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Honors for Hoogenraad & Haak

Also in 2011 our firm has received acknowledgements for its expertise and case handling. Based on peer review *Best Lawyers* has listed **Ebba Hoogenraad** as the leading advertising lawyer in the Netherlands. *Chambers Europe* names Ebba *highly respected among peers* and describes **Maarten Haak** as *a reputable lawyer and a solid performer*. That latest remark is shared by publishing house *Corporate INTL*, honoring Maarten with the title *Trademark Lawyer of 2011 in the Netherlands*. *Chambers Europe* about Hoogenraad & Haak: *"Despite its modest size, it often secures instructions from big-name clients such as Yakult and shoe brand Camper."* *Corporate INTL* and *Best Lawyers* have maintained our firm's position as *top listed* for advertising law in the Netherlands.



Good press of course, and more important: an acknowledgement that we have chosen the right path. Solid advice with a short clarification and an eye for how things work in practice. We thank all our clients, who keep asking new questions and thus allow us to constantly renew our vision and expertise.



The "Gouden Windei" context: misleading product names?

Foodwatch's annual "Gouden Windei" contest for *the most misleading marketing* is no longer an unfamiliar phenomenon. In 2011 around 10,000 consumers took part and voted. However, is the advertising of the nominees for the Gouden Windei contest really misleading? Some examples are discussed.



Nestlé FruitFlesje ("FruitBottle") ended in second place for the Gouden Windei. According to Foodwatch, the name and depictions of strawberries on the packaging are misleading because the product only contains 7 percent strawberry puree. The Advertising Code Committee (RCC) holds that the packaging should be viewed in its entirety. In combination with the other statements on the product, there is no doubt about the product's composition: it is a follow-on milk with fruit flavouring. Not misleading; the RCC dismisses the complaint.

The same applies to the holder of third place in the Gouden Windei contest 2011: Crystal Clear Shine. The packaging does say "Cranberry Elderberry Blossom" but, unlike Foodwatch, the RCC does not believe that the name creates the impression that the product consists for a large part of cranberry and elderberry blossom. It is clear that the product tastes of cranberry and elderberry blossom. The consumer can read the exact quantities of these ingredients on the list of ingredients. The RCC settles the admissibility of the claims in relation to water and aloe vera on the transitional arrangement of the Claims Regulation. Moreover, Vrumona has adequately disputed that health claims should not be made for products containing artificial sweeteners.



The RCC also does not follow Foodwatch for the Limburg Cream of Asparagus soup made by Honig, number 4 in the Gouden Windei contest 2011. According to the RCC, the packaging does not create the wrong expectation for the consumer. Asparagus is actually used in the soup and the minor amount of 0.5 percent is evidenced by the statement of ingredients. The name of the product simply refers to the specific flavour and characteristic ingredients of which the product consists. > > >

> > > The consumer is also not being misled by the texts “46% Fruit filling” and “With lots of extra fruit filling”. Foodwatch thinks it is: a Liga Fruitkick bar only contains 6.7 percent fruit and further mainly sugar and glucose fructose syrup. According to the RCC, the consumer understands that fruit is processed *in some form* in the filling but that also other possible ingredients are used as well. The list of ingredients is clear. The RCC does not find the promotion of “responsible” inadmissible. Liga is evidently referring here to the presence of grains and fruit and a lower sugar content compared to other fruit bars. Therefore the RCC also dismisses the complaint against number 5 of the Gouden Windei contest 2011.



Hence, the RCC rejects all of Foodwatch's complaints against numbers 2 to 5 of the Gouden Windei collection 2011. In all these cases, the RCC has assumed that the “average careful considerate consumer” looks further than the end of his nose. This consumer sees the entire packaging and reads the ingredients on the label to see what the product contains exactly. This appears to be a different consumer from the people who voted in Foodwatch's Gouden Windei contest. Being placed in the top 5 of the Gouden Windei therefore does not equate being defined as misleading by the Advertising Code Committee!

