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Unauthorised exploitation of an athlete's portrait in the Netherlands

Even when the 'portrait' of a well-known professional athlete is disclosed without authorisation for a short period, such disclosure may already have significant consequences in the Netherlands. This follows from the judgment of the Amsterdam District Court of 25 April 2018 in the matter between the famous Formula 1 driver Max Verstappen and online supermarket chain Picnic¹. Picnic shared on its Facebook page a video that featured a look-alike of Verstappen. The commercial was deleted after one day but had, even in this short period, been viewed on the internet and in national media hundreds of thousands of times. The Amsterdam District Court ruled that Picnic acted unlawfully towards Verstappen by the inclusion of the look-alike in the disclosed commercial, as a result of which Picnic had to pay a compensation of €150,000 to Verstappen. Tim Wilms and Rogier de Vrey, of CMS the Netherlands, discuss this decision and examine under which circumstances the use of a portrait of a well-known athlete is considered unlawful in the Netherlands.

The portrait right of Article 21 of the Dutch Copyright Act 1912 ('DCA')

In the Netherlands, there is no absolute right for a person to one's own image or portrait and therefore a person does not have an exclusive exploitation right with regard to his own portrait². A person is however able to prevent unauthorised (commercial) exploitation of their portrait based on Article 21 of the DCA. Article 21 stipulates that if a portrait is made without the maker having been commissioned by or on behalf of the person portrayed, the maker or another person or entity is not permitted to make the portrait public if there is a reasonable interest against disclosure on the part of the person portrayed. Violations of Article 21 of the DCA constitute an unlawful act and the portrayed person may in such case claim, amongst others, an injunction and/or compensation.

A portrait is considered a depiction of a person's face, with or without the depiction of other parts of the body, irrespective of how it has been created (e.g. drawing, photo, painting, video, etc.).

It follows from case law that a portrait is not necessarily a person himself, but is more in general a tool which brings to mind the image of that person. A typical body posture can also play a role in this assessment. Even without corresponding facial features, but with other identifying factors being used, a court can find that a portrait is used³. Relevant is whether the likeness with someone is used to bring to mind the image of that person and whether the public considers the image is used as portrait of that person. It does not matter whether a portrait is portrayed online or offline, as follows from the case between former professional football player Edgar Davids and game publisher Riot Games⁴. According to the District Court of Amsterdam, a character used in computer game League of Legends, 'Striker Lucian,' constituted a portrait of Davids, mainly because the combination of several elements (dreadlocks, goggles, dark skin colour, sporty posture, aggressive play style, and football uniform) caused the public to identify Striker Lucian as Edgar Davids.

Reasonable interest

Based on Article 21 of the DCA, a person can only oppose to disclosure of his portrait if that person has a reasonable interest to do so. A reasonable interest can refer to both personal (privacy) interests and commercial interests. This standard also implies that a person who is portrayed does not have to accept that the popularity he acquired in the exercise of his profession is commercially exploited, if no compensation is granted⁵. In short: if an athlete has 'exploitable popularity' they can oppose to the disclosure of their portrait without financial compensation.

Crujff v. Tirion

The commercial reasonable interest of the person portrayed is a right based on Article 8 of the European Convention on Human Rights ('ECHR'). The Supreme Court of the Netherlands ruled in 2013 in the case of *Crujff v. Tirion* that, even with the existence of such reasonable commercial interest, an assessment should be made in individual cases, taking into account all the details of

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the case, whether such reasonable interest outweighs the by Article 10 of the ECHR protected right to freedom of expression and information of the person or entity that discloses the portrait⁶.

The Supreme Court also ruled in the *Crujff v. Tirion* case that if a reasonable compensation has been offered to the person portrayed (and protection of privacy interests is not at issue), in principle additional circumstances will be required to determine that disclosure is unlawful *vis-à-vis* the person portrayed (e.g. if disclosure negatively affects or damages the manner in which the person portrayed wishes to exploit his reputation)⁷.

The commercial of Picnic

The commercial featuring the look-alike of Verstappen was shared on Picnic's Facebook page a day after the supermarket chain Jumbo launched a national television commercial featuring Verstappen. In the Jumbo commercial, Verstappen delivered Jumbo groceries in his Formula 1 car. In the commercial of Picnic, a look-alike of Verstappen delivered in a Picnic van groceries while wearing the same race outfit and cap that Verstappen had been wearing during recent media appearances and races. The commercial started with the look-alike running past a delivery van of Jumbo and getting into a delivery van of Picnic. Picnic took the commercial offline after one day and after being summoned to do so by Verstappen.

