

Bollywood: Hindulife must rectify	1
Nijntje (Miffy): outlawed as parody?	2
A leader in style – Obama's portrait in advertising	3
Slogans can be a mark after all	4
Borrowing money does not cost much money!	5
Strongbow strongly refreshing cider: 'aaaaaaaaahhhhhh'	6
Buma/Stemra vs PRS – The one-stop-shop in a deadlock	7
A leak in selective distribution: profiting from breach of contract?	8
Use of a Community Trademark in one member state: 'normal use'?	9
Exit cookies advertising at after-school care	10
Regulation on Claims: drama of timing health claims	11
Exit German prohibition on purchase obligation for games of chance	12

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### Bollywood: Hindulife must rectify

The Bollywood film industry is now bigger than Hollywood. Productions are large and professional (with a few **exceptions**). The recent box office successes *Slumdog Millionaire* and *Three Idiots* show that these films can count on a large audience even outside of India. The leading movie theatre Pathé has meanwhile reserved a screen permanently for Bollywood films in each of the Dutch cities of Amsterdam, Rotterdam and The Hague.



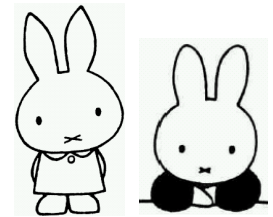
Reliance is one of India's largest film companies. End of 2009 the Dutch online magazine **Hindulife** wrote that Reliance would distribute illegal copies of big Bollywood films. Film piracy is a huge problem in Bollywood and reliability is crucial. Reliance therefore also essentially acted against Hindulife's accusations. The **Amsterdam Court** in interlocutory proceedings found the accusations to be false: Hindulife could not substantiate them at all and was ordered to make a clear rectification of the article.



*Maarten Haak and Daniël Haije assisted Reliance in this case.*

## Nijntje (Miffy): outlawed as parody?

Have you seen them on blog forum [Punt.nl](#)? Seven pictures of Miffy as DJ at a trance party, completely stoned or high on a "line". Mercis manages the commercial rights to Dick Bruna's world-famous Miffy, in Holland known as 'Nijntje'. It wanted to prohibit these drawings on [punt.nl](#) by invoking the copyright, the word mark NIJNTJE and the two Nijntje figurative marks (the two Nijntjes here on the right).



The [Amsterdam Court](#) in interlocutory proceedings decided on 22 December 2009 that five of the seven drawings were allowed as admissible parodies. The reworked Nijntje drawings had acquired a humorous aspect with a different tenor due to



the text. In the event of a parody it also counts whether there is confusion amongst the public. There is no confusion: children do not check [Punt.nl](#). Nijntje with a line of Coke (here on the left) is far from Bruna's real Nijntje according to the court.

The other two images are not distanced enough from the real Bruna drawings however and these two do not apply as a parody. Strangely enough the court also sees *trademark infringement* here: the pictures do not resemble the NIJNTJE word mark and the figurative marks at the top right of this article.

For 'nijn - eleven' (here on the right) I do not see the resemblance at all. Bruna's plane with Nijntje has been copied exactly but this does not mean that the drawing resembles the Nijntjes which are registered as a mark. Also here the question is whether trademark law applies to non-commercial expressions on a blog site but the court did not make a point of this: hence infringement.

Mercis is hoping that all images will be prohibited in appeal. But I wonder whether 'nijn - eleven' ultimately will not also just apply as admissible parody.



*Maarten Haak*

## A leader in style – Obama's portrait in advertising

Barack Obama: a presidential Marlboro man. In January the world leader unwillingly formed the *eyecatcher* of an enormous advertisement by



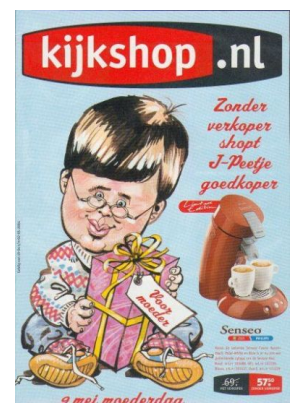
Weatherproof on Times Square, New York. Would this have been allowed in the Netherlands?

In the Netherlands a portrait cannot simply be used in advertising. The person depicted can appeal to his portrait right if he has a privacy interest or a commercial interest. The privacy interest is violated if by using someone's portrait it could be assumed that the person is endorsing the product which is being advertised. Besides privacy interest celebrities also have a commercial interest. Portrait use without consent violates that interest because the celebrity cannot earn from his popularity.

