

Court follows market research (as an exception): Red Bull not used as trademark for motorbikes

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In trademark cases courts are very reluctant to attach conclusions to market research. It is therefore surprising that in a case between Red Bull and Lamborghini (about a possible lapse of a Red Bull trademark) a market research submitted by Lamborghini was deemed conclusive by the Court of The Hague. On the basis of that research the Court has assumed that use of the RED BULL trademark on motorbikes does not constitute normal trademark use, so that the trademark (in so far as registered for vehicles) was declared lapsed.

Battle Between Red Bull and Lamborghini

For many years already, Lamborghini, the well-known producer of luxury cars, owns a trademark consisting of the picture of a bull and the name 'Lamborghini'. This trademark is not only registered for cars, but also for other goods, including non-alcoholic beverages in class 32. Red Bull, the producer of the well-known energy drink, entered the market much later with its products under a trademark consisting of two fighting bulls and the name 'red bull'. Also that trademark has been registered in a broader sense than only for the key product (beverages), amongst other things for vehicles in class 12.

In 2010 Red Bull started legal proceedings against Lamborghini to have Lamborghini's trademark for non-alcoholic beverages declared lapsed due to non-use. Lamborghini reacted by cancelling its trademark. In a judgment of 5 October 2011, the Court of The Hague therefore rejected Red Bull's claim due to a lack of interest, and ordered Red Bull to pay the costs of the proceedings because (in brief) it had needlessly involved Lamborghini in the proceedings.

Lamborghini, however, has used these proceedings in its turn to institute a similar claim (counterclaim) against Red Bull, aimed at the declaration of a lapse of Red Bull's trademark for vehicles. Red Bull defended itself with the argument that the trademark had actually been used on racing cars (in Formula 1 races), on airplanes (in the Red Bull Air Race) and on motorbikes of KTM. The Court immediately deemed the use on cars and airplanes irrelevant, because the cars and airplanes concerned are not being sold, so that the RED BULL trademark is, apparently, not used for finding or maintaining a sales market for the goods, as case law requires. This is different with respect to motorbikes, because these are actually sold by KTM.

Burden of Proof for Normal Use

The party that relies on it that no normal use was made of a trademark during a period of five years and that it should therefore be declared as lapsed (in conformity with Article 2.26 (2) under a of the Benelux Treaty on Intellectual Property or BTIP) must, according to the main rule of the law of evidence (Section 150 of the Dutch Code of Civil Procedure), support, and if necessary prove this non-use. Because normally the trademark proprietor has the evidence of use available, a special rule has been included in the BTIP that a court may (in deviation of the main rule) put the burden of proof of use on the trademark proprietor. In this case, however, there was no reason to do this. After all, it was clear that Red Bull had its trademark depicted on motorbikes of KTM; Red Bull had already submitted leaflets and the like. The discussion was not about whether the trademark was actually being used,

but whether this specific use could be regarded as trademark use, i.e. as use of the sign in order to distinguish the goods according to their origin. Lamborghini brought forward that this was not the case, because the relevant public would perceive the RED BULL signs as copies of the signs applied to competition motorbikes in connection with sponsoring. In other words: the consumer buys a replica of the competition motorbike, and the competition motorbike only bears these RED BULL trademarks because Red Bull is the sponsor.

The Court could follow this reasoning, and gave Lamborghini the burden of proof to prove that the public actually perceives the RED BULL trademarks this way, rather than as trademark use to distinguish the product motorbikes.

Incidentally, some question marks can be placed to this burden of proof. European case law on 'normal use as a trademark' emphasizes the intentions of the trademark proprietor that can be derived from the actual use, which opinion can normally be given by the Court without the necessity of further fact-finding about the perception of the public. Therefore, one may wonder whether in this case the Court should not have given a final judgment itself instead of ordering to furnish proof.

Market Research

Lamborghini had the factual question presented by the Court researched by TNS NIPO. Two pictures with motorbikes of KTM, with the RED BULL trademark, were shown to a group of respondents. They had to answer the following questions:

- In your opinion, what is the brand of the motorbike below?
- A bull is depicted on the motorbike. Is this bull (part of) the trademark of the motorbike?
- Why do you think so?
- Can you mention one or more sponsors of the motorbike shown?

It appeared from this research that the major part of the respondents did not perceive the RED BULL trademark as a trademark (i.e. as a designation of origin) for motorbikes. Only 2 out of the 1184 respondents answered "Red Bull" as a trademark to the first question. 92% does not perceive the bull as a part of the trademark. A large part (61%) perceives the bull as a logo of the energy drink Red Bull.

Criticism and Rebuttal

Red Bull has tried to put the results of this research into perspective by conducting its own research, and by submitting various objections against the set-up of the research of TNS NIPO. The most fundamental objection of Red Bull is that the question should not be whether the public perceives the sign RED BULL as a trademark for motorbikes, but whether it perceives a connection between the RED BULL trademarks and motorbikes. The formulation of the questions should therefore be aimed at establishing that connection; this has been the angle of Red Bull's own research. However, the Court has rejected this point of departure. It is not sufficient for 'normal use' that the public perceives a connection between the trademark and the goods. Thus, Red Bull's research is less relevant: the outcome thereof ('55% of the Dutch people think that Red Bull is involved in marketing the motorbikes of KTM') does not alter the outcome of the research of TNS NIPO, in which the correct question was indeed asked.

The Court has also rejected various methodological objections. It is not true that the formulation of the questions does not leave room for co-branding; after all, the respondent could also have answered 'KTM-Red Bull'. It is true that the specifically targeted question about sponsors directs the attention to sponsoring, but this happens only after the other questions have been answered, and therefore does not alter the answer to these earlier questions. Moreover, the answers to the question about sponsors also say something about the perception of the public. To conclude, it is not true that only a 'shop situation' may be presented; Red Bull itself has not done this either in its research; moreover, the pictures used by TNS NIPO are sufficiently in line with the manner in which the motorbikes are usually offered for sale.

Conclusion: RED BULL Trademark Lapsed for Motorbikes

The Court concluded that Lamborghini has succeeded in providing the evidence. Therefore, the RED BULL trademark has not been used normally for vehicles and will lapse for these goods. Agencies that conduct market researches take pride in it that their research in the correct context is apparently taken seriously and may even be conclusive; after all, the general picture is that scepticism regarding such researches dominates in the courts.

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