

FRENCH REPUBLIC
IN THE NAME OF THE FRENCH PEOPLE

PARIS COURT OF APPEAL

Division 5 - Chamber 1

JUDGMENT OF 14 DECEMBER 2021

(no 203/2021, 16 pages)

Registration number in the general directory: **20/12598 - Portalis No 35L7-V-B7E-CCJ63**

Decision referred to the Court: Judgment in accelerated proceedings on the merits of 4 June 2020 - Judicial Tribunal of PARIS - 3rd chamber - 1st section - RG No 19/08639

APPELLANTS

POLESTAR HOLDING AB

Company incorporated under Swedish law

Acting through its legal representatives domiciled as such at the herein aforementioned registered office

Assar Gabrielssons väg 9

40531 GÖTEBORG (SWEDEN)

Represented by Maître Vincent RIBAUT of SCP GRV ASSOCIES, lawyer at the PARIS bar, registration no: L0010

Assisted by Maître Emmanuel DE MARCELLUS from SELARL DE MARCELLUS & DISSER Law firm, lawyer at the Paris bar, registration no: A0341

POLESTAR PERFORMANCE AB

Company incorporated under Swedish law

Acting through its legal representatives domiciled as such at the herein aforementioned registered office

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RESPONDENT

SA AUTOMOBILES CITROËN

Registered in the VERSAILLES Trade and Companies Register under number 642 050 199

Acting through its legal representatives domiciled as such at the herein aforementioned registered office

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Represented by Maître Frédéric INGOLD of SELARL INGOLD & THOMAS - LAWYERS, lawyer at the PARIS bar, registration no: B1055

Assisted by Maître Claire WEYL from AARPI KERN & WEYL, lawyer at the PARIS bar, registration no: B0251

COMPOSITION OF THE COURT:

Pursuant to the provisions of Articles 805 and 907 of the Civil Procedure Code, the case was debated on 3 November 2021, in a public hearing, the lawyers not having objected, before Deborah BOHÉE, counsellor, and Ms Françoise BARUTEL, counsellor, responsible for investigating the case, her report having previously been read.

These magistrates gave an account of the pleadings in the deliberations of the Court, composed of:

Ms Isabelle DOUILLET, President
Ms Françoise BARUTEL, Counsellor
Ms Déborah BOHÉE, Counsellor

Clerk, during the debates: Ms Karine ABELKALON

JUDGMENT:

- In the presence of all parties
- by making the judgment available at the court registry, the parties having been previously notified under the conditions provided for in the second paragraph of Article 450 of the Civil Procedure Code.
- signed by Isabelle DOUILLET, President of the Chamber and by Karine ABELKALON, Clerk, to whom the minutes of the decision were sent by the signatory magistrate.

Having regard to the judgment of the Paris judicial court rendered on 4 June 2020;

Having regard to the appeal lodged against the said judgment on 1 September 2020 by the company Polestar Holding Ab and the company Polestar Performance Ab (collectively Polestar);

Having regard to the latest submissions presented to the registry and notified electronically on 6 October 2021 by the Polestar companies, appellants, and incidental respondents;

Having regard to the latest submissions presented to the registry and notified electronically on 8 October 2021 by the company Automobiles Citroën (Citroën), respondent and cross-appellant;

Having regard to the order closing the pre-trial review of 12 October 2021;

WHEREUPON, THE COURT:

Expressly referred, for a full statement of the facts of the case and the procedure, to the decision undertaken and to the previously referred submissions of the parties.

It will simply be recalled that Automobiles Citroën, the company under French law founded in 1919 by André Citroën, is one of the major French automobile manufacturers.

This company belongs to the PSA Group, the leading French group in the automotive sector, which has now become the Stellantis Group.

The company Citroën states that it has used the Citroën logo, made up of 'two chevrons' to identify its vehicles since the inception of the company, for all its models.

To distinguish its goods, Citroën holds the following French trademarks in particular:
- the French figurative trademark no 3422762 filed on 12 April 2006 and renewed, in class 12 in particular to designate the following goods : 'Vehicles; apparatus for locomotion by land, air or water; motor vehicles';



- the French figurative trademark no 3841054 filed on 23 June 2011 and registered in classes 7, 9, 12, 25, 36, 37, 38, 39, 40, 41 and 42, to designate in particular in class 12 'Vehicles; apparatus for locomotion by land, air or water; motor vehicles';



The companies Polestar Holding and Polestar Performance have their origins in the Swedish company Flash Engineering founded in 1996 by racing driver Ian 'Flash' Nilsson. Since 2015, they have been owned by the Swedish company Volvo Car Group and the Chinese company Zhejiang Geely Holding.

