NETHERLANDS

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Country Report

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1.	
Topic:	**Euro coins**
Who:	European Commission
When:	22 October 2001
What Happened:	In July 1998 the European Central Bank issued a directive concerning the depiction of banknotes in advertising. However, the use of European coins remained unclear. This has now been solved. The member states, without having to follow a specific procedure, may reproduce the design of Euro coins on pictures, drawings, paintings and other flat reproductions, provided there is a true resemblance to the real design and provided the reproduction does no damage to the image of the Euro. Relief reproduction is also allowed except on coins, medals, tokens and other metal objects which could be confused with real coins. Imitation coins, e.g. toy Euro coins, can be manufactured from soft synthetic materials. Such reproductions will, however, have to be at least 50% smaller or larger than the size of the real Euro coins. For any other form of reproduction, permission will have to requested from the European Commission. The Central National Banks will supervise the enforcement of this regulation.

2.

Topic:	**Contents databank**
Who:	NVM vs. El Cheapo
When:	21 March 2002
Where:	The Supreme Court of The Netherlands
What Happened:	Al Cheapo.nl is a specific search engine for a.o. price comparisons between cars, music, travels and housing. The part "find your favourite house" searches various databanks with houses for its visitors, including that of the Dutch Association of Estate Agents (NVM). This the largest file in The Netherlands with houses on offer. The data found with suitable houses are then temporarily copied to the El Cheapo server and combined in one list with a maximum of 100 search results. In this the approximate prices as well as the files are provided with a hyperlink. When clicking this link, an NVM frame appears which is visually the same as the page which would have appeared if the user has searched through the NVM homepage. The data copied by the El Cheapo server remain available there as long as the user uses these data and some minutes thereafter. NVM demanded that El Cheapo cease the copying of information from its databank as in their opinion this is in contravention with their databank right and copyright. The President of the Court in Amsterdam found in favour of the NVM in 2000. The Court of Appeals rejected the claim of the NVM in the second instance. The Court of Appeals considered that the NVM could not successfully appeal to copyright protection. The information being copied is not original enough. Furthermore, there is no "document protection" because, according to the Court of Appeals, there is no derivation through "simple repetition". The Court of Appeals else did not grant data protection. The Court of Appeals was of the opinion that the data were a spin-off from the NVM's main activities, the internal exchange service for members. For that reason there was no substantial investment to build the data in a website accessible for the general public and therefore this can not be considered a databank. The Supreme Court rejected the spin-off argument. In their opinion the costs which the NVM has in fact incurred in collecting and categorising the data should be considered independently from the question if and when the NVM makes these data accessible through the internet. The Supreme Court else grants copyright to the website and in their opinion there is in fact derivation of the NVM database through simple repetition. The consequence of this judgment is that search engines making substantial use of the databanks of others can in all probability no longer do so in future, other than on a contractual basis.

3.

Topic:	**Spamming and opt out XS4all vs. Ab.fab.**
Who:	XS4all vs. Ab.fab
When:	7 March 2002
Where:	President Court Amsterdam
What Happened:	Recently, the European Telecom Ministers decided that Opt-in should become the standard in Europe. In a number of countries, including The Netherlands, the Opt-out system still applies. This means that the consumer can receive unasked advertising messages, until the consumer gives notice that he does not wish to receive such messages. In this procedure the core question is if Opt-out is the same as Spam, the wholesale undirected sending of advertising materials and can the internet provider claim that a sender of Spam, in this case Ab.fab, is forbidden to do so. The basis of the claim of XS4all is the argument of financial damages. The costs of Spam are after all charged to the receiver by the provider. Furthermore, in its conditions to the consumer, XS4all has made it clear that they consider it of importance that their customers are safeguarded from unasked advertising through e-mail. They provide this safeguard by imposing a prohibition to this effect on their own customers. As XS4all imposes this prohibition on its own customers and as they do not have a legal transport duty for data, XS4all can also prohibit others, like Ab.fab to do so. On this basis, the requested prohibition is granted and Ab.fab is prohibited to send/have sent commercial e-mail messages on behalf or not of third parties, to (e-mail addresses of) users and/or customers and/or subscribers to XS4all. The consequences of these judgements is that in all probability new cooperative ventures will be created between marketing agencies and providers. The providers can after all analyse their e-mail addresses per product category in which the subscriber is interested. The subscriber will then receive Spam in the area of his/her interest. It will then no longer be Spam, but e-marketing.

