

§ 18 Netherlands

Bibliography: *P.G.F.A. Geerts/E.R. Vollebregt*, *Ooneerlijke handelspraktijken, misleidende reclame en vergelijkende reclame: een bespreking van de art. 6:193a-6:196 BW*, Deventer 2009; *Ch. Gielen (red.) et al.*, *Kort begrip van het intellectuele eigendomsrecht*, 2011 (10th edition), chapter XI; *Henning-Bodewig*, *European Union and member States*, 2006, p. 200–209; *E.H. Hondius/G.J. Rijken (ed)*, *Handboek Consumentenrecht*, Parijs, 2011 (3rd edition); *A. Kamperman Sanders*, *Unfair competition law: the protection of intellectual and industrial creativity*, Clarendon Press Oxford 1997; *C.J.J.C. van Nispen*, *GS Onrechtmatige Daad*, section IV, Deventer: Kluwer (l.-leaf); *W.J. Slagter*, *Dient de wet ten aanzien van ongeoorloofde mededinging nadere bijzondere regelen te bevatten, en zo ja, welke?*, *Preadvies Nederlandse Juristenvereniging*, *Handelingen der NJV* 1963; *E. Ulmer (ed.)/L. Baeumer/W.C. van Manen*, *Het recht inzake oneerlijke mededinging in de lidstaten der EEG*, section I and II, Zwolle, Tjeenk Willink 1974; *D.W.F. Verkade*, *Ongeoorloofde mededinging*, Tjeenk Willink Zwolle, 1986; *D.W.F. Verkade*, *Ooneerlijke handelspraktijken jegens consumenten*, in: *Monografieën BW*, 2009; *R.W. de Vrey*, *Towards a European Unfair Competition Law: A Clash Between Legal Families (a comparative study of English, German and Dutch law in light of existing European and international legal instruments)*, 2005.

I. Background and General Approach to Unfair Competition Law	1
II. Legal Basis of Unfair Competition Law and Relations to Neighbouring Areas of Law	9
1. Law of unfair competition embodied in regulations and case law.....	9
2. Relations to other areas of law	12
a) Anti-trust.....	12
b) Consumer protection.....	13
c) Contract law	14
3. Relation to IP laws – pre-emptive effect	15
III. Basic Considerations	20
IV. General Clause Against Unfair Competition (or lack of it).....	24
V. Marketing.....	26
1. Advertising	26
a) Legal background	26
b) Definition	30
c) Misleading advertising (6:194 and 193 c et seq. Civil Code)	33
d) Comparative advertising	36
2. Special forms of marketing	39
a) Prospectus liability.....	39
b) Medicines	42
c) Media Act.....	43
d) Tobacco.....	44
e) Commodities	45
f) Games of chance and promotional games	46
3. Self-regulation.....	48
a) Dutch Advertising Code	48
b) Advertising for medicines	50
VI. Protection of Competitors Against Unfair Trade Practices.....	51
1. Introduction	51
2. Slavish imitation	54
a) The plaintiff's product must be distinctive.....	56
b) The defendant's product must be likely to confuse the public.....	57

c) The defendant's product must be similar to the plaintiff's product regarding features that are not important for the reliability and usefulness of the product	59
d) The defendant must have failed in doing what is reasonably possible to prevent confusion ("needless confusion")	60
3. The imitation of badges of trade	62
4. Denigration	63
5. Protection of know how	66
6. Inducing breach of contract	70
VII. Specific Protection of Consumers Against Unfair Trade Practices	71
1. Aggressive trading practices	71
2. Information disclosure duties	72
3. Some specific rules	73
a) Inertia selling	73
b) Door-to-door selling and timeshare	74
c) Direct marketing	75
VIII. Enforcement	77
1. Private enforcement	77
2. Public enforcement	79
3. Self-regulation	82

Specific Abbreviations and Acronyms

I. Background and General Approach to Unfair Competition Law

- 1 Dutch law does not contain any specific statutory rules on unfair competition law, although the legal concept itself is clearly recognised in case law and legal doctrine. The general principles of unfair competition law ("ongeoorloofde mededinging") are derived from the basic provision of tort embodied in Article 162 of Book 6 of the Dutch Civil Code. This general tort clause has, over the years, given rise to an extensive body of case law on unfair competition.¹ In addition to this, various statutory regulations exist that contain rules on specific areas of unfair competition law mainly dealing with misleading and comparative advertising. Furthermore, the Dutch approach to unfair competition law is characterized by a strong self-regulation system built on various codes of conduct.
- 2 The development of the law of unfair competition is closely connected to the development of the general tort clause. The Dutch Civil Code was substantially influenced by the French Code Napoleon. The French Code served as a model for the Dutch Civil Code of 1838. Article 1401 of the Dutch Civil Code of 1838 contained the general tort clause and read:

"Any unlawful act, which causes damage to another person, obliges the one, by whose fault this damage has been caused, to compensate the other"

The Dutch general tort clause closely resembles its French equivalent (art. 1382 of the "Code Civile"). The main difference however, is the use of the word "unlawful" in the Dutch text. By introducing this word, the Dutch legislator wanted

¹ R.W. de Vrey, *Towards a European Unfair Competition Law: A Clash Between Legal Families*, Leiden/Boston 2006, p. 79.

to ensure that not every act or culpable behaviour that inflicts damage would lead to compensation, but only acts that were not legally authorized.²

In the years following the introduction of the Dutch Civil Code in 1838, case law 3 favoured a strict interpretation of the term "unlawful". The term was construed as being contrary to statutory law. Its ambit was confined to acting against the law or acting in a manner which is legally unauthorized. However, an epoch-making judgement delivered by the Supreme Court on 31 January 1919, changed this reserved policy of the Supreme Court. This change was preceded by a reverse trend in the legal literature, where the need for a more flexible general tort clause was advocated, *inter alia* to accommodate an effective control of unfair competitive practices. In its *Lindenbaum v Cohen* case³ the Supreme Court held that:

"An unlawful act shall be taken to mean an act or omission, violating a right or a statutory duty or violating either the good morals or the standard of due care, which must be observed in society with respect to a person or the person's property (...)"

Under the heading of "an act or omission (...) violating either the good morals 4 or the standard of due care", from this moment on unfair trading practices not covered by Dutch statutory law could be combated as well.

At various stages of the re-codification of the Dutch Civil Code that led to the 5 New Civil Code of 1992, the question was raised whether codification of the law on unfair competition was deemed to be necessary. Although many voices were raised arguing for introduction of a general prohibition on unfair competition accompanied by specific rules for certain kinds of unfair competition,⁴ by pointing to the obligations pertaining to international law as imposed by section 10bis of the Paris Convention, these voices proved to be insufficient grounds for the codification of Dutch unfair competition law.⁵

In Dutch legal practice, unfair competition law often plays a part as a supplement 6 to protection under intellectual property laws. In most intellectual property cases, e.g. in the case of an alleged copyright or design infringement, unfair competition law is used as an alternative charge by way of the legal action of "slavish imitation". Unfair competition law, in such cases, plays the part of a residual category as well as a last resort, especially if e.g. a patent's term has lapsed, or a design is not registered. In addition to this, unfair competition or, more in particular, advertising law plays an important role in preventing the public from being misled, as well as businesses from being defamed; it also deals with certain specific anticompetitive acts (like e.g. stealing trade secrets).

Until December 2003 Article 14(8) of the old Benelux Designs and Models Act 7 (BDMA) impeded a possible action for slavish imitation. This provision stated that no action for unfair competition may be brought in relation to facts that solely constitute an infringement of a design right. This provision precluded actions to protect designs under unfair competition law if protection could have been granted had the design been properly registered under the BDMA. As a consequence,

² Cf. *Van Maanen*, *Onrechtmatige Daad*, diss. 1986, p. 33 *et seq.*; *Van Dam*, *Aansprakelijkheidsrecht*, The Hague 2000, p. 163.

³ Dutch Supreme Court ("HR") 31 January 1919, W 10365, ann. *Molengraaff*, NJ 1919, p. 161 *et seq.*, nt. EMM.

⁴ See the parliamentary history to the Dutch 1992 Civil Code, *Handelingen II* 1993, p. 2920.

⁵ *Dorhout Mees*, *Nederlands handels- en faillissementsrecht*, Arnhem 1964, at 423.

ancillary protection to design under the action for slavish imitation was only allowed in the case of special “extra” circumstances.⁶ This obstacle has, however, been removed by an amendment of the BDMA (currently the Benelux Convention on Intellectual Property), thereby putting the action for slavish imitation back on track. As a result, the action for unfair competition, specifically regarding cases where products are imitated, is quite relevant under Dutch intellectual property law.

