and cartridges; compact discs; DVD discs; phonographic records; laser readable discs for recording sound or video; Rom cartridges, CD Roms, cards and discs, integrated circuit cards, memory carriers, recording media, all pre-recorded with computer video games and/or quizzes; encoded cards; radio and television signal antennae; music, sounds, videos, images, text and information provided by a telecommunications network, by on-line delivery and by way of the Internet and/or the world-wide web or other communications network; interactive sound and/or audio recordings; music, video, sound and/or audio recordings (downloadable) provided from MP3 Internet websites; MP3 players, MP3 readers; audio and/or video file recorders and/or players; portable audio and/or video file recorders and/or players; telephone ring tones (downloadable); apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus and instruments for the reception of radio and television broadcasts including the reception of cable, satellite and digital broadcasts; smart cards; credit cards; loyalty cards; acoustic apparatus or instruments; adaptors; aerials; antennae; amplifiers; amusement apparatus and instruments adapted for use with an external display screen or monitor; communication apparatus and instruments; encoded or magnetic banking or credit cards; cinematographic film; cinematographic instruments and apparatus; data carriers; data storage; electrical telecommunications and/or communications and/or broadcast and/or transmission and/or decoding and/or image processing and/or audio visual instruments and apparatus; electronic telecommunications and/or communications and/or broadcast and/or transmission and/or decoding and/or image processing and/or audio visual instruments and apparatus; film reproducing instruments and apparatus; hand held electrical telecommunications and/or communications and/or broadcast and/or transmission and/or decoding and/or image processing and/or audio visual instruments and apparatus; hand held electronic telecommunications and/or communications and/or broadcast and/or transmission and/or decoding and/or image processing and/or audio visual</p>	
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instruments and apparatus; interactive educational or entertainment games for use with television receivers and video apparatus; mobile telephones; motion pictures; telephone apparatus and equipment; parts and fittings for all the aforesaid goods; sunglasses, leather cases for holding mobile phones; e-sell through products, namely downloadable media content, including video and films, television programmes, computer games, music, images and ring tones provided by Internet, telephone line, cable, wireless transmission, satellite or terrestrial broadcast service; cases, containers, protective coverings and parts and fittings therefore, all for use with MP3 players, music storage devices, media storage devices and other consumer electronic devices; electrical, electronic and computer equipment for machinery for use in conservation, generation and efficient use of heat, light and water, including thermostatic controls, solar panels for electricity generation, photovoltaic devices, solar cells, turbines and motion detectors; electrical, electronic and computer equipment for use in the generation of alternative energy including wind power, hydroelectric power, tidal power, geothermal power, solar power, biomass, and biofuels; control and monitoring equipment for use in the generation of alternative energy including wind power, hydroelectric power, tidal power, geothermal power, solar power, biomass, and biofuels; electronic publications [downloadable], including electronic publications, magazines and newsletters regarding environmental protection, energy conservation and ecology, animal welfare and renewable energy projects, including wind power, hydroelectric power, tidal power, geothermal power, solar power, biomass, and biofuels; apparatus and instruments for closed circuit television and surveillance systems; apparatus and instruments for personal security monitoring; apparatus and instruments for home security monitoring and control; home and personal security apparatus; home and personal security devices; home and personal security alarms; electronic protection equipment, including fire detecting and alarm equipment, intruder and burglar alarm equipment and motion detecting equipment; radio, telephonic, television and signalling apparatus and instruments, cameras, sound and video monitoring and recording and sound and video reproducing apparatus and instruments, all for control and telemetry purposes for the home and personal security; closed-circuit television systems (CCTV); monitors; cameras; optical lenses; camera casings; pre-packaged cameras; infrared illuminators; videocassette recorders (VCRs), system controlling software; video monitoring apparatus; detectors; access control apparatus; readers; magnetic or encoded access control cards; monitoring apparatus; electronic panels for alarm management and monitoring; alarm panels; glass breakage detectors; smoke detectors; carbon monoxide detectors; digital audio recorders; digital video recorders; digital audio servers; digital video servers; electrical communication equipment; message programming equipment; radio paging equipment; electronic locking systems; life-saving apparatus and equipment; electric alarms; electronic devices for