The commercial had at that moment been viewed more than 100,000 times on the Picnic Facebook page, more than 200,000 times on YouTube and

was screened on national television, including in two programs with 931,000 and 624,000 viewers, respectively. Verstappen took the view that Picnic acted unlawfully towards him by the disclosure of his portrait in the commercial by using a person that looked like him. Verstappen therefore initiated proceedings in which he requested a declaration that Picnic acted unlawfully towards him and claimed financial compensation.

The legal assessment

The District Court of Amsterdam ('District Court') held that the look-alike constitutes a portrait of Verstappen. It was considered relevant that the look-alike showed all the characteristic features of Verstappen's portrait: the same cap, the same race outfit, the same hair colour, the same silhouette and the same posture. As a result, the look-alike brought to mind the image of Verstappen, which apparently was also the intention of Picnic as evidenced by Picnic's media statements⁸.

The District Court furthermore held that Verstappen had a reasonable commercial interest since he had been enjoying worldwide fame as a race car driver and because he had been exploiting his popularity (e.g. by being part of national television campaigns of Jumbo). Picnic's view that Verstappen would not incur any damage because he already concluded an exclusive contract for the Jumbo commercial was not followed by the District Court. Relevant is that Verstappen is free to determine whether he wishes to allow the use of his popularity in support of commercial activities, that he could claim a reasonable monetary

reward for giving his permission for such activities and that Picnic had not offered any compensation⁹.

In light of its rights under Article 10 ECHR, Picnic brought forward that the commercial was a one-off playful and funny-mannered response to the commercial of Jumbo. It was only shared on Facebook for one day and the content and tone of the commercial was positive. The District Court acknowledged that Picnic had a certain freedom to express itself in a humorous way, however the interests of Verstappen weighed heavier. In particular, the District Court relied on the fact that Picnic's commercial was an advertisement with a commercial character. Placement of the video on Facebook made it accessible to the public and was aimed at increasing the brand awareness of Picnic. Picnic consciously brought to mind the image of Verstappen with the use of the look-alike. The importance of Verstappen to oppose the commercial exploitation of his portrait without being offered compensation therefore weighed heavier than the importance of Picnic to freely express itself with the video. In light of this, Picnic infringed Article 21 of the DCA and acted unlawfully towards Verstappen¹⁰.

Compensation for Verstappen

The District Court emphasised that, based on the *Crujff v. Tirion* decision, it has to be determined on the basis of the circumstances of the case what is considered a reasonable compensation. The compensation should do justice to the degree of popularity of the person portrayed (i.e. Verstappen) and must be consistent with the market value of his exploited interest¹¹. Thus, it should

1. District Court of Amsterdam 25 April 2018, ECLI:NL:RBAMS:2018:2648. See for the interim judgment: District Court of Amsterdam 6 September 2017, ECLI:NL:RBAMS:2017:6395.
2. See e.g. Supreme Court 14 June 2013, ECLI:NL:HR:2013:CA2788, par. 3.6.3.
3. See also: Supreme Court 2 May 2003, ECLI:NL:HR:2003:AF3416.
4. District Court of Amsterdam 9 August 2017, ECLI:NL:RBAMS:2017:5415.
5. Supreme Court 19 January 1979, NJ 1979, 383.
6. Supreme Court 14 June 2013, ECLI:NL:HR:2013:CA2788, par. 3.6.3.
7. Ibid.
8. District Court of Amsterdam 6 September 2017, ECLI:NL:RBAMS:2017:6395, par. 4.1-4.3.
9. District Court of Amsterdam 6 September 2017, ECLI:NL:RBAMS:2017:6395, par. 4.7-4.8.
10. District Court of Amsterdam 6 September 2017, ECLI:NL:RBAMS:2017:6395, par. 4.9-4.11.
11. Supreme Court 14 June 2013, ECLI:NL:HR:2013:CA2788, par. 3.6.3.
12. District Court of Amsterdam 6 September 2017, ECLI:NL:RBAMS:2017:6395, par. 4.15.
13. District Court of Amsterdam 25 April 2018, ECLI:NL:RBAMS:2018:2648, par. 2.5.
14. See for another interesting case: District Court of Amsterdam 20 January 2016, ECLI:NL:RBAMS:2016:199. In this matter the Court estimated the damages incurred by the famous Dutch football coach Louis Van Gaal due to the unauthorised use of his portrait in an advertisement in a national newspaper to be €25,000.
15. District Court Amsterdam 6 December 2017, ECLI:NL:RBAMS:2017:8990.
16. District Court Amsterdam, provisional relief court, 2 May 2018, IEF 17830.