- 8 As will be detailed below, enforcement of the law of unfair competition was originally mainly effected through private party complaints and self-regulation. However, the introduction of various European rules on unfair trading practices, has added a varied portfolio of public enforcement options.

II. Legal Basis of Unfair Competition Law and Relations to Neighbouring Areas of Law

1. Law of unfair competition embodied in regulations and case law

- 9 As discussed above, under Dutch law the protection against unfair competition is primarily provided for under the general tort clause embodied in Article 6:162 and the advertising clauses embodied in Article 6:194 et seq. of the Dutch Civil Code. Dutch unfair competition law is therefore mainly judge-made law. In addition, Directive 2005/29/EC on unfair commercial practices has been implemented in Articles 6:193 a – 6: 193 j of the Dutch Civil Code.
- 10 Starting from about the middle of the 20th century, several regulations under public law were enacted that can be partly categorized as belonging to unfair competition law, although most of these regulations have been abolished.⁷ Nowadays, this mainly consists of the Commodities Act, the Door-to-Door Sales Act, the Betting and Gaming Act and several regulations of (lower) governments, primarily product boards and industry boards” regulations.
- 11 In addition, various unfair trading practices are punishable under the Dutch Criminal Code. The Criminal Code contains one general unfair competition provision in art. 328bis, that states:

“Any person who commits a fraudulent act in order to mislead the public or a particular person, with the intention of building up, protecting or increasing his own sales or those of another person, shall, if this could result in any disadvantage to his competitors or those of such other person, be guilty of engaging in unfair competition and be liable to a term of imprisonment not exceeding one year or a fine of the fifth category.”

This Article has proven to be of very little practical significance because of the additional requirements that need to be satisfied (i.a. malice) and because the public prosecutor gives low priority to the enforcement of such offences. Other relevant – but also very seldom used – provisions are Articles 225 (forgery of documents), 261 (defamation), 272 and 273 (regarding trade secrets) and 326 b (deception) of the Criminal Code.

⁶ Benelux Court of Justice, 21 December 1990, NJ 1991, 429.

⁷ De Vrey, *supra* note 1, p. 101.

2. Relations to other areas of law

a) Anti-trust

Nowadays, competition is basically regulated by two areas of the law.⁸ Anti-trust law, on the one hand, provides the government with the means to stop behaviour by market participants that is likely to distort competition, in the interest of the market as a whole. Government takes the initiative to enforce compliance of the anti-trust regulations. Unfair competition law, on the other hand, provides (private law) rules to parties that come into conflict with each other. The action is confined to non-contractual liability under civil law. Unfair competition law aims at preventing dishonest or fraudulent rivalry in trade and commerce. These two areas of law have been traditionally separated from each other in legal practice.

b) Consumer protection

Although generally considered two separate areas of law, consumer protection law has been – at least partly – been integrated into unfair competition law, facilitated by the flexible nature of the general tort clause of Article 6:162 BW.⁹ This integration has been accelerated under influence of European “consumer protection focused” unfair competition legislation, like the Directive 2005/29/EC on unfair commercial practices. The effective enforcement by consumer organisations has been addressed – to a certain extent – by legislation.¹⁰

c) Contract law

The Directive 2005/29/EC on unfair commercial practices is expressly “without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract”.¹¹ The Dutch legislator has followed this approach. No formal “link” has been established between unfair commercial practices and contract law. This does not mean that consumers do not have a civil action, e.g. to claim that the agreement entered into be declared void on the basis of error or deception.¹² However, it is for the consumer to prove that the requirements for these civil actions are met. The (absence of a formal) link between unfair commercial practices and contract law is still the topic of discussion. Recently, some members of the House of Representatives have proposed a motion that enables consumers who have entered into an agreement under the influence of unfair commercial practices, to cancel this agreement.¹³

3. Relation to IP laws – pre-emptive effect

Certain statutory intellectual property regulations contain provisions that implicitly or explicitly refer to the possibility of providing ancillary protection by case law. In some cases, protection under unfair competition law is precluded for acts

⁸ Cf. D.W.F. Verkade, *Ongeoorloofde mededinging*, Zwolle 1986, No. 1–5.

⁹ Cf. E. Hondius, *Niederländisches Verbraucherrecht – vom Sonderrecht zum integrierten Zivilrecht*, VuR 1996, p. 295 (295).

¹⁰ See the references to the Act on Joint Actions, § VIII (1) below.

¹¹ Article 3(2) of Directive 2005/29/EC. See also the 9th recital to the Directive.

¹² See de Vrey, *Vermogensrechtelijke gevolgen van oneerlijke handelspraktijken*, *Vermogensrechtelijke Annotaties* 2006, p. 53–54;

¹³ House of Representatives 2011–2012, Nr. 32320, nr. 3.

that are covered by the specific legislation. In Dutch literature, this phenomenon has given rise to the doctrine of the positive and negative "reflex effect".¹⁴ Positive reflex effect entails that the legislator has intentionally created room for additional protection. Negative reflex effect concerns cases where the regime of intellectual property protection is considered exhaustive and the awarding of ancillary protection under tort law is not deemed to be appropriate.

- 16 As far as trademark protection is concerned, Article 2.19(1) of the Benelux Convention on Intellectual Property (BCIP) states that no one may claim protection of a trademark unless this trademark has been registered. However, Article 2.20(1) BCIP, explicitly leaves a degree of scope for ancillary protection based on tort law (Article 6:162 BW), by providing that trademark protection under the BCIP is "*without prejudice to the possible application of ordinary law in matters of civil liability*".
- 17 Nonetheless, it is safe to say that there will generally be no need for additional protection to Benelux trademark law, given the very broad protection awarded under the BCIP to trademark owners. As far as design protection pursuant to the BCIP is concerned, the same room for additional protection under tort law is provided for. Article 3.16 of the BCIP is equivalent to Article 2.20(1) as cited above. Ancillary protection to the regime of (Benelux) design law is primarily provided for by the tort law doctrine of "slavish imitation".
- 18 Article 34 of the Neighbouring Rights Act states that protection under unfair competition law is not precluded for acts that are covered by this act. Art 2(2) of the Database Act states that the act shall be without prejudice to the copyright or other rights to the database or works, data or other materials included in the database.
- 19 Some intellectual property regulations do not contain any specific rules on the "reflex effect", but are assumed to allow for ancillary protection based on tort law, for example the Trade Names Act and the Copyright Act.¹⁵ Other statutory legislations leave little room for ancillary protection under tort law. This is the case, although not explicitly expressed, in various intellectual property rights that protect the technical features of a product, as e.g. the Patent Act 1995, the Seeds and Planting Materials Act and the Original Topographies of Semiconductor Products Legal Protection Act.

III. Basic Considerations

- 20 While originally tuned towards protecting the interests of the competitor, Dutch unfair competition law aims to protect the interests of the consumer as well. The neutral formulation of the basic provision on tort under Article 6:162 of the Dutch Civil Code, acting as a kind of broadly formulated general clause, facilitated this introduction of consumer protection within the confines of Dutch unfair competition law. As a consequence of the inclusion of consumer protection in unfair competition law no proof of a competitive relationship is required for a successful action against unfair competition.
- 21 Because of the clear separation from public competition law (antitrust law), the protection under the law of unfair competition is mainly geared towards protecting

¹⁴ Cf. *Boukema*, *Civielrechtelijke samenloop*, diss. Leiden, Zwolle 1966.

¹⁵ See *Van Nispen*, *Ongeoorloofde mededinging* (looseleaf), IV.4, No. 101 *et seq.* for an overview of the pre-emptive ("reflex") effect of the various IP regulations in the Netherlands.

the individual against unfair behaviour instead of protecting the general interest. Nonetheless, it is safe to say that preventing unfair trading practises is in the general interest as well.

The predominant starting point in unfair competition case law is the freedom of trade. For some situations, specific monopolies have been designed that are an exception to this rule. In the absence of any intellectual property right protection, according to the Supreme Court, the principle of free trade dictates that benefiting from the achievements of another person is allowed even if this behaviour harms the interests of that person. Only under special circumstances may this behaviour be held to be unlawful.¹⁶

Dutch case law in the area of unfair competition, and in particular advertisement law and defamation law, show a quite strong influence of fundamental rights, in particular the right of freedom of speech (both on a national level and on a EU level). Practices that are deemed not normal and acceptable in certain branches of trade or industry are not decisive in the decision of the courts when considering unfair competition law.¹⁷

IV. General Clause Against Unfair Competition (or lack of it)

In the absence of a (complete) codification of the law of unfair competition and consequently of a general clause, Dutch unfair competition law is embodied in case law pursuant to Article 6:162 of the Dutch Civil Code. The first subsection of this general tort provision states that a person who commits a tortious act (unlawful act) against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof.

