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New faces at Hoogenraad & Haak



As of 1 September Julia Kat has joined our firm as a paralegal. She studied at the University of Groningen. Julia wrote her thesis on the commercial exploitation of art in public spaces. As a former employee of a men's fashion boutique in the Dutch city of Haarlem she knows a lot about fashion. Besides work, Julia does sports, paints and rides horses.



On 1 October Daniel Haije will join Hoogenraad & Haak. Daniel previously worked as a lawyer with another law firm in Amsterdam focussing on intellectual property. There he advised a number of celebrities and several businesses in the music and gaming sectors. Daniël is also into music. You may well have heard him playing with his band *Ten Four* - he is that tall blond guy playing the guitar.

Be careful! Borrowing money costs money

Credit advertising has been rather under fire this year. First the obligatory warning of "Be careful: Borrowing money costs money" for any advertising for money loans and directly following that a private member's bill from the CDA (*Christian Democratic Alliance*) and PvdA (*Dutch Labour Party*).

This warning must be stated in all advertising for loans since 1 April. This applies for all media forms: TV, radio, the internet and printed matter. The obligatory warning is one of the many measures taken by the cabinet to counteract increasing debt problems.

Let op! Geld lenen kost geld

The new rule applies for all advertising for loans except for mortgages. Strangely enough the warning must also be listed for interest free loans. According to the definition of the Dutch Financial Supervision Act even with an interest percentage of 0%, there is a case of a loan. Hence the Netherlands Authority for the Financial Markets (AFM) believes that the warning must also be included. Rather strange reasoning. Why should you have to report that a loan costs money if that is not the case? It is even misleading. Various market parties are therefore trying to negotiate with the AFM on this matter. Let us hope that the AFM quickly revisits its opinion.

Apparently the results of the obligatory warning could not be awaited. One day before the new measure became effective, CDA and PvdA brought out a private member's bill further tightening the rules for credit advertising between 6 a.m. and 9 p.m. And advertising may not contain links between loans and kitchens, sofas and other items which can be purchased with a loan. Luckily the question still remains whether this private member's bill will make it. It does not appear to be adequately thought through and may even be in violation of European legislation.

Kim Braber

Is only STOKKE allowed to make a sloping baby chair?

In how far may you follow a design before you infringe the copyright? Are you allowed to borrow one characteristic element or have you then already gone too far? The Hague Court of Appeal gave an interesting decision at the end of June on the Fikszó *Bambino* high chair which apparently too greatly resembles the well known Tripp Trapp chair by Stokke.



The Tripp Trapp (left) is recognisable due to the sloping stand which together with the horizontal lower beam forms an italic *L*. The Hague Court of Appeal sees two 'copyright protected features' in the stand and the *L* form of the Tripp Trapp. The Bambino chair by Fikszó (right) does not have an *L* form and not an italic *L* form but it does have the typical sloping stand of the Tripp Trapp. Is this infringement?

The overall impressions of the Tripp Trapp and the 'Bambino' high chair by Fikszó are different. But the Court of Appeal finds the differences too minor to see Bambino as a new and original work. Even though only one of the two protected features has been used, the Court of Appeal finds that the Bambino infringes on the Tripp Trapp design. Reading between the lines the Court also believes that since the chair has won many prizes it therefore should apply as a 'revolutionary design'. According to the Court this means you must keep your distance.

For years the clear rule applied that if the *overall impression* of the imitation corresponds to that of the protected work then it is an infringement. Now suddenly it is not the 'similarity' which is decisive but the fact that there are 'too few differences'. Precisely the reverse therefore with a different outcome. And what does this mean? May a stylist borrow one typical element of another design - who does not do this in the fashion world? I hope that Fikszó goes on to the Supreme Court because this rule is screaming out for clarification. Until then, followers of applied arts must be careful, certainly if the design has won prizes. Borrowing one characteristic element from a famous chair, pair of trousers or car can evidently cost you your head..!