Well-known politicians have a special position. Generally they cannot object to the use of their portrait and advertising pursuant to a privacy interest – the supposition that the politician endorses the product in question is a bridge too far. Well-known politicians also have no commercial portrait right because they are not expected to capitalise on their popularity. Therefore it is far more difficult for a politician to object to the use of his portrait in advertising.

Some courts have ruled that merely the association between the politician and a product justifies successful objection but in our opinion that is incorrect. Weatherproof quickly removed the advertisement after a cross letter from the White House. Not a point, the action had already had its effect. **Better being talked about, than not being talked about.** If the Dutch court were to apply the legal rules correctly then Obama would not get his way.

*Daniël Haije*



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## Slogans can be a mark after all

That is what the EU Court of Justice decided on 21 January 2010 in the [case](#) on the slogan VORSPRUNG DURCH TECHNIK, a pay-off of [Audi](#). Such slogans were always refused as trademark because the public would not see a mark in them: nice advertising but not for a specific service or product.

The Court of Justice made quick work of this refusal policy of the [OHIM](#) which was also applied by the [Benelux Office for Intellectual Property](#). Slogans which are not descriptive for the goods and services in question can still have distinctiveness. As an example the court refers to slogans which *"possess a certain originality or resonance, requiring at least some interpretation by the relevant public, or setting off a cognitive process in the minds of that public."* Not exactly clear criterion, there is room for interpretation.

Slogans can therefore be a mark as long as they possess word play or if the slogan can be interpreted imaginatively and unexpectedly. This is important for the advertising sector and all companies who wish to protect 'their' slogan! So does the [GVR slogan register](#) still have added value? Often it does.



////////GVR//////SLAGZINNENREGISTER////

It is therefore always a good idea to examine (urgently) that register before using a slogan. A GVR slogan registration can still be important as well as or instead of a trademark registration.

*Maarten Haak*

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## Borrowing money does not cost much money!

The obligatory warning for credit advertising is a thorn in the side for advertisers. The warning even has to be given for car loans with 0% interest. For example at Christmas a car brand has a fun radio commercial in the form of a rhyme. This



commercial is about financing. And hence the jolly rhyme must end with the evil words "Watch out! Borrowing money costs money".

It is not surprising that some creative people amongst us take it upon themselves to liven up this warning now and again. Luckily the Advertising Code Authority (RCC) seems to appreciate this humour - even insofar as the DSB Bank is concerned. Before the bankruptcy the bank joked around with the obligatory warning in a television commercial for lenen.nl ('borrowing.nl'). While the warning was shown during the entire commercial the voice-over said:

*"But watch out, borrowing money costs money". (...)*

*"Yes but of course we have taken that into account.*

*As you see, with lenen.nl it's possible."*

The RCC does not see anything wrong with this. The warning meets the statutory requirements and was visible during the entire commercial. Moreover the RCC does not find that the commercial 'negates' the warning. This seems to be good news for advertisers. As long as you meet the requirements you can make a joke!

*Kim Braber*

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### Strongbow strongly refreshing cider: 'aaaaaaaahhhhhh'

Another bead on the chain of a series of decisions on *refreshing* and *fresh* cider. The Strongbow television commercial is allowed. The commercial shows three men who after taking the first gulp of Strongbow cider stand still as if in a trance and call out 'aaaaahhhhhh' for a lengthy period of time.



According to the Advertising Code Authority (RCC) this does not suggest that their physical and emotional performance is improved by drinking. The Alcohol Prevention Foundation (STAP) has already addressed various variants about the word "refreshed". The conclusion of all these decisions: if "refreshed" refers to the fresh taste of cider the pay-off is allowed but as soon as improved physical performance is suggested then the Advertising Code for Alcoholic Beverages has been violated. In the context of this television commercial there is no case of improvement in performance. The body language and the lengthy 'aaaaahhhhhh' of the three men are very clear: it concerns Strongbow's fresh taste. STAP has not filed appeal. But one thing is sure; STAP shall undoubtedly present many other "refreshing" varieties on the market to the Advertising Code Authority

*Ebba Hoogenraad and Kim Braber handled this case for Heineken.*

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## Buma/Stemra vs PRS – The one-stop-shop in a deadlock

Buma may not offer licences for online music for the PRS repertory outside of the Netherlands. In January the Amsterdam Court of Appeal upheld a decision from the District Court of Haarlem with this effect.

In the offline world Buma represents the entire world repertory. Based on an agreement from 1973 with foreign sister organisations Buma may offer licences for exploitation of the world repertory within a demarcated area: The Netherlands. So what about *online* music use? According to Buma online music use exceeds Dutch territory by definition. Therefore the area demarcated in the agreement of 1973 cannot be applicable to online music use.