According to the second subsection of Article 6:162 of the Dutch Civil Code, as a tortious act is *inter alia* regarded an act or omission in violation of what according to unwritten law has to be regarded as *proper social conduct*. Unlawfulness may therefore result from violation of this general duty of care, as developed in the case law of the Dutch courts. This general tort clause has contributed to the flexible nature of Dutch unfair competition law. Injured parties may file a claim (such as an injunction or claim for damages) with the Dutch courts, if they feel wronged.

V. Marketing

1. Advertising

a) Legal background

Misleading and comparative advertising in the Netherlands is traditionally considered to be part of the law of unfair competition. Rules on misleading advertising were introduced in 1980 in the Dutch Civil Code. Prior to that, the general tort clause was applicable. The introduction of the directive on misleading advertising in 1984 did not bring about any changes to these rules. Finally, in 2002 rules on comparative advertising were implemented in the Dutch Civil Code following Directive 97/55/EC on comparative advertising.

¹⁶ HR 27 June 1986, NJ 1987, 191 (*Holland Nautic v Decca*).

¹⁷ HR 8 January 1960, NJ 1960, 415 (HB); HR 27 June 1986, NJ 1987, 191 (VNH). Of another opinion C.A. Boukema, Trade Morals and competition (inaugural Amsterdam), 1968.

- 27 The rules concerning advertising as codified in Articles 6:194–196 of the Dutch Civil Code are primarily applicable to commercial advertising. Although the right to freedom of expression as embodied in Article 7 (4) of the Dutch Constitution was traditionally considered not applicable to commercial advertising, case law shows that Article 10 ECHR may be applicable and may therefore limit the restrictions on inadmissible commercial advertising.¹⁸
- 28 Within the framework of the Civil Code, the rules on misleading and comparative advertising are recognized as species of the general tort clause. Article 6:194 Civil Code contains a provision on misleading statements, Article 6:194 a a provision on comparative advertising, in Article 6:195 Civil Code some rules are provided concerning the burden of proof and Article 6:196 Civil Code provides rules on injunctions and rectification. These provisions only relate to misleading and comparative advertising. Other unlawful forms of advertising, as far as they are not covered by these specific provisions (e.g. statements that are not made public or comparative studies of consumer organisations¹⁹), may still be unlawful under the general tort clause of 6:162 Civil Code. In addition, the rules of the Directive 2005/29/EC on unfair commercial practices as implemented in Articles 6:193 a – 6:193 j of the Dutch Civil Code may be applicable to such advertisements as well.
- 29 An important consequence of the introduction of the Directive 2005/29/EC on unfair commercial practices is that the application of the existing rules on misleading advertising (6:194–196 Civil Code) has been limited to B2B advertising. As far as B2C misleading advertising is concerned, the rules of the Directive 2005/29/EC on unfair commercial practices as implemented in Articles 6:193 a – 6:193 j of the Dutch Civil Code are applicable. With regard to comparative advertising, the general opinion in literature is that the existing rules as embodied in art. 6:194 a Civil Code apply to both B2B and B2C cases.²⁰

b) Definition

- 30 Dutch advertisement law does not define the concept of advertising. However, according to Article 1 of the Dutch Advertising Code (NRC), part of the vast body of self regulation present in the Netherlands, advertising is defined as “*any public and/or systematic direct or indirect promotion of goods, services and/or ideas by an advertiser or on his behalf, either with or without the help of third parties. Advertising also includes the solicitation for services.*” Under this very broad definition many advertising practices are covered, among others: teleshopping, telemarketing, sponsorship, product placement, packaging, labelling, direct marketing and buzz marketing.

¹⁸ See *Gielen* (red), *Kort Begrip van het Intellectueel Eigendomsrecht*, Deventer 2011, nr. 769; *van Nispen*, *Ongeoorloofde mededinging* (looseleaf), Article 194, no. 25; *Verkade*, *Monografie* [n Nieuw BW B-49 (1992), no. 85 and the annotation by Kabel to CvB 18 January 1993, IER 1993, p. 49 et seq.

¹⁹ Cf. HR 9 oktober 1987, NJ 1988, 537.

²⁰ See for a detailed analysis of the application of the advertising rules in the Netherlands to B2B cq B2C relations: *Geerts/Vollebregt*, *Oneerlijke handelspraktijken, misleidende reclame en vergelijkende reclame* (Kluwer 2009), p. 6–7; *Geerts/Vollebregt*, *Het toepassingsgebied van de art. 6:193a–j BW, art. 6:194 BW en art. 6:194 a BW: misleidende wetgeving die tot verwarring leidt en/of verwarrende wetgeving die tot misleiding leidt?*, IEF 9516.

It is irrelevant which medium is used for transmitting the message, so dissemination via the press, radio, television and the cinema are included.²¹ The message must be disclosed to the public and the public must be able to receive the message. This includes oral statements by employees to individual customers and a standardized offer to an addressee with a private message attached to it. However, conversations of a strictly personal nature and written offers are not included in Article 6:194 Civil Code.²² In addition, the message should be made in the course of business. Incidental advertisements by private persons are therefore not covered by the rules on misleading advertising.

Under the Dutch advertising rules, not only the original advertiser but also the medium (e.g. newspaper) that has published the advertisement may be considered to act in violation of these advertising rules. However, the medium will (unlike the advertiser) usually not be held liable for any damages as a result of the unlawful advertisement.

c) Misleading advertising (6:194 and 193 c et seq. Civil Code)

For the statement to be unlawful, Dutch law requires that the statement misleads the public. The public does not actually have to be deluded by the misleading statement, it is sufficient to prove the danger of this occurring in the future. According to legal history²³ and case law,²⁴ the statement must be misleading to the average person, who is aware of the fact that advertising involves a certain degree of exaggeration and who is not easily affected by this fact. This criterion resembles the criterion adapted in case law by the European Court of Justice.

In answering the question whether an advertisement is misleading many factors may be decisive. Both the message as well as its format must be taken into consideration. The advertisement will be evaluated in its entirety. However, case law grants extra weight to certain dominant elements of the advertisements. The presentation and format of the advertisement, the font used and its directness can be a catalyst in increasing the possibility of creating a false impression to the consumers. Which communication medium is used, may also be of relevance to the assessment of the lawfulness of the advertisement. The level of attention of the public will be generally higher in case of written advertising than will be the case for TV commercials. As a result, a comprehensive advertisement in a newspaper is subject to a stricter assessment than a short TV spot. The intention of the advertiser is in most cases irrelevant. The courts will try and determine how the relevant public perceives the communication.

²¹ *Van Nieuwenhoven Helbach/Huydecoper/Van Nispen* (1989), *Industriele eigendom en mededingingsrecht*, Volume II in the series of Dorhout Mees, *Nederlands handels- en faillissementsrecht*, Gouda Quint: Arnhem 1989, no. 1274.

²² *De Vrey*, *supra* note 1, p. 105.

²³ See the Explanatory Memorandum, *Bijl. Hand. II 1975-76*, no. 13 611, p. 10 and 21.

²⁴ See e.g. HR 29 March 1985, NJ 1985, 592 (LWH), BIE 1985, no. 38, p. 296 (DWFV); Court of Appeal 's-Hertogenbosch 19 June 1991, BIE 1993, no. 52, p. 190, IER 1991, no. 48, p. 119; President District Court Breda 1 June 1993, BIE 1995, no. 105; Court of Appeal 's-Hertogenbosch 21 September 1994 (see for the text: HR 15 December 1995, NJ 1996, 509); President District Court Arnhem 22 February 1989, BIE 1991, p. 55 (CvN); President District Court Haarlem 28 September 1990, BIE 1991, no. 98, p. 353, IER 1991, no. 4, p. 15 (SdW); President District Court Breda 28 December 1990, IER 1991, no. 18, p. 43; President District Court Amsterdam 21 September 1989, BIE 1992, no. 68, p. 223; President District Court Rotterdam 16 March 1995, KG 1995, 171.

