

31 Mar  
2020

## *adidas v H&M*: H&M did not cross the line with its two-stripe sign

Netherlands - [Hoogenraad & Haak, Advertising + IP Advocaten](#)

- The Court of Appeal of The Hague has ruled that H&M's use of a two-stripe sign on its sports clothing did not infringe adidas' three-stripe mark
- H&M's sports clothing fell outside the scope of adidas' infringement claim, because the spacing between the two stripes was smaller to a relevant extent than the stripes themselves
- The court found that new market surveys submitted by H&M were convincing

On 28 January 2020 the Court of Appeal of The Hague [ruled](#) that H&M can use a specific two-stripe sign on its sports clothing without infringing the three-stripe trademark of adidas. The scope of protection of the three-stripe mark, which is defined by the spacing between the stripes in relation to the width of the stripes, turned out to be the determining factor in this case.



H&M's two-stripe sign

### Background

The decision of the Court of Appeal of The Hague is the latest addition in the longstanding battle between adidas and H&M. In 1997 adidas started preliminary injunction proceedings before the District Court of Breda. Subsequently the Court of Appeal of Den Bosch, the Dutch Supreme Court, the Court of Justice of the European Union, the Dutch Supreme Court (again) and the Court of Appeal of Arnhem-Leeuwarden have ruled in this case.

Following the preliminary injunction ordered by the Court of Appeal of Arnhem-Leeuwarden, adidas started proceedings on the merits at the District Court of The Hague. In line with the decision of the Court of Appeal of Arnhem-Leeuwarden, the District Court of The Hague [ruled](#) that H&M's sports clothing infringed adidas' three-stripe mark. H&M appealed to the Court of Appeal of The Hague.

### Decision of the Court of Appeal of The Hague

On appeal, the court examined adidas' infringement claim. adidas opposed the use of a motif consisting of two vertical and parallel stripes of equal width, placed at equal distance from each other, where:

- the spacing between the stripes was visually more or less equal to the width of the stripes;
- the stripes were applied to the whole length of the side of garment (shoulders, sleeves, or trouser legs); and
- the stripes were in a colour that was contrasting with the colour of the garment.

Contrary to the Arnhem-Leeuwarden appeal court, the Court of Appeal of The Hague came to the conclusion that H&M's sports clothing fell outside the scope of adidas' infringement claim, because the spacing between the two stripes was smaller to a *relevant* extent than the stripes themselves. Therefore, the condition that the spacing between the stripes was *visually more or less equal to the width of the stripes* was not met. As a consequence, the court dismissed adidas' infringement claims and revoked the decision of the District Court of The Hague. Even though this concluded the matter, the court went on to assess whether there was a likelihood of confusion between H&M's two-stripe sign and adidas' three-stripe mark.

The court stated that the overall impression of adidas' trademarks was created by a specific combination of elements (three vertical stripes and spaces equal to the width of the stripes in between). This specific combination formed a pattern. The court found that H&M's two-stripe sign lacked that particular pattern. Therefore, H&M's two-stripe sign and adidas' three-stripe mark were similar only to a very low degree. Further, the court did not deem the claim relating to a trademark with a reputation to be assignable.

### Comment

How did Court of Appeal of The Hague come to a different conclusion than the other courts? Although this was stated only in the superfluous considerations (and thus not as a deciding matter) by the appeal court, it may be that the new market surveys submitted by H&M during this last round did help to change the underlying feeling behind the case. Market surveys submitted previously by adidas showed that a convincing number of respondents had been confused: when confronted with H&M's sports clothing, the consumers' reaction was that it came from adidas. To counterbalance adidas' results, H&M criticised adidas' market leader effect with new market surveys. The market leader effect entails that, because adidas is a market leader in sportswear, a certain percentage of respondents will answer "adidas" in any case when asked about the origin of a piece of sportswear. The court found H&M's surveys on this aspect convincing and, contrary to all the courts before, decided to dismiss adidas' claims.

Will this be the end of the battle between adidas and H&M? Only time will tell. Adidas still has the possibility to file an appeal in cassation and pay a visit to the Dutch Supreme Court (again).

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### TAGS

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