Sports Image Rights in The Netherlands*

by **Steffen Hagen****

1. Introduction

As the legendary Nike slogan said: "Image Is Everything". Successful sportspersons are right up there with the famous actors, pop stars and other showbiz celebrities, as the commercial icons of our time. Even more so in this day and age of outer appearances and multimedia, the image of a sportsperson has become more than just the depiction of a sporting person - it has become a marketable asset often representing great value.

In June 2009, Real Madrid took over striker Cristiano Ronaldo from Manchester United for the astronomical amount of €94 million, making for the most expensive transfer in football history. Although the payment of such a high transfer amount was frowned upon by many sceptics, Real Madrid allegedly recovered its costs within a year's time due to the enormous marketing income that Cristiano Ronaldo generated for the football club. It goes to show that Real Madrid didn't pay almost €100 million just for Ronaldo's football playing qualities, but also for the value of Ronaldo as a commercial product, a marketing commodity. Cristano Ronaldo is the new Beckham.

Well-known sportspersons, especially footballers, are the idols admired by their fans - the consumers - and therefore commercial organisations are eager to bind a sports personality with a positive reputation as the 'face' of their product or service, or to otherwise link their trade name or trademark to that sportsperson in order to boost sales by profiting from the positive image of the player reflecting on the company's product. Clearly, there is a significant commercial value in the exploitable popularity of sportspersons with a reputation. In this respect, exclusivity is of the essence. The popular player therefore has every reason to prevent third parties, without consent, from using and profiting of such player's reputation. This is where Sports Image Rights come into play.

2. Image Rights in the Netherlands

2.1. Defining image rights

The term 'image' may have different meanings. It may refer to a particular depiction (portrait) of a person - a photo, picture, painting, caricature - or to one's physical appearance generally. Image may also have the broader meaning of: how a person is perceived by the public, i.e. a person's *reputation*. In the latter sense, one's image (reputation) will not merely be connected to a person's physical appearance, but the public will also associate such image to other elements of one's *persona*, such as name, nickname, voice, autograph and/or other symbols particular to such person (for instance, the shirt number of a famous football player).

* This chapter is based on, and is a completely revised version of, the chapter on The Netherlands in the first edition of *Sports Image Rights* (T.M.C. Asser Press, The Hague, 2005) book © 2005, written by Bert-Jan van den Akker and Dolf Segaar.

** Attorney-at-law, C.M.S. Derks Star Busmann, Utrecht, The Netherlands.

It goes without saying that sports personalities have an interest in controlling the commercialisation of their image in the broadest sense - image meaning the reputational goodwill value represented in one's persona (depiction, name and other personal elements). Such control lies in the legal protection enjoyed by (sports)persons against the (commercial) use of one's image by a third party without consent or valid reason. This is what is often referred to as 'image rights'.

2.2. Legal protection

Dutch law does not recognise an image right as such - neither in the broader sense of one's right to (the exploitation of) his or her *persona* (reputation generally), nor in the sense of a right to one's own image (in the meaning of depiction) similar to the "*Recht am eigenen Bild*" as recognised in Germany.

Nevertheless, in the Netherlands a famous (or less famous) sportsperson does have several grounds for legal action available to him or her to prevent third parties from (mis)using or profiting from such sportsperson's image without his or her consent. This legal arsenal - what's in a football club's name - can be found in the Copyright Act, the Civil Code and the Benelux Convention on Intellectual Property.

The Copyright Act contains certain provisions that may protect sportspersons against the unauthorised (commercial) exploitation of their portrait. These provisions are generally referred to as Dutch 'portrait law' as they provide 'image rights' in the narrow sense of depiction or portrait rights. These portrait rights are discussed in further detail in chapter 3 below.

As to the commercial exploitation of the elements of one's persona other than his or her depiction - such as name, nickname, voice - a sportsperson may enjoy a protection similar to that provided by portrait law by invoking the doctrine of the unlawful act as laid down in the Civil Code. Such protection of a sportsperson's indicia (other than one's appearance) are considered in chapter 4.

In addition, sportspersons may strengthen the legal protection of their image by registering certain elements of their persona as a trademark. Chapter 5 elaborates on these possibilities of trademark protection.