- 35 Articles 6:194 and 6:193 c Dutch Civil Code contain a list of factors that will, if at least one of them is fulfilled, lead to the qualification of the advertisement as unlawful.²⁵ An advertisement that contains falsehoods or half-truths, is deemed to be misleading if a person relies on its correctness and consequently buys the goods offered.²⁶ However, subjective and general claims such as "the best" are not considered misleading. The public recognizes such obviously as exaggerations and not based on statements to the fact. Although the advertiser is not obliged to communicate aspects of his product that are not essential to the buyer's decision, the omission by the advertiser of facts that are relevant to the consumer for making his decision, can be misleading. Moreover, if the advertiser chooses to enter into detail with respect to a certain feature of his product, this piece of information should be complete and correct.²⁷ As a general rule, the more precise the statements, the more can be expected in terms of truthfulness and correctness. Nonetheless, in most cases, the advertiser will not have to point to the negative features of his product or the fact that other products are of better quality.

d) Comparative advertising

- 36 The rules on comparative advertising as embodied in art. 194 a of the Dutch Civil Code, are an implementation of the Comparative Advertising Directive.²⁸ As this directive is a full harmonisation directive, only some specific issues regarding the Dutch implementation will be discussed.
- 37 Following implementation of the Comparative Advertising Directive, the starting point is that comparative advertising is in principle allowed, as far as it meets the conditions laid down in the Directive, the essential aspects of which have been implemented almost word for word in the Dutch Civil Code (Article 6:194a). Even if a competitor's name or trademark is not explicitly mentioned in an advertisement, it may nevertheless be found to be unlawful under Articles 6:162 and 6:194 a of the Dutch Civil Code, in case the consumer will consider the competitor's name or trademark when viewing the advertisement. An implicit reference to a competitor is therefore sufficient for an advertisement to be within the scope of the comparative advertising rules.²⁹
- 38 Dutch courts generally have a flexible attitude towards comparative advertising. Judges are, however, quite critical in assessing comparative advertising that make use of derogatory or disparaging statements. The boundary between acceptable metaphors and unacceptable disparaging statements towards competitors is not always easy to determine. Competitors have to accept some – maybe unwanted –

²⁵ These including references to the nature, composition, quality or features of a product or service or its uses; quantity; source; geographical origin; method of production; date of production; size of stock; price or its calculation; awards or certificates received; use of technical or scientific terminology; conditions for delivery or payment; extent, specifications and duration of a warranty; and characteristics of the seller or manufacturer.

²⁶ Explanatory Memorandum, Bijl. Hand. II 1975–76, 13 611, p. 10.

²⁷ *Kabel* (ed.), *Praktijkboek Reclame- en aanduidingsrecht (PRAR)*, Deventer: Kluwer (looseleaf), p. IIA-256, and the case law mentioned in IIA-420 *et seq.* See e.g. RCC 3 July 1979, no. 1729; RCC 26 November 1979, no. 1973; RCC 5 November 1982, no. 3195.

²⁸ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising replacing the Directive 97/55/EG of 6 October 1997.

²⁹ HR 29 March 1985, NJ 1985, 591.

critical imagery from each other. According to the Court of The Hague in preliminary relief proceedings and proceedings on the merits, the use of a trademark by a competitor of the proprietor of the trademark in Google's AdWord program may be a form of comparative advertising. The advertisements that appear when typing in a trademark of a competitor in Google must therefore meet the requirements of comparative advertising.³⁰

2. Special forms of marketing

a) Prospectus liability

The Act on Financial Supervision (Wft) requires that a prospectus be issued in case of issuance or reinstatement of stocks outside a closed circle. Under the Prospectus Directive³¹ Member States are obliged to, among other things, attach civil liability to those responsible for the information provided in the prospectus. The Supreme Court in 1994 ruled that the legislation concerning misleading and comparative advertising constitutes a valid basis for prospectus liability.³² These rules were directed towards protecting the interests of professional investors and consumers. Following implementation of the Directive 2005/29/EC on unfair commercial practices, these rules only apply to the professional investor and competitor. The interests of the consumers are covered by the legislation on unfair commercial practices.

According to the Dutch Supreme Court the basis to assessing liability are the presumed expectations of the informed, observant and circumspect consumer to whom a security brochure is directed. The fact that the consumer may have (investors) experience is not of importance, unless it is determined that the class of persons to whom the brochure was directed is exclusively composed of persons experienced in this business.³³ To assess whether a prospectus is misleading, the investor does not have to prove that he was actually aware or affected by the prospectus.

In the 2009 *World Online* case, regarding World Online's disastrous stock market launch, the Supreme Court ruled that what matters is whether a statement in the prospectus *per se* is of a misleading nature. If that is the case, the issuer must refrain from disclosure and it acts unlawfully if it decides to publish the statement.³⁴ In the same case the Supreme Court ruled that liability cannot be denied by asserting that the prospectus provides for correct information and is therefore not misleading, if in addition to the prospectus by or on behalf of the issuer misleading statements were made. Nor can the issuer in such a case successfully invoke a clause in the prospectus cautioning the potential investor not to rely on information other than the information contained in the prospectus. Such a clause does not relieve an issuer of its obligation to refrain from making false and/or misleading statements.

³⁰ Court of The Hague in preliminary relief proceedings of 20 December 2010 and in proceedings on the merits of 18 January 2012 (*Tempur v Energy+*) and in preliminary relief proceedings of 4 February 2011 (*Tempur v Medicomfort*).

³¹ Directive 2003/71/EC of 4 November 2003.

³² HR 2 December 1994, NJ 1996, 246. See also HR 5 June 2009, JOR 2009/199 (*de Treck v Dexia*); District Court Rotterdam 24 June 2010, JOR 2010/237 (*Top Real Estate cs v AFM*).

³³ HR 30 May 2008, LJN BD2820.

³⁴ HR 27 November 2009, LJN BH2162.

Finally, the Supreme Court underlines the strict duty of care in such prospectus cases, by stating that even if the prospectus contains accurate information but the public has a distorted picture of the risks involved, there is a duty to provide clarification. The issuer may, even if he is not responsible for the distorted picture, have a duty to provide clarification in case the public confusion or the ambiguity is significant.

b) Medicines

- 42 The Medicines Act (*Geneesmiddelenwet*) distinguishes between advertising for prescription medicines and advertising for medicines which are available without a prescription. Advertising prescription medicines to the public is not allowed. These medicines may be advertised to professionals such as doctors and dentists under certain conditions. The rules can be found in the Code of Conduct for Pharmaceutical Advertising (*Gedragscode Geneesmiddelenreclame*) of the Pharmaceutical Advertising Standards Foundation (*Stichting Code Geneesmiddelenreclame, CGR*), see below. Advertising non-prescription medicines is allowed, even to the public, under certain conditions. One of these conditions is that the advertisement must clearly be about medicines and must include instructions for use. In addition, the advertisement must not be specifically aimed at children.

c) Media Act

- 43 The Media Act regulates the organization of public broadcasting in the Netherlands and contains a set of advertising rules for public broadcasters. The Media Act also includes a number of basic requirements for commercial broadcasters and cable operators. The Media Act sets rules on e.g. the amount and order of advertising, sponsoring and product placement. In addition to this, rules are contained in separate regulations and decrees to the Media Act. The Media Act is also applicable to advertising via services on demand.

d) Tobacco

- 44 The Tobacco Act contains a ban on advertising and sponsorship of tobacco products, except for advertising in or near specialized tobacco shops.

e) Commodities

- 45 The Commodities Act provides general rules on public health, product safety, fairness of trade and proper information. It is linked to a large number of separate regulations and decrees that contain rules for specific foods and consumer products. These rules contain various labelling requirements.

f) Games of chance and promotional games

- 46 The Betting and Gaming Act (*WoK*) prohibits offering games of chance in the Netherlands if no license has been granted for this purpose. Currently, multiannual licenses for games of chance are only allowed to a few permanent and semi-permanent license holders, such as Holland Casino, the State Lottery and the Lotto. The *WoK* does not yet offer possibilities for playing games of chance on the Internet. Offering games of chance on the Internet is therefore not legal in the Netherlands. On 1 April 2012 the Games of Chance Authority ("*Kansspelautoriteit*", *Ksa*) was established. The *Ksa* is a non-departmental public body with legal

personality that issues licences for games of chance, supervises the licence holder's compliance with the laws and regulations, monitors the payment of tax on income from games of chance, combats illegal games of chance practices and sanctions offences.³⁵ Recently, State Secretary Teeven of the Ministry of Security and Justice has indicated that the Dutch gaming policy will be amended. The Ministry is investigating various options like admitting more providers to the gaming market and enabling games of chance offered via the Internet under certain conditions.