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be determined what compensation Verstappen (hypothetically) could have claimed if he would have approved the commercial (i.e. the damage suffered)¹². The portrayed person (i.e. Verstappen) should in principle motivate and proof these damages. Therefore, Verstappen submitted two expert reports that stated that he could have negotiated €600,000 and €250,000 respectively for his approval for the Picnic commercial. Verstappen also submitted an invoice of €100,000 for his attendance at a three-hour opening of a business location.

The District Court stated that the damage suffered by Verstappen should be calculated in line with Article 6:97 of the Dutch Civil Code. Article 6:97 stipulates that the extent of the damage shall be assessed in the way which is most consistent with the nature of the damage and shall be estimated in so far the extent of the damage cannot be assessed exactly. The damage of Verstappen could here not be assessed exactly according to the District Court and should therefore be estimated¹³.

In the District Court's estimation of damage, the general explanation of the expert reports regarding the market value of the exploited interest was taken into account as well as the €100,000 invoice. Both expert reports were, however, based on the continuation of Picnic's advertising, considering that the commercial went viral and would still be available on the internet. According to the District Court, the fact that the commercial could still be accessed online was a factor that does not come at the risk of Picnic, since it is up to Verstappen to act against third

parties that unlawfully disclose the commercial. The expert reports were therefore not considered fully accurate. In addition, the District Court looked at the fact that Verstappen did not have to make any effort for the commercial and that Picnic, with reference to a press publication of Verstappen, stated that Verstappen earns approximately €300,000 per year with Jumbo commercials. The limited duration of the disclosure by Picnic as well as all other, not specified, circumstances were also taken into consideration. Based on these considerations, the District Court determined that Verstappen was entitled to €150,000 compensation.

Comment

The decision that the portrait of Verstappen was used and that he had a reasonable interest to oppose disclosure, does not come as a surprise. After all, the Picnic ad obviously featured a look-alike used with identical clothing, while Picnic also had the objective to bring the image of Verstappen to the mind of the public. It goes without saying that Verstappen, given his popularity, would normally receive a monetary reward for such advertising and thus had a commercial interest, whereas Picnic could not give any other justification beyond its commercial interest.

The discussions about what is considered a 'reasonable fee' nevertheless remain interesting. In most such cases, one has to assess what amount an athlete could have reasonably considered for the use of his portrait in a specific case. This will generally not be easy to determine, as this is dependent on many circumstances such as the way in which the portrait is

published, the duration and repetition, exposure, popularity of the athlete, the actual efforts and involvement of the athlete, etc. Often it will therefore be difficult to submit concrete evidence of similar media performances. In the absence of such comparative data, courts will have a lot of freedom in estimating what is a reasonable compensation. That was also the case here, as a result of which the judge reaches €150,000. Consequently, the (financial) outcome of such cases will be hard to predict¹⁴.

Finally, two other recent cases show that offering compensation in advance can be beneficial to the party that exploits the portrait of a professional athlete. In another portrait case involving Verstappen, the District Court ruled that 10% of the net turnover that a publisher had offered to Verstappen for the publication of his biography including photographs was reasonable¹⁵.

According to the District Court, Verstappen had not sufficiently disputed why this compensation would not be reasonable and the expert reports submitted by Verstappen - in which it was stated he could have asked €175,000-€250,000 for the biography - were not considered reasonable because the reports did not take into account all circumstances of the case, such as the news value of the biography. In another recent comparable case involving the legendary Dutch football player Johan Crujff, 10% of the net turnover was also considered a reasonable compensation for the publication of a biography including pictures of Crujff, since Crujff did not substantiate why another amount would be reasonable¹⁶.