



Benelux Office for
**Intellectual
Property**

BENELUX OFFICE FOR INTELLECTUAL PROPERTY
OPPOSITION DECISION
N° 2012889
of 14 April 2020

Opponent: **SC CROCO SRL**
Str. Slanicului 12 , Onesti
601110 Judetul Bacau
Romania

Representative: **NLO Shieldmark B.V.**
New Babylon City Offices
Anna van Buerenplein 21 A
2595 DA The Hague
Netherlands

Invoked right: **Benelux trademark 866034**

against

Defendant: **Rigo Trading S.A.**
Route de Trèves 6 EBBC, Building E
2633 Senningerberg
Luxembourg

Representative: **Rigo Trading S.A.**
Route de Trèves 6 EBBC, Building E
2633 Senningerberg
Luxembourg

Contested trademark: Benelux application 1346393

I. FACTS AND PROCEEDINGS

A. Facts

1. On 11 January 2017 the defendant filed an application for a trademark in the Benelux for the



combined word/figurative mark for goods in class 30. This application was processed under number 1346393 and was published on 13 January 2017.

2. On 10 March 2017 the opponent filed an opposition against the registration of the application. The opposition is based on Benelux trademark registration 866034 of the combined word/figurative mark



, filed on 22 June 2009 and registered on 10 September 2009 for goods and services in classes 30 and 35.

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

4. The opposition is directed against all goods of the contested application and is based on all goods and services of the trademark invoked.

5. The grounds for opposition are those laid down in article 2.14, 2 (a) the Benelux Convention on Intellectual Property (hereinafter: "BCIP").¹

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 13 March 2017. During the administrative phase of the proceedings both parties filed arguments and at the request of the defendant proof of use was filed. In addition the proceedings were suspended at the request of the parties. 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 24 May 2018. Subsequently, the proceedings were suspended ex-officio due to a cancellation action directed against the earlier trademark invoked. This cancellation action has been rejected on 3 September 2019. On 11 November 2019, the Office informed the parties that the opposition proceedings were no longer suspended.

II. ARGUMENTS

8. The opponent filed an opposition at the Office under article 2.14, 2 (a) BCIP, in accordance with the provisions of article 2.2ter, 1 (b) BCIP: the likelihood of confusion based on the identity or similarity of trademark and sign and the identity or similarity of the goods or services concerned.

A. Opponent's arguments

¹ This decision shall always refer to the laws and regulations applicable on the date of the decision, except in the case of provisions which have undergone a material change during the proceedings and which are relevant to the decision.

9. The opponent argues that the goods are identical or at least highly similar as both classifications of goods contain confectionary products. The opponent also states that the contested goods are highly similar and/or complementary to the other goods and services of the trademark invoked.

10. According to the opponent, the word elements in both signs should be considered as most dominant. With regard to the contested trademark, the opponent argues that the word CROCO is more dominant than AVENTURE, because it is written in larger letters and placed above the word AVENTURE. The opponent also states that the word AVENTURE is French for 'adventure', which is a generic and commonly known word.

11. The opponent argues that both trademarks contain the word CROCO which is a striking visual similarity. According to the opponent, the differing element AVENTURE has a subordinate position in the overall visual impression of the contested trademark. For this reason, the signs are visually highly similar.

12. With regard to the aural comparison, the opponent states that it is uncertain whether the second word element AVENTURE in the contested sign will be pronounced, due to its subordinate position in relation to the word element CROCO. Furthermore, even if the word AVENTURE is pronounced, due to the identical first word CROCO, the signs are aurally highly similar.

13. According to the opponent, neither trademark has a fixed meaning for the public in the Benelux. However, the opponent also argues that, if the Office is of the opinion that the element CROCO does have a meaning in one of the Benelux languages, the signs should be considered conceptually identical, or at least highly similar when the element AVENTURE is taken into account, despite its subordinate position.

14. The opponent further states that the goods concerned are foodstuff, for everyday use. Therefore, according to the opponent, the level of attention of the relevant public is low, which causes that small differences between the trademarks can be easily overseen.