Kim Braber

Vrumona was assisted in the Crystal Clear case by Ebba Hoogenraad and Kim Braber

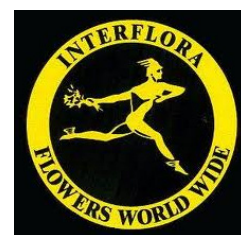
Interflora: on brand names, AdWords and comparative advertising

On 22 September 2011 the ECJ clarified in *Interflora* when a brand owner can act against third party use of the brand as an AdWords. Marks & Spencer competes with the international flower delivery service by Interflora. M&S had selected the well-known brand name INTERFLORA as AdWord. A Google search for "Interflora" revealed the following advertisement.

www.marksandspencer.com/flowers

Gorgeous fresh flowers and plants.

Order by 5 p.m. for next day delivery.



Since *Google France* we already knew that use of a brand AdWord for similar goods can be prohibited if it adversely affects a *trademark function*. Take the *origin function*: the ad must show whether the advertised product comes from (an affiliate of) the trademark owner or from a third party. A new development is that the court can take into account "general knowledge of the market". If everyone knows that M&S has nothing to do with Interflora, then the name "M&S" alone in the advertisement makes it transparent enough. The *advertising function* is not harmed by AdWords because the brand owner can still inform and convince the consumer with the brand name. Now he has to pay a bit more to stay at the top of the Google Ads list. The *investment function* can be damaged if the use of the AdWord "*substantially interferes with the proprietor's use of its trade mark to acquire or preserve a reputation capable of attracting consumers and retaining their loyalty*". The owner will have to make more effort to preserve a reputation and must allow that some consumers will ignore the branded product precisely because of the competing AdWords advertisement. The owner of a well-known brand can act against dilution if advertising using the AdWord contributes towards turning the brand (INTERFLORA) into a generic term (a synonym for a flower delivery service). The ECJ holds that this will not happen too readily, perhaps only in case of a likelihood of confusion. 'Free riding on the coat tails' that seemed to be widely prohibited since *l'Oréal/Bellure* specifically concerns imitations. Whether this also applies in other cases remains to be seen.

Interflora can also be applied outside of AdWords for advertising in which comparison with a well-known brand occurs. Use of a well-known trademark in comparative advertising does not readily result in trademark infringement. The first application of *Interflora* meanwhile is a fact: the Court of Appeal of > > >

> > > The Hague ruled on 22 November 2011 that Medicomfort can bring its memory foam mattresses to the public's attention using the AdWord TEMPUR:

[Need a New Mattress?](#)

Order a Medicomfort Mattress. Up to 40% cheaper than other top brands!

Medicomfortmatras.nl

Adequately transparent, no detriment to a trademark function, and moreover a due cause to use the brand name TEMPUR. The Court of Appeal assumes an Internet user who is not easily misled. Conclusion: brand AdWords are given the benefit of the doubt. Trademark owners have lost ground. An advertiser who transparently offers an actual alternative for the branded product may use a brand AdWord for it, even if the brand is well known. This is "fair competition" and hence a due cause.

Maarten Haak

"What you see is what you get" ... (or not?)

Kiwi sweets with real kiwi in them can be called exactly that. Of course. Even when there is a minimum amount in them - because the consumer reads the label on the bag. Admittedly it must contain real flavouring (95% or more natural kiwi



flavour) but what if the kiwi sweet contains *artificial* kiwi flavouring? Then kiwi should not feature on the packaging. What you then get is a "kiwi look & feel": a lot of green, a lot of palm trees and maybe even some black seeds.

More kiwi: the television commercial for Coolbest Raw Juice shows images of Maoris and kiwis with the text: "*Here in New Zealand we've found this amazing kiwi*". A viewer found this misleading because the original kiwi comes from China and not from New Zealand. Luckily the Advertising Code Committee found that the viewer understands that Coolbest

Raw Juice is made from the best and tastiest kiwis grown in New Zealand.

A picture of a kiwi does not say it all; seek and thou shalt hopefully find the right information, on the label for example. It remains a puzzle however: do I taste real fruit, natural flavouring or artificial flavouring and aromas?

Ebba Hoogenraad

Parody, not a tobacco advertisement

The Amsterdam cinema *Het Ketelhuis* is not carrying out prohibited tobacco advertising with its poster. The Food and Consumer Product Safety Authority (VWA) had imposed a fine: the poster was supposedly indirectly advertising tobacco. Section 5a of the Dutch Tobacco Act prohibits the use of a name, logo, symbol or other distinctive sign that was previously used for a tobacco product. The VWA found that the "LUCKY STRIKE" look-alike breached this prohibition.

