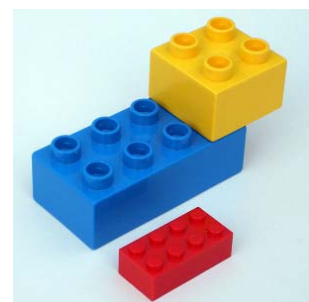

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LEGO blocks no longer protected in the Netherlands

Mega Blocks may sell blocks which are almost the same as the LEGO ones. That follows from the Dutch Supreme Court [decision](#) of 20 November 2009.

After the lapse of its patent LEGO has attempted to extend its monopoly on the building blocks in other ways. In the Netherlands LEGO found the Mega Blocks blocks a *slavish imitation*: confusion was supposedly caused by the comparison with the 'real' blocks. There was supposedly no confusion if they had holes in them or were striped but Mega Blocks showed with market research that no child wants 'other' blocks. A wall with holes or stripes is not a 'real' wall. The Den Bosch Court of Appeal saw this as a public need for a standard (in fact: the outward appearance of a LEGO block). Competitors must be able to sell blocks within such a standard now that the patent rights have expired. It is sufficient that the Mega Blocks name is printed in a different place on the block and that the colours are slightly different. The Supreme Court agreed with the Court of Appeal's view. In the Netherlands the LEGO blocks seem outlawed.



Maarten Haak

The online music agenda Heineken.nl

The music agenda on www.heineken.nl which changes daily continually presents a current and extensive offer of concerts and events. Photos of the artists are also depicted. Some concerts are sponsored by Heineken and some are not. Mojo Concerts is agent for U2, UB40 and Fleetwood Mac among others. Mojo filed a complaint with the Advertising Code Committee (ACC), inter alia due to misleading and unauthorised latching on.

The screenshot shows the Heineken.nl website interface. At the top, there's a green navigation bar with the Heineken logo and text 'maakt uitgaan nog leuker'. Below this are links for 'INLOGGEN', 'WORD LID', and 'JE WINKELMANDJE IS NOG LEEG'. A search bar is present with 'Zoek in de hele site' and 'ZOEK'. The main content area is divided into sections: 'HOME', 'MUZIEK AGENDA', 'SPORT AGENDA', 'SHOP', 'E-PROGRAMMA', and 'KROEGZOEKER'. A prominent 'MUZIEKTIP' section features a photo of the band De Staat and text: 'DE STAAT - 28 DECEMBER, DOORNROOSJE. Dit jaar moet het jaar worden van De Staat. Sinds september 2007 heeft... Bekijk'. Below this is a calendar view for the week of 07-dec-2009 to 13-dec-2009. The calendar shows events for each day: MAANDAG 7 december (Marilyn Manson), DINSdag 8 december (Dudok Kwartet), WOENSDAG 9 december (Paul McCartney: Good Evening Holland), DONDERDAG 10 december (Laura Jansen), VRIJDAG 11 december (Kyteman's HipHop Orkest en C-Mon & Kypski), ZATERDAG 12 december (Dance Classics XXL), and ZONDAG 13 december (Hush Hush). A sidebar on the right contains 'SERVING YOU' with a search bar, and 'Filters' for date, genre, city, and location.

The ACC rejected Mojo's complaint on all counts: it is normal that concert agendas have their own *look & feel* just like the Heineken site. Moreover the site clearly states that the agenda contains events *not* sponsored by Heineken. The public is aware of the phenomenon of online music agenda and therefore will not get the wrong impression. The use of photos and brand names in this context is also permitted. The Heineken look & feel is allowed.

Mojo et al lodged appeal. In the appeal, also the more principal question will be decided on: whether the self regulatory Advertising Code provides an authority to the ACC to rule on an alleged infringement of intellectual property rights, such as portrait and trademark rights. A decision in the appeal case is awaited in the first quarter of 2010.

Ebba Hoogenraad and Maarten Haak represent Heineken in this case.

Public privacy: Je maintiendrai!

This summer the Netherlands Government Information Service (NGIS) had a 'media moment' at Wassenaar beach. The Royal Couple posed with their children in the sun, complete with bucket and spade. The NGIS has drawn up a so-called **Media Code** for such media moments. This determines inter alia:

"The private lives of members of the Royal House will be respected; that is, they may be confident of being left in peace at times when they are not appearing publicly in one of their official positions. This provision therefore also applies to the members of the Royal House who are still minors."