Promotional games, i.e. games of chance organized for the promotion of a 47 certain product or service, are exempted from the prohibition contained in the WoK, provided the criteria set out in the self regulation code "Gedragcode promotionele kansspelen" are met. This code differentiates between large promotional games and small promotional games. Large promotional games have to satisfy a number of strict requirements, e.g. such promotional games may only be organized once per year and the total value of the prizes awarded must not exceed € 100,000 per year. The requirements for small promotional games (with prizes to a maximum of € 4,500 and limits to the communication costs allowed) are less stringent.³⁵

3. Self-regulation

a) Dutch Advertising Code

In the Dutch advertising practice, self-regulation plays a very important role. The 48 Dutch Advertising Code (NRC) contains a body of rules with which all advertising should comply. It is divided into a general section and a special section (containing special Advertising Codes related to inter alia alcoholic beverages, tobacco products, children, games of chance, food products and SMS services). The Dutch Advertising Code (NRC) was drafted by trade associations of the media, advertisers and advertising agencies in conjunction with consumer organizations, organized in the Advertising Standards Organization (SRC). The NRC contains rules on advertising in general, including misleading and comparative advertising. It applies to advertising in the press as well as radio and television advertising. Consumers as well as competitors can rely on the NRC, although it is mostly applied by individual consumers. An applicant does not have to show an interest when lodging a complaint.³⁶

The NRC is adapted to the Directive 2005/29/EC on unfair commercial practices, 49 in fact: it was decided to – unlike the implementation in the Civil Code – have the rules of the Directive apply without distinction to both B2C and B2B advertising. Also, the Netherlands Consumer Authority (enforcing the Directive) and the SRC drafted a cooperation protocol, under which the Consumer Authority will leave it to the SRC to handle any violations regarding misleading advertising that fall within the latter's jurisdiction. If the advertiser does not comply with the decision of the RCC or CvB, the Consumer Authority can decide to take the matter in its hands.

b) Advertising for medicines

Advertising aimed at the general public concerning medicines and medical 50 devices is reviewed prior to its broadcasting by the specialized Inspection Boards

³⁵ D. Segaar/W. Seinen, *Sports Betting: Law and Policy*, T.M.C. Asser Press 2011, p. 181–182.

³⁶ RCC 11 May 1992, BIE 1994, 205.

for the Public Advertising of Medicines (KOAG) and Health Products (KAG). The Inspection Boards KOAG and KAG review the advertising of medicines, medical devices and health products according to the industry drafted codes: the Code for Advertising Medicine to the General Public (CPG), the Code for Advertising Medical Devices to the General Public (CPMH) and the Code for the Advertising Health Products (CAG).

VI. Protection of Competitors Against Unfair Trade Practices

1. Introduction

- 51 In determining whether protection may be granted under tort law, in addition to or in the absence of protection under intellectual property law, the Supreme Court has determined that the predominant starting point in case law is the freedom of trade.³⁷ As a result, benefiting from another's labour is allowed even if it disadvantages that person in doing so.
- 52 In its *Holland Nautic v Decca* decision, the Dutch Supreme Court held that profiting from the efforts of others may constitute an unlawful act under certain circumstances.³⁸ This case concerned the misappropriation of a valuable intangible, i. e. an extensive radio navigation system. Holland Nautic had introduced cheap radio receivers that were capable of receiving the signals transmitted by the Decca navigator system (DNS), directing customers to buy their radio receivers instead of the ones provided by Decca. The Supreme Court started by stating that the benefit to Holland Nautic from Decca's business was not unlawful per se, even if it would inflict a loss on Decca. Only under specific circumstances, after weighing the relevant interests involved, is the injured party awarded damages under tort law. For this to happen, a party has to benefit from the products of another's labour that are "*of such a nature that they could be put on a par with other products of labour that justify the granting of such a[n] [intellectual property] right*". This case introduced the possibility to obtain protection for products of labour equivalent to products of labour that do qualify for intellectual property protection. However, the Supreme Court is very reluctant to grant sweat of the brow protection to such "products of labour" and the "equivalent performance" doctrine is merely a theoretical possibility at the moment.
- 53 In the case of the imitation of products, protection under tort law against slavish imitation may be granted in specific circumstances, inter alia if the action under tort law is not pre-empted by any specific intellectual property regulation.

2. Slavish imitation

- 54 The action for slavish imitation was first introduced in the 1953 *Hyster Krane* case.³⁹ In this case, the plaintiff produced a mobile hoisting-crane under the name of "Hyster Karry Krane". The defendant had imitated this product, partly by disassembling the Hyster Karry Krane, and created an identical crane called "The Elephant". It was an incontestable fact that the Hyster Karry Krane was not patented or protected by any other intellectual property right. The Dutch Supreme Court considered (translated):

³⁷ HR 27 June 1986, NJ 1987, 191 (*Holland Nautic v Decca*).

³⁸ Ibid.

³⁹ HR 26 June 1953, NJ 1954, 90 (*Hyster Karry Krane*).

"Everybody may endow his product with as much reliability and usefulness as possible, using another's efforts, even if this leads the public to be confused. Only in the case where one could have adopted an alternative shape, without impairing the reliability and usefulness of one's product, and the result of not doing so is the confusion of the public, will imitation of a competitor's product constitute an unlawful act."

Based on the *Hyster Karry Krane* decision of the Dutch Supreme Court and cases 55 that followed, there are four requirements that must be fulfilled for a successful action for slavish imitation:

a) The plaintiff's product must be distinctive

The Dutch Supreme Court held in the *Scrabble* case⁴⁰ that the plaintiff's product 56 must be distinctive, meaning that the product must significantly stand out from other products on the market. Irrelevant, however, is the product's distinctiveness per se, its novelty or originality.⁴¹ The Supreme Court follows a narrow interpretation when defining the "market".⁴² A certain dish will for example be set off against e.g. the specific market for plastic dishes instead of the market for domestic appliances as a whole.⁴³ In most cases, the market conditions in the Netherlands are deemed to be decisive.⁴⁴ A product's distinctiveness may diminish over time when more similar imitations are introduced on the market, although the extensive use of the product in this period may just as well lead to increasing the distinctiveness.⁴⁵ It is for the defendant to prove that products exist on the market that are similar to the plaintiff's product.⁴⁶

b) The defendant's product must be likely to confuse the public

The plaintiff must prove that confusion is likely.⁴⁷ However, in most cases the 57 courts will independently decide whether the likelihood of confusion has arisen. Dutch case law does not provide for a clear answer as to what gradation of confusion is protected under the action for slavish imitation, although its persistent focus on assessing the similar features of the product themselves, instead of its effect on the consumer's decision to buy, leads one to believe that primarily direct confusion and confusion as to the origin will qualify.⁴⁸

⁴⁰ HR 8 January 1960, NJ 1960, 415 (*Scrabble*).

⁴¹ HR 7 June 1999, NJ 1992, 392; Dutch Supreme Court 22 November 1974, NJ 1975, 176. See *de Vrey*, *supra* note 1, p. 116. The criterion of distinctiveness is therefore not exactly the same (distinctiveness/originality) criterion used in trademark, design and copyright law.

⁴² HR 15 March 1968, NJ 1968, 268.

⁴³ See *de Vrey*, *supra* note 1, p. 116.

⁴⁴ HR 7 June 1991, NJ 1992, 392. See *Van Nispen*, *Ongeoorloofde mededinging* (looseleaf), IV.6, no. 280.

⁴⁵ *Martens*, *Onrechtmatige Daad* (oud), p. VI-109.

⁴⁶ See *Van Nispen*, *Ongeoorloofde mededinging* (looseleaf), IV.6, 281; *Haardt*, annotation to HR 22 November 1974, NJ 1975, 176; *Martens*, *Onrechtmatige Daad* (oud), VI-108. Of another opinion is *Hijmans van den Bergh*, annotation to HR 8 January 1960, NJ 1960, 415.

⁴⁷ HR 28 February 1969, NJ 1969, 366.

⁴⁸ *de Vrey*, *supra* note 1, p. 118. See also, *Van Nispen*, *Ongeoorloofde mededinging* (looseleaf), IV.6, no. 288; *Holzhauser*, *Inleiding intellectuele rechten*, Boom J.U.: Den Haag 2002, 12.04; *Van der Kooij/Mulder*, *Hoofdzaken mededingingsrecht*, Kluwer: Deventer 1996, p. 185.