Polestar Performance has become a full-fledged car manufacturer of the Volvo Group since 2015, dedicated to the development of electric cars. It has recently developed two models of electric vehicles: Polestar 1 and Polestar 2.

The Swedish company Polestar Holding owns the intellectual property rights of the Polestar Group.

Polestar Holding, which states that Polestar translates to 'pole star' by reference to the northern origins of the eponymous companies, has filed the following EU figurative trademarks:

- trademark no 016896532 filed on 21 June 2017 and registered on 4 October 2017 to designate 'Vehicles and means of transport; Parts and fittings for vehicles; Electric vehicles; Electric cars' of class 12:



- trademark no 016898173 filed on 22 June 2017 and registered on 16 October 2017 to designate 'Vehicles and means of transport; Parts and fittings for vehicles; Electric vehicles; Electric cars' of class 12:



Citroën states that it became aware of the existence of these new trademarks by discovering the Polestar 1 and Polestar 2 electric vehicles on which they were used and which, according to it, directly evoked its famous trademarks.

The PSA Group then sent a letter of formal notice on 26 September 2017 to Volvo Car Corporation ordering it to cease the use of the contentious trademarks. By letter of 16 October 2017, the Volvo Car Corporation refused to do so, citing the lack of similarity between the Polestar logo and that of Citroën.

On 27 March 2018, Citroën brought invalidity proceedings before the European Union Intellectual Property Office (EUIPO) against the two aforementioned trademarks of Polestar Holding invoking its own earlier trademarks.

By decisions of 30 January 2020, then 9 July 2021, the Cancellation Division, then the Board of Appeal of EUIPO dismissed these claims for invalidity. Citroën appealed against these decisions on 22 and 28 September 2021, these cases being pending before the court of the European Union.

It is in this context that, on 24 October 2019, Citroën served a writ of summons against the companies Polestar Performance and Polestar Holding for infringement and detriment to its reputed trademark and alternatively for unfair and parasitic competition.

By judgment under appeal, the Paris judicial court:

Dismissed the request by Polestar Holding AB for 'exoneration';

Excluded from proceedings exhibits nos 21-3, 21-4, 46, 47, 48, 49, and 50;

Ruled that, in using the signs



as a trademark, Polestar Performance had damaged the reputation of the French trademarks no 3422762 and no 3841054 of which Automobiles Citroën is the proprietor;

Ordered Polestar Performance to cease these uses throughout the national territory, in any form whatsoever, subject to a fine of 1,000 euros per day of delay and per breach noted, running as from the expiration of a period of three months following the notification of this judgment, and for a period of six months;

Reserved the liquidation of the penalty payment;

Ordered Polestar Performance to pay Automobiles Citroën the sum of 150,000 euros by way of damages in compensation for the infringement of the distinctive character of its trademarks;

Rejected the claims based on the infringement of trademarks, as well as the publication requests presented by Automobiles Citroën;

Rejected the counterclaims of Polestar Holding and Polestar Performance;

Ordered in solidum Polestar Holding and Polestar Performance to pay the costs and authorised Maître Claire Weyl, lawyer, to directly recover those which it would have made the advance payment without having received provision, in accordance with the provisions of Article 699 of the Civil Procedure Code;

Ordered in solidum Polestar Holding and Polestar Performance to pay to Automobiles Citroën the sum of 70,000 euros pursuant to the provisions of Article 700 of the Civil Procedure Code;

Ordered the provisional enforcement of the decision.

On the grounds of the uncontested judgment

The grounds of the judgment are not contested with regard to the exclusion of exhibits numbered 21-3, 21-4, 46, 47, 48, 49, and 50 at first instance, to the dismissal of the request for exoneration by Polestar Holding Ab, and to the dismissal of the claims of Automobiles Citroën on the basis of trademark infringement, and these are no longer under discussion on appeal.

On the infringement of reputed trademarks

The Polestar companies first argued the lack of use of the contentious signs in France in the course of trade. They maintained that the filing of a trademark does not constitute use in the course of trade, and that, moreover, the filing of two European trademarks does not constitute use in France, so that the request by Citroën to rule that, by registering European trademarks nos 532 and 173, Polestar Holding made use of these trademarks in the course of trade, must be dismissed.