15. The opponent concludes that there is a clear likelihood of confusion and requests that the Office upholds the opposition and refuses the registration of the contested trademark.

16. At the request of the defendant, the opponent has filed proof of use.

B. Defendant's arguments

17. The defendant initially requested proof of use for the trademark invoked. However in his arguments the defendant does not react to the proof of use submitted by the defendant.

18. The defendant does not argue that the goods for which the trademark invoked is registered in class 30 (amongst others "*pastry and confectionary*") are at least similar to a certain degree with the goods of the contested sign ("*confectionary*"). However, according to the defendant, the trademarks are not highly similar.

19. The defendant points out that the trademark invoked consists of one word and the contested sign consists of two words. For this reason, the defendant states that the trademarks are visually and aurally very different because the signs differ in length and structure. According to the defendant, the only similarity consists of the use of the word element CROCO.

20. With regard to the meaning of the trademark invoked, the defendant states that the trademark "consists only of one readily identifiable French word, namely CROCO". The defendant refers to the Larousse dictionary which confirms that the word is commonly used in French as an abbreviation for 'crocodile'. The defendant is therefore of the opinion that the word CROCO immediately informs consumers without further reflection that the goods applied for are in the shape of crocodiles or decorated with crocodiles. The sign thus conveys obvious and direct information regarding the kind and appearance of the goods. According to the defendant, the opponent intended this from the beginning, whereby the defendant points to an image from the homepage of the opponent showing a packaging of cookies on which a stylized (cartoonlike) crocodile is depicted. The defendant finds that the trademark invoked is not merely allusive, as its descriptive meaning will be immediately perceived by the French-speaking public.

21. The defendant also states that the relevant public in the Benelux will understand the meaning of the word CROCO, whereas French is an official language in Belgium and Luxembourg and the basic understanding of the French language by the general public in the Netherlands is also a well-known fact.

22. Furthermore, the defendant argues that although the letters of the trademark invoked are depicted in a stylized typeface, such stylization is not particularly striking and is certainly not of such nature that it would require a mental effort from the relevant consumer to understand the meaning of the verbal element CROCO.

23. According to the defendant the relevant public is made up of average consumers, who are reasonably well informed and reasonably observant and circumspect, since the goods are goods of mass consumption. The level of attention of the relevant public will be average in respect of the goods in question.

24. Due to its descriptive meaning, the defendant concludes that the trademark invoked is devoid of distinctive character and has no scope of protection. For this reason, the defendant requests that the Office rejects the opposition and orders that the opponent shall bear the costs.

III. DECISION

A.1 Proof of use

25. In accordance with Article 2.16bis BCIP, the opponent, at the request of the defendant, shall furnish proof that the trademark invoked has been put to genuine use as provided for in Article 2.23bis BCIP or that proper reasons for non-use existed. In view of the filing date of the opposition, the evidence must show genuine use in a period of five years prior to the publication date of the sign against which the opposition is lodged.

26. The contested trademark was published on 13 January 2017. Therefore, the opponent was required to show use of the trademark invoked during the period from 13 January 2012 to 13 January 2017 ('the relevant period'). Given the fact that the trademark invoked was registered more than five years prior to the publication date of the contested trademark, the defendant's request that proof of use is submitted is legitimate.

27. However, the defendant has not responded to the proof of use furnished by the opponent (see paragraph 17). Therefore, the Office will not proceed with the examination of the proof of use. In accordance with Rule 1.25 (4) IR, the defendant may withdraw his request to provide proof of use or deem the evidence provided as adequate. Rule 1.21 (d) IR stipulates that the facts to which the other

party did not respond will be deemed undisputed. The Office holds the view that both parties clearly agree on the genuine use of the trademark invoked, as the defendant did not question the proof of use furnished by the opponent.

A.2 Likelihood of confusion

28. In accordance with article 2.14 BCIP, the holder of a prior trademark may submit a written opposition to the Office, within a period of two months to be calculated from the publication date of the application, against a trademark which in the order of priority, ranks after its own in accordance with Article 2.2ter BCIP.

