

New associate: Eva den Ouden	1
Use of third party's brand permitted as AdWord (Google/Louis Vuitton)	2
Trademark infringement? No complaint under the Advertising Code	3
Under 16? Not a drop	4
Is scrolling necessary? Do not be misled!	4
FTD / Eyeworks: A website goes to court	5
Cruijff did not get anything for his portrait	6
Freedom of expression limited – publication prohibition for rapper AWA	7
Not satisfied: no shipping costs!	8
It's green, it's organic: a new organic EU logo	9
No European design protection for Crocs	9
First judgment General Court on cancellation RCD (PepsiCo/Grupo Promer)	10

New associate: Eva den Ouden

In April 2010 Eva den Ouden joined our firm as a lawyer. Eva studied communication science and law at the University of Amsterdam,



specialising in intellectual property. In 2008 she started work as a lawyer in the intellectual property department of a large international law firm. At our firm Eva will be working in all areas: advertising law, intellectual property law and product information law (ingredients, health claims). Eva is an enthusiastic lawyer, advising practically, feasibly and clearly. She

has a passion for sport, particularly for running.

Use of third party's brand permitted as AdWord (Google/Louis Vuitton)

Can you use a third party's brand as AdWord? The Court of Justice finally gave clarity in the case *Google/Louis Vuitton*. Anyone searching for Louis Vuitton on Google saw a certain ad for fake bags. And a travel agency had used the brand name of a competitor as AdWord. The text of the ad did not show the actual word but it was shown when searching for the brand.

The outcome: using a third party's brand as AdWord is permitted in principle. There may not be any likelihood of confusion and it should not be difficult for the 'average internet user' to ascertain from the advert with link whether or not the advertiser is 'economically connected'

with the trademark holder, for example by a license agreement. Moreover if it concerns a *reputable* trademark, the use of the AdWord may not give the advertiser any 'unfair advantage'. The Court of Justice did assume such an advantage in the use of the famous brand 'Louis Vuitton' as AdWord for fake Vuitton bags. It was explicitly prohibited due to the *repute* of the brand. This implies that an *unknown* mark-AdWord cannot be prohibited, as long it is clear that the mark owner has nothing to do with it. The advertiser has won ground.

The decision is most profitable to Google as well. Google is seen as an internet service provider with limited liability. Google is not responsible for the advert content but the advertiser is. Google only has to remove the ad after a founded complaint from a trademark owner according to a proper notice and takedown procedure. Google is only liable if it does not act quickly enough after a report or if it is too closely involved with the content of the advertisement, for example due to the selection of keywords.

In the run-up to this decision any trademark owner in Europe could block its trademark as AdWord. Outside of Europe this is only possible for *visible* use in advertisements. Google will now employ a worldwide policy: mark blockades only for visible mark use. The use of mark AdWords will greatly increase. Anyone looking for a brand product will now also see a few alternatives.

Maarten Haak



Trademark infringement? No complaint under the Advertising Code

Word is out. Complaints about complicated mark and copyright infringement in principle do not belong with the Advertising Code Committee (RCC) but with the



civil court. This includes unlawful act, like inadmissible profiting from the efforts of the competitor. So it appears from a fundamental opinion from the Appeals Board about the

online music agenda [Heineken.NL](#). Heineken announces hundreds of concerts and musical events with a brief description and photo. Mojo Concerts complained to the Advertising Code Committee about the use of photos of 'its' artists (including U2, Fleetwood Mac and Eros Ramazzotti). Announcing U2, Lowlands and the North Sea Jazz Festival moreover would infringe on the same trademarks.

This complaint was rejected in both instances (also see our [NEWS No. 4/2009](#)).

Mojo viewed the asserted mark and copyright infringements as a violation of article 2 of the Advertising Code: advertising may not *be in violation of the law*. Heineken successfully asserted that 'violation of the law' has a limited interpretation. It must concern a statutory provision that advertising must comply with in the interest of the receiver of the advertising, such as rules to guarantee specific standards such as honesty, decency and truthfulness. The textbook example is the statutory prohibition of deception. Brand or copyright infringement or a tort only gives the entitled party *authority* to act. Infringement on a right itself is not enough to constitute 'in violation of a statutory standard'. At most this infringement can be included in the issue of whether the advertising possibly violated the Advertising Code for *other* reasons, for example the rule that advertising may not be misleading.