The remedies and sanctions available to a sportsperson looking to enforce his image rights in proceedings before the Dutch courts are set out in chapter 6.

2.3. Limitations

In practice, a sportsperson may often be limited in the commercial exploitation of his image. The image rights of a sportsperson may often be restricted by contractual (sponsorship) obligations pursuant to an employment contract or membership of a club and/or national sports federation or union. As a member of a club or federation, a sportsperson is bound by constitutions and regulations, including regulations regarding sponsorship, and he or she can therefore be bound by sponsorship obligations towards third parties. Also, practice shows that where a sportsperson has several relationships (e.g. with his club/employer, as well as with the national sports federation) which confer different contractual obligations upon him, this may result in conflicting sponsorship obligations. These issues will be further discussed in chapter 7.

3. Definition of a Portrait

The term 'portrait' may first of all bring to mind the classic notion of a painting or photograph of the face of a person posing. However, in Dutch law the concept of a 'portrait' is much broader than that.

3.1. Depiction

In the Explanatory Memorandum to the Copyright Act - which dates back to the introduction of the Act (including the aforementioned 'portrait right articles' included therein) in 1912 - a portrait was defined as "a depiction of a person's face, with or without the depiction of other parts of the body, however it has been created".

First of all, this definition makes it clear that the productional manner or *form* of the portrait is not relevant. A portrait may be made with a photo- or video camera, painted or drawn, cast in bronze, etc.

Essential for a portrait is that it is a *depiction*. In this respect, it is irrelevant whether the person portrayed has actually posed for its depiction; a photograph of a person taken by chance, or including that person unintentionally, may also qualify as a portrait. A description of someone's appearance, however striking or recognisable, does not make for a portrait.

Also, to qualify as a portrait the depiction must be of a *person*. A photograph of a football team will not qualify as a portrait of the football club concerned. An attempt to have a team photo qualify as a portrait of the football club Ajax therefore failed in 1980.[1] The court in this case explicitly considered that portrait rights are only attributable to natural persons. Consequently, a football club, or any other corporate body or entity, does not qualify as a "person portrayed" within the meaning of the Copyright Act.

For a long time, it was taken from the above referenced passage in the Explanatory Memorandum that at least a person's *face* must be visible in a depiction in order for it to qualify as a portrait. However, the concept of depiction - and therefore the concept of a portrait as such - has been further developed in case law and its interpretation has become broader over time. As to what nowadays qualifies as a portrait, the line will be drawn in further detail in the following paragraphs.

3.2. Corresponding facial features

Initially, the Dutch Supreme Court found that for an image to qualify as a portrait (and thus for the person depicted to have a claim based on portrait rights) corresponding facial features were required. Mere association did not suffice to speak of a portrait.

This followed from the Supreme Court's judgment in the *Ja zuster/nee zuster* case in 1970.[2] In this case the issue concerned promotional key rings with little plastic figures (dolls) attached which represented the main characters/players in a popular television series. The figures did not display recognisable facial features, but they did represent - also clear from the legends on them - the main characters from the series.

The Supreme Court considered, in so many words, that there must be a recognisable visual likeness between an image and the depicted person in order to qualify as a portrait of that person. In this respect, the Supreme Court found that if the face depicted on an object does not correspond with the facial features of a person, such object will not qualify as a portrait of that person, regardless of whether the public will associate or identify (the face on) the object with that certain person.

This judgment received mixed comments in the Dutch legal community. One included the example of a 'depiction of the football player Cruijff in action, who's head is hidden from view by a teammate'. Although everybody would immediately recognise Cruijff, he would not be able to claim any portrait right in such picture.

3.3. Possibility of recognition

Later, in 1987 the Supreme Court in its *Naturiste* judgment[3] still considered the 'depiction of the face', but held that the *possibility* of recognition of the depicted person is sufficient to make for a portrait. This case concerned the publication without consent in a magazine of a photograph of a woman depicted naked, standing up. Her hair was partly over her face, so that the eye area was not visible.

The Supreme Court found that it is not always required that a person's eyes are visible in the depiction. It is not necessary that the viewer of the depiction should be able to get a (clear) representation of the depiction of the face. It is also not required that each viewer should be able to identify the person portrayed. It is sufficient if the person portrayed can be recognised even by only a few people.