29. Article 2.2ter, para. 1 BCIP stipulates that, *"A trademark shall, in case an opposition is filed, not be registered (...) where: b. because of its identity with, or similarity to, the earlier trademark and the identity or similarity of the goods or services covered by the trademarks, there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association with the earlier trademark."*

30. According to case law of the Court of Justice of the European Union (hereinafter: the "CJEU") concerning the interpretation of Directive 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trademarks (hereinafter: "Directive"), the likelihood of confusion of the public, which is defined as the risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings, must be appreciated globally taking into account all factors relevant to the circumstances of the case (CJEU, Canon, C-39/97, 29 September 1998, ECLI:EU:C:1998:442; Lloyd Schuhfabrik Meyer, C-342/97, 22 June 1999, ECLI:EU:C:1999:323; CJBen, Brouwerij Haacht/Grandes Sources belges, A 98/3, 2 October 2000; Marca Mode/Adidas, A 98/5, 7 June 2002; Supreme Court of the Netherlands, Flügel-bottle, C02/133HR, 14 November 2003, ECLI:NL:HR:2003:AK4818; Court of Appeal Brussels, N-20060227-1, 27 February 2006).

Comparison of the signs



31. The wording of Article 5, 1 (b) of the Directive (cf. article 2.2ter, 1 (b) BCIP) according to which "there exists a likelihood of confusion on the part of the public including the likelihood of association with the earlier trademark" shows that the perception of marks in the mind of the average consumer of the type of goods or services in question plays a decisive role in the global assessment of the likelihood of confusion. The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (CJEU, Sabel, C-251/95, 11 November 1997, ECLI:EU:C:1997:528).

32. Global assessment of the visual, aural or conceptual similarity of the marks in question, must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components (CJEU, Sabel and Lloyd, already cited).

33. The overall impression created in the memory of the relevant public by a complex mark might, in certain circumstances, be dominated by one or more components of that mark (CJEU, Limonchello, C-334/05 P, 12 June 2007, ECLI:EU:C:2007:333). With regard to the assessment of the dominant characteristics of one or more components of a complex trademark, account must be taken, in particular, of the intrinsic qualities of each of these components by comparing them with those of other components. In addition, account may be taken of the relative position of the various components within the

arrangement of the complex mark (EGC, Matratzen, T-6/01, 23 October 2002, ECLI:EU:T:2002:261 and El Charcutero Artesano, T-242/06, 13 December 2007, ECLI:EU:T:2007:391).

34. The signs to be compared are the following:

Opposition based on:	Opposition directed against:
	

35. According to relevant case-law, it is possible that when a composite trademark consists of the juxtaposition of an element (in this case AVENTURE) and another trademark (in this case CROCO), the latter still has an independent distinctive role in the composite sign (CJEU, THOMSON LIFE, C120/04, 6 October 2005, ECLI:EU:C:2005:594). In such a case, the composite mark and the other mark can be regarded as similar (EGC, Life Blog, T-460/07, 20 January 2010, ECLI:EU:T:2010:18).

36. Furthermore, it has also been established that 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 Matratzen and Sabel, already cited).

Visual comparison

37. Both trademarks are combined word/figurative marks. The trademark invoked consists of one word of five letters, CROCO, depicted in a specific typeface including white letters with dark borders. The contested trademark consists of two words of five and eight letters, CROCO AVENTURE. The word CROCO is depicted in yellow letters with a brown border. The word AVENTURE is smaller, depicted in brown letters and is positioned below to the right of the word CROCO. Above and below the word AVENTURE there is a brown line.