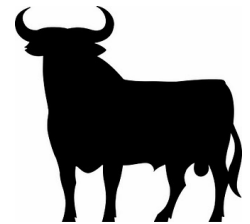
In the first instance, Het Ketelhuis's objection was dismissed but the cinema appealed to the District Court. The cinema argued that the Tobacco Act is not intended to prohibit a parody. The District Court found in favour of Het Ketelhuis. The intention of Section 5a of the Tobacco Act is to prevent camouflaged advertising (circumventing advertising limitations). The District Court did not see camouflaged advertising for Lucky Strike in the poster. For an objective viewer this is a recognisable parody on the health warning on a cigarette packet. The District Court also considered that Het Ketelhuis did not intend to advertise tobacco but to parody it and the Tobacco Act was not made to prohibit parodies. The cinema does not have to pay the fine.

Daniël Haije



Bullfight: Red Bull / Osborne (TORO XL)

Bulls on steroids. Who can miss them, the energy drinks depicting bulls and sold in long cans? Red Bull is a famous brand that uses bulls to distinguish its taurine drink. It was the first and since then has fiercely responded to competitors that also depict a bull. As with Osborne, which has used the well-known "peaceful" bull (on the right) for sherry and other alcoholic drinks for years, and since 2006 has been using the bull for its own energy drink.



The Appeal Court of The Hague assessed whether the design of Osborne's TORO XL can (here below on the right) was too similar to the Red Bull logo (the single bull, here on the left). Although it concerns a bull, in both cases the Court of Appeal saw the necessary differences. In the case of Red Bull it is a dynamic, energetic and fighting beast, whereas the Osborne bull is static, quiet and peaceful. There is no correspondence between the depiction on Osborne's can and the Red Bull bull. The average consumer would not be confused. The fact that both cases concern energy drinks does not change this.



Red Bull believes that in any case Osborne is still wrongfully profiting from the familiarity of its brand: free riding as familiar from the *l'Oréal/Bellure* case. Osborne started to sell energy drinks with a bull after Red Bull had conquered the market. The Court of Appeal did not agree with this argument either. Although many people make a connection between Red Bull and the combination energy drink and bull, this is not detrimental to the Red Bull bull's distinctive character. The quiet bull does not affect the distinctive power of the fighting bull. What is more, Osborne has carried out brand expansion – using its umbrella brand for other products besides alcoholic drinks and expanding its assortment. The Court of Appeal believes that Osborne proceeded from the power of its own brand, and not from the reputation of Red Bull.



TORO XL will continue to make Red Bull see red.

Daan van Eek

TUC and Apéro: the point of trademark packaging

The manufacturer of TUC biscuits (General Biscuits) successfully objected to the packaging of a competitive biscuit Apéro (manufacturer Hoppe). According to the District Court of The Hague the consumer may be confused by the similarity. Again it appears that filing packaging as a trademark can contribute towards protection of design.

The District Court remarks that it concerns supermarket products that are purchased without much thought and further consideration. The average consumer is therefore easily led by the *visual* impact of the packaging. We were already aware of this rule from the olive oil case *Carbonell / La Espanola*. Visually the Apéro packaging resembles the TUC packaging branding: the colours used and colour composition (yellow background, white letters outlined in red and blue surface) and the biscuits spread out on top of each other. The fact that APERO is written in large letters does not make the packaging adequately distinguishable. The other differences are also not enough to compensate the risk of confusion.



General Biscuits invoked a Community Trademark and therefore was awarded an injunction for the entire European Union. Hoppe had to remove the Apéro packaging from the shelves. It also had to show which companies were involved in the production, import, export and sale of the infringing package. To be continued.