3.4. Posture

The characteristic posture of a sportsperson may also be of relevance in the assessment of potential infringement of one's portrait right. In the abovementioned *Naturiste* judgment, it was found that a *striking body posture* may also be considered in determining whether the depiction of a person is recognisable.

1 President of the District Court in Utrecht, 16 January 1980, NJ 1980, 481 (*Krol c.s./Panini*).

2 Supreme Court, 16 January 1970, NJ 1970, 220 (*Ja zuster/nee zuster*). [Transl.: Yes nurse/no nurse.]

This view was confirmed in a 1991 court ruling.[4] The case concerned an advertisement by the Burnham Company for a new gas boiler. This advertisement featured an action photo of the well-known marathon skater Yep Kramer without his consent. The accompanying text made a comparison between the stamina of Kramer and that of the gas boiler. The court found that the advertisement infringed on the portrait rights of Kramer by free-riding on the persona of Kramer which constituted commercial use of his popularity. The court considered that Kramer was clearly recognisable in the photograph used in the advertisement, not only because his facial features were visible, but also due to the characteristic posture in which he was known to move across the ice.

3.5. Other identifying elements

Since the Supreme Court's *Breekijzer*[5] judgment in 2003, the threshold for possibility of recognition has been lowered considerably. This judgment lives up to its name as it indeed represents a 'crowbar' in Dutch portrait law history (*Breekijzer* translates as crowbar). Although not using the word 'association' as such, in this judgment the Supreme Court has basically accepted that even if a depiction lacks any corresponding facial features all together, it may nevertheless qualify as a portrait due to other identifying elements depicted.

This case concerned the television programme 'Breekijzer, a programme aimed at exposing abuses and reprehensible behaviour by confronting persons responsible on camera unannounced. In this particular case the relevant question was whether the person filmed could oppose the broadcasting of the recording even though his face had been blocked out making it *completely unrecognisable*. The Supreme Court ruled that if the face of the person depicted is partly or even entirely made unrecognisable, this does not necessarily stand in the way of qualification of the depiction as a portrait, in the event that the person portrayed can also be identified from any other elements in the picture.

In view of the foregoing, it may not come as a surprise that also pictures of caricatures and look-likes may qualify as a portrait of the actual (sports)person 'portrayed'.

3.6. Caricatures and look-alikes

A caricature, which shows a minimum of resemblance, may also qualifies as a portrait within the meaning of the Copyright Act, especially if the context makes it clear which specific (sports)person is depicted in the caricature. In 1965, the President of the District Court of The Hague prohibited the unauthorised sale by the company Electro-Visie of various white metal pins bearing the caricatures and names of the players and trainer of football club Feyenoord.[6] In a more recent case, the use in a commercial advertisement of a caricature of Jan-Peter Balkenende, at that time the Prime Minister of the Netherlands, depicted as a toddler named J.P., was prohibited.[7]

Whether the depiction of a look-alike will also qualify as a portrait is less obvious. Portrait law protection may be granted depending on the context of the image. Mere corresponding facial features of a look-alike will probably not suffice. However, if the resemblance would intentionally be emphasized, for instance by the use of make-up, hair style, typical posture and/or by stating the name of the sportsperson represented in the image, the portrait of the look-alike may indeed qualify as a portrait of the person that the look-alike resembles.

In 1994, the President of the District Court of Amsterdam denied the claim brought by the late Dutch television celebrity Silvia Millecam against the use of a look-alike in an advertising brochure of Escom computer shops. Although Millecam evidenced that acquaintances had 'recognised' her in the picture of the curly red-haired female model, such picture was not accepted as a portrait of Millecam within the meaning of the Copyright Act. In this respect, the court considered that the said resemblance had not been intended by Escom and that the brochure lacked any references to Millecam or any of her programmes or activities (i.e. there was no additional context that could make the picture of the look-alike model qualify as a portrait of the celebrity in question). Therefore the use of the look-alike in the brochure was not considered a breach of the portrait rights of Millecam.[8]

