

Alcohol advertising in the news	2
The offer is clear: portrait rights and politicians	3
INTEL: no absolute protection for famous trademarks	5
New Unfair Trading Practices Act: a deluge of questions	6
Advertising for text messaging services now regulated	7
Website liable for user generated content?	8
Free range eggs and cantherelles: nutritional information	10

Successful 2008 for boutique law firm Hoogenraad & Haak

In this, our first newsletter combined with our best wishes for the coming year, we take a brief look back over the past year, because our firm celebrated its first anniversary on 1 December. But more particularly, we look forward at developments in advertising law, intellectual property and product information.



Many clients have found their way to our firm. We have been permitted to think along, giving our in-depth legal insights with a human touch. Where it was possible, we suggested a creative solution at an early stage (*'how can it be done?'*).

That is what we do and how we do it.

We found that many clients appreciate that we do not just provide a solid and reliable answer, but also bear in mind the practical issues; quickly and efficiently, and giving clear advance cost estimates. Our practice continues to grow, even in the current climate.

We wish everybody we have met over the past year a happy and healthy 2009.

With kind regards,

Ebba Hoogenraad, Maarten Haak, Maud van der Leeuw, Kim Braber and Irene Surig

Alcohol advertising in the news

The pace of change is fast. Firstly, the Press Advertising Code for Alcohol was tightened substantially with effect from 1 July 2008. From 2009, no TV advertising of alcohol may be broadcast between 06.00 hrs and 21.00 hrs. A transitional period will apply for spots purchased in 2008. Program sponsoring will also still be permitted, on condition that it complies with Dutch Media Authority regulations. Furthermore, the Appeals Board of the Dutch Advertising Code Foundation has pronounced a number of landmark rulings.

Not if more than 25% are minors

Alcohol advertising is not permitted if more than 25% of the people present at an event are minors. But how to assess whether this is the case? In the *Heineken Music Hall* case it was ruled that the annual programme is not decisive. For each event the 25% limit must be assessed separately on the basis of visitor numbers. That is no problem for the Heineken Music Hall: for the few youth concerts that are held, advertisements in the hall and on the glass doors can simply be covered up.

However, the 25% rule may cause difficulties for events and festivals sponsored by alcohol brands. Of course a quite accurate estimate could be made in advance, and appropriate measures taken. But imagine that unexpectedly more than 25% of those present are minors. Should the masking service be called out? Cancelling the event is not a realistic option.

No 'free alcohol'

It is a well-known fact that alcohol manufacturers are not permitted to offer 'free alcohol' themselves (Article 20 of the Press Advertising Code for Alcohol). That ban also applies to manufacturers of non-alcoholic drinks, if there is any 'active cooperation by the (alcohol) sector'.

The interpretation of this article has been stretched somewhat by the Appeals Board: even if an alcohol manufacturer has no involvement in the publicity of another party, a sort of risk liability is nevertheless construed. As an illustration, imagine the home beer-tap systems advertised by white good dealers in free newspapers. Even though the third party dealer is not a party to the Press Advertising Code for Alcohol, the alcohol manufacturer must warn nevertheless



that it must comply with those regulations! The Appeals Board holds that the manufacturer must have done everything in its power to prevent the supply of 'free alcohol', in order to evade liability for a third party advertising 'free alcohol'.

In my view, proper self-regulation implies that regulations must not be stretched by case law but, if desirable, are adjusted by parties in the sector. It is precisely self-regulation which will allow this to be organised quickly and adequately.

Ebba Hoogenraad assists a number of alcohol manufacturers and importers with procedures under the Advertising Code for Alcohol

The offer is clear: portrait rights and politicians

Advertisers often pull out all the stops on *Prinsjesdag* [Budget Day], and this year was no exception. The Dirk van den Broek supermarket ad caused quite a



controversy. Full-page photographs appeared in all the major newspapers, of the government in the first row of the official government hall *Ridderzaal*, with the familiar red DIRK shopping bags under their chairs. The title of the ad: "The offer is clear". But was Dirk van den Broek entitled to just use portraits of the entire government like this?

The Copyright Act provides that the person portrayed can oppose publication of portrait if he has a *reasonable interest*. This can be a commercial or a privacy interest. Because of his position, a politician cannot commercialise his portrait, so he has no commercial interest. But how about a privacy interest? The answer is yes. The Supreme Court determined in the 1997 *Disco dancer* case that in principle, everyone always has a reasonable interest in objecting to the commercial use of their portrait. That includes politicians. Why? The public will associate the person portrayed with the product or service. The Supreme Court held that the public might think that the person portrayed consented to the use of the portrait, seeing it is a display of his public support for the product or service. In that case the person portrayed can object on the basis of his privacy interest.