Burma/Stemra dropped a bombshell and gave pan-European licenses to the online music shops eMusix and Beatport for the world repertory (including the repertory of PRS, the British sister organisation of Buma). PRS found this unfair because this violated the old agreements. PRS summoned Buma and was put in the right in two instances.

Back to the offline world. In the summer of 2008 the European Commission decided in the so-called CISAC case that the coordination of territorial demarcations by Buma and its sister organisations had a competition restricting effect. The European Commission has required Buma and its sister organisations to review their agreements. An arrangement for online music use will probably also be made.

The one-stop shop for pan-European online music therefore glimmers on the horizon but still remains music of the future.

*Daniël Haije*



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### A leak in selective distribution: profiting from breach of contract?

Alfa Romeo has a selective distribution system. Its dealers are bound by strict dealer standards. They may not sell new Alfa Romeo passenger cars to non-recognised resellers. Via a leak in the distribution network Multicar buys Alfa Romeo cars and sells them on to the public. Multicar knows that the dealer may not sell the cars to it but is not bound by the standards itself.

Alfa Romeo believes that Multicar is profiting wrongfully from a leak in the distribution system. The Supreme Court followed the mark holder and decided on 8 January 2010 that this method of action applied as unfair competition. The Supreme Court distinguishes between the position of the dealers and that of the importer.

Multicar's conduct can be wrongful towards the dealers if it:

- (i) consciously benefits from the breach of a dealer,
- (ii) by trading the cars competes with the dealers and
- (iii) in doing so profits from the poor position of these dealers: they must adhere to the selling on prohibition in any case.

This manner of action in addition can also be unlawful towards Alfa Romeo if it undermines the distribution system. For example because recognised dealers evade their obligations or if they no longer wish to be a recognised dealer or if a third party no longer wishes to join the system.


Alfa Romeo's claims were dismissed in lower instances. At the time the decisive issue for the Court of Appeal was that Alfa Romeo had chosen the selective distribution system itself. The harm caused by a "leak" was therefore also for the account of the recognised distributors, hence not a wrongful act. The Supreme Court does not believe that the negative "effects" of this choice should be for the account of the recognised dealers. This means that leaks in a selective distribution system can now be dealt with far more easily.

*Kim Braber*



## Use of a Community Trademark in one member state: 'normal use'?

Trademark agency Onel is only active in the Netherlands. However the European ONEL mark (CTM) is protected in the entire European Union. Hence Onel may prohibit others *outside* of the Netherlands from using the ONEL mark. In order to



The screenshot shows the website for 'Onel trademarks'. The logo 'Onel trademarks' is displayed in a large, bold, black font. Below the logo is a navigation menu with three items: 'Home', 'Wie zijn wij', and 'W:'. The text to the right of the screenshot discusses the requirements for retaining a monopoly on a Community Trademark, specifically mentioning 'genuine use' in the European Union within five years of registration.

retain that monopoly the owner must use such a Community Trademark "genuinely" in the European Union within five years of registration. Otherwise the mark can lapse. But what does "genuine use in the European Union" entail precisely? Is use in one member state enough or should a mark also be used over the border?

The [Benelux Office for Intellectual Property \(BBIE\)](#) **decided** on 15 January 2010 that the Community Trademark ONEL has not been used genuinely. Use that is limited to the Netherlands is not sufficient to apply as "genuine use in the European Union".

This decision came as a real bombshell. A great deal of 'local' Community Trademarks would suddenly lapse if they were only used in one member state. The [OHIM](#) found it necessary to hastily report that use in one member state is sufficient to uphold a Community Trademark. For opposition at European level for the time being other criterion apply then at the BBIE in the Benelux. It is a good thing that ONEL appealed. This case is crying out for a principle decision.

*Maarten Haak*

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### Exit cookies advertising at after-school care

For years the battle has been ongoing between the government, the Consumers' Association and the manufacturers of foodstuffs. Image: can food advertising be targeted at children under the age of 12?

The Consumers' Association has lost the battle for the time being because the prohibition only applies to children under the age of 7. The Ministry of Health, Welfare and Sport threatened statutory measures if the foodstuffs industry did not impose voluntary restrictions.



Since 1 February 2010 the tightened **Advertising Code for Foodstuffs** took effect containing an advertising prohibition for children under the age of 7. Another new point is that all foodstuffs advertising is forbidden at day-care centres and after school care. That was already the case at primary schools. The code has also been brought into line with the European **Claims Regulation**. Food claims such as 'more fibre' and 'less sugar' are only allowed if they are listed on the list of permitted food claims. The Consumers' Association, one of the parties to the Dutch Advertising Code Foundation, refused to sign the new code because it does not go far enough. However the code does generally apply.

