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A single channel for copyright licensing

Good news: it is now possible to arrange the use of music, visual footage and text in just one place via www.mijnlicentie.nl. This digital office is managed by Buma and Sena (which handle the use of music), Videma (use of TV footage) and

MIJN LICENTIE NL

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Stichting Reprorecht (use of copies from books, magazines and newspapers). Entrepreneurs can purchase, view and manage their licenses via mijnlicentie.nl. It is also possible to request a single (electronic) combined invoice for Buma, Sena and Videma. To arrange authorized use of photocopies of copyright-protected works, an automatic link is provided to the portal of Stichting Reprorecht,

the Repographic Reproduction Rights Foundation, which went online in 2010.

This makes it much easier and more transparent to request and manage licenses. But Beware: only these four organisations cooperate through mijnlicentie.nl. For example, one who intends to publish a music CD, should also contact Stemra. So attention remains needed.

Daan van Eek and Maarten Haak

De Natuurhoeve wins packaging case against FrieslandCampina

The shape of the ready-made pudding made by dairy farm De Natuurhoeve and FrieslandCampina's pudding packaging for its MONA brand are sufficiently different. De Natuurhoeve delivers its pudding a.o. to large supermarket chains



Albert Heijn and Lidl, which sell the pudding under their own private labels. The Interlocutory Court decided on 6 July 2011 that De Natuurhoeve's packaging does not infringe on the Mona shape marks (pictured left): no similarity, so no risk of

confusion or detriment to the trademarks. The packaging cannot be deemed a 'slavish imitation' of the Mona packaging either. The court denied the claimed cease order and FrieslandCampina was ordered to compensate the costs made by De Natuurhoeve.



Mona

Lidl

Albert Heijn

Mariska Lekkerkerker, De Natuurhoeve's marketing manager, is very happy with this result: *"We have always done our best to be distinctive. Our pudding cup strongly differs from the one used by Mona. But the consumer must be able to see that it concerns pudding, so any pudding needs these classic bows."*



FrieslandCampina has not yet replied to the recent judgment.

De Natuurhoeve is represented by Maarten Haak, Eva den Ouden and Daan van Eek.

Schoolkrantdrukkerij forces Apprentice to issue rectification

Apprentice, a publisher of school newspapers, exaggerated the coverage and distribution figures of its *CJP School Magazine* publication in order to generate more advertising revenues. Its competitor, De Schoolkrantdrukkerij, took Apprentice to court and claimed a rectification. This was granted by the Amsterdam Interlocutory Court in its [decision of 28 April 2011](#).

Publisher De Schoolkrantdrukkerij commissioned a market research bureau to investigate the claims made by Apprentice. As it turned out, the figures were much less positive than Apprentice had indicated. The *CJP School Magazine* is distributed not at 95% but at 64% of schools, reaching not 730,000 but only 131,000 secondary school pupils. Moreover, it became apparent that Apprentice prints not 80%, but only 16% of all school newspapers in secondary schools.



Such a serious misrepresentation of the facts warrants a significant rectification, as the court also concurred. Apprentice had to issue a rectification on its own website and - a novel phenomenon - in the trade journal *Adformatie* (both in print and online). *Adformatie* is the perfect publication for rectifying erroneous coverage figures. De Schoolkrantdrukkerij increased the effectiveness of the rectification by placing its own advertisement in *Adformatie*, explaining what the correct figures mean. Advertisers now know where to find the biggest return on investment for their advertisements.

Ebba Hoogenraad and Eva den Ouden have represented De Schoolkrantdrukkerij.

Green card without a green destination: misleading

American Express will have to change the campaign for its "NEW Green Card". According to a [ruling by the Advertising Code Committee \(RCC\)](#), American Express wrongfully created the impression that its credit card would support a better environment. The campaign is therefore misleading.



American Express uses banners bearing the text "De NIEUWE Green Card" ("The NEW Green Card"). American Express argued that the title 'Green Card' refers not to the environment, but to the colour of its well-known basic card. The Advertising Code Committee held that this was too simplistic. Clicking on the banner takes the viewer to a dark green page of the American Express website. The prominent feature there is a green and blue planet in the shape of a heart. It is precisely the combination of the word 'new' with the design of this page that could mislead consumers as to the (new) environmental aspects of the new Green Card being offered. The Advertising Code Committee therefore considers the slogan to be in violation of the Environmental Advertising Code.

It should be noted that the term 'Green Card' is not misleading as such, as long as it is clear that 'green' refers solely to the colour of the card. American Express uses 'green' to make a distinction between its most basic card and the levels of luxury offered with Red, Silver, Gold and Platinum cards. Without the accompanying pictures, it is permitted.