A photographer from press agency The Associated Press (AP) was also present at the beach. The invitation had stated that anyone who came had to adhere to the Media Code. A week later another AP member photographed the family "in the wild" during a skiing holiday in Argentina. Four photos of skiing and abseiling princesses and a prince made it into the Dutch media. The royal family was *not amused*. Does their public role make them outlaws? The media promised not to publish any more photos but AP did not want to cooperate.



The Amsterdam Court agreed with the royal family. In *Caroline von Hannover* the European Court of Human Rights (ECHR) had already decided that the privacy of public figures is also protected. *Public privacy* therefore. A private picture may only be published if it contains a newsworthy fact or if it contributes to a public debate on a matter of social interest. The **Amsterdam Court** does not see a newsworthy fact in the holiday pictures or anything contributing to a public debate. Rather the photos serve to '*satisfy the curiosity of certain parts of the population*'.

The royal privacy bears more weight. The Court did rule however that the Media Code does not bind the media. This is significant for future media moments. In any way the claiming family shall be happy with the acknowledgment of this public privacy.

Daniël Haije

Advertising Code for Alcoholic Beverages tightened up again

The new Advertising Code for Alcoholic Beverages (ACAB) took effect on 1 October 2009. This means even stricter rules for alcohol advertising!

Alcohol advertising may still not target minors. An absolute prohibition on using ring tones is new as well as a list of youth magazines which may not be advertised in. The age check on websites has also been tightened: visitors now have to fill in their own date of birth. Asking whether the visitor is 18 or older is not enough. Further, alcohol advertising on sport articles, such as hockey sticks, balls, and rackets, is also prohibited. Hence an end to golf bags with an alcohol brand!

Situations which are explicitly prohibited for the topic 'social and sexual success' have been specified. No 'before and after' situations may be shown: no wallflower who is suddenly the Queen of the dance floor after having a glass of alcohol. Under these new rules it remains a challenge to make surprising alcohol commercials. For the new ACAB text check www.stiva.nl.



'That extra sparkle to your life'

Lucas Bols may still use the slogan "Coebergh Sparkle gives that extra sparkle to your life". The Alcohol Prevention Foundation (STAP) recently complained in vain to the Advertising Code Committee (ACC): STAP found that this suggested that you need Coebergh Sparkle to give an extra cheerful lift to your life. A life without this drink would supposedly be less exciting. Whether this is true or not, STAP in any case found that 'not drinking' was shown negatively here. This would mean the slogan violated article 2 of the Advertising Code for Alcoholic Beverages (ACAB). Lucas Bols argued that the slogan only refers to the sparkles/bubbles in the product; it is a sparkling drink after all. The ACC agreed wholeheartedly with Lucas Bols: abstention or moderate alcohol consumption is not put in a negative light, the slogan is not dismissive of non-alcoholic drinks in any way. Luckily not all fun advertising slogans are in violation of the ACAB!



Kim Braber (In the Coebergh Sparkle case Ebba Hoogenraad acted for Lucas Bols)

Well known mark in the Benelux = well known CTM? (PAGO)

Marks with a reputation are better protected than 'ordinary' marks. In June the European Court of Justice (ECJ) ruled in *l'Oréal/Bellure* that well known marks can act against followers who want to 'latch on' free of charge to the (famous) mark image. In October the Court also decided again that a Community Trademark (CTM) can easily be assumed to have a 'reputation' (*PAGO/Tirolmilch*). Trademark owners have won ground again.



Everybody in Austria is familiar with the figurative mark of a bottle of PAGO fruit juice with a full glass but outside of Austria it is barely known. The ECJ has now decided that Austria can apply as 'a substantial part' of the Community. Reputation in Austria causes that the mark applies as a CTM with a reputation in the entire Community. The ECJ



considered 'specific circumstances' but did not report what they were. Remarkable: if Austria with less than 2% of EU territory is already a 'substantial part' of the Community then the Benelux should be too.

Tirolmilch sold LATTELLA, a drink with a figurative mark consisting of a bottle and a full glass, only in Austria. If the product had also been sold in another member state the Court would have had to indicate whether any ban would have applied for the *entire* Community. From the CTM

Regulation it seems to follow that such an infringement ban cannot be restricted to those member states where the infringement takes place. Next year the ECJ shall finally resolve this issue in the case *DHL/Chronopost*.

From PAGO it seems to appear that a CTM with a reputation in the Benelux has extra protection from Poland to Greece. Is this a reason to greatly increase the marketing budget in one member state in order to have extra protection in one go in 27 countries? Let us await *DHL/Chronopost* first but the trademark holder friendly approach of the ECJ is indicative.