4.	
Topic:	**What is the extent of the responsibility of the ISP**
Who:	Deutsche Bahn AG vs XS4all Internet BV
When:	25 April 2002
Where:	President Court Amsterdam

What Happened:	In the case of the Scientology Church versus XS4all, in 1999 the Court in The Hague decided that the offerer of Internet Access (ISP) does not disclose by itself, but only offers others the opportunity to do so. The offerer is however capable, in case of infringements on his copyrights published unlawfully by a third party through his website, of preventing this by intervention. Under certain circumstances it can be unlawful if the ISP fails to do so. The Court lists as conditions, that the ISP does not intervene if a user publishes his services unlawfully on a website; he has been notified of this and the correctness of this notification can not in all reasonableness be doubted. This judgment has been widely critized because the ISP can not judge independently if a publication is unlawful or otherwise contrary to the right of a third party, while also the freedom of speech is at stake. The appeal in this case is still pending. In the meantime, in June 2000 the e-commerce directive has been drawn up and included in a Dutch legislative proposal. This provides legal regulation for ISP liability. Recently there was the aforementioned case between the Deutsche Bahn and the Radical-site. XS4all did not consider that they were in any way responsible or liable for the contents of this case because the authorities never ordered them to block the site objected to. The site contained information on the sabotage of the railway network during the transport of radioactive waste. In the judgement of the President the provision of this information should be considered unlawful as the texts carry a real threat of damages to the DB as a result. Once this unlawfulness has been established, XS4all is obliged to take all actions to cease the transfer of said information. The freedom of speech is not impeded by this, in the opinion of the President. The conclusion to be drawn from this is that the ISP does not have to check independently what type of messages they are passing on. If, however, the unlawfulness of these messages is pointed out to them, and this has been established in all reasonableness, they are obliged to act and to block the transfer of said publication. This not only applies to the infringement of copyrights such as the transfer of illegal copies of books, movies and music, but also when the message is unlawful, e.g. insulting, inflammatory or otherwise dangerous or otherwise poses a threat of damages to a third party.

5.	
Topic:	**Copyright Bon Bons**
Who:	Spaargaren vs. Da Vinci
When:	9 August 2001

Where:	President Court Amsterdam
What Happened:	A prohibition granted on the imitation of bonbons. Until October 1994, Jan Blanke was employed by Spaargaren as head of production. After leaving the company, Jan Blanke started his own bonbon store under the name of Da Vinci. 13 of the 30 bonbons produced and sold by Da Vinci resemble in its external design the bonbons sold by Spaargaren as well as containing almost the same basic ingredients. Although bonbons by definition resemble each other rather closely, in the opinion of the President all 13 bonbons objected to can be considered to be a creation of Spaargaren in which in each case a specific combination of ingredients is combined with a specific design. Although in the scope of interlocutory proceedings it can not be determined whether this also applies to the taste of the bonbons, these elements combined lead to the conclusion that for each type of bonbon separately there is a creative achievement with its own original character bearing the personnel stamp of its creator. This leads to the conclusion that Spaargaren has the copyright on these bonbons and that Da Vinci should cease and remain ceased the production of and trade in these bonbons.

6.	
Topic:	**Amendment to an Act**
Who:	Amendments on the Benelux laws concerning trademarks
When:	Proposed introduction 1 January 2004
What Happened:	The Benelux are the only countries in Europe where a trademark right is obtained by single application and not by registration. For this reason the Benelux counties do not have the system of opposition. In the proposed introduction on 1 January 2004 this system will be altered and adapted to the common practice in Europe. This means that a trademark right is granted only after registration and that said registration is only completed after a decision has been taken on possible opposition.

