

ABCOR's ABChronicle



Trademarks

BAVARIA fends off German attack

For over 10 years Dutch beer brewer BAVARIA has been entangled in legal issues with German beer manufacturers from the state of Bavaria. In 1994 the Association of Bavarian Beer Brewers issued a request with the European authorities to protect Bavarian Beer as a geographical indication. This would mean that the consumer would be ascertained that whenever he bought "Bavarian" beer, the beer would actually come from Bavaria. There are several protected geographical indications, the most famous being Parmesan Cheese and Champagne. But even the Netherlands has some geographically protected names, such as Gouda and Edammer.



The grant for the geographical protection of Bavarian Beer was eventually issued in 2001. In the meantime, BAVARIA, from Lieshout in the Netherlands, applied for trademark protection in Germany in 1995. Although the beer brand has been used since 1925. The question now is, which right is the strongest? The court eventually decided in favor of BAVARIA from the Netherlands. The reason for this being that with geographical indications the critical date is not the application date, but the date of acknowledgement, which in this case was 2001. Good news for Dutch BAVARIA beer and a wise lesson for all of us: In order to prevent this from happening it is advised to always immediately register your trademark in any countries in which you may use it.

The bottle neck

The shape of a product is usually one of the most recognizable aspects. Consumers usually recognize the product from a certain brand by its shape alone, and often do not even bother to read the label. Despite this fact it is extremely difficult to register a shape mark in the Benelux. This was not always the case. Coca Cola, for example registered her elegantly shaped bottle as a shape mark many years ago.



Original bottle



Pepsi bottle

Not only does Coca Cola protect the secrets to her ingredients very well, virtually every aspect that concerns Coca Cola is well protected. This, of course, includes the shape of her bottles. When Pepsi introduced a new bottle in Australia Coca Cola was on high alert. Pepsi's new bottle bore a striking resemblance to the bottle Coca Cola has been using since 1916.

A similar case once occurred in Holland. Coca Cola had just developed a new 1.5 liter bottle (and registered the shape as a trademark). After a few months Superunie introduced her new bottle for First Choice Cola, which had essentially the same form. Eventually Superunie caved under the pressure of a pending lawsuit and changed the shape of her bottles.

Be careful with flags, stars and symbols

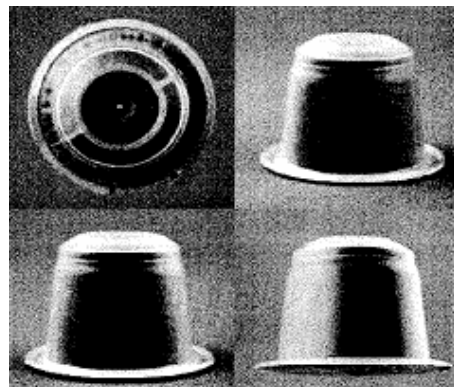
In Poland the Red Cross has opposed the registration of Alta's new trademark. Alta's new trademark contained a polar bear in front of a red cross. It is not allowed to use flags and other international symbols as a trademark. The Polish court decided that this is the case even if other distinctive elements are part of the mark, such as a polar bear.



Nespresso, who else?

Nestle coffee cups are a worldwide success. In order to gain a profit competing companies will often offer a comparable product under their own name. Swiss Retailer Denner was no exception.

Nestle, however, took all the precautionary steps in protecting her interests. The shape of her capsules had been protected as a shape mark. During interlocutory procedures the court decided that Denner's product was an infringement on Nestle's trademark rights.



The shape of the capsule was not determined entirely by its technical application. Although the two capsules were not identical up to 50 % of the consumers associated Denner's capsules with Nestle. As a result Denner was prohibited to sell her coffee cups.

Raw Deal

G-Star has registered the word RAW as a trademark in both the Benelux and the European Union. When H&M decides to sell T-shirts and sweaters with the print RAW BEAT EXPERIENCE, a new conflict is born.



H&M claims that RAW is descriptive for clothing since it allures to the rough street culture. G-Star produced a survey in which over 30% of the participants immediately thought of G-Star or GapStar when seeing the sign RAW. H&M did not contest the findings of this survey. The court subsequently concludes that the general public will recognize a mark in RAW. Even the counter claim by H&M that RAW is also used to describe a certain musical style has no effect. Despite its decorative character the public will assume there is a connection between the decorative element RAW BEAT EXPERIENCE and G-Star's trademarks. Trademark infringement is likely.

Descriptive trademarks

In 2006 Henkel applied for trademark protection for her logo MEN PERFECT. Competitor Dramers later files for trademark protection of the word MAN's PERFECT in the Benelux and internationally. Henkel claimed that these applications should be cancelled because of the descriptive nature of the trademark.



product itself or its end result.