This Supreme Court interpretation of "reasonable interest" offers scope for Dirk van den Broek: will the public really think that the government is collaborating

with a supermarket campaign on Budget Day? Of course not - everyone understands that the government would not do that.

Nevertheless, there is a legal catch in using the government in the Dirk van den Broek advertisement, because in 2005 the District Court of Amsterdam considered



that a drawing (also a portrait) of our Prime Minister Jan Peter Balkenende could not be used in a Kijkshop campaign. Kijkshop depicted him in the Mother's Day campaign as a toddler, with the text: *'without a salesman it's cheaper for little Jan Peter'*. The public would not have thought that the Prime Minister had given Kijkshop his permission, but the court felt that it would create a (subconscious) association between Kijkshop and Balkenende. That in itself was enough for the court to prohibit the use of Balkenende's portrait. Strangely enough, the court did not go on to consider the question of whether the public would think that Balkenende had

collaborated on the advertisement. Seemingly, the District Court is stricter than the Supreme Court in its Disco Dancer ruling. In our opinion, this judgment was incorrect. Moreover, the court seems to hold that depicting Balkenende as a toddler and using the abbreviation 'little JP' as his first name are denigrating.

Dirk van den Broek took the risk of using the portraits. As they themselves say, the tone of the advertisement was friendly and it would raise a smile amongst the members of the government. They might be right about that, because the Dutch Government Information Service did not take any action. They also kept a low profile last year when Bolletje advertised its biscuits on Budget Day in an advertisement entitled *"I want a Bolletje hot air biscuit"*, in which they interviewed Wouter Bos. The slogan was: *"And that's what we use to make our biscuits"*.

Politicians do not seem to take a one-off, light-hearted action too seriously. The message is clear: be careful when using politicians' portraits! But more opportunities are often available if the public does not assume it is an expression of support.

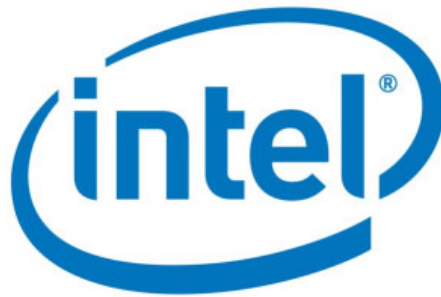
Kim Braber



INTEL: no absolute protection for famous trademarks

INTEL: a unique, famous trademark for computer products. Who is not familiar with it? Nevertheless, even with this cast-iron reputation Intel Corporation cannot forbid anyone from using a trademark that resembles INTEL. This follows from a

ruling by the European Court of Justice (ECJ) dated 27 November 2008.



An English telemarketing company had registered its services under the trademark INTELMARK. Intel Corporation opposed this, as consumers seeing INTELMARK would of course think of the extremely well-known INTEL. This could diminish the impact of

the famous trademark and is therefore damaging, enough to give INTEL precedence, according to Intel Corporation.

The Court of Justice took a different view. It may be the case that the consumer makes an association between the two trademarks, but that in itself is not sufficient. More is required before a later trademark can be cancelled or its use banned: for example the *look-alike* user is enjoying an unfair advantage by the association; dilution of the famous trademark, or the repute of the earlier trademark is damaged by the use of the later trademark. The famous trademark also has precedence where there is a serious likelihood of the foregoing situations arising. The court may not assume this automatically; proof must be submitted, and that is a new development.

A serious likelihood: in itself, it sounds logical. But there is a nasty catch in the *Intel* ruling. The ECJ holds that dilution requires proof that the economic behaviour of the INTEL consumer changes as a result of the use of INTELMARK. If the latter is not yet in use, it must be argued convincingly that this behaviour will probably change. That is certainly not easy: how do you prove that consumer behaviour actually changed because of the existence of the *look-alike* trademark? Or, if the later trademark is not yet trading, that it will cause a change in future behaviour? In my opinion, the Court of Justice is allowing the later trademark too much leeway for submitting the defence that the potential change in behaviour has a *different* root cause. In that case the holder of the well known trademark comes off worst, because it bears the burden of proof.