However, in more recent case law it has indeed been confirmed that the depiction of a look-alike may indeed qualify as a breach of a sports person's portrait rights when it follows from the context in which the image is used that the image intends to impersonate such sports person. This was decided in the *Kalou/Achmea* judgment, which is discussed in more detail in para. 3.3.3.3 below.[9]

3.7. In summary: the current view

The concept of a portrait within the meaning of Dutch portrait law as laid down in the Copyright Act has been stretched considerably over the years. The current view on what qualifies as a portrait follows from the Supreme Court's *Breekijzer* judgment in 2003, which has been cited and followed in a number of judgments since. Basically, it is accepted that even if a depiction lacks any corresponding facial features altogether, i.e. even if the face of a person is not included in the picture at all, it may nevertheless qualify as a portrait due to other identifying elements depicted. The test is, in fact, whether a person may be recognised in a certain image taking into consideration all the identifying elements pro-

3 Supreme Court, 30 October 1987, NJ 1988, 277 (*Naturiste*).

4 Sub District Court in Harderwijk, 29 May 1991, PRG 1991, 3507; Mediaforum 1991, B115 (*Kramer/Burnham*).

5 Supreme Court, 2 May 2003, NJ 2004, 80 (*Niessen & IPA/Storms Factory; Breekijzer*)

6 President of the District Court in The Hague, 7 December 1965, BIE 1966, nr. 66 (*Feyenoord players*).

7 District Court in Amsterdam, 2 February 2005, LJN: AS4624 (*The State vs. Kijkshop*).

8 President of the District Court in Amsterdam, 22 December 1994, IER 1995/12 (*Millecam/Escom*).

9 President of the District Court in The Hague, 13 April 2006, BMM bulletin 2006-2, p. 80-81 (*Kalou/Achmea*).

10 District Court in Breda, 24 June 2005, IER 2005/80 (*Katja Schuurman, Gouden Gids/Yellow Bear*).

vided in or with the image. Such elements must be considered altogether as making up the image in correlation. In other words: the overall impression of the image must be such that the viewer recognises a particular (sports)person in such image. This may indeed be the case where a depiction lacks any facial elements, but where a sportsperson is nevertheless recognisable from such picture due to other identifying elements, such as a characteristic posture or, for example, a striking hairdo, a certain style of clothing or sports gear, a players' shirt number or the typical colours of his club or team. Often, a combination of these elements will be decisive to conclude that an image is clearly recognisable as a portrait of the sportsperson depicted.

The aforementioned element of a striking body posture is obviously of specific relevance in the case of sports images - arguably, the way in which Cristiano Ronaldo celebrates a goal, Arjen Robben's typical posture when dribbling over the pitch, the way Usain Bolt celebrates winning the 100 metres sprint, or the typical posture of Michael Jordan or Kobi Bryant when they make a slam dunk, may be eligible for portrait right protection in the Netherlands.

The Court of Breda has even granted portrait law protection against the use of the recognisable posture of a *look-alike* viewed from the backside, so without any recognisable facial features at all. In 2005, the Dutch celebrity actress Katja Schuurman was the face of the Dutch yellow pages and she starred prominently in the nationwide advertising campaign. Hooking into this, competitor Yellow Bear launched a similar campaign using a look-alike model with the same hair style and colour, the same silhouette, posture and pose and similar high-heeled shoes. With explicit reference to the Supreme Court's *Breekijzer* judgment, the Court considered that although the advertisement lacked any corresponding facial features, the "not-quite portrait" (as the Court phrased it) of the look-alike did indeed qualify as a portrait of Katja Schuurman, as the picture used contained all characteristic features of the portraits used in the original yellow pages campaign. What also didn't help Yellow Bear was that they (internally) named their own campaign the 'Katja campaign' which the Court considered a clear indication that the depicted woman was intentionally suggesting to be Katja Schuurman.[10]

So, in the Netherlands even the picture of a look-alike, without depicting any part of the face, may in certain circumstances - depending on the various typical (identifiable) elements contained therein - qualify as a portrait of the sportsperson resembled in such picture.

