

BENELUX OFFICE FOR INTELLECTUAL PROPERTY
OPPOSITION DECISION
N° 2016193
of 28 December 2021

Opponent: **Institut de Recherche Biologique, Société par Actions Simplifiée**
Parc d'activité Sud Loire 0 Boufféré
85612 Montaigu Cedex
France

Representative: **VIDON Marques et Juridique PI**
16 B rue de Jouanet
35703 Rennes
France

Invoked right 1: **Benelux registration 840000**

MANHEA

Invoked right 2: **European trademark registration 8706327**

MANHEA

against

Defendant: **Enzyme-X B.V.**
Maasboulevard 156
3011 TX Rotterdam
Netherlands

Contested trademark: Benelux application 1415928

MANNA

I. FACTS AND PROCEEDINGS

A. Facts

1. On 30 April 2020 the defendant filed a Benelux trademark application, for the wordmark MANNA for goods in classes 1 and 5. This application was processed under the number 1415928 and was published on 11 May 2020.

2. On 6 July 2020 the opponent filed an opposition against the registration of the application. The opposition is based on the following trademarks:

- Benelux trademark registration 840000 wordmark "MANHEA", filed on 6 March 2008 and registered on 5 June 2008 for goods in classes 3, 5 and 29;
- European trademark registration 8706327 wordmark "MANHEA", filed on 23 November 2009 and registered on 22 June 2010 for goods in classes 3, 5, 29 and 30.

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

4. The opposition is directed against the goods in class 5 as covered by the contested trademark and is based on the goods "dietetic substances adapted for medical use, nutritional additives prepared for human consumption, for medical purposes, for combatting menopause symptoms" in class 5 as covered by the Benelux trademark invoked and "dietetic substances adapted for medical use, nutritional additives prepared for human consumption, for medical purposes, for combatting menopause symptoms; food supplements and dietetic products prepared for human consumption, not for medical purposes, made from trace elements and plants; nutritional additives prepared for human consumption, based on animal-derived food ingredients, for combatting menopause symptoms" in class 5 as covered by the EU trademark invoked.

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

6. The language of the proceedings is English.

B. Course of the proceedings

7. The opposition is admissible and was notified by the Benelux Office for Intellectual Property (hereinafter: "the Office" or "BOIP") to the parties on 8 July 2020. The proceedings commenced on 9 September 2020. 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 24 November 2020.

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

9. The opponent considers the goods in class 5 of the Benelux trademark invoked to be identical to those goods in class 5 for which the contested trademark is filed, as they share the function and purpose of improving general health. Furthermore, these goods share the same distribution channel and could be offered to the same end users by the same stores. The opponent does not refer to the goods in class 5 for the invoked EU trademark.

10. Addressing the comparison of the trademarks, the opponent notes that the trademarks at hand are highly similar on a visual level (as the letters "M", "A", "N" and "A" are reproduced identically and in the same order, whereas the additional letter "N" in the middle of the contested trademark does not make it possible to distinguish the trademarks visually), almost identical on a phonetic level (as the attacked syllables are those which will be easily remembered by the public and the letter "H" in the invoked trademarks is silent, whereas the last letter "E" does not have a loud sound) and identical on a conceptual level, as both trademarks are to be seen as variations of the Tahitian word "MANA", which invokes the idea of health and well-being within the Tahiti philosophy and which refers to the "spirit of the island" in Polynesia.

11. As a result of the above, the opponent considers that there exists a likelihood of confusion for the consumer. He asks the Office to grant the opposition and not to register the contested trademark.

B. Defendant's arguments

12. The defendant starts his arguments with an introduction of the defendant's company and notes that the trademark MANNA is used in animal feed formulations to hydrolyse 1->4-beta-D-mannosidic linkages in mannans, galactomannans and glycomannans. By doing this the immune system of the animal is not unnecessarily triggered allowing for more energy to be used for growth.

13. The defendant also notes that the number of letters of the trademarks at hand differ, and that the visual and phonetic differences do not cause confusion. The trademarks are furthermore different on a conceptual level as the contested trademark is used in animal feed formulations in relation to an enzyme named "mannanase", whereas it does not refer to the Tahitian mood "MANA".

14. Also, the contested trademark is aimed at a different public, namely the animal feed industry, whereas the invoked trademarks are to be used in human cosmetics/ by humans.

15. In that regard and considering the arguments above, the defendant finds that there exists no risk of confusion for consumers between the trademarks. Thus, he asks the Office to register the contested trademark.

III. DECISION

A Likelihood of confusion

16. In accordance with article 2.14 BCIP, the holder of an earlier 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.

17. 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."

18. 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 trademarks

19. 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).

20. 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).

21. The trademarks to be compared are the following:

Opposition based on:	Opposition directed against:
MANHEA	MANNA

Visual comparison

22. The invoked trademarks consist of the word element "MANHEA" composed of 6 letters. The contested trademark consists of the word element "MANNA" composed of 5 letters. While the invoked trademark contains the letter sequence "HEA" which is somewhat uncommon and noticeable, said element is not sufficient to attract the relevant public's attention in such a manner that the similarities between the trademarks will not be noticed. This especially as both trademarks share the same initial letters "MAN", being of particular importance as 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). Thus, considering that within these words of 5 and 6 letters respectively, 4 share the same placement in both trademarks, in particular within the beginning of the trademarks, the overall visual impression of the trademarks is similar.

