



BENELUX OFFICE FOR INTELLECTUAL PROPERTY
CANCELLATION DECISION
N° 3000316
of 29 December 2022

Claimant: **Baidu Online Network Technology (Beijing) Co., Ltd.**
3F, Baidu Campus, Shan gdi 10th Street 10
100085 Haidian District, Beijing
China

Representative: **Leeway Advocaten**
James Wattstraat 100
1097 DM Amsterdam
The Netherlands

against

Defendant: **Baidu Europe BV**
Keizersgracht 62
1015 CS Amsterdam
The Netherlands

Representative: **Bavelaar & Bavelaar Advocaten**
Postbus 11014
1001 GA Amsterdam
The Netherlands

Contested trademark: Benelux registration 987405

Baidu

I. FACTS AND PROCEEDINGS**A. Facts**

1. On 16 June 2021 the claimant filed an application for cancellation in accordance with Article 2.30bis of the Benelux Convention on Intellectual Property (hereinafter: "BCIP"), invoking the following grounds:

- I. No genuine use was made of the contested trademark (Article 2.27(2) BCIP).
- II. The application for the contested trademark was filed in bad faith (Article 2.2bis(2) BCIP).

2. The ground mentioned under II is conditional. The claimant expressly requests the Benelux Office for Intellectual Property (hereinafter: "Office" or "BOIP") to decide on this ground for invalidity only in the event that it were to rule that the trademark should not be revoked on the basis of ground I.

3. The application for cancellation is aimed at Benelux registration 987405, filed on 17 December 2015 and registered on 29 February 2016, of the word mark 'Baidu'.

4. The cancellation claim is directed against all goods and services of the contested trademark, namely:

Class 5: Pharmaceuticals; veterinary preparations; sanitary preparations for medical purposes; Dietetic food preparations adapted for medical use; Dietetic food adapted for veterinary use; food for babies; dietary supplements for humans; dietary supplements for animals; plasters, materials for dressings; material for stopping teeth; dental wax; disinfectants; preparations for destroying vermin; fungicides; herbicides.

Class 7: Machine tools; motors and engines (except for land vehicles); machine coupling and transmission components (except for land vehicles); agricultural implements other than hand-operated; incubators for eggs; automatic vending machines.

Class 8: Hand tools and implements (hand operated); cutlery; side arms; razors.

Class 9: Computer hardware; Computer software; Computer peripherals; Electronic data processing equipment; Computer networking and data communications equipment; Computer components and parts.

Class 11: Apparatus for lighting; Apparatus for heating; Apparatus for steam generating; Apparatus for cooking; Apparatus for refrigerating; Apparatus for drying; Apparatus for ventilating; Apparatus for water supply; apparatus for sanitary purposes.

Class 14: Precious metals; jewellery; precious stones; chronometric instruments.

Class 17: Rubber; gutta-percha; asbestos; mica; plastics in extruded form for use in manufacture; packing materials; stopping materials; insulating materials; flexible pipes, not of metal.

Class 18: Leather; trunks and suitcases; travelling cases; handbags; purses; wallets; umbrellas; parasols; walking sticks; whips; harness; saddlery.

Class 20: Divans; sofas; armchairs; beds; ottomans; tables; chairs; chaises longues; furniture; mirrors; picture frames.

Class 22: Ropes; string; nets; tents; awnings; tarpaulins; sails; Bags and sacks for packaging, storage and transport; Padding and stuffing materials (except of rubber or plastics); raw fibrous textile materials.

Class 23: Threads and yarns for textile use.

Class 24: Textile goods, and substitutes for textile goods; bed covers; table covers.

Class 25: Clothing; footwear; headgear; swimwear; sportswear; leisurewear.

Class 26: Lace; Embroidery; ribbons; braid; Buttons; hooks and eyes; pins; needles; Artificial flowers.

Class 27: Carpets; rugs; matting; Linoleum for use on floors; Non-textile wall hangings.

Class 28: Games; playthings; Gymnastic articles not included in other classes.

Class 29: Meat; fish; poultry; game; meat extracts; preserved fruits; frozen fruits; dried fruits; cooked fruits; jellies; jams; compotes; eggs; milk; milk products; edible oils and fats.

Class 30: Coffee; tea; cocoa; artificial coffee; rice; tapioca; sago; flour; preparations made from cereals; bread; confectionery; edible ices; sugar, honey, treacle; yeast; baking-powder; salt; mustard; vinegar; Sauces [condiments]; spices; ice.