4. Portrait Rights

Dutch 'portrait law' is laid down in the Dutch Copyright Act, in articles 19 - 21, 25a and 35. These articles not only contain rules regarding (restrictions on) the copyrights of the portrait maker, but also - more importantly - attribute specific rights to the portrayed person, vis-à-vis both the portrait maker as well as third parties. The inclusion of these rules of law in the Copyright Act is not directly obvious or logical, and in a sense a bit arbitrary. The rights of a portrayed person towards third parties have little to do with copyright. After all, one is not the creator of his own image. In essence portrait rights are rather *privacy* rights and/or, particularly when a famous sportsperson is concerned, *commercial* rights to control and profit from the exploitation of one's image. This includes the right to prohibit the unauthorised association with, and profiting from, one's popularity by a third party.

In the preceding chapter, the picture has been painted as to what it takes for an image to qualify as a portrait within the meaning of the Copyright Act (i.e. for an image to be eligible for portrait right protection). The next assessment to make is obviously whether the sportsperson depicted in an image qualifying as a portrait may indeed have any rights to such image, in particular, whether the sportsperson depicted may prohibit the use (exploitation) of this image without his or her consent.

First of all, it will depend on whether or not the portrait was commissioned by the person portrayed.

4.1. Portrait commissioned by person portrayed

Articles 19 and 20 of the Copyright Act (CA) provide for the situation where a portrait has been commissioned by the person(s) portrayed.

In such case, article 19(1) CA provides that the person portrayed will always have the right to reproduce the portrait, regardless of the copyright of the author of the portrait (i.e. a reproduction by or on behalf of the person portrayed shall not be deemed an infringement of copyright). If more than one person has been portrayed in one image, the portayed persons will need each other's consent for reproductions (art. 19(2) CA).

Furthermore, article 20 CA prohibits the author (e.g. the photographer) of a portrait commissioned by the person portrayed to make such portrait (e.g. photograph) public without the portrayed person's consent. If the portrait is made of two or more persons, the author will require the consent of all persons portrayed.

4.2. Portrait not commissioned by person portrayed

Most disputes concerning sports images will concern cases where a picture of a sportsperson is made without having been commissioned by or on behalf of that sportsperson and where such picture is being used without his or her consent. In such case of unapproved use of a sportsperson's portrait, the copyright owner (usually the maker of the picture and/or the publisher of the publication containing the image) shall not be allowed to communicate it to the public, in so far as the person portrayed (or, after his death, any of his relatives) has a *reasonable interest* in opposing its communication to the public.

4.2.1. Weighing of conflicting interests

However, a reasonable interest as such does not automatically lead to a valid portrait right claim. This was decided by the Supreme Court in its *Murderer of G.J. Heijn* judgment in 1994.[11] If such a reasonable interest is found to be present, then such interest will be weighed by the court against any other interests, particularly the freedom of information, as codified in Article 10 of the European Convention on Human Rights (ECHR) and Article 7 of the Constitution of the Netherlands. The Supreme Court found that (also) in the context of Article 21 CA the right to privacy (as a reasonable interest) was not more absolute than the freedom of information/expression. This weighing of the interests of Articles 8 and 10 ECHR was later also applied in the first image rights decision of the European Court of Human Rights in January 2000.[12]

4.2.2. Reasonable interest

So, if an image qualifies as a portrait within the meaning of Article 21 CA - and as we have seen in the previous chapter, this will often be the case - the person portrayed can oppose publication/exploitation, provided that the person portrayed has a *reasonable interest* in doing so. Case law over the years has given further clarification as to what may qualify as a 'reasonable interest' within the meaning of Article 21 CA. Two types of reasonable interest can be distinguished: (i) the *privacy* interest and (ii) the *commercial* interest.

4.2.3. Privacy interest

The right to one's privacy is codified in Article 8 of the European Convention on Human Rights (ECHR) as well as Article 10 of the Constitution of the Kingdom of the Netherlands. In the above referenced *Naturiste* judgment (see para. 3.3) in 1987, the Supreme Court for the first time acknowledged the privacy interest as a ground for protection of the person portrayed. In the 1988 *Vondelpark* case[13], the Supreme Court expressly linked the privacy interest under Article 21 CA with the right to one's privacy of Article 8 ECHR.