23. The trademarks are visually similar.

Aural comparison

24. Both trademarks consist of a single word element, composed of 2 syllables [MAN] [HEA] and [MAN] [NA] respectively. It follows that the trademarks only differ in the second syllable, yet have identical first syllables. This is of particular importance given the fact that, as already stated, the consumer normally attaches more importance to the first part of a sign (ECG Mundicor, already cited). Thus considering that the trademarks both consist of only two syllables, the first being identical but the second being quite different, the overall phonetic impression of the trademarks is similar to a certain degree.

25. Thus, the Office considers the trademarks to be aurally somewhat similar to a certain degree.

Conceptual comparison

26. Neither the opponent (arguing that the trademarks in question will be found to be variations of the Tahitian word "MANA", invoking the idea of health and well-being within the Tahiti philosophy), nor the defendant (arguing that "manna" is a mere abbreviation for the enzyme "mannanase") has demonstrated that the trademarks in question will have a set meaning to the relevant public in the Benelux. The word "MANHEA" does not seem to have any meaning in any language, and although the contested trademark "MANNA" is the Hebrew word for "food falling out of the sky for the Israelites as a gift from God during their travels in the desert", it seems highly unlikely that the relevant public in the Benelux will be aware of this meaning. The aforementioned means that neither of the trademarks will be found to be referring to a certain concept, making a conceptual comparison impossible.

Conclusion

27. The trademarks in question are similar both visually and phonetically while a conceptual comparison cannot be made, therefore being irrelevant.

Comparison of the goods and services

28. 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 (CJEU, Canon, already cited).

29. With the comparison of the 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.

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

Opposition based on:	Opposition directed against:
<i>Invoked Benelux trademark</i>	

<p>CI 5 Dietetic substances adapted for medical use, nutritional additives prepared for human consumption, for medical purposes, for combatting menopause symptoms</p> <p><i>Invoked EU trademark</i></p> <p>CI 5 Pharmaceutical and sanitary preparations for medical purposes, dietetic substances adapted for medical use, nutritional additives prepared for human consumption, for medical purposes, for combatting menopause symptoms; food supplements and dietetic products prepared for human consumption, not for medical purposes, made from trace elements and plants; nutritional additives for cosmetic use, for combatting menopause symptoms; nutritional additives prepared for human consumption, based on animal-derived food ingredients, for combatting menopause symptoms.</p>	<p>CI 5 Enzyme dietary supplements; Digestive enzymes.</p>
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31. According to Rule 1.21(e) of the IR, compliance with the adversarial principle referred to in Article 2.16(1) CBPI implies, inter alia, that the examination of the opposition is limited to the arguments, facts and evidence put forward by the parties. As the opponent does not substantiate its claim in relation to the goods covered by the EU trademark, the Office would not take these into consideration. However, as the defendant does not contest the similarity between the goods at hand and the opponent did substantiate the similarity between the goods covered by the invoked Benelux trademark and the contested trademark, the Office concludes that the goods are, as argued by the opponent, identical.

Conclusion

32. The Office concludes that the goods covered by the contested trademark are identical to the goods covered by the trademarks invoked.

A.3 Global assessment

33. 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.

34. 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. In the present case, the goods in question concern pharmaceutical and medical products for which there is generally an increased level of attention, regardless of whether they are prescription drugs or not. For example, professional users (doctors and pharmacists and/or possibly people active in the animal feed industry), have a high level of attention when prescribing, preparing and/or dispensing these and non-professional (end) users will also have an increased level of attention when purchasing these products, as they affect

their health (see, *inter alia*, EGC, *Tolposan* judgment, T-331/09, 15 December 2010, ECLI:EU:T:2010:520 and *Zydus*, T-288/08, 15 March 2012, ECLI:EU:T:2012:124). Therefore, the Office is assuming an increased level of attention.

35. 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 they cover. A lesser degree of similarity between the relevant goods can be offset by a greater degree of similarity between the trademarks, and vice versa (Canon and Lloyd, already cited).

36. 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 trademarks invoked have a normal distinctiveness, as they are not descriptive of the goods concerned.

37. Account must also be taken of the circumstance that normally, the average consumer perceives a mark as a whole and does not proceed to analyse its various details (Sabel and Lloyd, already cited). 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.

38. Based on the abovementioned circumstances, despite the higher level of attention, the Office finds that due to the similarities between the trademarks both visually and aurally, and the fact that the goods are identical, the relevant public might believe that these goods would originate from the same undertaking or from economically-linked undertakings.

B. Other factors

39. The defendant argues that the contested sign is not aimed at the same public, as the invoked trademarks are used by and aimed at humans, whereas the contested trademark is aimed at the public in the animal feed industry. 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; *02 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) and the description of the goods of the contested trademark is not limited to those specifically for the animal feed industry.

C. Conclusion

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

IV. DECISION

41. The opposition with number 2016193 is justified.

42. The Benelux trademark application with number 1415928 will not be registered in the Benelux for the goods in class 5.

43. 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. This decision constitutes an enforceable order pursuant to article 2.16, 5 BCIP.



The Hague, 28 December 2021

Pieter Veeze
(*rapporteur*)

Camille Janssen

Eline Schiebroek

Administrative officer: Vincent Munier