

# Kluwer Copyright Blog

## Your Hosting v. Bavaria: stricter demarcations for the concept of ‘Work’?

Geert Lokhorst (Institute for Information Law (IViR)) · Tuesday, December 13th, 2016

It could be called the Dutch case of the summer of 2016: the question of whether beer manufacturer Bavaria’s slogan “*Zo. Nu eerst een Bavaria*” (translated: “So. Now first a Bavaria”) is a work entitled to copyright protection. In summary proceedings, the [District Court of The Hague](#) decided that the slogan is a work. The [Court of Appeal of The Hague](#) annulled this decision.



This case is important in two respects. First, it highlights the issues arising from the low threshold for copyright protection laid down by the Court of Justice of the EU (CJEU). Second, it shows how easily rules and principles regarding trade mark law are mixed up in the assessment of copyright protection for slogans. Before delving deeper into these issues, I will briefly describe the relevant considerations at the District Court and Court of Appeal.

### *The Judgments*

The [District Court](#) stated that the slogan is succinct, catchy and has a certain wit, which points to free creative choices made by the author. Second, the syntax between the first and following words creates an aural element which contributes to the creative character. The fact that the slogan is phrased in common language does not mean that it involves no creativity. Moreover, the Court concluded that “*Zo. Nu eerst*” is the element protected by copyright, while “*een Bavaria*” is predominantly descriptive of the action that should be taken. This means that the District Court concluded that there can be copyright in three words.

Bavaria’s victory was short-lived, as the [Court of Appeal](#) dismissed the reasoning of the District Court. Referring to the famous [Infopaq](#) case, the Court of Appeal stated that the three words do not constitute a choice, sequence and combination of words which constitute the author’s own intellectual creation. Viewing the words in isolation it cannot be regarded as a work, because the substance of the slogan is still a normal, common sentence in the Dutch language with a common syntax. The witty nature of the three words in combination with “*een Bavaria*” does not lead to

any other conclusion. While the three words in combination with “*een Bavaria*” leads to a succinct or catchy slogan for the brand, this does not mean that the first three words constitute the author’s own intellectual creation.

### *No De Minimis for Copyright*

Dirk Visser was blunt in his initial critique of the District Court’s judgment: “Judgment is wrong. No copyright in three words. Especially not these three” (translated). However, the acceptance of copyright protection for short slogans is far from rare in Dutch court proceedings. See for some examples the article by Bas Kist.

The acceptance of copyright in slogans is filled with legal uncertainty. The Dutch Slogan Register states that the successful protection of slogans is very dependent on the circumstances, making court outcomes unpredictable. A source of this uncertainty can be found in the case law of the CJEU. The *Infopaq* case states that eleven consecutive words can be protected by copyright if they express the author’s own intellectual creation. It does not seem that the CJEU meant eleven words as a *de minimis* for copyright protection. Even fewer words could potentially be protected. See for example the poem often attributed to Hemingway: “For sale: baby shoes, never worn”. While this sentence could be seen as consisting of normal language, even very common in print advertising, its artistic value is undeniable.

The Court of Appeal in the *Your Hosting v. Bavaria* case did not provide explicit reasoning on the relationship between the length of a sentence and the capacity for copyright protection. However, it could be argued that the number of words in a sentence does influence the creative freedoms of the author. A sentence of eleven words arguably contains more choices, sequences and combinations than three words. Therefore, the longer the slogan, the higher the probability of copyright protection due to creative choices and use of non-common language.

### *Trade Mark Confusion*

The Court of Appeal rebuked the District Court’s reasoning regarding the succinct, catchy and witty nature of the slogan. While the District Court saw these elements as indications of creativity, the Court of Appeal fully rejected this connection. In the paragraph regarding the succinct and catchy nature of the slogan, the Court of Appeal seems to implicitly link these features of the slogan to objectives of trade mark law.

The Court of Appeal stated that while the three words in combination with “*een Bavaria*” leads to a succinct and catchy slogan for the brand, this does not mean there is an own intellectual creation. This implies a demarcation between an own intellectual creation in the three words “*Zo. Nu eerst*” viewed in isolation and the distinctiveness of the entire slogan in its context. The argumentation of the District Court that the slogan is succinct and catchy, should therefore not be a ground for copyright protection. Slogans as a distinguishing sign for brands are meant to be protected as a trade mark: the more succinct and catchy, the greater the distinctiveness of the trade mark.

### *Conclusion*

The threshold for copyright protection is far from clear following the judgments in the *Your Hosting v. Bavaria* case. While the CJEU has accepted the possibility of copyright protection for sentences of eleven words, there is no lower boundary to be found. In the present judgment, the Court of Appeal stated that “*Zo. Nu eerst*” constituted common language. It is unclear whether

other combinations of three words could constitute an own intellectual creation. From a public viewpoint, this would be undesirable. Private monopolies on very short sentences or even individual words would have detrimental effects on free speech. For commercial application, the Court of Appeal does seem to spell out a useful demarcation. Either create a long slogan, consisting of many creative choices and protect it as copyright; or make the slogan succinct and catchy and register it as a trade mark.

For further reading in Dutch, Dirk Visser has written an insightful article on the distinction between copyright and trade mark protection for slogans (*'Zo. Nu een artikel' IER 2016/26*).

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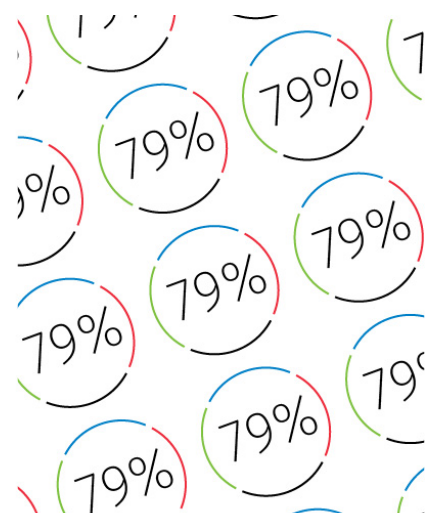
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