Such privacy interest is not a privilege of the common man. Public figures (other than persons in an official function), including famous persons that are often in the public eye, may also rely on a privacy right, which right may outweigh the freedom of information of the (entertainment) press. This follows from the decision of the European Court of Human Rights in the case of *Caroline von Hannover v. Germany*.[14] Obviously, a famous sportsperson may also qualify for such privacy protection.

In practice, however, the privacy interest will not often be relied on

11 Supreme Court, 21 January 1994, NJ 1994, 473 (*Moordenaar van G.J. Heijn*).

12 ECHR, 11 January 2000, *News Verlags GmbH & Co.KG v. Austria* (no. 31457/96, ECHR 2000-I).

13 Supreme Court, 1 July 1988, NJ 1988, 1000 (*Vondelpark*).

14 ECHR, 24 June 2004, *Caroline von Hannover v. Germany* (no. 59320/00), Mediaforum 2004-7/8, no. 27, p.252.

in sports image cases. In such disputes, the reasonable interest of the sportsperson will typically be a *commercial* interest.

One of the rare cases in the Netherlands in which a sportsperson successfully[15] invoked protection of his privacy concerned a weekly tabloid that suggested a homosexual relationship between a singer and a professional footballer. It was presented as a fact on the cover of the magazine, but denied in the relevant editorial article. The football player felt that his privacy had been infringed by this publication. The District Court in Amsterdam agreed, considering that although public figures, such as professional football players, must tolerate a certain degree of interference of their personal life, in this case the magazine had crossed the line. Rectification was ordered and damages were awarded in the amount of NLG 5,000 (approx. €2,250).[16]

4.2.4. Commercial interest

The reasonable interest of a person portrayed to object to publication of his image may also lie in a financial or commercial interest of the person portrayed. Such a commercial interest can only be invoked by specific groups of professionals, namely people with an *exploitable popularity*. Such professionals who are able to commercialize (i.e. make money out of) their popularity include popular artists, TV personalities and, in particular, professional sportspersons.

The first case in which such a commercial interest was recognized by a Dutch court as a reasonable interest for opposing publication of one's image without consent, dates back to 1960. This concerned the portrait of Teddy Scholten, a popular singer at the time, which was used in an advertising campaign without her consent. The Court of Appeal in The Hague considered that a popular singer such as herself was indeed in a position to make (commercial) use of her popularity by, for instance, licensing third parties to use her image for promotional purposes against payment of a consideration (fee, royalty). Such third parties would only be prepared to pay for such use on the basis of exclusivity. The Court reasoned that this gave the popular singer a reasonable interest to oppose publication of her image without consent.[17]

Five years later followed the first case in which professional sportsmen were awarded the right to cash in on their popularity. In this case, the players and coach of football club Feyenoord successfully opposed the production and sale of badges depicting their caricatures. The District Court in The Hague found that players and coach could have exacted a reasonable payment in exchange for their consent to use their depictions, whether or not with mention of their names and whether or not in connection with the sale of specific products.[18]

In 1979, the Supreme Court ruled on the issue whether a financial interest qualifies as a reasonable interest within the meaning of article 21 CA. In the *'t Schaep met de Vijf Pooten* judgment,[19] the Supreme Court indeed recognized the commercial interest of popular professional personalities:

"Although when drawing up the Copyright Act the legislator in using the words 'a reasonable interest' in article 21 CA will mainly have had in mind interests of a non-financial nature, given also the developing social views in this respect, there can also be a reasonable interest when the popularity of those portrayed, acquired in the exercise of their profession, is such as to make possible the commercial exploitation of that popularity by any form of publication of their portraits. The interest of those portrayed in such case to be able to share in the benefits of such exploitation by not having to allow the publication of their portraits for commercial ends without receiving compensation for it, is a reasonable interest in the meaning of article 21."

Therefore, in order for a sportsperson to have a reasonable commercial interest to oppose publication of his or her image, such sportsperson must have: (i) popularity acquired in the exercise of his/her profession, and (as a result) (ii) commercial exploitation potential in that popularity.

4.2.4.1. Popularity acquired in exercise of profession

As said above, a person opposing use of his portrait will first of all have to show that he has acquired popularity in the exercise of his *profession*. For the world of sport, the interesting question then arises whether the *amateur* sportsperson could have any commercial interest at all in order to invoke portrait law protection. Case law shows that no clear dividing line can be drawn in this respect. Popular sportspersons who do not, strictly speaking, exercise their sport as their (main) profession, may still enjoy portrait law protection.