Substantive discussions about complicated (often very factual) brand or copyright infringements or unlawful act do not belong at the Advertising Code Committee but at the normal court. The entitled party can only complain to the RCC about 'manifest' infringement – so with a high burden of proof. And [Heineken.nl](#)? The green colour may be used without further ado: Heineken clearly states that the agenda contains sponsored and unsponsored events, hence is not misleading about its role vis-à-vis the artists. Heineken may publish an online music agenda.

Ebba Hoogenraad and Maarten Haak handled this case for Heineken

Under 16? Not a drop

Again a change in alcohol land. Since 5 March 2010 all new alcohol advertising for weak alcoholic drinks (less than 15%) must bear the slogan 'Under 16? Not a drop'. The old slogan 'Alcohol under 16, certainly not' has been relegated to the past. 'Under 16? Not a drop' is a joint initiative by the government, civil society organisations and the business sector. The aim is to support parents in giving children a clear limit when they are not yet 16. There is a transitional period of six months for print advertising. There you may still see the old logo up until 5 September. The logo must be shown on the left-hand side of the picture for five seconds on television and in the cinema. If you want to know the font and where the slogan/logo must be printed: take a look at the new text of Article 31 of the [Advertising Code for Alcoholic Beverages](#). All the playing rules are there!



Kim Braber

Is scrolling necessary? Do not be misled!

When selling products on the Internet all conditions must obviously be stated: what can the consumer buy at what price. The purchaser may not be put on the wrong track. Leaving out essential information is misleading as is skating over restrictive conditions in minute letters which are 'illegible'.



It goes further than this however: if information can be found on the website but only by scrolling down to the bottom of the screen this is misleading. This was the ruling of the Advertising Code Committee for an offer from the mobile phone operator Hi for an internet package: on the screen you could see: the description of the calling package, the price as well as a button 'purchase'. Hence the consumer could think that this was all relevant information. It only became clear that the price outside of the calling package was 0.30 per Mb once you had scrolled all the way down to the bottom. So an appeal to website builders: put all the important information on the first screen, without scrolling, or refer (visually) to the rest of the page.

Ebba Hoogenraad

FTD / Eyeworks: A website goes to court

A copyrighted work, such as a film, may not be "published" without permission from the copyright holder. At the beginning of June a [decision](#) from The Hague Interlocutory Judge caused commotion. Providing information about files by FTD also applied as 'publication' of these files. What was going on exactly?

Via www.FTD.nu internet users can easily find files on Usenet by so-called 'spots' (a spot provides information about files, including the file name). FTD had Eyeworks on its back because the film 'Komt een vrouw bij de dokter' was being downloaded frequently via its service. According to the court FTD played a key role. It is 'the maker, owner and manager of a key providing access to copyright protected material'. This meant that FTD was ensuring that the public could see the film and was making it public. It is remarkable that the court did *not* set the condition that FTD also actually had the work at its disposal. FTD was not passing on the film itself but only giving information about the file. Yet the Court sees this as a form of publication requiring consent from the copyright holder. By doing so the Hague Judge derogated intentionally from previous rulings in this area.



The FTD ruling does not seem to be isolated. A couple of days previously a different Hague Interlocutory Judge gave a [ruling](#) in a dispute between cable companies UPC and Ziggo and telecom provider Tele2. Here, the direct supply of television images *by the cable companies* to Tele2 clients was considered a publication *by Tele2*. This was because only Tele2 determines whether its

TELE2

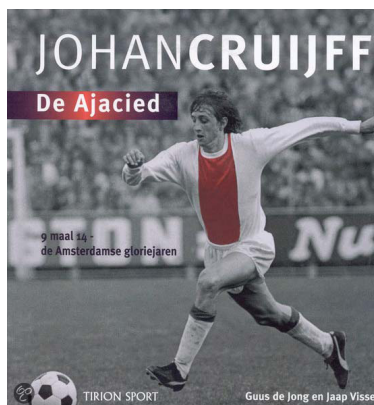
customers receive the images or not, it does hold the key in fact. Tele2 does not pass on the content but – so to the Court holds – makes them public.