Eva Rog – den Ouden

Miffy parodies on Punt.nl allowed after all

Do you remember? Last year the Amsterdam Interlocutory Court ruled on the use of seven pictures on blogsite Punt.nl. Although the parodies Miffy as a DJ at a trance party, completely stoned or high on a "line" were allowed, the parody

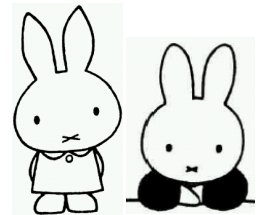


"Nijn-eleven" (in Dutch Miffy is called *Nijntje* or short: Nijn) was considered a copyright infringement. Check [here](#) my assessment of that judgment. However on 13 September 2011 the Amsterdam Court of Appeal took a more principal approach: all seven Miffy parodies on Punt.nl are allowed as clear parodies. They are reproductions in a slightly modified form, making the Miffy character the subject of laughter.

This changes the tendency of the work with both humour and

irony. The contrast is enhanced by the texts that go with the pictures. While Dick Bruna's texts are always child friendly and without any violence, these texts are blunt and aggressive. Miffy at a hardcore party, totally stoned, as a trance girl, Nijn-eleven: they are all considered clear parodies in which the object is the work itself. These clear parodies are allowed, even though not everyone will think it is funny (Dick Bruna for example).

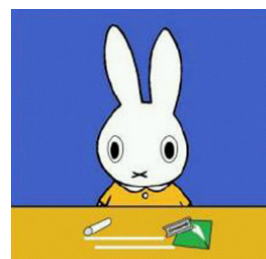
So no copyright infringement, but neither an infringement on the Miffy device marks (here on the right): the Court of Appeal assumed a due cause for this use in view of the humoristic intention, the lack of any competing motive, the distance to the trademarks and the lack of any confusion.



Maarten Haak



Het feest
 Tijs is op het feest.
 Daan ook.
 Tijs draait er trance.
 "Wat een herrie!" roept Daan
 en hij geeft Tijs een duw.
 Daan gooit een Dikke Hardcore
 tune op de SL1200.
 Iedereen is blij.
 Tijs is een vieze trancenicht.



LIJNTJE
 Nijntje is al 3 dagen waker.
 Ze zit lekker op de pep.
 "Pep is slecht", zegt mammi.
 "niet met me fokken,"
 roept nijntje
 "ik sta super strak"
 Nijntje weet wat goed spul is.
 Mammi is een mellow-teef.

Swan song of the paper collection of cuttings

News reports in the paper where copyright is reserved may not be used in paper collections of cuttings. So decided the Court of Appeal of Leeuwarden in the case Province of Flevoland / Nederlandse Dagblad Pers (NDP).

The communication department of the Province of Flevoland had made a paper collection of press cuttings from newspaper reports relevant to Flevoland. This *seems* to be old-fashioned civil service, but was actually a smart budgeting move. Case law says namely that the copyright holder's consent is required for including newspaper articles in a *digital* collection of cuttings and obviously that costs money. Until now the *paper* collection was not under fire.



The NDP thought that the province should not have included newspaper articles in the paper collection of cuttings without consent and started legal proceedings. The province invoked Section 15 of the Copyright Act (the "press exception"). This says that the press does not require consent to take over reports on current affairs from the press as long as they state the source. However, this is *not* allowed if copyright is reserved in the source. According to the Act "news reports or mixed reports" may be taken over even if copyright has been reserved. Therefore the province believed that they did not require consent. NDP pointed out that the



newspapers had reserved copyright in their mastheads. In addition NDP argued that the lawful exception for news reports and mixed reports restricted their possibilities to exploit these copyright protected works. In other words: the newspapers would not receive a fair compensation and that is precisely an important European principle.

The Court of Appeal agreed with NDP in this argument: a paper collection of cuttings which does not pay to take over copyright protected works (newspaper articles) is infringing copyright if these rights have been reserved, even if it concerns news reports. It was already somewhat outdated but now it really is curtains for the paper collection of cuttings.

Daniël Haije

Alcohol advertising moves with the times

New media, new times. The Advertising Code for Alcoholic Beverages (RvA) has been tightened up again. Any direct digital promotional text such as a tweet about a brand of alcohol must state that it is intended for those aged 18 or older. For example, for Twitter a disclaimer that one should be of full age can be made



with *followers* is made to followers, and an app game that advertises an alcohol brand must contain an age check.

One ambiguous situation has been clarified: the alcohol advertiser may only place photos on someone's Facebook wall if they the people on the photos are aged 18 or over. Nevertheless, the models for staged advertising campaigns for alcohol must be at least 25. The vague rule that they may also not *seem* younger than 25 has become more practicable: only if someone is *obviously* younger does it go wrong. Hence it seems wise to at least ask for a passport at the shoot.