This is illustrated by the judgment of the Court of Appeal in Amsterdam in the case of *Amateurboxer Vanderlijde*. This case concerned a large photo of the Dutch amateur boxer Arnold Vanderlijde on the centre pages of Panorama magazine (i.e. the picture could be removed and put up as a poster) published without the boxer's consent. Vanderlijde went to court claiming compensation in the amount of NLG 30,000 (almost €15,000), invoking a reasonable commercial interest and arguing he could have stipulated such amount for his prior consent to such a promotion. Panorama stated in its defence that Vanderlijde's popularity - which was undisputed - had not been acquired in the exercise of his *profession* as he was an *amateur* boxer. The Court rejected this defence and held that it is a matter of whether the popularity which Vanderlijde acquired as a boxer - irrelevant whether as amateur or professional boxer - is such that it can be commercially exploited by way of publication of his portrait.[20]

In other words, in order to enjoy a portrait right it is essential for a sportsperson to acquire substantial popularity in the exercise of his sport, rather than exercise his sport on a professional level. Where the popular amateur may enjoy protection, on the other hand the *pro* status of a sportsperson is not automatically a guarantee for (significant) portrait law protection.

Popularity does not necessarily have to mean famous or known by the general public. In its *Snowboarders* judgment, the Court of Appeal in Amsterdam held that two (allegedly unknown) snowboarders were in principle eligible for portrait law protection given that, as they had participated in World Cup and National Cup tournaments, the snowboarders would at least be known by some within the snowboarding community.[21]

4.2.4.2. Commercial exploitation

However, a certain degree of popularity is not enough for a portrayed sportsperson to actually have a reasonable interest to oppose publication of his or her portrait. In addition, the sportsperson will have to show that such popularity is commercially exploitable, i.e. that the sportsperson's popularity is such that commercial exploitation of his popularity by publication of his portrait can reasonably be considered a realistic possibility.

In the aforementioned case of the *Snowboarders*, the Court of Appeal considered that the two snowboarders depicted on the cover and back of a book on snowboarding were not popular enough to have significant commercial exploitation potential in that limited popularity. Also, the snowboarders failed to show that the publisher of the book had chosen their image for commercial reasons. The book did not contain any reference to the names of the two snowboarders nor any hints to their identity. The Court therefore concluded that the commercial use of the pictures was to such a limited extent geared at, and resulting from, the identity of the snowboarders that no exploitable popularity could be taken from such use.

In respect of well-known sportspersons, in particular professional football players, it is generally accepted that they have a right to take action against unauthorized commercial exploitation of their 'portrait'. After all, these sportspersons have acquired popularity in the exercise of their profession (sport), and such popularity is commercially exploitable (i.e. they can cash in on their popularity). Hence, they have a legitimate interest in controlling the commercial use of their images.

15 Two recent cases in which the privacy interest was invoked but denied, are the *Van Basten* case and the *Cruijff* case, both discussed in further detail in para. 4.2.4.5. In both cases, a *commercial* interest was indeed accepted, although in the particular case of *Cruijff* this reasonable interest was ultimately outweighed by the freedom of expression/information.

16 President of the District Court in Amsterdam, 2 May 1996, KG 1996/171.

17 Court of Appeal in The Hague, 13 April 1960, NJ 1961, 160 (*Teddy Scholten*).

18 President of the District Court in The Hague, 7 December 1965, BIE 1966, no. 66, p. 240 (*Bouwmeester c.s/Jacobi*).

19 Supreme Court, 19 January 1979, NJ 1979, 383, BIE 1979, no. 23, p. 163 (*'t Schaep met de Vijf Pooten*).

20 Court of Appeal in Amsterdam, 27 May 1993, NJ 1994, 658 (*Amateurbokser Vanderlijde*).

21 Court of Appeal in Amsterdam, 14 April 2009, B9 7818 (*Snowboarders*).

The question arises what exactly qualifies as 'commercial exploitation by any form of publication' opposable by the popular sportsperson. In this respect, one may distinguish three categories of commercial exploitation, namely: (i) advertising, (ii) products and (iii) publications.