The rulings elaborate on the decision [Rafael Hoteles](#) from the Court of Justice. That case was about a hotel that put televisions in each room and hence, according to the Court, was making public. The FTD ruling is a major setback for websites making access to films, music and such like possible. FTD has already announced that it will appeal but the entitled parties are 1-0 ahead.

Daniël Haije

Crujff did not get anything for his portrait

A book of photos of Johan Crujff in his Ajax years (from 1964–1973 and 1981–1983) is seen by the District Court of Amsterdam as an *'adequate way of informing the public about a specific part of Crujff's sporting career and providing the younger public with a time frame'*. Crujff was



unable to prohibit the publication of this book, a picture story with lots of photos and little text. He also received no payment for it.

The parties agreed that Crujff has 'a popularity that could be cashed in on'. In principle this means that Crujff has a reasonable interest in objecting to the use of his portrait. The District Court then weighed up Crujff's reasonable interest arising from his popularity and the publisher's interest to receive and provide information and images (Article 10 ECHR). The publisher's freedom of information weighed heavier in this case.

The Court also considered that the photographs in the book were made during Crujff's active football period in the scope of free access to information. At the time Crujff knew that he was exposed to this. He did not pose for the photos. In addition the public will not think that Crujff worked on the making of the book so that his good name or reputation are not damaged. The Court also does not assume infringement on Crujff's trademark rights. There is no use of a mark for a product but use as the title of a book. Moreover the publisher has a valid reason to use the designation 'Crujff'. How else can they indicate that the book is about Crujff?

Conclusion: Crujff gets nothing for his name and fame.

Eva den Ouden

Freedom of expression limited – publication prohibition for rapper AWA

The rapper AWA may not release his song “*Ben een crimineel*” [I'm a criminal] and its video clip because he is in a forensic hospital. The Amsterdam Interlocutory Judge decided this on 23 March 2010 in injunction proceedings.

In 2004 AWA had severely maltreated his girlfriend at the time. He was sentenced to one and a half year's cell and hospital order with compulsory treatment for this crime. AWA recorded the number *Ben een crimineel* in the forensic hospital in order to expose abuses in the hospital. A journalist from Revu magazine found the recording in his letterbox and passed it on to a record company. The company wanted to release the rap via iTunes. Moreover a video was recorded outside the clinic showing photos of AWA.

His ex-girlfriend found out about the plan in a Revu article. AWA, the record company and Apple received a writ of summons where the ex-girlfriend demanded prohibition of the intended publication. The State of the Netherlands and the forensic hospital supported the claimant in the proceedings: publishing a rap recorded in a forensic hospital is not in line with the regime applicable to forensic patients.

AWA did have an interest in being able to express criticism about abuses in the forensic hospital. The court weighed this up against the interest of the ex-girlfriend to be left in peace after the abuse. The interest of the State and the forensic hospital were also weighed up: they do not wish the release of the rap to give society the wrong impression about forensic patients.

AWA drew the short straw. His right to freedom of expression is limited by the forensic hospital regime he is subject to. Moreover he can bring attention to any abuses in alternative ways. *Fight the power*, but not like this.

Daniël Haije



Not satisfied: no shipping costs!

Good news for online shoppers. If you are not satisfied with a purchase you may return it and get your money back. This means you also do not have to pay the cost of the original dispatch. This was the decision of the European Court of Justice in a [case](#) about the German mail order company Heinrich Heine.



Dissatisfied Heine customers who used their 'right of withdrawal' had to pay the sending costs themselves. This was in the Heine small print. According to the Court this violates the Distance Selling Directive. This directive

regulates for the entire European Union that the consumer may withdraw from a distance contract within 7 working days *free of charge*. Any consumer sending the purchase back therefore does not have to pay the costs of sending the product. The vendor can only ask for payment for the return costs.