One of the first matters in which the *Intel* ruling was applied, was a case between Dutch fashion group G-Star and soft drink giant PepsiCo. It was about Pepsi's new soft drink PEPSI RAW. G-Star held that this infringed its (famous) trademark RAW. In the first instance, the case was won by PepsiCo.

Protection of famous trademarks seems to place more emphasis on the 'unfair advantage' for the user of the newer trademark than (potential) damage to the holder of the older trademark. It is a good thing that more clarity on the protection of famous trademarks has been provided, but the holders of famous trademarks have been forced to relinquish too much.

Maarten Haak

New Unfair Trading Practices Act: a deluge of questions

The Unfair Trading Practices Act entered into force on 15 October 2008. Consumers now have better protection against misleading practices by traders. The Act covers misleading advertising and aggressive trading practices: for example, discounts on sales of expensive holiday trips to wonderful destinations, which are very disappointing on arrival. The Act is based on European directives, ensuring that the same rules apply throughout Europe. The Act contains a blacklist describing misleading and aggressive trading practices which are prohibited under any circumstances.

There is a good reason for this Act. According to a study by the Dutch Consumer Authority, every year Dutch consumers suffer damage from dubious trading practices valued at half a billion euros. More than 2 million Dutch people were victims of these practices in 2008, both young and old and from all strata of the population. One conspicuous misleading practice is the abuse of expensive telephone lines (long waiting times); others include misleading holiday clubs and aggressive selling during bus trips.



It is already clear that many elements of the new Act are *not* clear. For example, it prohibits suggestions that stocks are low to induce panic buying whereas on the other hand, failure to inform the consumer that stocks are limited is also prohibited. In other words, *special offer - limited stocks* may not be used to

induce panic buying, but *while stocks last* must be used to avoid misleading the consumer. Work that out!

Another striking new item: the word *advertorial* must be placed above any paid advertising space. If the content of the advertisement does not make it obvious that the advertising has been paid for, this could constitute one of the blacklisted misleading practices, and is forbidden by definition. You and I know that many magazines do not state clearly that editorial space has been paid for. This also applies to *flagging*: fake blogging where the writer on the weblog is paid by an advertiser. If this is not made clear to the consumer, this constitutes an unfair trading practice. This is going to lead to a lot more debate. We will keep you informed.

Ebba Hoogenraad

Advertising for text messaging services now regulated

It is almost certain that a new Advertising Code for SMS Services will be introduced. This advertising code is part of the Code of Conduct for SMS services, drafted by the sector, which entered into effect on 1 May 2008. The new code of conduct is aimed at preventing misleading conduct by SMS providers.



The new SMS advertising code stipulates precisely how the conditions for a messaging service should be described. The main thing is that they must be clear. For example, they must always state whether the service is based on a subscription, the exact cost, contact points for consumer questions, the number of messages, etc. There is also a template for TV spots and an example of online

advertising which the advertiser must use. A website aimed at children must make clear what sections are advertisements and must contain a warning that it involves a subscription.

In addition, the sector has created an 'opt-out' option: the SMS service filter, which allows consumers to determine that they cannot use certain SMS services. This will allow parents to give their child a mobile without receiving enormous telephone bills because their little darling has suddenly decided to download all sorts of expensive ring tones.

The SMS Code has been submitted for approval to the Dutch Advertising Code Foundation. If the Code is accepted, consumers and competitors can complain directly to this foundation in the event of a violation. Even now, SMS providers have to act with caution: under the Unfair Trading Practices Act, which entered into force on 15 October 2008, advertising must provide *clear and complete information on the most important features* of the products or services in question. Although it is not specifically directed at SMS services, this act does apply to them. The Unfair Trading Practices Act has been incorporated in the Dutch Advertising Code and can be evaluated by the Advertising Code Committee.

This creates dual protection against misleading advertising of SMS services and the SMS Code will offer many extra safeguards. Children in particular (and their unsuspecting parents...) will benefit.

The SMS Code and the Code of Conduct can be found on www.smsgedragcode.nl.

Maud van der Leeuw

Website liable for user generated content?

Managers of websites containing 'content' provided by third parties can be liable for trademark or copyright infringements. This follows from a recent judgment in summary proceedings by the Amsterdam District Court in the *Bruno Press* case about the website showbiznewz.nl. The website manager was held responsible for 'user generated content'. Good news for the right holders!

The *structural facilitation* of infringements via websites is considered unlawful in the Netherlands. Where it is *unmistakably clear* to the website manager that his site is being used for infringing acts, he must act. One example is a site where users could exchange files using *peer-to-peer* software. It emerged that almost all of these files were copyright protected, and the manager should have known that. He was obliged to pay a compensation.