Kim Braber

Buy a car now and pay half later

Buy a car now and pay the other half of the purchase price two years later (interest-free). Is this allowed? It's colloquially referred to as a '50/50 deal'.

Information about the purchase price has to be communicated clearly - and that



doesn't always happen. For instance, the Advertising Code Committee (RCC) ruled that Suzuki had not been sufficiently clear about the purchase price of a Suzuki Swift. The ad said: "[...] the Suzuki Swift, starting from €5,569. And you only pay the second half 2 years from now, interest-free. [...]". The Advertising Code Committee

finds it unclear that €5,569 is not the total purchase price, but only half of it (which means that the consumer essentially pays twice that after two years). Stay alert! 50/50 deals are permitted, but the conditions need to be crystal-clear.

Prevent misleading consumers who may potentially decide to make a transaction that they would not consider without such statement.

Eva den Ouden

Health claim in Google Ad or on Twitter?

New media, new rules? Not when it involves the use of a health claim in a Google Ad. Just like in the 'old' world, the Google Ad may not be a prohibited medical claim. That means no 'urinary tract infection Google Ad' with a cranberry advertisement - not even if general opinion says that it helps. Because an Ad does not have room for much text, the Dutch Inspection Boards for the Public Promotion of Registered Medicines (KOAG) and Health Products (KAG) permit the required qualifiers to be shortened to 'read information leaflet' and 'read package'. In that case, the link must lead directly to the webpage containing the full and complete text of the required consumer information and contraindications. Want to place a positive tweet on the product website? As an advertiser, doing so means that you are adopting the opinion expressed in that tweet, and that the contents are attributed to the advertiser. This means that a prohibited medical claim expressed in a tweet cannot be used on the product website. The KOAG/KAG considers these kinds of tweets to act as a 'testimonial'.



Ebba Hoogenraad

Disneyland.nl now belongs to Disney

Strange but true: until recently, the domain name disneyland.nl took visitors to a website that was completely unrelated to Disney. The domain had been registered in 2002 - apparently with the aim of selling it to the highest bidder. Domain City was unwilling to voluntarily transfer the domain name registration to Disney.

Disney had had enough. Disney made use of the UDRP rules of the .nl registry SIDN to compel the holder to transfer the domain, and involved its well-known



DISNEYLAND brands. Domain City still claimed that the trademarks had lapsed because they had allegedly never been used. This defence did not help its case, as it had not been substantiated. The WIPO panelist simply noted that the DISNEYLAND trademarks are registered

in the trademark register. That meets the requirements for a trademark protected by Dutch law. Domain City also submitted that the domain was intended to be used for a fan site. A claim like that is sometimes accepted, but only if the fan site is actually active. In this case, the domain name had been unused for more than eight years, so this defence was also dismissed. The WIPO panelist ruled that the domain name should go to Disney. All's well that ends well.



This case was handled for Disney by Maarten Haak and Daniël Haije.

Mediq must change its logo

The largest Dutch pharmacy Mediq must change its logo and trade dress, so the district court of Utrecht recently decided. The copyright on the Mediq logo and the trade dress had remained with the designer in 2005. Mediq and its holding



company had a licence for use in the Netherlands only. The pharmacy formula proved its success and was rolled out in Poland and Belgium. But Mediq had overlooked that it only had a Dutch licence. The parties had agreed to a penalty of €2 million euros in case of an infringement.

The court did not moderate the penalty: *pacta sunt servanda*. In addition SVT terminated the licence. Mediq now has to look for a new logo and trade dress for its pharmacies.

Maarten Haak

Hotelkamerveiling.nl / Hotelveiling.nl: descriptive trade names

Trade names that consist solely of descriptive elements: how does that work again? The District Court of Groningen confirmed what we already knew for some time: there is little scope for protection if such a descriptive trade name has not *acquired distinctiveness* due to long-term use (like Ebay's affiliate [Marktplaats.nl](#), meaning 'market place') or *demonstrates significant originality*. The operator of [Hotelkamerveiling.nl](#) ('hotel room auction'.nl) wanted to ban the trade name [Hotelveiling.nl](#) ('hotel auction'.nl) based on the Trade Name Act and the rules governing unlawful competition. The court did not concur.

HOTELKAMERVEILING.NL
BIED MEE OP UW HOTELVAKANTIE!

Hotelveiling.nl

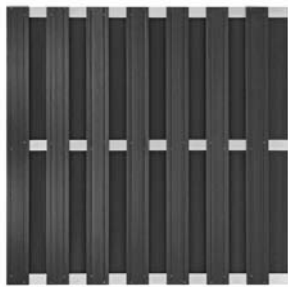
The more distinctive the trade name is, the greater the scope of protected use will generally be. [Hotelkamerveiling.nl](#) consists of purely descriptive, non-original elements that have not entered into common usage. These exclusively descriptive elements – like the city in which a business operates or the profession being practice – cannot in principle be monopolised.