By this decision the Court clarified the rules of the directive implemented in the Netherlands in the Distance Selling Act. A large number of webshops will have to amend their sales terms and conditions! Websites affiliated with the Dutch Home Shopping Organisation were already good for consumers: the condition for membership was that only the direct costs of return could be charged.

Kim Braber

It's green, it's organic: a new organic EU logo

A European logo has been designed for products which may bear the official designation 'organic' according to European legislation. From 1 July 2010 onwards new organic products will bear a green ornamental leaf, consisting of the well-known 12 stars. The logo is the result of a European competition between graphic design students. The public voted online for the best logo. This logo must be depicted on all packages in this specific green colour according to a prescribed format. Luckily for the manufacturer a black and white logo may be used if colour print is not used. May the manufacturer's own symbols be used on the packaging referring to organic farming? Yes, provided this does not change the meaning of the community organic logo. In other words: does not cause confusion. The logo is protected as a Benelux collective mark. For existing products there is a transitional period: stock may be sold off. Recognisability will soon be a fact for the food industry and the consumer: one organic logo for real organic products.



Ebba Hoogenraad

No European design protection for Crocs

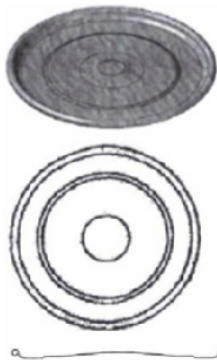
A design registration is not valid if the design application was filed more than a year after it was made public. OHIM is very strict about this as evidenced by the decision of the Board of Appeal of OHIM's Cancellation Division in the case on the CROCS 'Cayman' design. This famous shoe had already been presented before the relevant date at a boat show in Fort Lauderdale (USA) and had already been for sale for several months on Crocs.com. Moreover 10,000 items had already been sold in nine months in the United States. The OHIM Board of Appeal found that *each* of these circumstances caused that the design was no longer novel when filed. Hence every reason for users of designs to think properly about protection *before* a market introduction, however limited. Many other registered designs will be found actually void. OHIM's cancellation division is going to be busy.



Maarten Haak

First judgment General Court on cancellation RCD (PepsiCo)

PepsiCo's Registered Community Design (RCD) for a kind of flippo ('rapper', depicted left) was cancelled. The General Court holds that it does not cause a different overall impression on the 'informed user' than an older RCD owned by Grupo Promer (here on the right). In its first **judgment** on the validity of an RCD the General Court clarifies several definitions at stake in any design infringement case.



The 'informed user' is not a manufacturer or vendor of rappers, but a child aged 5-10 and a marketing manager of products that are marketed using rappers. These users are familiar with rappers and this kind of promotional gadgets. It is their perspective that determines whether a design makes a different overall impression.

The Court also throws light on the term 'different overall impression'. Flat metal discs had already been used throughout the sector; it was difficult to stay away from this usual shape. The Court holds that commonly used banal features will not attract the user's attention and must not be taken into account in the comparison. This is remarkable: I would think that also such common features should put weight in the scale, however not much.



The informed user does not pay attention to features caused by the design's function or by other statutory requirements (e.g. safety, fitness to be added to other products). Here the edges were rounded for safety reasons and the product must be cheap which also restricted the designer's freedom. Features that were imposed by these restrictions do not affect the overall impression of the design.

Yet particularly features where the designer did have freedom draw the user's attention and may produce a different overall impression. The more the designer's freedom was restricted, the smaller the differences with older designs may be to still produce a different overall impression. This last consideration seems to save PepsiCo, as its rapper contains three circles and is curved where the older RCD of Grupo Promer has only one circle. But the informed user cannot easily perceive the curvature, so that feature falls out as well. The remaining difference does not produce a different overall impression. There the curtain fell for PepsiCo's RCD after all.

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

Ebba Hoogenraad, partner (advertising + product information law)

Maarten Haak, partner (intellectual property)

Daniël Haije, associate

Kim Braber, associate

Eva den Ouden, associate

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

f +31 (0)20 – 305 3069

chamber of commerce 34314579