They also dispute any use in France of the contentious signs by Polestar Performance in that it has no activity in France, and that the assertion that it is preparing for the imminent marketing of the Polestar 2 vehicle in France is incorrect, given that these vehicles are still not marketed in France, any such imminence being in any case not susceptible to imply the use in France of the trademarks in dispute.

The Polestar companies add that the Polestar.com site, published by Polestar Performance, is not intended for the French public, but for the Belgian public under this extension, that it is written in English, does not allow the French public to proceed to a pre-order, and that it is moreover no longer accessible in France in execution of the judgment under appeal.

They maintain that the written statements submitted to the proceedings are not conclusive, that social networks such as Facebook and Instagram do not target the French public nor do the newsletters intended for the Belgian public, and that the alleged uses in press articles and on the volvocars.com/fr site are not the work of the Polestar companies, but the work of third parties who wrote and published them on their own initiative without their consent, the fact of giving an interview not implying being the sponsor, or having control of its content.

The Polestar companies secondly argue that there is no link between the contentious signs and the famous trademarks cited. They maintain that the existence of a similarity between the contentious sign and the earlier trademark is the first of the conditions, so that this degree of similarity must be sufficient for the public to establish a link between the signs, and they dispute the court's analysis, according to which the damage to the reputation of the Citroën trademarks no 3841054 would be proven, in spite of a weak similarity, on the grounds of the exceptional reputation of the trademark known as 'chevrons' with the French public, and its strong distinctiveness acquired by its use.

They claim that the alleged reputation of the Citroën trademarks is circumscribed by two chevrons, superimposed one above the other, and oriented in the same direction (upwards); that only this particular representation defines the extent of their protection, and that there is no similarity between the signs in question in the visual sense, the signs under investigation, with a clean and elegant design, being composed of four thin and tapered branches symbolising the four cardinal points like a North Star, whereas the trademarks no 3422762 and no 3841054 are each composed of two chevrons in the shape of a reversed 'V', superimposed one above the other, and oriented in one and the same direction (upwards), and also in the intellectual sense, the contentious signs not representing the chevrons, but a pole star in a stylised way, with particular reference to the name and the wordmark Polestar.

They add that the relevant public is a very attentive public whose level of attention is high, given the high price of the products, the scarcity of purchases, the particular interest of buyers and the distribution channels of these products mainly through exclusive dealers, in addition to the Polestar companies targeting customers interested not only in an electric vehicle, but also in a high-end or luxury vehicle, with high performance, whereas Automobiles Citroën is aimed at a general public interested in the acquisition of an inexpensive or moderately priced motor vehicle.

They claim that the survey carried out by the company Yougov on a sub-sample of 527 people, then restricted to less than 300 people, is not conclusive, as the phrasing of the questions was also suggestive.

Lastly, the Polestar companies maintain that they do not draw or are not likely to draw any advantage from the reputation or the alleged distinctive character of the Citroën trademarks, nor do they undermine the distinctive character of the trademarks cited.

They claim that they convey an image and values that are specific to them, which are distinct from those of the Citroën trademarks, and are aimed at a different public, in that the name and the Polestar logo refer to a pole star, that this image is linked to their history, and that it is associated with that of Volvo, which enjoys great reputation. They add that they are making investments in order to maintain this image of high-quality high-end electric vehicles, combining high technology and very high performance aimed at a premium clientele, whereas Automobiles Citroën is a general manufacturer offering 'entry-level' vehicles presenting themselves as a popular brand, which does not benefit from any renown for electric vehicles, so that the Polestar companies cannot draw any advantage from the reputation of the Citroën trademarks.

Automobiles Citroën maintains that the mere filing of a trademark already constitutes an act of use in the course of trade, prefiguring an imminent exploitation of the trademark.

It also considers that the French market is well targeted by Polestar Holding and Polestar Performance, and that the plan to market Polestar vehicles in France is clearly established in view in particular of the interview granted in March 2019 by Mr Jonathan Goodman, Managing Director of Polestar, and press articles in magazines and on websites specialising in the automotive market, demonstrating the plan to market cars online from the Polestar.com website, during 2020, and to develop a network of dealerships whose financing was under negotiation.

It observes that this is an extremely concrete marketing project which has been widely announced and promoted to the public, so that it is likely to accredit the use of the disputed sign in the course of trade.