38. Where a sign consists of both verbal and figurative elements, the former are, in principle, considered more distinctive than the latter, because the average consumer will more easily refer to the goods or services in question by quoting their name than by describing the figurative element of the trademark (EGC, SELENIUMACE, T-312/03, 14 July 2005, ECLI:EU:T:2005:289). The graphical aspect of the trademark invoked can be qualified as rather marginal, because it only consists of a specific layout of the letters, which the consumer will perceive as adornment (see EGC, Dieselit, T-186/02, 30 June 2004, ECLI:EU:T:2004:197). Also with regard to the contested trademark, the Office finds that the graphical elements are of minor importance, because the public will consider it as adornments. For this reason, due to its size and central position, the public's attention is most drawn to the word CROCO and the relevant public will perceive the element CROCO as the dominant element of both trademarks.

39. Although the public would pay less attention to the figurative elements of the signs, the Office also considers that the graphical depiction of the letters of the dominant element CROCO contains certain similarities, because of the dark borders and the contrast in colours.

40. Both trademarks contain the identical word CROCO which also shows certain graphical similarities. Despite the presence of the word AVENTURE in the contested sign, which does not appear in the trademark invoked, the word CROCO causes a clear visual similarity at the beginning of the signs. It is of importance that the consumer normally attaches more value to the first part of a sign (EGC, Mundicor, T-183/02 and T-184/02, 17 March 2004, ECLI:EU:T:2004:79). Moreover, this element is also considered to be the dominant element (see paragraph 38).

41. For this reason, the Office finds that the trademarks are visually similar.

Aural comparison

42. With regard to the aural comparison, it must be remembered that, in the strict sense, the phonetic reproduction of a complex sign corresponds to that of all its verbal elements, regardless of any specific graphic features, which fall more within the scope of the analysis of the sign on a visual level (EGC, PC Works, T-352/02, 25 May 2005, ECLI:EU:T:2005:176 and Thai Silk, T-361/0821, April 2010, ECLI:EU:T:2010:152).

43. The trademark invoked is pronounced in two syllables as [krɔ-kɔ]. The contested trademark will be pronounced in five syllables as [krɔ-ko-a-vã-tyr]. The relevant public will pronounce the first two syllables identically.

44. The Office has doubts whether the public will pronounce the word AVENTURE, which is the second word of the contested trademark, because the average consumer will not pronounce a caption or legend and will generally abbreviate a trademark in order to make it easier to pronounce (EGC, Green by Missako, T-162/08, 11 November 2009, ECLI:EU:T:2009:432 and EGC, BROTHERS by CAMPER, T-43/05, 30 November 2006, ECLI:EU:T:2006:370).

45. Even if the public would pronounce the word AVENTURE, the pronunciation of the first two syllables are identical. As indicated above, the public attaches more importance to the first part of a sign.

46. For this reason, the Office finds that the trademarks are aurally similar.

Conceptual comparison

47. As the defendant has pointed out, the word 'croco' is the French abbreviation of 'crocodile', which refers to the well-known large predatory semiaquatic reptile as well as to goods made of crocodile leather.² In Dutch the word 'croco' is commonly used to define goods made of crocodile leather or goods with a 'croco' print. The Office is therefore of the opinion that a substantial part of the public in the Benelux will understand the meaning of the word 'croco' as referring to 'crocodile'. The contested trademark additionally contains the word 'aventure', which is the French word for 'adventure', which means "an unusual and exciting or daring experience".³ Due to the similarities between the French word 'aventure' and its Dutch (avontuur) and English (adventure) equivalents, the Office finds that the public in the Benelux will also understand the meaning of this word.

² <https://www.larousse.fr/dictionnaires/francais/croco/20603?q=croco#20488> in conjunction with <https://www.lexico.com/en/definition/crocodile> - 'a large predatory semiaquatic reptile with long jaws, long tail, short legs, and a horny textured skin'. In French and English: crocodile; in Dutch, Luxembourgish and German: krokodil (orig. Greek: krokodeilos and Latin: crocodilus).

³ <https://www.mijnwoordenboek.nl/vertaal/FR/EN/aventure>;
<https://dictionary.cambridge.org/dictionary/english/adventure>

48. Both trademarks refer to the concept of a crocodile and for this reason the signs are conceptually similar.

Conclusion

49. The trademark invoked and the contested trademark are visually, aurally and conceptually similar.

Comparison of the goods and services

50. 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).