Class 32: Beers; mineral waters; aerated waters; non-alcoholic beverages; fruit beverages and fruit juices; preparations for making beverages.

Class 33: Alcoholic beverages (except beers).

Class 35: Provision of information and advice to consumers regarding the selection of products and items to be purchased; advertising particularly services for the promotion of goods; retail services connected with the sale of clothing and clothing accessories; online retail store services in relation to clothing.

Class 36: Financing services; Management of investment funds; Investment of funds; Financial management and planning.

Class 37: Building construction; Installation, repair and maintenance of computers and computer peripherals; Installation and repair of telecommunications networks; Installation of communications network instruments.

Class 38: Telecommunication services; communication services for the electronic transmission of voices; transmission of data; electronic transmission of images, photographs, graphic images and illustrations over a global computer network; transmission of data, audio, video and multimedia files; simulcasting broadcast television over global communication networks, the Internet and wireless networks; provision of telecommunication access to video and audio content provided via an online video- on-demand service.

Class 39: Travel information services; providing online information relating to travel; sightseeing [tourism]; travel services; arranging travel tours.

Class 41: Production of radio and television shows and programmes; film production services; film distribution; provision of non-downloadable films and television programs via a video-on-demand service.

Class 42: Technical design and planning of telecommunications equipment; computer software technical support services; technical consultancy relating to the application and use of computer software.

Class 43: Hotel services; hotel reservation services; rental of temporary accommodation; business catering services; bar services; cafés; restaurants.

Class 44: Medical services; veterinary services; Hygienic and beauty care for humans; Hygienic and beauty care for animals; Agriculture, horticulture and forestry services.

Class 45: Legal services; security services for the protection of property and individuals; information, advisory and consultancy services relating to legal matters.

5. The language of the proceedings is English.

B. Course of the proceedings

6. The application for cancellation is admissible and was notified by the Office to the parties on 22 June 2021. 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").

II. LEGAL GROUNDS AND ARGUMENTS OF THE PARTIES

A. Claimant's arguments

7. The claimant explains that he (Baidu) is a multinational technology company established in China in the year 2000, specializing in both internet-related services and products as well as artificial intelligence. For many years, he claims, Baidu has been one of the world's largest companies in this sector, sometimes referred to as the Chinese Google. Baidu has been the world's second-largest internet search engine for some time, and also operates a mapping service, an online encyclopaedia, a cloud storage service and a discussion forum, among others. Baidu went public on Wall Street in 2005 and has been the first Chinese company listed on the Nasdaq-100 since late 2007, which has led to considerable media attention, including in the Benelux region.

8. The defendant is, according to the claimant, a Dutch company, whose sole shareholder is a Singapore-based company, which is controlled by Mr Michael Gleissner. Mr Gleissner is, according to the claimant, one of the most notorious "trademark trolls" in history.

9. The claimant notes that this case is not an isolated case. There are four other cancellation proceedings between the same parties (based on bad faith and/or non-use) pending before the Office. In

reaching a decision in this case, the claimant deems it important that the Office also keeps the bigger picture in mind, as other registrations and applications highlight a pattern in the defendant's conduct.

10. As primary ground for cancellation, the claimant claims that the contested trademark should be revoked because it has not been used for a continuous period of five years. The claimant submits that he has conducted extensive (internet) research, which shows that to the extent that use has taken place, it should clearly be qualified as 'token use' and not as genuine use in the course of trade in accordance with one or more functions of a trademark. The defendant's various websites have only a landing page with no working functionality and the links (general terms and conditions, privacy policy, company and contact information, login...) appearing thereon do not work. The Facebook page created in 2017 has only a handful of clear 'ghost messages'. The 'Baidu TV' app does not work and has only one user, according to the Google Chrome Webstore. Baidu Europe's Facebook page - created on 13 February 2017 - contains no more than a handful of posts that are clearly 'ghost messages'. An office building in the Limburg town of Swalmen (which, contrary to the defendant's claims, is more than 55 kilometres away from High Tech Campus Eindhoven and is an illogical location) bears a Baidu Europe logo, but no activity takes place in the building, which, according to local media, has been vacant for considerable time. In short, according to the claimant, the defendant is nothing more than a 'ghost company' and there is no evidence of any genuine use of the disputed trademark. The material submitted by the defendant, according to the claimant, is not sufficient to refute this, since none of the documents proves genuine use of the disputed sign, by the proprietor (or licensee), as a trademark, in the form in which it was filed, in the relevant territory, for the relevant goods and services and within the relevant period and, in addition, the authenticity of several documents can be questioned.