Concerning the Polestar.com/fr-be website, Citroën notes that Polestar itself announced through a press release that the Polestar 1 was available for pre-orders in 18 countries including France, information which has been picked up by the press, and that these pre-orders are placed exclusively online on the 'Polestar.com' website, in addition to promoting its vehicles through the 'Volvo Car France Site Media' website of their parent company (<https://www.media.Volvo cars.com/fr/fr-fr>), accessible in France and in French.

It argues that there is indeed a link between its trademarks and those of Polestar Holding. It considers that the signs differ only by the distinct positioning of the chevrons, but that this difference cannot have the effect of eliminating the overall impression that the signs have as a whole, the chevrons of the two earlier trademarks appearing to have been turned upside down within the secondary trademarks, made up of mirrored images.

Automobiles Citroën also considers that the reputation of its trademarks makes it possible to compensate for a similarity which would be considered as average. It points out that the goods in question are identical, and that the relevant public is likely to pay a higher level of attention in the automotive field, but that this degree of attention will not prevent consumers from associating the trademarks in question, and establishing a link between these trademarks, as evidenced by reactions in the press and comments on the Internet indicating a resemblance between the logos of Citroën and the Polestar companies, as well as in surveys.

It maintains that its trademarks no 3422762 and no 3841054 enjoy an exceptional reputation, acquired as a result of a century of investment, innovation and publicity, whereas Polestar Performance is a recent automobile manufacturer which has only produced its own vehicles since 2017, and which is still little known to the general public. Automobiles Citroën concludes that, by adopting a logo similar to the very old trademark with the double chevron for identical goods, Polestar is taking advantage of the reputation of the Citroën trademark without deploying the corresponding efforts and investments.

It adds that the PSA Group will launch four 100% electric models in 2021, which will necessarily increase the risk of transferring the image of the reputed trademark to the Polestar products in question, and that the use by the appellants of the criticised trademark has already been effected, and will necessarily in the future lead to a dilution of the Citroën trademark and a dispersion of its identity, the automotive market comprising a small number of manufacturers that have all adopted trademarks which differ greatly from one another.

The court recalls that, pursuant to Article L.713-3 of the Intellectual Property Code, 'It is prohibited, without authorisation of the owner of the trademark, the use thereof in the course of trade, for goods or services, of a sign identical or similar to the trademark enjoying a reputation and used for goods or services identical, similar or not similar to those for which the trademark is registered, if this use of the sign, without just cause, takes unfair advantage of the distinctive character or reputation of the trademark, or is detrimental to the same.'

Article L.713-3-3 of the same code, relating to infringements committed during preparatory acts, also provides that: 'When there is a risk of infringement of its rights, pursuant to Articles L. 713- 2 to L. 713-3-1, due to use in the course of trade for goods or services, packaging, labels, markings, security or authentication devices, or any other medium on which the trademark is affixed, the owner of a trademark may prohibit:

1. The affixing of a sign identical or similar to the trademark on the media mentioned in the first paragraph;
2. The offering, placing on the market or possessing, importing or exporting the same media for these purposes'.

These texts, which carry out the transposition into domestic law of Article 5 paragraph 2 of Directive No 89/104/EC of 21 December 1988 approximating the laws of the Member States on trademarks, codified by Directive No 2008/95/CE of 22 October 2008, must be interpreted in the light of the case law of the ECJ

Proof of use in the course of trade

The Court of Justice, in the Arsenal Football club judgment of 12 November 2002 C-206/01, stated that 'the use of a sign identical to the trademark does indeed take place in the course of trade, since it is placed in the context of a commercial activity aimed at an economic advantage, and not in the private domain'.

In addition, by a judgment of 27 November 2008 Intel Corporation C-252/07, the Court of Justice of the European Union, after having noted that Articles 4, paragraph 4, under a), and 5, paragraph 2, of the directive were worded in substantially identical terms and sought to confer the same protection on renowned trademarks, said:

'37 In order to benefit from the protection introduced by Article 4 paragraph 4 a) of the Directive, the owner of the earlier mark must adduce proof that the use of the later mark 'would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier mark'.

38 To this end, the proprietor of the earlier trade mark is not required, for that purpose, to demonstrate actual and present injury to its mark for the purposes of Article 4 paragraph 4 a) of the Directive. When it is foreseeable that such injury will ensue from the use which the proprietor of the later mark may be led to make of its mark, the proprietor of the earlier mark cannot be required to wait for it actually to occur in order to be able to prohibit that use.

The proprietor of the earlier mark must, however, prove that there is a serious risk that such an injury will occur in the future.'