Maarten Haak

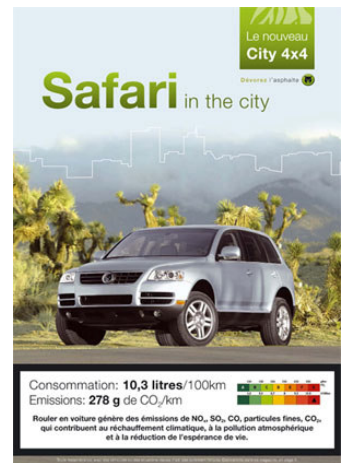
Stricter rules for reporting CO2 emissions data in advertising

Car advertisements must report fuel consumption and CO2 emission. However, organisations such as Milieudefensie (*Friends of the Earth*) think that this is often not done properly in the Netherlands. Emission data are not reported in full or are hardly legible. The regulations on this matter are not clear.

For specific models of new personal vehicles the consumption and the CO2 emission must *always* be reported in printed advertising. That follows from the Labelling Decree for the Energy Consumption of Personal Vehicles. In one advertisement for several models/types of cars the 'fuel CO2 series' must be reported (lowest/highest emission).

The fuel/CO2 data may not be less noticeable than the 'main component of the information provided in the advertising material.' But what constitutes the *main component* of the information? It appears sufficient if the data are clear and easily readable. For example if they are the same size as the body text. It can also be well defended that the body text is 'the main component'. Unreadable font in any case is not sufficient.

New rules are always being made. A new European directive is being prepared and (probably from 1 October) the Advertising Code for Personal Vehicles will be amended with new provisions for the format of the emission data. For an A5 advertisement in a newspaper for example the letters must be at least 1.5 mm, for an A3 poster at least 5 mm. And according to the new Code the letters in printed matter must be at least the same size as the smallest letters of the *information* provided in the advertisement. Subscript or superscript and other special symbols do not count. But the term 'the same size as the other information' does not comply with the statutory criteria 'the same size as the main component'. On the other hand the new code is also stricter: emission data must not only be listed in printed matter but also on the Internet and in TV/radio commercials.



Maud van der Leeuw

Client's copyright on commissioned applied arts

The rights to tables, chairs, prints and other drawings and models which are made in order to be put on the market on a commercial scale accrue automatically to the client. That follows from a decision from the Court of Appeal of Amsterdam at the beginning of this year. In brief it equates to the client obtaining both the



copyright and the right to register the design as a Benelux design merely by giving the order to make the design. This decision has caused quite some commotion: one always assumed that the client only becomes copyright owner if a design is registered in the designs register. That also appears to be the case for unregistered designs. The client may therefore also register the design right.

It is remarkable that different rules apply for an (unregistered) Community Design. The European Design Regulation does not automatically appoint the client as the design owner and the client may also not register a

Community Design right without the designer's consent. This means that the Amsterdam Court of Appeal's interpretation could lead to crazy situations, in which both the client and the designer are entitled.

Be this as it may, luckily there is an escape route. The new rule does not apply if other agreements have been made. For freelancers/designers therefore it is extra important to make clear agreements in advance. In principle, a copyright reservation in general terms and conditions is sufficient, on the condition obviously that the applicability of these terms and conditions has been agreed on correctly. If that has not been done then the designer runs the risk of losing his copyright; at least if it concerns creative work to be produced and traded on an industrial scale.

Maud van der Leeuw

Mininova ordered to remove torrent links to commercial films and music

The bittorrent site Mininova.org makes it easy to share films and music by means of 'torrents'. These are links to content from elsewhere, often content protected by copyright and neighbouring rights. On 26 August the Dutch Foundation BREIN, which protects the interests of the entertainment industry, obtained a court order from the District Court of Utrecht. Mininova must remove all links to protected material. This judgment reconfirms that right owners can successfully act against unauthorised use through the internet.



Mininova not only allowed its users to infringe copyrights, it even encouraged them to do so and profited from this. It also assisted users to locate the required copyright protected content. Mininova's 'administrators' and 'moderators' made sure that copyright protected content that was made available through its site was actually useable for others and that empty 'spoofs' were deleted.

Mininova argued that it cannot locate and delete torrent links to copyright protected content. But the Court holds that it is widely known that commercially produced movies, games, music and tv-series are mostly copyright protected. If torrents are placed on the site in those categories, Mininova must have serious doubts whether the torrents link to authorised material and check first.

Mininova is not the party that publishes the content itself as meant in the Copyright Act, as the sharing procedure does not go through Mininova but directly between the users. But the Court holds that Mininova committed a tort by perpetuously facilitating copyright infringements by its users. Thus the right owners can act directly against the torrent platform.