11. As a subsidiary ground for cancellation, the claimant argues that the contested trademark should be declared invalid because the application for registration of the mark was made in bad faith. Given the notoriety of Baidu outlined above, the claimant argues it is highly unlikely that the defendant was unaware of this. According to the claimant, the only reason for applying for and keeping the trademark registered is to harm Baidu's interests in a manner inconsistent with fair practice and to impede its access to the market. The claimant refers to various news articles which, according to the claimant, show that the 'ultimate beneficial owner', Michael Gleissner, is notorious for hijacking trademarks (either by applying for huge numbers of trademarks or by buying trademarks) and the application for the contested trademark fits seamlessly into this modus operandi. The claimant further notes that the 'token use' described above is also a strong indication of bad faith and that it was and is clearly not the subjective intention of the defendant to participate in trade in accordance with honest practices.

12. The claimant refers to various publications and court decisions, which, according to him, confirm (the pattern of) bad faith on the part of the defendant. As regards a 2013 judgment of the District Court of Noord-Nederland, which rejected Baidu's claims against Baidu Europe, the claimant argues that, contrary to the defendant's assertion, it does not constitute *res judicata*. The claimant points out in this regard that the judgment relates to other trademarks than the contested trademark in these proceedings and that the court ruled on other grounds and facts at the time.

13. The claimant concludes that the contested trademark should be revoked for non-use or, as a conditional request, be declared invalid for bad faith and the defendant should be ordered to pay the costs.

B. Arguments of the defendant

14. The defendant states that the company Baidu Europe has been active since 2003, first as a sole proprietorship and since 2012 as a private limited company, as an internet services provider focusing on software consultancy, automation and web-portal design. In October 2015, the then owner entered into

negotiations with Michael Gleissner to sell the shares in Baidu Europe to one of Mr Gleissner's companies. According to the defendant, Mr Gleissner is a highly successful serial entrepreneur, film producer, director, screenwriter and actor, who has invested in numerous companies worldwide since 2002, including technology and internet companies, especially in China, Taiwan and Japan. In the trademark world, Gleissner is known for filing and defending numerous trademarks owned by his companies. However, he is no "trademark squatter" or "trademark troll", as stated by trademark professionals in various specialized media. Mr Gleissner's trademark strategy, which has raised eyebrows in the trademark world for several years, is part of his current and future business plans that he undertakes and explores, apart from his current running businesses. Gleissner is not interested in selling his trademarks. All trademarks of his companies are intended to be used genuinely in the course of trade and it is solely up to him to decide when and how a trademark will be used, the defendant argues.

15. However, the acquisition of Baidu Europe was not part of Gleissner's trademark activity, which only is a part of his business interests and plans in Chinese, Japanese and Taiwanese companies. Baidu Europe is and has always been a Dutch company. Gleissner was interested in acquiring the company because it is an internet company that was already past its start-up phase and he has long been active with companies in that field. The sale and transfer took place in December 2015.

16. Years before Gleissner acquired the company, Baidu and Baidu Europe were already in a dispute. In 2010, Baidu applied for some EU trademarks against which opposition was filed by Baidu Europe. Baidu then claimed the invalidity of some Benelux trademarks of Baidu Europe in proceedings before the District Court of Noord-Nederland, which dismissed the claims in 2013. There were also proceedings concerning an EU trademark, in which the claimant's claim was rejected in 2015 by OHIM's (now called EUIPO) Board of Appeal. The claimant was thus ruled against in both cases but, the defendant argues, still failed to pay the litigation costs. These judgments are final and, according to the defendant, contrary to the claimant's contention, do relate to the same grounds, so they constitute *res judicata* and the Office cannot rule on them again. The defendant further claims that the claimant is trying to mislead the Office by holding back this important information.

17. There is and was, in summary, according to the defendant, no bad faith on his part. According to the defendant, the truth is that it is precisely the claimant who has been harassing him and hunting his trademarks almost since the beginning of his existence. The claimant seems to see Mr Gleissner's involvement as an opportunity to attack the Baidu trademarks once again after the earlier failed attempts to do so.

18. The defendant argues that Baidu Europe has been active from 2003 until today. Long before Gleissner became involved in the company, there was already normal use in commerce, as has been established by the court according to the defendant. One of the current plans is to start a tech campus in the town of Swalmen (near Eindhoven) for Chinese companies in which Gleissner invests, as a hub to the western world. The defendant has searched for suitable locations and acquired premises that it plans to set up as a bar to make the place attractive to young tech workers. To create local goodwill, the defendant has sponsored a sports team. Although immigration issues and the Covid pandemic have delayed realisation, these plans are still ongoing. The defendant further claims that he is an accredited ICAN registrar, has company vehicles and premises on which his logo is displayed. According to the defendant, this clearly proves that Baidu Europe is not a ghost or letterbox firm but an independent company that has nothing to do with Baidu.