In this case, it follows from the reports drawn up by the bailiff on 14 June and 29 November 2019 respectively on the media.volvocars.com and polestar.com websites, that these websites, accessible from France and written in part in French, promote Polestar 1 and 2 vehicles reproducing the signs under investigation, and announce the marketing of the Polestar vehicle in France, a country mentioned among the 18 countries where pre-orders have been opened.

These elements are corroborated by the numerous screenshots of websites included in the file, and in particular the automobile-propre.com site dated 12 March 2019 on which Mr Jonathan Goodman, Polestar CEO, states 'With the Polestar 2 we aim for the mass-market', 'confirming the imminent arrival of the vehicle in France', the article specifying, 'For France, the manufacturer is moving towards specific financing solutions in the form of LLD'; the argus.fr site dated 7 March 2019 mentions 'as suggested by the President of Volvo France, France is only part of lot number 2 for marketing, during or even at the end of 2020'; on the autojournal.fr site dated 9 March 2018, it states 'Polestar will open pre-orders on 13 March at 8 am. Great news, the French market will be concerned!'; on the autoactu.com site dated 8 March 2018 Jonathan Goodman stated, 'We are planning between 6 and 7 showrooms in France'; on the autoplus.fr site dated 25 April 2018, it states, 'In Europe and France, where the 600 hp hybrid coupe has been available for pre-order since 13 March (...)'.

It follows from all of these elements relating to the uses of the signs under investigation in the context of a commercial activity aimed at an economic advantage and not in the private sector, that Citroën at the very least has established the existence of elements making it possible to conclude that there is a use by Polestar Performance in the the course of trade likely to characterise a serious risk of alleged infringement to its reputed trademarks.

On the other hand, Citroën's argument cannot be upheld when it asks the court to 'judge that by registering the contentious signs, Polestar Holding has also made use of these signs in the course of trade, and is undermining the reputation of the French trademarks no 3422762 and no 3841054, which it owns'.

Indeed by judgment of 13 October 2021 (nos 19-20504 and 19-20959), the Court of Cassation ruled that, with regard to ECJ case law, and in particular the judgment of 3 March 2016, Daimler, C -179/15, the simple application for registration of a sign as a trademark does not imply the use of goods or services, so that the sole application for registration of a sign as a trademark does not constitute an act of infringement, and therefore cannot characterise an infringement of a reputed trademark. Citroën's claim in this regard and its subsequent claims for compensation against Polestar Holding will therefore be dismissed.

On the links between the trademarks cited and the signs under investigation in the mind of the public

In its Adidas judgment of 23 October 2003 (Aff. C-408/01), the Court of Justice of the European Union said:

'29 The infringements referred to in Article 5 paragraph 2 of the Directive, where they occur, are the consequence of a certain degree of similarity between the mark and the sign, by virtue of which the relevant section of the public makes a connection between the sign and the mark, that is to say, establishes a link between them, even though it does not confuse them'.

30 The existence of such a link must, (...) be appreciated globally, taking into account all factors relevant to the circumstances of the case.

In the aforementioned Intel judgment of 27 November 2008 (C-252/07), the Court of Justice of the European Union recalled:

'42 Those factors include:

- the degree of similarity between the conflicting marks;
- the nature of the goods or services for which the conflicting trademarks were registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public;
- the strength of the earlier mark's reputation;

- the degree of the earlier mark's distinctive character, whether inherent or acquired through use;
- the existence of the likelihood of confusion on the part of the public.

(...)

47 The reputation of a mark must be assessed in relation to the relevant section of the public as regards the goods or services for which that mark was registered. That may be either the public at large or a more specialised public. (...)

49 Furthermore, even if the relevant section of the public as regards the goods or services for which the conflicting marks are registered is the same, or overlaps to some extent, those goods or services may be so dissimilar that the later mark is unlikely to bring the earlier mark to the mind of the relevant public.

50 Accordingly, the nature of the goods or services for which the conflicting marks are registered must be taken into consideration for the purposes of assessing whether there is a link between those marks.

On the relevant public

It is common ground in this case, as the court rightly held, that the relevant public is made up of buyers of vehicles, either professionals or individuals, whose level of attention is, by reason of the nature and the price of the goods, high.