58 In assessing the probability of confusion the courts start from the hurried, non-vigilant consumer, most of the time not an expert, and most of the time not able to directly compare the two products in juxtaposition.⁴⁹ The overall impression is deemed to be decisive.⁵⁰ In some cases of (lower) courts, plaintiffs have been awarded protection under the doctrine of slavish imitation for the imitation of a series of products. While in these cases, not each individual product was confusingly similar imitated, the imitation of the whole series of products was found to be unlawful.⁵¹

c) The defendant's product must be similar to the plaintiff's product regarding features that are not important for the reliability and usefulness of the product

59 The functional aspects of a product will in most cases predominantly relate to its reliability and usefulness and therefore fall outside of the scope of the action of slavish imitation. In its judgement of 12 June 1970 the Supreme Court decided that requirements for standardization in industry may also be of importance to the reliability and usefulness of a product.⁵² This means that a product, whose appearance is primarily dominated by standardization requirements, may be more closely imitated. Non-technical trends that relate to people's preferences for a certain popular style, and for that reason in most cases of a temporary nature like e.g. trends in fashion probably do not allow for such a strict imitation.⁵³

d) The defendant must have failed in doing what is reasonably possible to prevent confusion ("needless confusion")

60 One needs to do all – if and insofar reasonably possible – that is needed to prevent confusion. If there is a possibility to deviate from the original product without impairing the reliability and usefulness of the imitation, one is obliged to do so.⁵⁴ In the Scrabble case⁵⁵ the Supreme Court held that it is sufficient to differentiate concerning some points to such an extent that one has reasonably done all that is needed to prevent confusion.

61 Some authors have raised the question whether the action for slavish imitation falls within the scope of the unfair trading practices rules and should therefore be solely assessed on the basis of those rules.⁵⁶ The *communis opinio* is that the enactments of the Directive 2005/29/EC on unfair commercial practices and the

⁴⁹ HR 7 June 1991, NJ 1992, 392; Court of Appeal The Hague 29 March 1990, see HR 14 February 1992, BIE 1993, no. 6, p. 25.

⁵⁰ HR 7 June 1991, NJ 1992, 392.

⁵¹ E.g. in case of imitations of a series of jewels, see Court of Appeal Den Bosch, 14 March 2012, LJN BV9043 (*All Round v Dutch Design*) and a series small Delftware, blue-and-white porcelain reproductions of old Dutch canal houses, filled with jenever presented by KLM to its long-haul first-class passengers, see Court of Appeal The Hague, 21 August 2008 (*Goedewaagen Gouda v Bols*).

⁵² NJ 1970, 434 (*Hazenveld v Tomado*). Further elaborated upon by HR 20 November 2009, LJN: BJ6999 (*Lego v Mega Brands*). See also *Maris*, Slaafse navolging en normalisatie, in: *Met eerbiedigende werking – Opstellen aangeboden aan Prof. mr. L.J. Hijmans van den Bergh*, Deventer: Kluwer 1971, p. 187–202.

⁵³ See *Verkade* (1986), no. 25(c). See also HR 22 November 1974, NJ 1975, 176.

⁵⁴ HR 15 March 1968, NJ 1968, 268.

⁵⁵ HR 8 January 1960, NJ 1960, 415.

⁵⁶ See i.a. *P.G.F.A. Geerts*, annotation to ECJ 14 januari 2010, C-304/08 (*Wettbewerbszentrale v Plus*), IER 2010, 42 (p. 309–315).

Enforcement Directive 2004/48/EC have not improved a plaintiff's chances of bringing a successful claim for parasitic/slavish copying.⁵⁷

3. The imitation of badges of trade

Benefiting from another's trade by imitating the badges of trade, which the other 62 uses to distinguish his products, will generally be held to be unlawful under the general tort clause 6:162 of the Dutch Civil Code in the case of confusion. The broad scope of protection under the Trade Names Act and the Benelux Treaty of Intellectual Property (as well as the Community Trademark regulations) reduces the need for additional protection under unfair competition law against the imitation of badges of trade.⁵⁸ In some specific cases ancillary protection under unfair competition law may be awarded. This may for example be the case when someone wants to protect a name of a natural person or of a legal person that is not a business within the meaning of Article 1 of the Trade Names Act, from imitation,⁵⁹ or if someone wants to protect its trade name against dilution in the absence of confusion.⁶⁰ Regarding trademarks, ancillary protection may be awarded (in special circumstances) in the case of a defendant who uses a (similar) trademark, but not in the course of trade.⁶¹

4. Denigration

A person who discredits his competitor(s) can be held liable under the general 63 tort clause of Article 6:162 Civil Code or he can, in special cases, be held liable under criminal law, e.g. on account of a simple insult to a person (Article 266 Penal Code) or libel (Article 261 Penal Code). A distinction is made between discrediting statements aimed at harming another person or his products, and discrediting statements without that intention. Secondly, case law differentiates between statements relating to a person and those relating to his products.

Discrediting statements that are truthful and not aimed at harming another 64 person or his products, will nearly always be allowed, unless the issuer knew it would be harmful to make the statement and he has violated a duty under the standard of due care given the specific circumstances.⁶² In the case of an untrue discrediting statement, the issuing thereof will nearly always be prohibited.⁶³

If the discrediting statement is aimed at harming another person or his products, 65 and the statement is truthful, the statement can nonetheless be unlawful depending on the circumstances.⁶⁴ Relevant circumstances can be the degree of aggressiveness

⁵⁷ K. Bisschop (et al), Study on Trade Secrets and Parasitic Copying (Look-alikes), Hogan Lovells Final Report on Parasitic Copying for the European Commission, Appendix 6, p. 20.

⁵⁸ *de Vrey*, *supra* note 1, p. 130.

⁵⁹ HR 29 November 1957, NJ 1958, no. 31; HR 11 February 1977, NJ 1977, no. 363.

⁶⁰ *de Vrey*, *supra* note 1, p. 130–131.

⁶¹ See e.g. District court of The Hague (interlocutory proceedings) 5 October 2004 (*Lijst Pim Fortuin*). In this case some members of the Dutch political party LPF (*Lijst Pim Fortuin*) had broken away from the party but were still using the name LPF. This use of the trademark LPF was considered to be unlawful under 6:162 BW.

⁶² HR 28 November 1941 NJ 1942, 190. See also HR 16 May 1946, NJ 1946, 564 and HR 10 June 1966, NJ 1966, 390.

⁶³ HR 13 March 1941, NJ 1941, 660 (although this is a case with harmful intent); HR 19 April 1968. See *Van Nispen*, *Ongeoorloofde mededinging* (looseleaf), IV.7, no. 373.

⁶⁴ HR 13 March 1941, NJ 1941, 660.

and the detail of the statement, whether it is needlessly offending, its relevance, its public nature, the issuer's relation to the addressee, or if it is a statement in defence.⁶⁵ A trader who discredits its competitor or his trade is presumed to have done this with the aim of harming his competitor or his trade.⁶⁶ The trader can in some cases invoke the principle of freedom of expression.⁶⁷ If the issuer of the discrediting statement is not a commercial party less strict rules apply, in particular if e.g. a consumer organisation wants to warn its members of the dangers attached to certain products or methods of selling.⁶⁸ Another special category is the warning communicated to a competitor or his potential buyers, in the case of an infringement or a danger of an infringement of intellectual property rights. The basic principle is that whoever invokes intellectual property rights will only act unlawful if he knows or should have realized that there is a serious, non-negligible chance that its right will not sustain in proceedings on the merits.⁶⁹

5. Protection of know how

- 66 The protection of the know-how embodied in trade secrets in the Netherlands is provided under civil law as well as criminal law. Despite efforts to draft specific legislation for know-how protection, up to date no specific rules exist under civil law (other than some criminal law provisions and a specific labour law provision that is limited in scope). Dutch law does not provide for exclusive and absolute rights of know-how protection as opposed to intellectual property rights. It is therefore uncertain whether (and if so, how) know-how can be assigned and licensed.⁷⁰
- 67 As a rule, benefiting from another's trade secrets is allowed. Someone who by lawful means comes up with certain information, a design or a product, may use it for his own benefit, even though it matches another person's trade secret.⁷¹ In case a person obtains information he knows or should know to be secret or uses improper methods in discovering another's trade secret, he may be held liable. This includes inter alia the use of industrial espionage, theft, the bribery of employees or the use of information disclosed by employees in violation of their obligation of secrecy as well as the abuse of confidential information acquired during the pre-contractual stage.⁷²

⁶⁵ *de Vrey*, *supra* note 1, p. 111; Verkade (1986), no. 35–38. See also, into detail, Van Nispen, *Ongeoorloofde mededinging* (looseleaf), IV.7., no. 375.

⁶⁶ *Van Nispen*, *Ongeoorloofde mededinging* (looseleaf), IV.7., no. 373; Verkade (1986), no. 35; Houwing, annotation to HR 25 May 1951, NJ 1951, 541.