7.	
Topic:	Sound trademark
Who:	Shieldmark vs. Kist

When:	13 July 2001
Where:	Supreme Court of The Netherlands
What Happened:	In the development of trademark rights we see a clear shift from the Benelux standard to the European standard. The judgments of the Court of Justice of the European Communities are increasingly important. This Court has already issued important judgments on the shape trademark such as e.g. on the Philishave (Philips vs. Remington) on 23 January 2001, and on dissolvable tablets for dishwashers of 19 September 2001 (Proctor & Gamble vs. BHIM. The legal precedents on the colour trademark are also becoming increasingly tangible and in these cases also a decisive legal issue has been submitted to the Court of Justice for the European Communities to explain the directive such as e.g. on the colour orange of Libertel (on 23 February 2001; NJ 2001/276). The Supreme Court asked the Court of Justice the following preliminary questions: "Can a single colour have the distinctiveness of a trademark?" "When does a single colour have the distinctiveness of a trademark?" The answers to these questions led to the dismissal of the Libertel claim. The Court in Brussels, concerning the Belgacom turquoise, was of the opinion that the preliminary questions were unnecessary and recognised the trademark of Belgacom on the colour turquoise. Since then, in practice, based on the approach of OHIM, applications for colour trademarks are approached in a critical manner, colours as trademark are dismissed unless it concerns: - very specific colour shade of very specific goods - colour exhibiting a shade which is extremely unusual and peculiar in the relevant trade - the mark has to be current. Now for a recent case on sound trademark. Two trademarks agencies have taken this matter on with each other, i.e. Shieldmark and Kist. Shieldmark has registered a trademark where a chicken cackles the first nine tones of Fur Elise. This trademark appears as follows: Kukelekuuu (Cock-a-doodle-doo) and consists of the following musical notes: e, d sharp, e, d sharp, e, b, e, c, a. When the Kist telephone is picked up, it plays the tones of Fur Elise on the piano. Shieldmark claims the trademark right. The President as well as the Court of Appeals rejected the claim. The Supreme Court wondered whether sounds could be registered because possibly article 2 of the directive dictates otherwise, in view of the wording in this article " which are capable of a graphic presentation". As sounds are in fact not directly perceivable visually for this reason they could not be registered as a

	trademark. If this were technically possible, the question arises whether the directive impels to accept sound marks as trademarks. The Supreme Court submitted this question to the Court of Justice for the European Communities. The question was also submitted if the aforementioned question is answered affirmatively, in which form a sound or sound mark should then be registered. We will have to wait and see how the sound trademark develops. It is clear that the trademark right gives an increasing number of possibilities without indicating the origin of products. It is therefore of the utmost importance for the users that the possibilities and conditions for registration are clearly defined.

8.	
Topic:	Parallel imports
Who:	Etos vs Dior
When:	25 January 2002
Where:	Supreme Court
What Happened:	Exhaustion of the trademark rights, permission of the trademark owner. The introduction of Community exhaustion to rights on intellectual property (regulation EC no. 3295/94) by the Council of 22 December 1994 took most members states by surprise, especially since the community always has always carried out a policy based on free trade, in accordance with the VTO/GATT agreements. This took some getting used to. Currently Community exhaustion is no longer a subject for debate and in legal precedences it this is also generally accepted. This means that the import of products which have first been brought into trade outside the European Economic Space can be blocked by the owner of the trademark based on his trademark rights. In the aforementioned procedure probably a last attempt is made to enable parallel imports. Etos' argument was that if Dior had not imposed a prohibition on its buyers outside of the European Economic Space to sell the products directly or indirectly to traders established inside the European Economic Space and furthermore had not included a statement on the products stating that trade inside the European Economic Space is not permitted, Dior implicitly grants permission for sale within the European Economic Space, so that the trademark right is exhausted en parallel imports are allowed. This argument was also rejected by the Supreme Court, which definitely closes the book on parallel imports, unless the European Commission alters the view on Community exhaustion.