On the reputation

The court recalls that, as ruled by the ECJ in a PAGO International C301/07 judgment of 6 October 2009, a trademark is considered to be reputed when it is known to a fraction of the relevant public, and when it exercises its own power of attraction independent from the designated goods or services, these conditions having to be met at the time of the alleged infringements. The age of the trademark, its commercial success, the geographic extent of its use and the size of the advertising budget allocated to it, its referencing in the press and on the Internet, the existence of enquiries or surveys of reputation attesting to the consumer's knowledge of partnership or sponsorship operations, or even possibly previous court decisions, should, in particular, be taken into account. These criteria are not cumulative, and the owner of a registered trademark may, for the purposes of establishing its renown, rely on evidence of its use in a different form as part of another registered trademark and reputation provided that the relevant public continues to perceive the goods in question as coming from the same company.

In this case, it has been established that since 1919, that is to say more than 100 years, all the cars of the Citroën company have borne a double chevron sign, namely:



- The French trademark no 1634319 which is an old version of the logo still present on many cars in circulation, for example on the famous 2CV, and which is still used in particular on spare parts produced by a Citroën licensee to repair old models vehicles.

- the opposing trademarks in this case, which are a derivative of this



It is also not disputed that Citroën devotes significant budgets to advertising its brands (more than 300,000,000 euros per year on average) and ranks third in vehicle sales in France, on which the trademarks mentioned above are affixed, so that the intensity of the use of the trademarks is established, and that, as the first courts retained the reputation of the trademarks in question, which is moreover not contested by the Polestar companies, which limit themselves to specifying that it is circumscribed by two chevrons superimposed one above the other and oriented in the same direction, is exceptionally high among the target audience of French vehicle consumers, both individuals and professionals.

On comparison of the goods

Citroën's trademarks in question are registered in particular for 'vehicles; motor vehicles', and the Polestar signs under investigation are also relate to motor vehicles.

To dispute the identity of the goods in question, the Polestar companies emphasise the premium character of the Polestar electric cars, sold online at a very high price. The court observed, however, that the Polestar 2 is positioned at a much lower price than that of the Polestar 1, that it is therefore intended for a wider public, and that Citroën for its part markets a wide range of vehicles, including not only 'entry-level' cars, but also top-of-the-range vehicles, as evidenced in particular by the fact that they were chosen by successive Presidents of the Republic, in addition to the fact that, being the 3rd largest French automobile manufacturer, it markets hybrid vehicles, and is intending to enter the new market for electric cars, as can be seen in particular from the press release of 19 December 2019 submitted to the proceedings. Finally the difference in the mode of marketing of cars is unimportant, since it does not impact the perception of the identity of the goods in question by the targeted consumer. The goods are therefore identical. The court's judgment must be approved on this point.

On comparison of the signs

Trademark no 3422762 with the signs under investigation



Trademark no 3422762

From a visual point of view, the signs in question are similarly made up of exclusively figurative signs, equally made up of two angles such as arrowheads or chevrons, having a similar or identical spacing, and placed close to each other, those of the earlier trademark being placed one below the other, with a space separating them, and oriented in the same direction, while those of the signs under investigation face each other, their tips almost touching.

Given the same number of angles (two), the same proportions (similar length, thickness and opening), their bevelled appearance, as well as the differences between their positioning and orientation, these signs visually show a relatively weak similarity.

Conceptually, the signs in question evoke two geometric shapes in a point such as an angle, an arrowhead or a chevron with no other intellectual significance, the target public not necessarily seeing the representation of a pole star in the signs under investigation, so that they present, taking into account the differences in the position of these geometric shapes, a relatively weak intellectual similarity.

Finally, in the case of figurative signs, there is no need to make their phonetic comparison.

Trademark no 3841054 with the signs under investigation



Trademark no 3841054

From a visual point of view, the signs in question are similarly made up of exclusively figurative signs, equally made up of two angles such as arrowheads or chevrons having a similar or identical spacing, and placed close to each other, those of the earlier trademark being placed one below the other, with a space separating them, and oriented in the same direction, while those of the signs under investigation face each other, their tips almost touching.

Given the same number of angles (two), the same proportions (similar length, thickness and opening), their bevelled appearance, as well as the differences between their positioning and different orientation, these signs visually show a relatively weak similarity.

Conceptually, the signs in question evoke two geometric shapes in a point such as an angle, an arrowhead or a chevron with no other intellectual significance, so that 'they present, taking into account the differences in the position of these geometric shapes, a relatively weak intellectual similarity.

Finally, in the case of figurative signs, there is no need to make their phonetic comparison.