The managers often refer to the advertiser or uploader (*'it is their initiative'*). The managers are only passing this on and do not want to interfere with the content. Thus, there is no advance control but a 'notice & takedown procedure'. If a complaint is made, an infringing ad or film is removed in line with the E-commerce Directive, which has also been implemented in Dutch law. Most



website managers do not want to interfere more substantially. The question is: can they reject such intervention so easily? In *Bruno Press*, the Amsterdam Court held that a more active approach can be required from the website manager.

The Dutch auction site marktplaats.nl was cleared in the first instance in proceedings initiated by Stokke, the manufacturer of the well-known children's



chair *Tripp Trapp*. As many infringing imitations are sold on auction sites like marktplaats.nl, Stokke wanted Marktplaats to conduct proactive controls on access. However, the District Court of Zwolle ruled that this would put too much pressure on the Marktplaats business model (expensive!) and is therefore not mandatory. Appeal proceedings are pending.

The position of online video sites has also come under fire. For example, some sites offered the viewer free images. The website manager attaches a short commercial to each short film, thereby generating a healthy profit; not from the viewer, but from the advertiser. Naturally, the many banners on the site also provide extra returns as the number of visitors to the site increases. But what happens if that extra profit relates to (allowing) viewing of protected images without the permission of the entitled party?

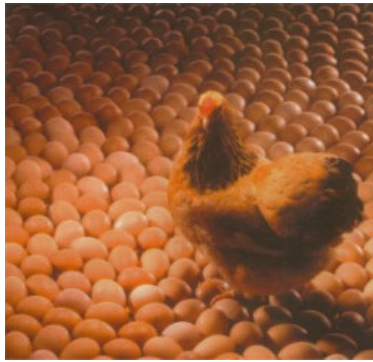
It is remarkable that the entitled party receives none of the extra revenues generated by such sites through the infringement of third parties. They have to maintain an expensive control system to enable early intervention. The question is whether this is the intention of protection under the E-commerce Directive: a commercial online video site that has its own (indirect) interest in the substance of the content may not be able to successfully take refuge in this protection by saying it is a mere conduit of information.

The Court of Justice will be taking a decision on how trademark law relates to e-commerce law (e.g. *Louis Vuitton/Google*). That ruling could also be relevant for claims against online video websites like YouTube and 123 Video. Managers of sites with user-generated content would be well advised to follow case law: claims are already being prepared in the Netherlands.

Maarten Haak advises a number of right holders on claims regarding user generated content websites

Free range eggs and cantherelles: nutritional information

Naturally, free range egg salad contains free range eggs. But what if the sauce is made from mayonnaise containing battery hen egg yolks? Does that make the name of the salad misleading? The Dutch animal welfare foundation *Stichting*



Wakker Dier felt that it does, and complained to the Advertising Code Committee. We argued on behalf of Johma that the product labelling is in full compliance with legislation (*Besluit Etikettering Levensmiddelen*): 63% of the filling is made from free range eggs and therefore, in accordance with labelling regulations, this name may be used for the salad. The Code Committee adopted Yohma's arguments, but could it be considered misleading nevertheless? No. The average and alert consumer

who wants to know the ingredients of the sauce will look at the label. This states that the salad contains 63% free range eggs and 2% egg yolk, the usual name for battery hen eggs. Because this is only a minimal percentage, the consumer is not misled. Free range egg salad is the correct name. Nevertheless, Johma has announced that with effect from January 2009 it will only use free range eggs for all its egg ingredients, including the beaten eggs used in mayonnaise.

Forest mushroom soup: with one or more chanterelles?

Unilever sells a tasty Forest Mushroom Soup '*with chanterelles and chervil*'. A consumer thought this name was misleading; the soup allegedly contained only one chanterelle. The Code Committee substantiated the Free Range Egg ruling by stipulating that the packaging complies with the Labelling Decree [*Etiketteringsbesluit*]. Are the words 'with chanterelles' misleading? No, because the consumer who considers this relevant will look at the label, which provides the exact percentages of mushrooms, chanterelles and other delicious fungi. The name is permitted. According to the Code Committee the public attaches more value to the percentages than to the actual number of fungi.

Conclusion: if you want to know what you are eating, read the list of ingredients. If necessary, take your reading glasses with you!

Ebba Hoogenraad

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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