19. In addition to exhibits relating to the above-mentioned activities, the defendant submits the following exhibits as evidence of use:

- Three credit notes (dated 11.03.2019, 11.04.2019 and 11.05.2019) from Team Internet AG addressed to the defendant, mentioning "2019-02[03/04] Parking Revenu (bf1sitematrix)" and "2019-02[03/04] Parking Revenu (bf1sitematrix_tier2)" (exhibit A)
- Three invoices (dated 20.06.2019, 15.07.2019 and 20.08.2019) from the defendant to Vubiquity Management Limited (in London, UK), mentioning "BAIDU TV Channel Package - Fashion Television monthly licence". (exhibit B)
- Two invoices (dated 15.07.2019 and 15.08.2019) from the defendant to FUEL TV EMEA SA (in Alfragide, Portugal), mentioning "BAIDU TV Channel Package – distribution fee – Data transfer charges". (exhibit C)
- Three invoices (dated 24.07.2019, 20.08.2019 and 15.09.2019) from the defendant to A1 Telekom Austria AG (in Vienna, Austria), mentioning "BAIDU TV Channel Package – Fashion Television HD/SD monthly content fee". (exhibit D)
- An affidavit by a person claiming to have been a project manager at Baidu Europe BV and partly responsible for a software application "Baidu TV" and its development, testing and roll-out to various customers in the years 2017 and 2018. (exhibit E1)
- An affidavit by a person claiming to have been 'Head of Playout' at Fashion One Television LLC, broadcaster of the television channel Fashion One, and that his responsibilities included cataloguing all information for playing and searching television shows in the Fashion One app, which was made available by exclusive European distributor Baidu Europe BV. (exhibit E2)
- A document from the Dutch Tax Authority concerning corporate income tax for 2017. (exhibit F)
- A printout of a website which according to the defendant relates to "Baidu TV app". (exhibit G)

20. The claimant incorrectly qualifies this use as 'token use', according to the defendant. Even modest use qualifies as genuine use and the rules for Baidu Europe are no different from the rules applicable to all others. Baidu Europe was and still is not a ghost company and is free to decide for itself how, when and to what extent it uses its trademarks. According to the defendant, the material he submitted clearly demonstrates genuine use of the contested trademark.

21. The defendant submits that the Office's decision should not be based on the claimant's speculative arguments. He concludes that the application for cancellation should be dismissed on both grounds and the claimant, as the losing party, should be ordered to pay the costs of the proceedings.

III. GROUNDS FOR THE DECISION

A.1 Ground I: genuine use – legal framework

22. Pursuant to Article 2.30bis (1)(a) BCIP an application for revocation may be filed with BOIP based on the grounds set out in Article 2.27 (2) BCIP. It is in that case up to the defendant to provide proof that genuine use has been made of the contested trademark in accordance with Article 2.23bis BCIP in a period of five years prior to the date of the claim for revocation in the Benelux territory or that there are proper reasons for non-use.

23. The application for cancellation was filed on 16 June 2021. Therefore, the defendant is required to show use of the contested trademark, during the period from 16 June 2016 to 16 June 2021 ("the relevant period").

24. In accordance with Rule 1.41 *io.* 1.25 IR, the proof of use should contain evidence of the place, duration, extent and manner of use of the contested trademark for the goods and services for which it is registered and against which the cancellation action is directed.

25. According to the case law of the Court of Justice and the General Court of the European Union¹, a trademark is put to genuine use if, in accordance with its essential function, which is to guarantee the identity of the origin of the goods or services for which it is registered, it is used to find or preserve an outlet for those goods or services, not including token use for the sole purpose of preserving the rights conferred by the trademark. Regard must be had to all the facts and circumstances relevant to establishing whether commercial exploitation of the mark is real, in particular the uses which are considered to be legitimate in the economic sector concerned in order to maintain or create market shares for the goods or services protected by the mark, the nature of those goods or services, the characteristics of the market and the scale and frequency of use of the mark². In this context, the requirement of genuine use of the mark means public and outward use of that mark as protected in the relevant territory³.