Moreover Mininova's Notice and Take Down-procedure has been criticised. After a notice of an infringement torrents were only removed for the time being, but not permanently. A torrent could be placed again right after removal (especially as Mininova's moderators actively invited users to replace them after a removal). The Court finds it essential that a torrent is removed forever. The judgment is double good news for right owners.

Maarten Haak

l'Oréal/Bellure: no freeriding on the tail of a famous trademark . . .

In how far may a trademark resemble that of the market leader? Profiting from the image of a well-known trademark can be more easily prohibited since recently. That follows from the decision of the Court of Justice in the *l'Oréal/Bellure* case of 18 June 2009.



The trademark owner can act if another party latches on to his mark and attempts to obtain 'unfair advantage'. That is the case if that other party seeks by its use to ride on the coat-tails of the mark with a reputation in order to benefit from the power of attraction, the repute and the prestige of that mark and from the marketing effort expended to create and maintain the mark's image.

This case was about comparison lists. Famous perfumes by l'Oréal, such as Trésor and Miracle were listed. And in addition imitation perfumes with almost the same fragrance and comparable names (La Valeur and Pink Wonder) but much cheaper. Bellure (the maker of the 'smell-alikes') thought this was permissible because it is all true: it is obviously imitation, it smells almost the same as the 'real thing' and the name and the packaging are not really similar. No one is confused.

L'Oréal was not selling less but Bellure was profiting from the image of the real perfumes which radiated onto its imitation products. So doing Bellure profited from L'Oréal's marketing effort by presenting itself as a cheaper "*imitation of*".

This is not permissible; the ECJ makes that crystal clear. In brief: anyone (1) latching onto a well-known trademark (2) to benefit from it (3) without paying a financial compensation can expect a claim. Owners of well-known trademarks are now sharpening their knives. They will surely act faster against imitation.

The battle between private labels and A marks will flare up further. Do you remember the famous interlocutory proceedings between Unilever and Albert Heijn in 2005? Then AH only had to change its peanut butter and margarine (photo). The packaging of eleven other products, which resembled Becel, Croma, Bertolli and Lipton Ice Tea, remained unchanged. This decision could now work to Unilever's advantage.



Maarten Haak

. . . and comparison with a well known trademark can also be dangerous

Anyone making comparative advertising already had to be careful. Purely comparative advertising means the text is not denigrating, the repute of a trademark is not profited from and the comparison is not confusing or misleading. The competitor of O2 was allowed to use a variation on O2's air bubble image in its price comparison. The trademark owner, based on normal trademark rules, cannot act (unless there is a case of confusion but that is almost never the case in comparative advertising, the competitor is careful..)

But if the advertising refers to a trademark *with a reputation* other rules now apply since *l'Oréal/Bellure*. Well-known trademarks are better protected than 'normal' trademarks anyway. The trademark owner can now also act if the comparison could harm one of the 'trademark functions' such as the functions of communication, investment or advertising. It has not yet been decided what this should mean. One thing is certain: playing with trademarks with a reputation in a comparative advertisement has become a lot more dangerous!

The decision raises another question: the Court of Appeal distinguishes between use of a well-known trademark in a comparison for *purely descriptive* objectives (that is allowed) and use of such trademark for *advertising purposes*. The key question is whether the depicted famous mark is used 'purely descriptively' or 'for advertising purposes'. That will result in great discussion. Moreover a claim may not give the idea that it concerns a counterfeit or imitation product. That is also the case if only one important characteristic has been copied.

As a handle for the practice: when comparing a famous mark it is therefore safer to say that something smells nicer or works better rather than choosing for a parity claim: 'smells just like Trésor perfume'. This claim can quickly be seen as an imitation claim. Since this decision, the claim 'costs less, just as nice' is also in the danger zone. The last word has not yet been had. In the future, the courts will have to apply these new standards wisely.



Ebba Hoogenraad

Advertising or information? / Responsibility for camouflaged advertising

You know them: free magazines full of advertisements for health products and users' experiences. The Inspection Board KOAG/KAG complained this year to the Advertising Code Committee (ACC) about one of these magazines: 'Swinglevend'. The ACC provisionally answered three questions of principle. Meanwhile appeal has been lodged; now it must be awaited whether the Board of Appeal upholds the decision.



Advertising or information?