Will we now be flooded with advertising targeted at children from the age of seven? Eleven large players on the market (Coca Cola, Burger King, Nestlé, Mars, Kraft, Danone, Ferrero, Pepsico, Unilever, General Mills and Kellogg) have voluntarily undertaken not to advertise in magazines or on radio and TV channels which are targeted at young people under the age of 12 unless the product is nutritionally responsible.

*Ebba Hoogenraad*

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## Regulation on Claims: drama of timing health claims

The European **Claims Regulation** raises more questions than it answers. Legal inequality is also imminent. These were the conclusions during a symposium *'Regulation on claims: health profit or loss?'* organised on 21 January 2010 by the foodstuffs industry and the health products industry.

Last autumn the EFSA assessed the first 523 health claims. The standard is high: only a small number of claims are deemed to have been scientifically proven.



The Regulation on Claims determined that after advice from the EFSA the European Commission should have dealt with all claims before 31 January 2010. A hopeless mission: in total more than 4000 claims were filed with pertaining scientific files for assessment. End of February 2010 **the EFSA published** that it had assessed a new batch of 416 claims. The result is even worse: only 9 out of 416 claims have been approved. As soon as the European Commission has taken a final decision, and part of the list with admitted and rejected claims is published, the curtain will fall for the manufacturers in question. Six months later these claims may no longer be used!

Meanwhile serious political pressure is exercised in order to have the publication of the list of assessed claims suspended until the EFSA has assessed all 4000 claims. Otherwise there is a danger of distortion of competition: negatively assessed claims will be prohibited whereas the undecided claims may only have their turn some two years later. Until that time they are permitted. Does politics have that much to say? Nobody knows. Meanwhile everyone is anxiously awaiting which health claims will bite the dust in the next batches.

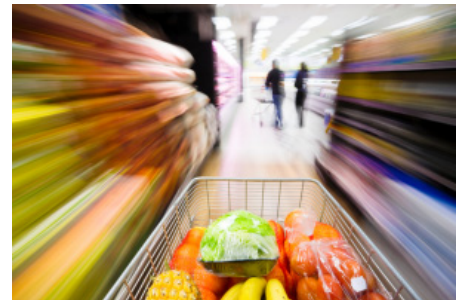
During the symposium it became clear that the Regulation on Claims unintentionally appears to work against innovation in Europe. Because of all the restrictive measures large companies will focus on markets outside of Europe. High time for a good impact assessment to obtain insight into the social consequences of the Claims Regulation!

*Ebba Hoogenraad*

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## Exit German prohibition on purchase obligation for games of chance

European member states may absolutely not prohibit games of chance or competitions which are linked to a purchase obligation. The EU Court of Justice decided this this year in the [case](#) on a promotional action of Plus, a German supermarket. Plus ran the promotion with the name 'Ihre Millionenchance'. The public was invited to shop at Plus and collect bonus points. The consumer could participate in a free draw of the German Lottoblock with 20 points. Such a promotion would have been permitted in the Netherlands but not in Germany. The Plus action was found to violate a German law which prohibits a purchase obligation for games of chance.



According to the Court of Justice the German law is in violation of the Unfair Commercial Practices Directive. Games of chance or competitions which are linked to a purchase obligation are not listed on the 'blacklist' of the Directive. Because the Directive only harmonises regulation on unfair commercial practices in the European Union individual states may not make stricter rules. Hence German law in this matter may no longer be upheld. The German court may examine whether the action in this concrete situation entails an unfair commercial practice.

The admissibility of the German prohibition had been in doubt for some time. Luckily there is now clarity. Organisers of games of chance on the German market may now make participation dependent on a purchase obligation - obviously provided that the games of chance further meet the rules of the Unfair Commercial Practices Directive!

*Kim Braber*

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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?*).

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*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**

Ebba Hoogenraad, partner (advertising + product information)

Maarten Haak, partner (intellectual property)

Daniël Haije, associate

Kim Braber, associate

Eva den Ouden, associate (as of 1 april 2010)

**office**

Emerald House

Jozef Israelskade 48-G

Amsterdam, the Netherlands

t +31 (0)20 – 305 3066

www.hoogenhaak.nl

**post**

PO Box 76780

1070 KB Amsterdam

e [info@hoogenhaak.nl](mailto:info@hoogenhaak.nl)

f +31 (0)20 – 305 3069

chamber of commerce 34314579