Maarten Haak

CANNABIS: a descriptive trademark for beer

Is the name of a potential product ingredient descriptive for the product itself? Even if the ingredient has not been used in the product? Then such name cannot be a valid trademark for the product. On 19 November 2009 the Court of First Instance (CFI) **decided** that CANNABIS cannot be a valid trademark for beer. The general rule is that signs which can describe the product, its purpose or a relevant characteristic of the product cannot serve as a trademark.



It was shown that several food products and beverages are made of a.o. cannabis (hemp). There are several beers on the market containing cannabis. The CFI holds that cannabis relates to one of the ingredients that *could* be used for producing beer. This causes that 'cannabis' is deemed to be descriptive for beer. It is not relevant that the beer produced by the applicant does not contain cannabis at all. It is still *possible* that this may change in the future.

Does this mean that the name of a product ingredient can never be registered as a trademark? If the trademark relates to a (potential) ingredient of the product, it can not be registered. So no CHOCOLAT voor biscuits and no LEMON for beverages.

There is another risk if regulatory rules prohibit the use of the ingredient for a specific product. Then the trademark may be considered misleading in itself. The consumer may think that the trademark does in fact describe a relevant ingredient of the product. But this is not necessarily the case: the 'average consumer' is 'reasonably circumspect' and can read from the label what ingredients have been used. When assessing whether a sign is misleading this rule of experience must be taken into account as well.

So watch out if you are about to register a (potential) product ingredient as a trademark. It may well cause trouble!

Kim Braber

Buma/Stemra Fair Play Music?

In October the Dutch collective copyright organisation Buma/Stemra published its new rates for digital music licences in a shiny brochure (illustration). Shortly after the fat was in the fire. It seemed that Buma/Stemra was going to collect a minimum rate of €130 for the *embedding* of copyright protected material, such as music videos on social networks such as Hyves. Pardon?

Meanwhile, Hyves has around 9 million users, many of whom upload music. In the public opinion paying for music is very '1994'. But paying €130 for music is Spartan. After the upheaval and a 'pithy meeting' of trade association VOICE, Buma/Stemra was not unaffected by the commotion. It abandoned its plan, at least for *non-business* websites. This includes uploading music to social network sites such as Hyves.

Now to the important legal question: is Buma/Stemra entitled to ask money for *embedding* music fragments? The Copyright Act and the Neighbouring Rights Act in general are not against (deep) linking on the internet - that has already been determined in case law. The key question is whether *embedding* can be seen as a relevant 'publication'. Opinions are divided on the matter. The Minister of Justice did give a clear signal to Buma/Stemra on 13 November in his answer to Parliamentary Questions:

"As long as it is not clear whether an embedded file is seen as a publication in the meaning of the Copyright Act, then the collection of payments for the use of such files must be handled most cautiously. (...) In a specific case the court shall have to assess whether there is a case of a new publication."

C'est le ton qui fait la musique. It must now be awaited whether Buma/Stemra does anything with this signal. Companies who embed music on their sites do not seem to be rid of Buma/Stemra yet.

Daniël Haije



Torrent site The Pirate Bay under arrest

Torrent site *The Pirate Bay* must cease facilitating the illegal exchange of copyright protected material via thepiratebay.org. All torrents referring to infringing materials must be removed. The three driving forces behind the site have even been held jointly responsible for the infringements which take place via the site on a large scale. That follows from the [interlocutory judgment](#) of the Amsterdam Court of 22 October in a case brought by copyright watchdog BREIN.

Users of this torrent website could upload a torrent (link) to protected material. If you click on it, the desired film is uploaded bit by bit via a network of computers from all over the world. The film does not pass through The Pirate Bay's server but goes directly to the requester. For this reason the Court does not see The Private Bay as a 'publisher'. The Pirate Bay did not get off scot-free however.



It seems that more than 90% of the best selling films and TV series in the Netherlands can be obtained via The Pirate Bay. The site also appears on advertising banners and on shirts and other products with its logo. By structurally referring to copyrighted material The Pirate Bay is promoting infringement and profiting from it. This is wrongful towards the entertainment industry represented by BREIN. Hence the torrents to protected BREIN material must be removed with 3 million euros of fines if The Pirate Bay does not execute the judgment properly.

Sites such as Mininova.nl (see our [NEWS 03/09](#)) and The Pirate Bay have frequently made the news lately. Downloading protected material from an illegal source is not yet an offence but if it is up to the Dutch Parliament it will become one. The Minister is working on a legislative proposal. This will bring an end to the era when anything could be downloaded problem free for private use.