The High Court does not see any reason to cancel Henkel's trademark. This trademark does contain descriptive elements, namely the words, but it also contains non-descriptive elements. These compensate the descriptiveness of the words. Although a wordmark generally gives a

The High Court agrees with Henkel. After all MAN'S PERFECT clearly indicates that the product is perfect for a man, or that man is perfect. In both cases it describes either the

better protection, visual elements and logos may be very important.

Red Pepper – Sweet Pepper

Red Pepper was a very well known advertising company in the Netherlands. Although bankrupt since 2008 its reputation has survived. To this day people associate the name Red Pepper with high quality advertising. When on September 1 a new advertising company was founded with the name Sweet Pepper, Tjeerd de Jong, founder of Red Pepper, was not amused.



"it is incredibly sloppy to give your company this name. In this business it is all about recognition and obtaining a unique position on the market. This trademark simply belongs to me." In a sense this is true. Red Pepper registered its trademark in 2000. However, the trademark expired in 2010. It was probably not renewed due to the bankruptcy. Had De Jong kept the rights to his trademark he would have been in a much better position right now.

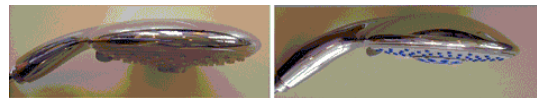
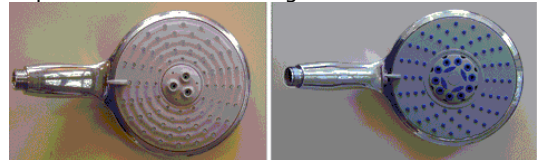
Sweet Pepper took immediate action in response to this conflict. Not only did Sweet Pepper apply for the registration of her own name as a trademark, an application for the trademark REDPEPPER was also filed. It now remains to be seen what Red Pepper's reaction to this will be.

Designs

Design registrations become increasingly more important

Protection of a product through design registration has been an all but forgotten option in the Benelux for a long time. However, in the past few years it has become increasingly more evident just how important this method of protection may be.

Hansgrohe claimed that her competitor Tiger infringed her design rights. Hansgrohe claimed that Tiger's Niagra showerhead was essentially the same as her own showerhead. The court, however, did not agree with this and stated that the Niagra showerhead gave a different general impression than the Hansgrohe showerhead.



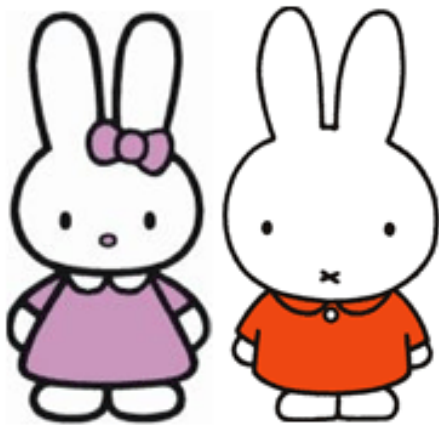
The Court of Appeal, however, disagreed completely and gave a much broader scope of protection to Hansgrohe's design rights. Tiger claimed that Hansgrohe's design owed its shape to technical specifications. The Court of Appeal, however, judged that although the shape of the showerhead is largely determined by technical characteristics, it is not the only technically possible shape for a showerhead and can therefore be protected as a design.

The fact that certain elements of the design were inspired by a certain fashion trend or style also does not affect the validity of the design, according to the Court of Appeal. The Court judged that Tiger's product infringes Hansgrohe's design rights. An injunction followed and Tiger was ordered to pay Hansgrohe's legal expenses, which were over € 93,000.-.

Copyrights

Nijntje keeps Kathy outside of the Benelux

World famous cat Hello Kitty (developed in 1974) recently got a new friend, Kathy the bunny. Like Hello Kitty, Kathy was a stylized animal, characterized by thick lines and a lack of depth. Eager to exploit Kathy commercially Sanrio immediately granted licenses to manufacturers of clothing and toys.



In the Benelux H&M(clothes) and Bart Smit(toys) started selling Kathy merchandise. This, however, did not go well with Mercis, a Dick Bruna owned company that manages all intellectual property rights concerning Nijntje, the world famous bunny.

The court eventually decided that even though Nijntje is a very stylized bunny, she is most certainly an artistic creation, and therefore protected by copyright. Nijntje, like Kathy, is characterized by the thick lines and elementary colors. The proportion of the head in relation to the hands and body is almost identical. The court judged that it is clear that Kathy had been copied off Nijntje, the only real difference between them being the mouth and shape of the ears.

Mattel squares off against lesbian Barbie

For years now Barbie has been a major success for Mattell. Barbie is placed at no. 97 of the top 100 most important trademark in the world. Naturally her good image must be protected at all times.

Argentine art couple Breno Costa en Guilherme Souza however, decided to make a Barbie calendar in which she poses with her lesbian lover. Mattell, of course, strongly disproves of this calendar, but how successful would a lawsuit in the Netherlands be?

