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Court of Appeal – The Hague: confusing similarity between the device mark of Lacoste and the word mark EAU CROCO

Charles Gielen (NautaDutilh) · Wednesday, March 9th, 2016

In a recent decision, the Court of Appeal of The Hague concluded that there is a confusing similarity between Lacoste's device mark consisting of a picture of a crocodile, registered for (among other things) cosmetic products in class 3, and the word mark EAU CROCO for the same products. The case concerned an application by a Dutch company for the trade mark EAU CROCO, which was opposed by Lacoste primarily on the basis of the Community trade mark registration for its device mark consisting of the image of a crocodile.



Lacoste's device mark

The Court of Appeal based its conclusion on the conceptual similarity between the two trade marks. In relation to cosmetic products such as fragrances, the element “EAU” (which means “water” in French) in EAU CROCO will be understood by the relevant public as referring to perfume, because of their familiarity with terms such as *eau de cologne* and *eau de toilette*; so this element is descriptive. The dominant element in the word mark EAU CROCO is the word “CROCO”, which will undoubtedly be understood to refer to “crocodile”. The Court of Appeal ruled that Lacoste's device mark clearly communicates the concept of a crocodile. On that basis the Court of Appeal decided that the two marks are conceptually similar. The parties agreed that there is no visual resemblance.

Interestingly, the Court of Appeal also touched upon the question of whether the marks are phonetically similar, referring to a recent decision of the General Court ([Case T-346/13](#) of 30 September 2015, now pending before the European Court of Justice). In that case, the General Court ruled that in the case of device marks there is no need to consider phonetic similarity because pictures cannot be pronounced; for such marks, only the question of visual or conceptual similarity plays a role. Therefore, the Court of Appeal did not pursue the issue of phonetic similarity any further. It also referred to the Court of Justice decision in *Lloyd/Loint's* ([C-342/97](#) of 22 June 1999), which held that it is possible for trade marks to create a likelihood of confusion even if they are similar in only one respect (i.e. conceptually, visually or phonetically).

The Court of Appeal ruled that there is a likelihood of confusion since the marks themselves are conceptually very similar, the products are identical and Lacoste's device mark enjoys a large

reputation. There is therefore a real risk that the relevant consumers will think that perfumes bearing the trade mark EAU CROCO have the same origin as the Lacoste perfumes.

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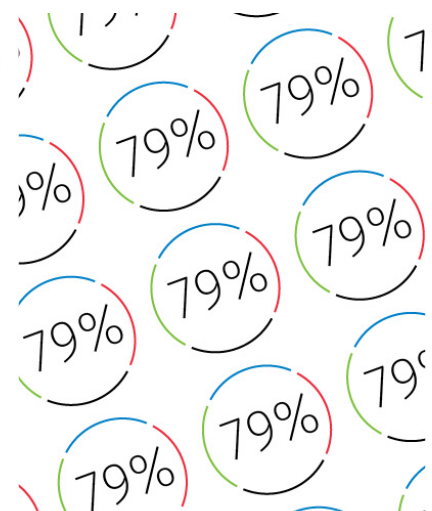
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