<p>opening doors; electronic devices for protection; intruder alarms and anti-theft equipment; intruder detection apparatus; motion detecting equipment; electronic control apparatus; electronic apparatus for controlling operation of machines; remote apparatus for controlling operation of machines; computer apparatus for controlling operation of machines; electronic network equipment; electronic communication equipment; message programming devices; electronic locking apparatus; apparatus for controlling temperature; apparatus for controlling water supply; apparatus for controlling lighting; all the aforesaid including remote and computer apparatus and instruments; parts and fittings for all the aforesaid goods.</p>	
<p>Class 12 Vehicles; apparatus for locomotion by land, air or water; vehicles adapted for use with renewable energy sources including wind power, hydroelectric power, tidal power, geothermal power, solar power, biomass, and biofuels; parts and fittings for all the aforesaid goods.</p>	<p>Class 12 Vehicles; apparatus for locomotion by land, air or water.</p>
<p>Class 42 Design and development of computer hardware and software; design, drawing and commissioned writing all for the compilation of web pages on the Internet; hosting websites; creating and maintaining websites; computer services for interactive communications and broadcasting; installation, rental and maintenance of computer software; weather forecasting; maintenance and repair of interactive video game devices comprised of computer software and accessories, namely software for operating game controllers; home computer services namely computer consultancy, installation, repair and maintenance of computer software, updating software and computer support services; computer services, namely the organization of an infrastructure to enable television subscribers to access Internet services via the television; advice relating to the development of computer systems; advisory services relating to computer based information systems; advisory services relating to computer hardware or software; design, installation, maintenance or updating of computer software; design of computer hardware; design services; designing electrical or electronic systems; design services for artwork for animated films; monitoring and analysis of call information; computer programming services; Internet walled garden services; operation of search engines; rental or leasing of computer hardware or software; testing, research, assessing, consultancy, advising or providing information in relation to the foregoing; computer services for on-line shopping; computer services relating to the processing of orders and payments; weather forecasting; providing information and advice with regard to environmental protection, energy conservation and alternative energy sources, ecology and animal welfare as well as conducting research and drawing up expert reports in the aforementioned fields; research and development of durable use of nature and the environment; technical assistance concerning environmental protection, energy conservation and alternative energy sources, ecology and animal welfare and effecting such projects; development and testing for renewable energy sources including</p>	<p>Class 42 Scientific and technological services and research and design relating thereto; industrial analysis and research services; design and development of computer hardware and software.</p>

<p>wind power, hydroelectric power, tidal power, geothermal power, solar power, biomass, and biofuels, and components therefor; effecting research projects concerning environmental protection, energy conservation and alternative energy sources, ecology and animal welfare; consultancy, information and advisory services relating to all the aforesaid services; information relating to all the aforementioned services provided on-line from a computer database or via the Internet.</p>	
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Class 9

50. The contested goods *scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision) and teaching apparatus and instruments, apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity, apparatus for recording, transmission or reproduction of sound or images, compact discs, DVDs, computers and computer software* are mentioned explicitly in the classification lists of the rights invoked and are thus identical.

51. The contested goods *magnetic data carriers, recording discs and other digital recording media* include the goods *compact discs and DVD's* relating to the rights invoked and are therefore identical to them (see in this sense EGC, Metabiomax, T-281/13, 11 June 2014).

52. The contested goods *calculating machines and data processing equipment* include the goods *computers and computer hardware* relating to the rights invoked and are therefore identical to them (EGC, Metabiomax, cited above).

53. The contested goods *life-saving apparatus and instruments, fire-extinguishing apparatus* and the goods *fire detecting and alarm equipment* relating to the rights invoked are both destined for emergency situations, fire fighting and fire protection. These products are aimed at the same kind of private individual or professional costumers looking for (a) (fire) protection (system). These goods are commercialized by the same distribution channels, like do-it-yourself stores or companies specialized in security. Therefore, these goods are similar.

54. The remaining contested goods *mechanisms for coin-operated apparatus and cash registers* are dissimilar to all the goods and services of the rights invoked as they have a different nature, method of use and intended purpose and they are not in competition. Furthermore, they do not normally have the same origin or distribution channels. Consequently, these goods are dissimilar to all the goods and services of the earlier marks.

Class 12

55. The contested goods *vehicles and apparatus for locomotion by land, air or water* are mentioned explicitly among the goods in the same class relating to the rights invoked and are therefore identical to them.

Class 42

56. The contested services *design and development of computer hardware and software* are mentioned explicitly in the specification of the rights invoked and therefore these services are identical.