26. The General Court has specified that use of the mark need not always be quantitatively significant for it to be deemed genuine⁴. The purpose of the notion of genuine use is not to assess commercial success or to review the economic strategy of an undertaking, nor is it intended to restrict trademark protection to the cases where large-scale commercial use has been made of the mark⁵.

27. Furthermore, it is not required that a mark be used throughout the relevant period, as long as the use takes place within that period⁶. Nor is it required that the mark be used throughout the relevant territory or that there be many customers; indeed, even minimal use may suffice to show genuine use⁷.

28. It should be emphasized, however, that the genuine use of a trademark cannot be assumed on the basis of probabilities or presumptions, but must be demonstrated by solid and objective evidence of effective and sufficient use of the trademark on the market concerned⁸.

A.2 Ground I: genuine use – analysis of the proof of use submitted

29. The defendant has failed to prove genuine use of the contested trademark. His submissions and exhibits (see in particular *supra*, paragraphs 18 and 19) focus on arguing that Baidu Europe is not a 'ghost company' and that there is no 'token use'. However, what he has to prove is place, duration, extent and manner of use of the contested trademark for the goods or services for which it is registered and against which the claim is directed (*supra*, paragraph 24). The only material that appears to relate thereto is that

¹ Hereinafter: "CJEU" and "General Court (EU)".

² CJEU 11 March 2003, C-40/01, ECLI:EU:C:2003:145 (Ansul).

³ General Court (EU) 12 March 2003, T-174/01, ECLI:EU:T:2003:68 (Silk Cocoon); General Court (EU) 8 July 2004, T-203/02, ECLI:EU:T:2004:225 (Vitafruit); General Court (EU) 8 November 2007, T-169/06, ECLI:EU:T:2007:337 (Charlott).

⁴ General Court (EU) 8 July 2004, T-334/01, ECLI:EU:T:2004:223 (Hipoviton); General Court (EU) 30 April 2008, 131/06, ECLI:EU:T:2008:135 (Sonia Sonia Rykiel).

⁵ CJEU 11 May 2006, C-416/04 P, ECLI:EU:C:2006:310 (Vitafruit).

⁶ General Court (EU) 16 December 2008, T-86/07, ECLI: EU:T:2008:577 (Deitech).

⁷ CJEU 11 May 2006, C-416/04 P, ECLI:EU:C:2006:310 (Vitafruit).

⁸ General Court (EU) 12 December 2002, T-39/01, ECLI:EU:T:2002:316 (Hiwatt); General Court (EU) 6 October 2004, T-356/02, ECLI:EU:T:2004:292 (Vitakraft); General Court (EU) 30 April 2008, 131/06, ECLI:EU:T:2008:135 (Sonia Sonia Rykiel).

enumerated above at paragraph 19. However, the defendant, who is otherwise very comprehensive in his submissions, hardly explains what he intends to prove with these exhibits.

30. The evidence submitted falls short on all counts. It makes no or insufficiently clear where exactly the use is alleged to have taken place (within or outside the Benelux), the duration, extent and manner of the use and to which goods or services the use relates. The defendant does not even indicate in any way to which of the (very broad and diverse) goods or services for which the contested trademark is registered (as listed under paragraph 4) the use he alleges would relate.

31. In other words, the defendant's submissions and exhibits are insufficient to demonstrate any actual use of the contested trademark for the relevant goods and services, within the relevant period and territory, let alone use that would qualify as genuine use for those goods and services.

B. Conclusion

32. The parties refer extensively to a prior history between them. However, this is not relevant in relation to the question at issue in these proceedings, namely whether there has been genuine use of the contested trademark. The conclusion can be brief: the defendant has failed to prove genuine use within the Benelux territory of the contested trademark for the goods and services for which it was registered in the five years preceding the filing of the application for cancellation. The contested trademark is therefore revoked.

33. Since the application for cancellation succeeds on ground I, an assessment of ground II (bad faith, relied on conditionally by the claimant) and all that has been argued by the parties in that regard need not be undertaken.

IV. DECISION

34. The application for cancellation with number 3000316 is justified.

35. Benelux trademark registration 987405 is revoked.

36. The defendant shall pay the claimant 1,420 euros in accordance with Article 2.30ter (5) BCIP in conjunction with rule 1.44 (2) IR, as the cancellation application is upheld in its entirety. This decision constitutes an enforceable order pursuant to Article 2.30ter (5) BCIP.

The Hague, 29 December 2022



Pieter Veeze
(*rapporteur*)

Eline Schiebroek

Marjolein Bronneman

Administrative officer: Vincent Munier