In addition, the rule that the audience to alcohol advertising may not comprise more than 25% minors has been better formulated. The period over which this was measured was not clear: a year, a month or even every time? Is an alcohol advertisement prohibited if a primary school class is passing by (because at that time it reaches more than 25% minors)? Or an advertisement for a brand of beer at a sports field where young people also train? No, the number of minors from now on can be measured over a *representative period* using figures and data that are as objective as possible. Incidental situations (e.g. a children's party next to a cafe) do not violate the minors' rule. It was never the intention that this would be forbidden. This also applies to the regular street scene: the sign and the tap button on the bar of the cafe, the beer coasters at the mobile chip shop.

Another new development is that top sport and alcohol advertising do not go together. Anyone appearing at the EC, WC and Olympic Games may no longer appear in alcohol advertisements. Ad hoc situations of inaugurations and press moments do not count. The exact date of effect (and the transitional period) will be made known very shortly.

Ebba Hoogenraad

Facebook maintains strict advertising rules

The social network Facebook offers companies a fantastic opportunity for a large group of people to become familiar with the company's products and services. A promotional action is set up in no time. But watch out: Facebook maintains strict rules. All activities organised via Facebook must be reported and approved in advance. Facebook also has specific guidelines such as the Promotions Guidelines and Advertising Guidelines. It is also significant that Facebook must be indemnified: in no way may the impression be created that Facebook supports the action. And for every participant who provides data as part of the action it must be clear that these are going to the advertiser and not to Facebook.

The Facebook logo, consisting of the word "facebook" in white lowercase letters on a blue rectangular background.

Parts or functions of Facebook may not be used as a registration mechanism for the promotional action. For example it is not permitted that 1) merely by liking a page, 2) by checking in at a certain location or 3) by connecting to Facebook using an app you are suddenly participating in a promotional action. Consent must first be given via a separate action. You may also not use a Facebook function as a condition for participation in an action. You may not use the Like



button to vote and the winner may not be published on the Facebook page. Facebook is also particularly strict with regard to its intellectual property. According to the Facebook rules you may not use any other function, trademark, pictorial logo or brand name (including the word 'Facebook!') or Facebook icon in the promotional material for the action (except to indemnify Facebook). Strictly speaking, according to the rules of Facebook you may not even say: go to our Facebook page and participate... And Facebook does not want that the well known 'Like' button is used (on Facebook) in one's own advertising. Briefly put, there are a large number of rules to watch out for.

Daan van Eek

Starting from € xxx bargains: watch out!

Advertisers now have to watch out with all advertisements that state a particular price or "starting from [price]". In our previous newsletter we already mentioned the decision of the Court of Justice in [the Ving Sverige AB case](#). As soon as a price and product are mentioned in an advertisement there is already an "invitation to buy". This means that the advertisement must contain all sorts of additional information. This European case law is now getting a Dutch aftermath. The Dutch



Advertising Code Committee was fairly flexible in recent years. The severe information obligations for an invitation to buy only applied if an ordering mechanism was actually referred to in the ad. This limited interpretation was favourable towards advertisers. Now the ECJ has spoken and the Advertising Code Committee was therefore forced to expand the definition of invitation to buy in September 2011. Consequence: as soon as an advertisement refers to a price, even a starting-from

price, in combination with a product or service, then all kinds of other information must also be provided straight away: the main characteristics of the product or the service must be clear but also the manner of payment and delivery and the exact price including all taxes. Even the name of the trader must be stated. A great deal of information therefore. Luckily there is still hope: if there is not much space (a banner) or not much time (a radio or TV commercial) a reference to the website or a brochure suffices for example. But watch out: the Advertising Code Committee and the Court are strict. Therefore no illegible font and no vague sentences. Short and to the point in the main message is okay but also: keep it short and clear and bring the entire message across.

Ebba Hoogenraad

Hoogenraad & Haak, advertising + IP advocaten is an independent boutique law firm in the Netherlands, recommended by a.o. Chambers, Legal 500 and Best Lawyers. We are specialists in advertising law, intellectual property and product information law (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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