It follows from that overall comparison that trademarks no 3422762 and no 3841054 have a relatively weak similarity with the signs under investigation.

As has been recalled, in the event that the conflicting signs present a certain similarity, even a weak one, an overall assessment must be carried out in order to determine whether, notwithstanding the low degree of similarity between the signs in question, there is, by reason of the presence of other relevant factors such as the important reputation of the earlier trademark, its strong distinctiveness, or the identity of the goods in question, a link between those signs in the minds of the public concerned.

As the ECJ recalled in the aforementioned Intel judgment:

'54 (...) the stronger the distinctive character of the earlier mark, whether inherent or acquired through the use which has been made of it, the more likely it is that, confronted with a later identical or similar mark, the relevant public will call that earlier mark to mind. 55 Accordingly, for the purposes of assessing whether there is a link between the conflicting marks, the degree of the earlier mark's distinctive character must be taken into consideration.

56 In that regard, in so far as the ability of a trade mark to identify the goods or services for which it is registered and used as coming from the proprietor of that mark, and therefore its distinctive character are all the stronger if that mark is unique, (...) it must be ascertained whether the earlier mark is unique or essentially unique'.

In this case, it can be seen from the table reproducing the logos of the 31 automobile manufacturers whose vehicles are the most sold in France, that none uses the representation of two angular geometric shapes of the chevron type one below the other, and in particular not those of Renault and Mercedes, as alleged by the Polestar companies, the first being a diamond, the second a star within a circle. In addition, the shapes of two superimposed chevrons are perfectly arbitrary for cars, and the intrinsic distinctiveness of this sign has furthermore been greatly enhanced by the intensive use which has been made of it, so that the distinctive character of the earlier trademarks is elevated.

It has also been shown that the reputation of these trademarks is also exceptionally high, and that the goods in question are identical, namely motor vehicles.

It follows therefore from the overall assessment of the signs in question, taking into account the exceptional reputation of the two trademarks no 3422762 and no 3841054 with the public, their strong distinctive character acquired through intensive use, and the identity of the goods in question, that, notwithstanding the relatively faint similarity of the signs in this case, there is a risk that the signs in question evoke, in the target public, the trademarks cited, the aforementioned double chevrons of Citroën.

This risk, distinct from the likelihood of confusion, the demonstration of which is not required in matters of infringement of a reputed trademark, is moreover proven, as has been rightly pointed out by the first court by the production of the exhibits submitted to the proceedings of comments of Internet users, noted according to the bailiff's report of 14 June 2019 and in particular, *'the sketch of the Northern star, which resembles by an unfortunate coincidence the old Citroën chevrons that a joker might have separated and flipped upside down'* (Challenges); *'The Polestar logo recalls... the Citroën chevrons'* (L'argus); *'They recycled the Citroën chevrons!'* (Autoplus website forum); *'Funny the logo. It looks like Citroën has burst its chevrons'* (forum of the Internet site Automobile Propre); *'I like the Citroën chevrons of the Polestar logo'* (forum of the Le Blog Auto website); *'You could almost see the shattered chevrons of Citroën'* (Logonews website); *'Hopefully it's more inspiring than the design of the Polestar logo, resembling Citroën's chevrons like two drops of water!'* (Site Buy less Choose well); *'The idiots! (Sic!) They recycled the Citroën chevron'* (Autoplus website forum).

The risk of a link between the implicated signs and the trademarks in question is thus established.

On taking unfair advantage of reputation or distinctive character

In the aforementioned Intel judgment of the ECJ of 27 November 2008 (C-252/07), the Court of Justice of the European Union recalled:

'27 The types of injury against which Article 4 paragraph 4 a) of the Directive ensures such protection for the benefit of trade marks with a reputation are, first, detriment to the distinctive character of the earlier mark, secondly, detriment to the repute of that mark and, thirdly, unfair advantage taken of the distinctive character or the repute of that trademark.

28 Just one of those three types of injury suffices for that provision to apply.

29 As regards, in particular, detriment to the distinctive character of the earlier mark, also referred to as 'dilution', 'whittling away' or 'blurring', such detriment is caused when that mark's ability to identify the goods or services for which it is registered and used as coming from the proprietor of that mark is weakened, since use of the later mark leads to dispersion of the identity and hold on the public mind of the earlier mark. That is notably the case if the earlier mark, which used to arouse immediate association with the goods and services for which it is registered, is no longer capable of doing so.'