The protection of Barbie's physical characteristics falls under the scope of copyright. Unfortunately according to copyright legislation a parody is permitted.



.However, a parody should never unnecessarily damage the reputation of the original product or the reputation of its creator. Furthermore, a parody should never have a commercial or competitive element to it. It is therefore not allowed to make fun of the competition. The calendar may be considered a work of art, one that protests our society and the use of sex as means of sale. Because of this contradiction a parody on Barbie could possibly be reasoned. Although the parody exception may give relief in some cases, it is a tricky business. Especially if a parody is being used by a competitor.

Advertising

Mary's immaculate conception

For years Antonio Federici has been making notorious and satirical advertisements. Just like last year this year's advertisement has been banned by the Advertising Standards Authority in the United Kingdom.

This time the ad features a pregnant nun, in her last trimester, eating delicious ice cream. Antonio Federici claimed that the way in which the ice cream was produced was immaculately conceived. In a way it is the holy mission of the company to make the ice cream, which would explain the use of religious elements in the advertisement.

Apart from this, the company wanted to



question the manner in which the catholic Church views certain social matters. Freedom of speech was supposed to prevail. The ASA, however, judged differently. The use of a pregnant nun and the reference to the immaculate conception will most likely be seen

as an insult towards Catholics, according to the ASA. The use of these images is therefore offensive. Religion and parody therefore continue to not go well together.

Suit Supply Sexist?

Suit Supply's new campaign "Shameless" caused a lot of commotion. It did not take long before the Dutch Advertising Standards Authority (RCC) was flooded with complaints. The complainants claimed that Suit Supply's new advertisement was indecent and of very poor taste. The RCC, however, decided that the reference to sexually explicit acts were not of such severity that any moral standard had been breached.



As far as the alleged unfriendliness towards females is concerned the RCC decided that the way in which both man and woman are depicted does not attest to any lack of respect for the woman.

In Belgium, however, the authorities had a very different opinion. Four pictures had to be removed from the website because they were sexist and used women as sex objects. This case clearly proves that good taste is a matter of opinion, and that moral standards are quite different in the Netherlands.

Internet/ social media/ domains

Search words Twitter commercialized

The # sign (hashtag) is used on Twitter to mark important words in messages. That way Twitter messages can be easily searched for and categorized with other messages on the same subject. On its own there is nothing much wrong with this.

Results for #apple



Advertisers have picked up on this new phenomenon recently, and have started to exploit the possibilities. HP for example has been sending tweets with the words #apple, #mac and #macbook. As with Google Adwords in the past, the long wait is now for the European Court to finally decide on the admissibility of this kind of use.

Use of competitor's adword prohibited

Following the European Court of Justice's decision in the Louis Vuitton case, Google has changed her Adwords policy. It is now possible for a company to buy their competition's trademark as an Adword for the promotion of their own website. Google believes this is allowed, but is this really so?

The first court decisions on Google Adwords

seem to indicate it is not. In both Denmark and the Netherlands the courts have decided that you are not allowed to use someone else's trademark as an Adword.

The Dutch case centered around the admissibility of the use of the Adword TEMPUR by competitor Energy+.

TEMPUR sells special matrices and pillows made of a particular Styrofoam. Energy+ sells these type of matrices as well and tried to lead traffic to her website by using TEMPUR as a metatag on some of her web pages, as well as using TEMPUR as an Adword. The court decided the case on the basis of comparative advertising. Since Energy+'s ads did not adhere to the strict European regulations on comparative advertising, Energy+ was acting unlawfully. Comparative advertising is only allowed when the products involved (in this case TEMPUR and Energy+) are directly and clearly compared. Of course, that cannot be the case in a Google advertisement. Energy+ was prohibited to further make use of the Adword TEMPUR and was ordered to pay damages of € 9,500.-



Bedoelde u: [TEMPUR](#)

Red Bull loses UDRP procedure

Sometimes a trademark is used as part of a domain name. This is quite undesirable, because it implies a bond between the trademark holder and the owner of the website. Usually this is not a problem for the trademark holder, since a simple UDRP procedure is usually all it takes to obtain the rights to the domain name registration. Red Bull, however, recently lost such a procedure concerning the domain name REDBULLNORGE.COM.

Red Bull lost this case because the registrant of the domain name was Red Bull's Norwegian distributor. Back in the day only a Norwegian company or person could register and operate a Norwegian domain name. Now that this is no longer required Red Bull wanted the domain name for herself. Unfortunately for Red Bull the domain name was registered in good faith. In UDRP procedures both registration and use of the domain name have to be in bad faith.



Abcor BV

Abcor is an IP Law firm, Located in the Netherlands. Our specialty is consultation with regards to intellectual property matter, trademarks, designs, copy right and domain names in particular. Our services include the registration of trademarks and designs, searches, infringements and oppositions.

Suggestions for ABCOR's ABCHRONICLE may be sent to info@abcor.eu

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