By choosing a trade name that describes the services provided, the user also accepts the risk that competitors may use the same name. The court did not see any grounds for unlawful competition. Competition based on providing the same services is permissible – even if the competitor is benefiting from the popularity of the service provided by the older company. Only truly exceptional circumstances can make competition unlawful, but such circumstances did not exist in this case.

Descriptive trade names are a handy way to let consumers know what a company does – but be careful: as soon as other parties start operating in the same gap in the market, protection is sometimes nowhere to be found. There is a flip side to every competitive advantage...

Eva den Ouden

Techniques are freely available: about protecting a fence



Dekker has been selling the fence shown here since 2009. The vertical boards are made of a wood-plastic composite, while the horizontal beams are made of aluminium. When wood product trading company Bakker recently started selling a fence that looked exactly like Dekker's fence, Dekker saw it as a violation of its design rights and copyright, and took Bakker to court.

In interlocutory proceedings, Bakker pointed out that the horizontal beams have a *technical function*. Technical elements of a design are not protected by design law or copyright law. Techniques can only be monopolised based on patent law; copyright and design laws are not intended for that purpose.

The court ruled in Bakker's favour in its decision of 29 March 2011. The horizontal aluminium beams ensure that the fence is solidly constructed and hence perform a technical function. It is irrelevant that solid construction could also be enhanced in another way. The court followed the prevailing (i.e. device-oriented) opinion: the aspects determined by technical requirements in *this* version cannot be included in consideration of the design. The contrasting colour of aluminium (which is after all a property of the material) therefore does not count. What remains is in essence a fence that has been around for years, which the court ruled was not protected by design law. Claims denied. Dekker has already announced that it will appeal.



Bakker received legal counsel in this procedure from Maarten Haak and Daniël Haije.

What is an 'invitation to buy'?

Misleading and aggressive trade practices are prohibited. Since the Unfair Commercial Practices Act entered into force in 2008, the promotion and sale of products or services has been strictly regulated. For instance, the advertiser making an *invitation to buy* is subject to a very significant requirement to provide information. The advertisement must include the product features, the advertiser's identity and address, the price and the payment method.

But what exactly constitutes an *invitation to buy*? The Court of Justice recently provided some clarity. An advertisement by Swedish travel organiser Ving contained an offer for a package deal on a trip to New York. The advertisement only listed the 'starting from' price. The Swedish Consumer Authority classified it as an invitation to buy. Listing only a 'starting from' price was therefore considered misleading.



The Court holds that an invitation to buy may exist if an *actual* opportunity to buy is not offered. An ordering mechanism is not required. An advertisement can therefore also be seen as an invitation to buy. That condition has been fulfilled if the consumer has enough information to decide to make the purchase.

So how far does the requirement to provide sufficient information go? According to the Court, it is necessary in each case to look at the nature of the product, the media used and the advertisement itself. Sometimes it is sufficient to list several key features of a product, including a reference to a website for further details. In short: it depends on the particular conditions in each case.

Providing a 'starting from' price in an invitation to buy is not misleading as such. That seems correct to me. It is not always possible to state a single total price, e.g. when advertising products such as cars or travels. It is necessary to assess each ad to see whether it should also state how it is calculated. The main priority is that the consumer should always be able to make an informed decision about the purchase. Please note: the Dutch Advertising Code does require (based on self-regulation) that an invitation to buy includes an opportunity to order. Still, it's all about avoiding misleading impressions. The consumer needs to receive accurate and complete information.

Kim Braber

Media not required to provide prior perusal

On 10 May 2011, Formula 1 boss Max Mosley did not win his case in the European Court of Human Rights (ECHR). Mosley demanded advance warning from media before publishing reports on people's private lives. This would allow the subject of the publication to go to court to prevent publication in order to avoid irreparable damage to his/her reputation. The ECHR was unwilling to impose that obligation.

In 2008, British tabloid *News of the World* published a front-page item with the less than subtle headline "F1 BOSS HAS SICK NAZI ORGY WITH 5 HOOKERS". The



newspaper also published stills from a video. The photos show Mosley playing SM games with five prostitutes dressed in German military uniforms and prison attire. Clips from the video were also posted on the newspaper's website. The Nazi theme was a particularly sensitive issue: Mosley's father, Oswald Mosley, had founded the British

Union of Fascists in 1932. The British courts awarded Mosley 60,000 pounds in damages. In addition, *News of the World* had to pay for 420,000 pounds in legal costs. Unfortunately for Mosley, the damage had already been done; the photos are still circulating on the internet.