In this judgment, the ECJ recalled and clarified:

'67 The more immediately and strongly the earlier mark is bought to mind by the later mark, the greater the likelihood that the current or future use of the later mark is taking unfair advantage of the distinctive character or repute of the earlier mark, or prejudices this.

(...)

69 (...) the stronger the earlier mark's distinctive character and reputation, the easier it will be to accept that detriment has been caused to it. (...)

74 (...) the more 'unique' the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character.'

In this case, it can be seen from the survey by the company YouGov (a British company certified by the official national standards body for the United Kingdom), carried out on 1,042 people representative of the French national population aged 18 and over between 20 and 21 January 2021, in answer to the following open questions, where no reference was made to any manufacturer's name: 'Do you readily establish a link between this new automobile trademark (visual of the Polestar company logo) and another automotive trademark? If yes, please specify which trademark do you associate it with?', more than half of the respondents (56%) associated the new Polestar trademark with another trademark in the automotive sector, and of these people, 59% establish a link with the Citroën trademark, that is to say that more than a third of the people questioned, which constitutes a significant part of the public, readily established a link between the Polestar logo and Citroën's double chevron trademark.

Given the exceptional reputation of the Citroën double chevron trademarks in question and their strong distinctiveness acquired through intensive use sustained by extremely large advertising investments, and the fact that the conflicting signs are used to designate the same goods, namely motor vehicles, the use by the Polestar companies of the signs under investigation entails an infringement on the distinctive character by dilution and blurring of the aforesaid trademarks used in the automobile sector, the number of manufacturers of which is relatively small.

The infringement of the distinctive character of the trademarks cited, sufficient in itself to constitute an infringement of the reputed trademark within the meaning of Article L. 713-3 of the Intellectual Property Code, is thus proven.

Finally, as the judges rightly ruled for reasons adopted by the court, the Polestar companies did not provide a just cause within the meaning of Article L. 713-3 of the aforementioned Intellectual Property Code, and the latter, moreover, have not maintained this argument in their appeal submissions.

It follows from the foregoing developments that the infringements of the reputed trademarks to the detriment of Citroën are proven. The judgment made must therefore be confirmed in this regard.

Consequently, there is no need to rule on the subsidiary claims made by Citroën on the basis of unfair and parasitic competition.

The Citroën companies are also asking the court to rule that damages also result from the fact that the Polestar companies are taking unfair advantage of the reputation of their earlier trademarks.

Although the infringement of the distinctive character of the Citroën trademarks due to their dilution is, as has just been said, proven, the Citroën companies do not succeed in demonstrating a separate damage resulting from the Polestar companies taking advantage of the reputation of their trademarks, as it is clear that the Polestar companies are positioned in a market segment, that of exclusively high-end and luxury electric vehicles, different from that currently occupied by Citroën, that they have justified their own investments for the creation of their logo, their graphic charter and the promotion of their vehicles, and that the marketing activity envisaged in France has not started. Citroën's request in this regard will therefore be dismissed.

On the remedial measures

The prohibition measures pronounced in first instance under penalty against Polestar Performance will therefore be confirmed, and renewed under the terms of the ruling below.

Taking into account the exceptional renown of the Citroën trademarks in question, and their strong distinctiveness acquired through their intensive use, the damage to the distinctive character of these reputed trademarks was fairly repaired by the sum of 150,000 euros. The judgment made will therefore also be confirmed in this regard.

On the counterclaims of the Polestar companies

The success of Citroën's claims requires the dismissal of the claims for damages from the Polestar companies under an abusive procedure.

They will also be dismissed of their claim for the damage resulting from the provisional execution of the judgment, as the execution of the judgment was a condition to avoid the cancellation of the appeal by the Polestar companies, which moreover failed in their appeal.

FOR THESE REASONS

THE COURT

Confirms the judgment in all of its provisions;

And in addition,

Enjoins Polestar Performance to cease the use of the signs



as a trademark throughout the national territory, in any form whatsoever, subject to a fine of 1,000 euros per day of delay and per breach noted, running as from the expiration of a period three months following the notification of this judgment, and for a period of six months;

Dismisses all other requests from parties contrary to the statement of reasons;

Orders the companies Polestar Holding and Polestar Performance in solidum to pay the costs of the appeal, which will be recovered pursuant to Article 699 of the Civil Procedure Code, and having regard to Article 700 of the same code, orders them in solidum to pay to the company Citroën Automobiles the sum of 80,000 euros for the irrecoverable costs of the appeal.

THE CLERK

THE PRESIDENT