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**Supreme Court: mere filling of cans does not constitute trademark use
Netherlands - Paul Steinhauser**

**Infringement
Enforcement**

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In 2010, in *Red Bull v Frisdranken Industrie Winters* (LJN: BK 4739), the Dutch Supreme Court (*Hoge Raad*) referred questions to the Court of Justice of the European Union (ECJ) for a preliminary ruling, including the following: "Can the mere filling of a can that bears a trademark be considered as use of that mark in the course of trade under Article 5 of the [EU Trademarks Directive](#) (2008/95/EC), even where such act is carried out on behalf of a third party with a view of distinguishing the products of that party?".

The questions asked by the *Hoge Raad* were answered by the ECJ in a judgment of December 15 2011, *Frisdranken Industrie Winters BV v Red Bull GmbH* (Case C-119/10).

Taking into consideration the judgment of the ECJ, the *Hoge Raad* unsurprisingly dismissed *Red Bull's* claim of trademark infringement (ECLI:NL:HR:2013:2057, December 20 2013). *Frisdranken Industrie Winters BV* was not instrumental in affixing the trademark on the cans, nor in distributing the filled cans to the public. *Winters* acted in accordance with the instructions of *Smart Drinks* by filling the empty cans. The cans, which had been supplied by *Smart Drinks*, already bore the trademark, and *Winters* produced an energy drink based on an extract supplied by *Smart Drinks*. *Winters* delivered the filled cans to *Smart Drinks* and was in no way involved in the marketing of the product (outside of the Benelux).

Under these circumstances, the ECJ - and now the *Hoge Raad* - held that *Winters* did not use *Red Bull's* trademark and, therefore, could not have infringed it.

Some commentators have argued that the interpretation of the ECJ is in contradiction with Article 11 of the [IP Rights Enforcement Directive](#) (2004/48/EC), which authorises the courts to enjoin an intermediary, whose services are used by others to infringe a trademark, from carrying on its activities. The judgment of the ECJ clarifies, however, that this is not possible in circumstances such as those in this case.

The judgment of the *Hoge Raad* is also of interest in that the court held that the winning party could seek reimbursement in full of the costs incurred during the proceedings before the ECJ.

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