Mosley therefore filed a case against England with the ECHR. He felt that the government should have ensured that he had a right to prior perusal. However, the Court ruled that the English justice system offers sufficient satisfaction in the event of a breach of privacy. Moreover, a right to prior perusal would act as an unacceptable deterrent on journalists. The Court also took into consideration the concept that serious journalism would also suffer under a right to prior perusal, which would not only affect the sensation-seeking gutter press.

No right to prior perusal, in other words. No absolute right to privacy. Justifiably, I would say: freedom of press needs a carefully considered assessment afterwards. *News of the World* will not benefit from the judgment. Today Rupert Murdoch announced the end of this newspaper because of a phone tapping scandal.

Daniël Haije

Cheapest energy?

In 2009, energy company Essent was taken over by a German company for €8.5 billion. The Nederlandse Energie Maatschappij (NEM) power company went so far as to offer 'friendly' consumer advice in a TV commercial containing the word:



"And of course they are planning to earn that money back. Are we going to help them? I say: NEIN! [...]."

The commercial made by the NEM is a *comparative advertisement*, and as such is subject to stringent standards. The comparison must in any case be accurate. You are not allowed to create the unfounded impression that the consumer would

have to pay more or different costs due to a takeover. The Advertising Code Committee (RCC) considers that misleading to begin with.

But the advertisement failed in other ways as well. For example, the NEM claims to be *'the cheapest'*. However, it is not clear from the commercial that it is only cheapest in comparison to its competitor Essent. The statement is much more generally phrased and could also be construed as including (all) other competitors. The contents are also inaccurate in that respect and are therefore (also) misleading.

To make it even worse, the NEM also made errors in its print advertisements. It compared its starting rate with the standard rate of a competitor. That is a no-go. Any comparison of complex fee structures must be crystal-clear, or the comparison is misleading. That is a hard and fast rule. Even *in appeal*, the advertisement was ruled to be in violation of the Advertising Code.



Rule number 1 for comparative advertising: the advertiser has to be able to prove its claim. And it has to be clear who is being included in the comparison, or the claim must be a valid comparison with all competitors.

Daan van Eek

Two rulings on portrait rights

Two more interesting rulings have been rendered in portrait rights cases about persons who were portrayed in a fairly negative light in the news.

In **the first case**, the person in question objected to his involuntary inclusion in the TV show *Undercover in Nederland*. In the show, the man (who works in youth services) is confronted with his sexually suggestive behaviour over the internet towards someone claiming to be a 14-year-old girl, who was actually a female editor working on the show. The man's demands included rectification, payment of damages and a ban on (further) airing of the footage. In such cases, the court weighs the right to privacy of the person portrayed against the media company's freedom of expression. In this case, the man's identity had been concealed in the footage, so it did not constitute a portrait. The court therefore ruled that the show was allowed to use him as an (anonymous) example to reveal abuses in alternative youth services. It also did not help his case that he had said himself on his Hyves social network page (which was open to the public) that he had been a subject of the show.



In **the other case**, the court acknowledged that it can sometimes be necessary to show a portrait in order to delineate a public debate. However, the portrait would in that event need to have sufficient added value. This case concerned an asylum-seeker who had been convicted of a crime in the Netherlands. National newspaper *De Telegraaf* discussed multiple times whether it was acceptable to grant a residence permit in such a case, repeatedly generating publicity for this case. The

De Telegraaf

court ruled that it was not necessary for that discussion to include the portrait of the man, let alone the man's first and last name. In this case, privacy interests weighed heavier than the freedom of press. Besides, it has been shown that placing a black bar over a portrait does not grant an automatic right to use a portrait. This tends to have the opposite effect (criminalising), and the person in the portrait can often still be recognised by people who know him/her. In this case, the first name of the person could have been used, but only the initials of the last name should have been shown.

Daan van Eek

Daan van Eek, advocaat

Daan van Eek transferred to Hoogenraad & Haak in April 2011. Daan has been a lawyer since 2009. Besides studying law, he also earned a bachelor's degree in communication and information sciences, following part of his courses at Deakin University in Melbourne (Australia). During his studies, he taught at the Centre for Intellectual Property Law (Utrecht University). He also co-authored various publications and took part in joint research projects, as well as working on the editorial team of the Dutch *Intellectual Property and Advertising Law (IER)*. Daan has a good sense of humour, an open and thorough attitude and a strong appreciation for personal interaction. In his free time, Daan can regularly be found on the water, surfing and kitesurfing.



Linda van den Berg, secretary

Linda van den Berg also joined our firm in April 2011. Linda has been working in the legal profession as a legal secretary for many years - and enjoying it, too! The work at Hoogenraad & Haak is highly varied and involves fun colleagues. Besides her work as a secretary, Linda gives yoga lessons and has her own massage practice. Her favourite things to do in her free time are walking, gardening and singing.



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