57. The contested services *scientific and technological services and research and design relating thereto* and *industrial analysis and research services* are similar to the following services relating to the rights invoked: *conducting research and drawing up expert reports in the fields of environmental protection, energy conservation and alternative energy sources, ecology and animal welfare, research and development of durable use of nature and the environment, technical assistance concerning environmental protection, energy conservation and alternative energy sources, ecology and animal welfare and effecting such projects, development and testing for renewable energy sources including wind power, hydroelectric power, tidal power, geothermal power, solar power, biomass, and biofuels, and components therefor, effecting research projects concerning environmental protection, energy conservation and alternative energy sources, ecology and animal welfare and consultancy, information and advisory services relating to all the aforesaid services*. The scientific, technological and research aspects are all involved in the latter services and the consultancy and advisory services relating to them imply a thorough industrial analysis. Moreover, this kind of services are provided by highly skilled professionals, and the public could think that providers of these services are economically linked.

Conclusion

58. The contested goods and services are partly identical, partly similar and partly not similar to the earlier goods and services.

A.2 Global assessment

59. 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.

60. 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 present case concerns partly goods and services that are considered to be expensive or aimed to meet a particular technological need, and consequently the level of attention of the consumer will be higher than average for these goods and services (see ECG, JAVA, T-554/12, 27 March 2014). For the remaining goods and services the average level of attention of the public concerned may be deemed normal.

61. The global assessment of the likelihood of confusion assumes that there is a certain degree of interdependence between the factors to be taken in 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).

62. 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 rights invoked have no meaning in relation to any of the goods and services at issue from the perspective of the public in the relevant territory. Consequently, the distinctiveness of the earlier marks must be seen as normal. According to the opponent, its trademark is one of the most reputed in the UK, Ireland, Germany and Italy, which has inevitably consequences on the distinctive character of said trade mark in the Benelux (see paragraph 15). However, the Office has not examined this affirmation, because even a higher distinctiveness of the rights invoked cannot possibly lead to a likelihood of confusion with regard to goods and services that are not similar.

63. 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.

64. Based on the circumstances mentioned above, including the level of similarity of the signs, the fact that some of the goods and services are identical or similar and notwithstanding the partly high level of attention of the public, the Office judges that the relevant public might believe that the identical and similar goods and services stem from the same undertaking or from economically-linked undertakings.

B. Other factors

65. The defendant considers that, according to European and Benelux law, the Nice classification cannot be used in order to determine the similarity of goods and services and that the assessment of similarity can only be based upon the current and on-going actual activities of the parties involved (see paragraph 26). The Office points out that the classification itself indeed does not constitute a criterion for evaluating the similarity (see article 2.20, paragraph 3 BCIP), but the exact wording in the register surely does. Actual use of the sign will only be considered relevant in assessing evidence of genuine use.

66. The defendant points out that the contested sign is only used for goods and services in relation with drones (see paragraphs 23 to 26). However, the opposition procedure leaves no room for considerations concerning the actual use of the signs or the normative issues as mentioned by the defendant. The comparison of the signs is solely based on the goods and services as mentioned in the registration, and in the given case the defendant has not limited the goods and services in the sense he mentions (CJEU, Quantum, C-171/06, 15 March 2007, O2 Holdings Limited, C-533/06, 12 June 2008, EGC, Ferromix e.a., T-305/06-T-307/06, 15 October 2008).

C. Conclusion

67. Based on the foregoing the Office judges that there exists a likelihood of confusion with regard to the identical and similar goods and services.

IV. DECISION

68. The opposition with number 2010591 is partly justified.

69. Benelux accelerated registration with number 966085 is cancelled for the following goods and services:

Class 9: Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; compact discs, DVDs and other digital recording media; calculating machines, data processing equipment, computers; computer software; fire-extinguishing apparatus.

Class 12: All goods.

Class 42: All services.

70. Benelux accelerated registration with number 966085 is upheld for the following goods, which appeared not to be similar:

Class 9: Coin-operated apparatus; cash registers.

71. Neither of the parties shall pay the costs in accordance with article 2.16(5) BCIP in conjunction with rule 1.32(3) IR, as the opposition is partly justified.

The Hague, 9 February 2016

Willy Neys
(*rapporteur*)

Pieter Veeze

Tomas Westenbroek

Administrative officer: Gerda Veltman