51. With the comparison of the goods and services of the trademark invoked and the goods against which the opposition is filed, the goods and services are considered only on the basis of what is expressed in the register or as indicated in the trademark application.

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

Opposition based on:	Opposition directed against:
<p>CI 30 Café, thé, cacao, sucre, riz, tapioca, sagou, succédanés du café; farines et préparations faites de céréales, pain, pâtisserie et confiserie, glaces comestibles; miel, sirop de mélasse; levure, poudre pour faire lever; sel, moutarde; vinaigre, sauces (condiments); épices; glace à rafraîchir, à l'exception des produits de chocolat.</p> <p><i>CI 30 Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flours and preparations made from cereals, bread, pastry and confectionery, edible ices; honey, treacles, yeast, baking-powder; salt, mustard; vinegar, sauces [condiments]; spices; ice [frozen water], with the exception of chocolate products.</i></p>	<p>CI 30 Confectionery.</p>
<p>CI 35 Publicité; gestion des affaires commerciales; administration commerciale; travaux de bureau, tous ces services en relation avec les produits de la classes 30.</p> <p><i>CI 35 Advertising; business management; business administration; office functions, all services related to the goods mentioned in Class 30</i></p>	

N.B. The original language of this registration is French. The translation is only added to improve the readability of this decision.	
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53. The contested goods "confectionery" are identical to the goods "confectionery" mentioned in class 30 of the trademark invoked. Furthermore, the similarity of the goods is not disputed by the defendant (see paragraph 18). Therefore, the goods are identical.

A.3 Global assessment

54. 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.

55. 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 goods concerned are targeted at the public in general. The Office does not agree with the opponent that the level of attention of the public is low, because it concerns regular foods (see paragraph 14). The Office finds that for these goods the average level of attention of the public concerned may be deemed normal.

56. 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).

57. 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). According to the defendant the trademark invoked is descriptive, because the goods applied for could be in the shape of crocodiles or decorated with crocodiles (see paragraph 20). However, the Office finds that although the concept 'croco' has a meaning which will be understood by the relevant public in the Benelux (paragraph 47), even if the trademark invoked has a weak distinctive character, it is of importance that, according to European case law, a weak distinctive character does not, by definition, mean that there is no likelihood of confusion.

58. Although the distinctive character of the marks must be taken into account with the assessment of the likelihood of confusion, it is only one of a number of elements concerning that assessment (CJEU, Ferromix, C-579/08, 15 January 2010, ECLI:EU:C:2010:18). Even in a case involving an earlier mark of weak distinctive character, there may be a likelihood of confusion on account, in particular, of a similarity between the signs and between the goods or services covered (EGC, Flexi Air, T-112/03, 16 March 2005, ECLI:EU:T:2005:102; ECG, Pages Jaunes, T-134/06, 13 December 2007, ECLI:EU:T:2007:387 and CJEU, compressor technology, C-43/15P, 8 November 2016, ECLI:EU:C:2016:837). In the present case, the goods of the defendant are identical to the goods of the opponent. Furthermore, the trademarks are visually, aurally and conceptually similar.

59. Finally, a likelihood of confusion among part of the relevant public is sufficient to grant an opposition (EGC, Hai/Shark, T-33/03, 9 March 2005, ECLI:EU:T:2005:89).

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. Conclusion

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

IV. CONSEQUENCE

62. The opposition with number 2012889 is justified.

63. Benelux application with number 1346393 will not be registered.

64. The defendant shall pay the opponent 1,045 euros in accordance with article 2.16, 5 BCIP in conjunction with rule 1.28, 3 IR, as the opposition is justified in its entirety. This decision constitutes an enforceable order pursuant to article 2.16, 5 BCIP.

The Hague, 14 April 2020

Eline Schiebroek
(*rapporteur*)

Camille Janssen

Saskia Smits



Administrative officer: Raphaëlle Gérard