Is an article about the experiences of a user with a health product advertising? Even if the (brand) name of the product in question is not mentioned? Yes! With the reference '*12 cents per day*' in a so-called editorial article whereas on the same page there was an advertisement for '*Bio-melatonin for 12 cents per night*' for the average consumer the 'article' applies as advertising. The word 'advertisement' should have been printed at the top. Because medical claims are used in the article it also breaches the Commodities Act. It was not the first time that Pharma Nord, the manufacturer of Bio-Melatonin, has committed these kinds of violations. Therefore the Advertising Code Committee has decided to publish the decision by means of a public recommendation as soon as it is definitive.

Publisher responsible for camouflaged advertising

When reading such a general editorial article about a specific ingredient (for example Q10) the public does not always have a specific brand in mind: there are many brands with that ingredient on the market. Nevertheless, the *publisher* of Swinglevend must show in such an article that the editorial amidst advertisements of a certain brand is in fact also advertising. For example by giving the 'article' an advertisement type look & feel or by printing the word 'advertorial' at the top. Even then the underlying advertiser must be stated.

Recognisability of advertising is an important thing. It is on the 'black list' of unfair commercial practices. The decision will greatly effect the set up of Swinglevend and other 'editorial' articles that in essence are camouflaged advertising.

Ebba Hoogenraad

KOAG/KAG was assisted in this case by Ebba Hoogenraad and Kim Braber

Claims Regulation: recommendation by expert

According to the Advertising Code Committee the prohibition of referring to a recommendation by an individual expert only applies if an expert is referred to *by name*. This also follows from its *Swinglevend* ruling. This provisionally answers one of the questions raised by the European Claims Regulation. The text '*recommended by an expert*' in an advertisement for a foodstuff (such as a vitamin supplement) is permitted. It is now up to the Board of Appeal whether a recommendation is only not allowed if a doctor or dietician is referred to by name or that '*advised by an expert*' influences the consumer too much.

Ebba Hoogenraad

Advice from chemist is not advertising



Danone sends brochures to chemists '*Work on your resistance during a course of antibiotics*'. This brochure complies fully with the rules of art: only health claims, no reference to an illness. When a chemist advised a patient to use Danone to prevent the side-effect of diarrhoea, the Advertising Code Committee considered that to be an advertising expression (and therefore in violation of the Commodities Act due to prohibited medical claims). That was a shock in advertising land.

Luckily the Board of Appeal set things right again. Individual advice from a chemist to his patient is not advertising. There is only a case of that if there is a standard text with an advertising effect. If the chemist gave a scientific article to the patient that is also not advertising. The Advertising Code Committee was also hauled back into line on that matter: the article is not a public advertisement and neither is individual advice.

Ebba Hoogenraad

GDA: Guideline Daily Amount

Have you seen it yet? The new GDA icon can be found on more and more foodstuffs packaging in the Netherlands as well. GDA stands for 'Guideline Daily Amount'. This enables you to easily see how much energy, sugars, fat, saturated fat and natrium are in a product/portion and how this amount relates to the guidelines for a balanced diet.

There was already a similar indication for minerals and vitamins: the Recommended Dietary Allowance (RDA). Pursuant to European legislation, vitamins and minerals may only be listed on packaging if they provide a sufficient RDA percentage per portion.

The GDA is a joint initiative of the umbrella European and national organisation of the foodstuffs industry (CIAA and FNLI). Stating the GDA is not obligatory but a voluntary addition to the current statutory obligatory nutritional value declaration.



The GDA has meanwhile been implemented in 23 European countries. In the Netherlands there are at least 3000 products on which the GDA is mentioned on the shelves. It appears

to be a great success: research by the FNLI shows that 75% of consumers find the GDA a useful aid.

Kim Braber

Hoogenraad & Haak, advertising + IP advocaten is an independent boutique law firm in the Netherlands. We are specialists in advertising, intellectual property and product information (labelling, ingredients). We are creative litigators and advisors, who think along, with legal profundity and with human understanding. Allow us to present a creative solution at an early stage (*how can it be done?*).

This news letter contains general information and does not provide a full review of the topics covered. If you have any questions on a particular subject, we recommend that you seek specific legal advice. © Hoogenraad & Haak, advertising + IP advocaten

Hoogenraad & Haak, advertising + IP advocaten

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