⁶⁷ *de Vrey*, *supra* note 1, p. 112.

⁶⁸ HR 19 April 1968, NJ 1968, 263.

⁶⁹ HR 27 January 1989, NJ 1989, 506 (*Meijn v Stork*); HR 29 maart 2002, LJN AD8184 (*Van Bentum v Kool*); HR 29 September 2006, LJN: AU6098 (*CFS Bakel v Stork Titan*).

⁷⁰ *Gielen*, *Bescherming van bedrijfsgeheimen*, Preliminary report to the "Vereeniging Handelsrecht", Deventer: Tjeenk Willink 1999, p. 6; *de Vrey*, *supra* note 1, p. 142.

⁷¹ President District Court Utrecht, 17 May 1963, BIE 1966, 152; Court of Appeal Amsterdam 20 February 1964, BIE 1966, 151; Court of Appeal Amsterdam 4 November 1971, BIE 1973, 81.

⁷² See HR 31 January 1919, NJ 1919, p. 161 et seq.; HR 1 December 1972, NJ 1973, 111; Court of Appeal Leeuwarden 21 February 1996, BIE 1997, 191; Court of Appeal Amsterdam 17 October 1995, BIE 1997, 137; Court of Appeal Amsterdam 2 June 1983, BIE 1984, 221; Court of Appeal Den Bosch 13 February 1940, NJ 1940, 669; District Court (KG) Breda 11 April 1986, KG 1986, 214; President District Court Amsterdam 6 November 1953, BIE 1954, 33; District Court The Hague 31 October 1986, KG 1986, 514.

Such behaviour may be actionable under tort law.⁷³ The plaintiff can claim that the defendant is prohibited from using his trade secret. This right of action is not limited in time.⁷⁴

To claim protection under tort law, the plaintiff must meet certain requirements. 68 First of all, he is required to keep the information secret. The plaintiff must therefore impose secrecy upon anyone he discloses the information to, e.g. by entering into a confidentiality agreement (NDA). The contracting party, who breaches confidentiality by disclosing the information to a third party, may be held liable for breach of contract. The third party, who has wrongly benefited from the breach of contract, may be held liable under tort law. A specific duty of confidentiality applies to an employee within the context of his employment contract. A breach of confidentiality by an employee may result in an urgent ground for dismissal according to Article 7:678 (2) sub i of the Dutch Civil Code. In many of these cases, it is difficult to make a clear distinction between what is a trade secret of the employer and what is part of the professional knowledge of the employee himself. Knowledge that falls outside the working area of the company as well as knowledge that is mainly attributable to the personal qualifications of the employee – and which will be absent as soon as the employee leaves the company – will in general not be viewed as a trade secret.⁷⁵ Secondly, the plaintiff must show that he has an economic interest in keeping the information confidential. Finally, the plaintiff must prove that he has taken reasonable steps to secure the confidentiality of the information.

Aside from protection under civil law, the intentional abuse of trade secrets is 69 punishable under Sections 272 and 273 of the Penal Code. Section 273 Penal Code criminalises the intentional disclosure by an (ex) employee of confidential details, to which he has sworn secrecy, that are not generally known and that may harm the company he works or worked for. This provision does not, however, criminalise the use of the secret information by third parties.

6. Inducing breach of contract

According to the settled case-law of the Dutch Supreme Court, knowingly 70 benefiting from the fact that someone violates or has violated an agreement with another party, is not unlawful per se.⁷⁶ For the behaviour to be unlawful, additional circumstances need to be present.⁷⁷ Inducement of breach of contract may be an action e.g. in trade secret cases (see above), disputes with employees and their new employers regarding non-competition clauses, (parallel) traders who benefit from the breach of contract of an official distributor towards a trademark owner, etc. A vast body of case law exist regarding this topic that is not suitable for inclusion in this chapter. In a recent case before the Dutch Supreme Court,⁷⁸ regarding parallel import of Alfa Romeo cars, the Supreme Court found that the plaintiff had succeeded in proving additional circumstances. The Supreme Court held that a trader who obtained cars from leaks in the selective distribution network (thereby

⁷³ See *Gielen* (1999), § 2.2.

⁷⁴ See *Van Nieuwenhoven Helbach/Huydecoper/Van Nispen* (2002), p. 339 *et. seq.*

⁷⁵ *de Vrey*, *supra* note 1, p. 144.

⁷⁶ HR 12 January 1962, NJ 1962, 246

⁷⁷ HR 17 May 1985, nr. 6663, NJ 1986, 760.

⁷⁸ HR 8 January 2010, LJN: BJ9352 (*Alfa Romeo*).

disrupting the selective distribution network), may be liable towards the original dealers of Alfa Romeo if he, by entering into competition with original Alfa Romeo dealers who are bound towards Alfa Romeo to meet certain contractual obligations, benefits from the fact that these traders are in an unfavourable position because they have to adhere to these contractual obligations.

VII. Specific Protection of Consumers Against Unfair Trade Practices

1. Aggressive trading practices

- 71 The rules on protection of consumers against unfair trade practices have been fully harmonized following the implementation of Directive 2005/29/EC on unfair commercial practices in Articles 6:193 a – 6: 193 j of the Dutch Civil Code. The rules on aggressive unfair trading practices that are part of this implementation are – from the viewpoint of Dutch unfair competition law – mostly a new category of unfair trading practices. There was no previous codification of such practices under Dutch law and according to the sparse case law on this subject matter, protection was usually found in the general standard of care (art. 6:162 Civil Code).

2. Information disclosure duties

- 72 Dutch rules providing information disclosure duties to the trader vis-à-vis consumers, are primarily based on EU law. These information requirements inter alia include details regarding the trader, method of payment, the existence of a right of withdrawal, the transaction and communication costs. First of all, a number of provisions in the E-Commerce directive⁷⁹ establish information requirements. These provisions have been implemented in Articles 3:15d(1&2), 3:15e(1) BW; 6:227b(1&2) and 6:227c(1) of the Civil Code. Furthermore, following implementation of the Distance Selling Directive⁸⁰ Articles 7:46c(1) and 46h(1, 2, 4, 5 and 7) were introduced in the Civil Code providing the trader with an additional set of information disclosure duties. The Directive 2005/29/EC on unfair commercial practices also introduced some specific information disclosure duties, implemented in Articles 6:193 d and e of the Civil Code. In the case of an invitation to purchase, this information is regarded as material. As far as online sales are concerned, most of this information should therefore be provided in a clear and comprehensible manner before the online ordering process begins. Finally, various information disclosure duties are included in specific regulations, like the Act on Financial Supervision (Wft), the Door-to-Door Sales Act, Telecommunications Act and the rules on Package Travel and on Timesharing as implemented in the Civil Code.

3. Some specific rules

a) Inertia selling

- 73 Article 7:7 Civil Code sets rules for the unsolicited sending of goods to consumers in order to induce consumers to enter into a purchase agreement. If the recipient can

⁷⁹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, 200 OJ L178/1.

⁸⁰ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.

reasonably assume that the product is sent to him to coerce him to purchase it, he may keep the product for free regardless of any statement to the contrary from the sender. Parties will not enter into a purchase agreement. However, if the recipient is responsible for the forwarding of the goods, for example if his roommate has requested the goods for him, Article 7:7 will not be applicable. If the recipient decides to return the package, the cost of returning will be for the original sender.

b) Door-to-door selling and timeshare

Both the Door-to-Door selling and Timeshare rules are based on EU directives 74 (Distance Selling Directive 97/7/EC and the Timeshare Directive 94/47/EC). The Timeshare Directive provides for an option of a personal right (*in persona*) or a property right (*in rem*). It is not possible under Dutch law to obtain a temporary right *in rem* (temporary ownership). The timeshare provisions (Art. 7:48 a Civil Code) are thus solely of contractual nature.

c) Direct marketing

The regulation of direct marketing practices in the Netherlands is mainly effected 75 through self-regulation. The NRC contains a number of Codes setting rules for direct marketing, like the Letter Box Advertising, Door-To-Door Sampling and Direct Response Advertising Code, the Advertising Code for the Use of the Postal Filter (to inform consumers, companies and organizations in a uniformed way about the use of the National Register of Deceased Persons) and the Code for the Distribution of Unaddressed Printed Advertisements (which provides that recipients may declare with a label at their mailbox that they do not wish to receive any unaddressed advertising material).