Maarten Haak

Advertising or information? Recognisability for a product group

Even if one individual mark cannot be named, an informative article about a product group can still apply as advertising. In the *Swinglevend* case the publisher objected in vain on this matter to the Advertising Code Appeals Tribunal.

The articles about the product Q10 in *Swinglevend* are so solicitous for Q10 that the Appeals Tribunal deems them as advertising for (all) nutritional supplements for Q10 (irrespective of the brand). The publisher should therefore have clearly marked the article as advertising by using the word 'advertisement' or by changing the page format.



This decision shall cause a great deal of controversy. Many publishers will now have to think hard whether their articles are not de facto advertising for the entire product group. And if they are about foodstuffs no reference to an illness may be made in the article!

Advertising or information? Symptom advertising

One of the biggest legal key questions is whether a text is 'advertising' or 'information'. As soon as something is advertising there are countless legal



requirements entailed: no medical claims for health products, no advertising of medicines towards the public, the obligation to make the article clearly recognisable as advertising. That is why manufacturers of medicines often choose for 'symptom advertising' whereby only the phenomenon is referred to without actually

advertising the pertaining product. However the website www.erecstiestoornis.nl went too far. Just referring to the brands VIAGRA, CIALIS, LEVITRA and MUSE does not make the site advertising. Information can also be given to the public about erectile dysfunction as a health complaint. But in combination with targeted product information and direct reference to the brands the information limit is exceeded. This makes the website into advertising. How? The Appeals Tribunal says the magic word: symptom advertising must be used "reticently".

Ebba Hoogenraad

Advertising or information? Combination article + advertisement

The curtain has definitively come down for various adverts and editorial articles in Pharma Nord's 'Swinglevend' magazine. Even in appeal it was confirmed that an apparent editorial article about alternatives for sleeping disorders is advertising after all. Why? Assessment criteria are whether the article and the pertaining advertisement are placed next to each other, whether it visually forms one whole and whether there are referring characteristics. In this case the text '12 cents per day' appeared twice in the 'article' and the same text was also used in the advertisement for Bio-Melatonine Complex. Therefore be careful with a characteristic catchword that appears both in an advert and in an 'editorial' placed close to it.



Ebba Hoogenraad and Kim Braber represented the Inspection Board for the Public Promotion of Medicines in the Swinglevend case.

Regulation on claims: 'recommended by experts' = prohibited

You may no longer just quote an expert in an advertisement for health products or foodstuffs. Article 12 of the Claims Regulation prohibits referring to recommendations by individual doctors or professionals in the area of health care.



This prohibition is fairly wide. Anyone thinking that only referring to an expert *by name* in an advert is not allowed ('recommended by dietician Mrs Jansen') must amend his campaign strategy. In the *Swinglevend* appeal case it was decided that any reference to an expert is prohibited. The Appeals Tribunal explains that the public attributes extra authority to an advert where an expert is quoted, irrespective of whether the consumer knows who this expert is.

This appears to be in line with the Claims Regulation: only references to officially recognised health organisations are allowed such as the Heart and Kidney Foundation (article 11). All other references in advertisements are prohibited. No white coats with stethoscope and no texts such as 'on the advice of a doctor', 'recommended by an expert', or 'the dietician advises product X'.

Ebba Hoogenraad

New Advertising Code for Cars



You may have seen them already: car advertisements clearly showing consumption data. In our previous **NEWS** we already announced it and as of 1 October 2009 the new Advertising Code for Personal Vehicles took effect. It specifies precisely how the consumption data must be depicted in advertisements for new cars. And it cannot be fiddled!

The average fuel consumption and CO2 emission must be indicated horizontally, at the bottom and separately from the advertising message and in an easily readable font. Even though an 'illegible' font was never allowed, it is now specified how large the letters must be per advertisement. Websites are also included. The site of a car brand must have an overview page stating all the use data of all models. The consumption data must also be listed on all pages where the model is depicted and you must be able to click through to the overview page from any page. If this is not

enough the statement must also be on banners! Car advertisers can find the new Advertising Code for Personal Vehicles on www.reclamecode.nl.

Kim Braber

... and a good wish for the next year!

First of all we would like to thank the growing group of subscribers to our quarterly **NEWS** for the positive feedback on the first three editions. Anyone else who would like to receive our **NEWS** can subscribe on hoogenhaak.nl/newsletter.

Looking forward, we wish all of our clients, referral firms and friends a merry Christmas and an inspiring new decade.

Ebba Hoogenraad and Maarten Haak

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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