Based on the Telecommunications Act, a national "Call-me-not"-register has 76 been established. Consumers can log on to the register and have their phone number(s) completely blocked or only blocked for certain organizations. Additionally, as part of a self-regulation initiative by a number of industry associations, the Postal Code Filter was established. Consequently, consumers can have their private contact details included in the National Post Register and request that they be blocked from unsolicited advertising materials. Furthermore, the Telecommunications Act contains as of 2009 a ban on spam in the Netherlands. The government has chosen for the opt-in system. The sending of unsolicited commercial messages, philanthropic or charitable purposes by fax, email, MMS or SMS, to natural and legal persons shall be permitted only if the sender can prove that he obtained consent (opt in) from the recipient prior to sending the message.

VIII. Enforcement

1. Private enforcement

In the Netherlands, a plaintiff who brings an action against unfair competition 77 will have the standard (civil law) remedies available for tortious liability under art. 6:162 Civil Code. He can therefore file for an injunction, if need be in conjunction with a daily default fine, he can claim damages,⁸¹ or he can ask for a declaratory

⁸¹ The plaintiff can claim special damages or he can claim for the surrender of profits, cf. art. 6:104 Civil Code that states: "If a person liable to another on the grounds of an unlawful act or a

judgement. In certain cases, specific remedies will be available like a rectification (possibly accompanied by an order to disclose the names of the addressees), compulsory publication of the judgement, the declaration of a new legal status, a product recall, or a claim for submission of exhibits. The plaintiff who claims rectification or requests an injunction does not have to prove culpable behaviour by the defendant, as opposed to a claim for damages. The plaintiff must, however, in any case prove that he has sustained damage or is in danger of sustaining damage. Next to the individual consumer and competitor, certain consumer organizations can bring an action against misleading advertising in the form of a type of class-action under Article 3:305 a and b Civil Code. The consumer organization must, in conformity with its charter, look after the interests of those consumers it seeks to protect in court. In addition, the organization must be a legal person with full legal competence. It is not allowed to claim damages.

- 78 The burden of proof is, in principle, on the plaintiff. However, in some cases the burden of proof is shifted to the defendant. First of all, in case of misleading advertising, the defendant (advertiser) must prove under Article 6:195 (1) BW that the allegations in his advertisements are correct. This is only the case if the defendant was directly or indirectly responsible for the content of the advertisement and as far as dividing the burden of proof is not unreasonable. Secondly, if the advertisement is found to be misleading, the defendant must prove under Article 6:195 (2) BW that (the publishing of) this advertisement was not his fault. These special rules are not applicable in interlocutory proceedings, although the defendant may nonetheless be expected to prove the correctness of his statements. The same shift of burden of proof applies to unfair commercial practices. According to Article 6:193 j Civil Code, the consumer only has to claim (not prove) that the information provided by the trader is incorrect or incomplete.

2. Public enforcement

- 79 The Netherlands Consumer Authority⁸² has the possibility of public enforcement of provisions dealing with unfair commercial practices in cases where collective consumer interests are involved. It has been charged with enforcing several consumer protection provisions, including Unfair commercial practices, the Services Act, Misleading Advertising, E-commerce, Consumer purchases, General Contract Terms, Distant Selling, Timesharing, Package Travel, Canvassing (Doorstep selling), Pricing (regulations on price visibility) and the Regulation 2006/2004. The Netherlands Consumer Authority is not authorised to take action in the financial sector; financial-market oversight in the Netherlands is exclusively provided by the Netherlands Authority for the Financial Markets (AFM).
- 80 The Netherlands Consumer Authority has powers based on both private law and administrative law. These powers are based on the Act for the Enforcement of Consumer Protection (Wet Handhaving Consumentenbescherming, WHC). The Consumer Authority can ask a trader for an undertaking to cease the infringement.

failure in the performance of an obligation has derived profit from that act or failure, the court may assess the damage, upon the demand of such other person, at the amount of such profit or a part thereof."

⁸² "Consumentenautoriteit", as of 1 January 2013: the "Autoriteit Consument en Markt" (Consumer and Market Authority).

The Consumer Authority can subsequently publicize this undertaking. After it has been established that an infringement has taken place, the Consumer Authority can also, in many situations, impose an administrative fine or orders subject to periodic penalty payments for each day the infringement continues. An administrative fine may not exceed € 76,000 per violation. When it comes to unfair trade practices, a fine of up to € 450,000 may be imposed per violation. The Consumer Authority can impose the fine both to companies as well as the directors of those companies. As a matter of principle, the Consumer Authority will publish its decision on the imposition of an administrative fine or order. An administrative order can also be imposed in case of an imminent violation of the rules of unfair trading practices.

The Consumer Authority can ask for an injunction with the Court of Appeal in 81 The Hague by means of a special procedure on the basis of 3:305 d Civil Code. Finally, the Consumer Authority can ask the Court to declare an agreement for the settlement of mass damages on the part of consumers to be legally binding.

3. Self-regulation

A complaint under the NRC is handled by the Advertising Standards Committee 82 (RCC). If the advertisement is found to be in conflict with the NRC, the RCC will recommend the advertiser(s) involved to discontinue such a way of advertising. This recommendation can be made privately as well as in public. The organizations affiliated to the SRC, such as the Dutch Advertisers Association, have contractually committed themselves to follow these recommendations. In the event of a repeat offence or a serious violation of the Code, the media affiliated to the SRC pursuant to the Netherlands Media Act will be asked to stop publishing the advertisement concerned. The complainant and/or advertiser can lodge an appeal within 14 days, or 7 days in the case of an urgent complaint, with the Board of Appeal (CvB). If the appeal is dismissed by this body, the only thing that the applicant can do is to instigate a separate court action for misleading advertising pursuant to 6:194–196 BW. The courts are not bound by the recommendations of the RCC and CvB but will often take them into account when considering the case.

Specific Abbreviations and Acronyms

AFM	<i>Autoriteit Financiële Markten</i> (Netherlands Authority for the Financial Markets)
BCIP	Benelux Convention on Intellectual Property
BDMA	Uniform Benelux Designs and Models Protection Act
BIE	<i>Bureau voor de Industriële Eigendom</i> (Netherlands Industrial Property Office)
BW	<i>Burgerlijk Wetboek</i> (Dutch Civil Code)
CAG	<i>Code voor de Aanprijzing van Gezondheidsproducten</i> (Code for the Advertising of Health Products)
CPG	<i>Code Publieksreclame voor Geneesmiddelen</i> (Code for Advertising Medicine to the General Public)

CPMH	<i>Code voor de Publieksreclame voor Medische Hulpmiddelen</i> (Code for Advertising Medicine to the General Code for Advertising Medical Devices to the General Public)
CvN	prof. mr. C.J.J.C. van Nispen (annotator)
DWfV	prof. mr. D.W.F. Verkade (annotator)
HB	L.J. Hijmans van den Bergh (annotator)
HR	<i>Hoge Raad der Nederlanden</i> (Supreme Court of the Netherlands)
IER	<i>Intellectuele Eigendom en Reclamerecht</i> (Legal Journal)
JOR	<i>Jurisprudentie Onderneming & Recht</i> (Dutch Law Reports)
KAG	<i>Keuringsraad Aanprijzing Gezondheidsproducten</i> (Inspection Board for the Promotion of Health Products)
KG	<i>Kort Geding</i> (Dutch Law Reports, currently named <i>Nederlandse Jurisprudentie Feitenrechtspraak civiele uitspraken</i> (NJF))
KLM	<i>Koninklijke Luchtvaart Maatschappij</i> (Royal Dutch Airlines)
KOAG	<i>Keuringsraad Openlijke Aanprijzing Geneesmiddelen</i> (Board for the Public Advertising of Medicines)
LJN	<i>Landelijk Jurisprudentie Nummer</i> (Dutch Law Reports)
LPF	<i>Lijst Pim Fortuin</i>
LWH	L. Wichers Hoeth (annotator)
NDA	Non-disclosure Agreement
NJ	<i>Nederlandse Jurisprudentie</i> (Dutch Law Reports)
NRC	<i>Nederlandse Reclame Code</i> (Dutch Advertising Code)
PRAR	<i>Praktijkboek Reclame- en aanduidingsrecht</i>
RCC	<i>Reclame Code Commissie</i> (Advertising Code Committee)
SRC	<i>Stichting Reclame Code</i> (Advertising Standard Organization)
VNH	E.A. van Nieuwenhoven (annotator)
VuR	<i>Verbraucher und Recht</i> (journal)
Wft	<i>Wet op het financieel toezicht</i> (Act on Financial Supervision)
WHC	<i>Wet Handhaving Consumentenbescherming</i> (Act for the Enforcement of Consumer Protection)
WoK	<i>Wet op de Kansspelen</i> (Betting and Gaming Act)