4.2.4.3. Use of a portrait in advertising

The first category concerns the use of a sportsperson's portrait in a commercial advertising for the promotion of products or services. This includes advertising in printed media - such as newspapers, magazines, billboards, promotional brochures - as well as broadcasting/video ads (TV, film) and online (which may also include social media).

A clear example of commercial advertising in printed media is the aforementioned unauthorized use of the photograph of ice skater Yep Kramer in an advertisement for Burnham boilers (see para. 3.4 above), which the Court found to be an infringement on the portrait rights of Kramer. Similarly, the use of the portrait of horseman Arjen Teeuwissen in a promotional brochure by its former sponsor Bieman *after* termination of the sponsorship agreement was considered unlawful by the President of the Arnhem District Court.[22]

In the run-up to the FIFA World Cup 2006 in Germany, there was a public debate in the Netherlands on the accelerated naturalization request that Feyenoord player Salomon Kalou had filed with the Dutch government to acquire the Dutch nationality so that he could join the Dutch national team playing in the World Cup tournament. The responsible Minister had rejected this request. Playing into this topical matter, indemnity insurance company Achmea launched a TV-commercial in which Kalou's portrait was used as well as a look-alike (starring as Kalou playing in the 2006 World Cup final, but against the Dutch, as a naturalized German...). The President of the District Court of The Hague recognized Kalou's reasonable commercial interest to object to the use of his portrait without his consent, and banned the TV advertisement.[23]

4.2.4.4. Use of a portrait on products

The second form of commercial exploitation that may be distinguished is the use of a portrait on (or as) commercial product. In 1965, Monty Factories gave away a free promotional surprise pack with its chewing gum products, which pack included photographs of PSV football player Ger Donners. The Court issued a prohibition on the publication of Donner's portrait, as Monty Factories could not demonstrate the alleged permission by Donner for such use.[24]

Another example of the use of a portrait on (or as) commercial product is the aforementioned use of caricatures (qualifying as portraits) of the Feyenoord players on promotional buttons (see para. 3.6 above).

Where Feyenoord won, Ajax lost. The President of the District Court in Utrecht held that the use of portraits of the Ajax players on stickers that were sold by Panini separately for collection in an album could, in this case, not be considered infringing use, as Panini had paid a fee to the VVCS, the Dutch association of professional football players, as agreed with the VVCS as remuneration for the use of the portraits of all football players performing in the Dutch premier league. Without such remuneration arrangement, the commercial exploitation by Panini of the football players' portraits on stickers would have been unlawful.[25]

4.2.4.5. Use of a portrait in publications or other media

The publication of pictures of sportspersons in a newspaper or magazine (if not included in a commercial advertisement therein - see under 4.2.4.3 above) or in a book is in principle *not* a form of commercial exploitation opposable by such sportspersons portrayed on the basis of a commercial interest (regardless that such media are published with a profit motive). Use of portraits in such media will usually be considered to be for informative purposes. In other words, the freedom of information/journalism (as codified in Article 10 ECHR) will in such cases generally outweigh any reasonable (financial) interest the sportsperson portrayed may have to prevent such use.[26]

This is made clear, inter alia, by the President of the Haarlem District Court in the *De Slag om het Voetbalgoud* judgment. Further to the FIFA World Cup in 1974, in which the Dutch team reached to the finals, a book was published entitled 'The battle for football gold' which included action photographs depicting well-known football players. The Dutch football players' union (with Johan Cruijff in its ranks) opposed this publication. The President of the Court ruled that the publication of this book was not, in itself, unlawful towards the footballers depicted in it, because it was likewise not customary for publishers of newspapers and magazines to make payments to footballers for the insertion of action photos.[27] However, in this particular case the distribution of this publication was prohibited by the court after all, as the whole print run of 20,000 copies was sold by the publisher to the well-known drinks manufacturer Martini & Rossi, who used it in advertisements in various magazines. The book could be obtained at a discount by sending in a flattened Martini bottle cap. The President of the Court found that the publisher had gone too far by, in turn, selling the book to a company that wanted to use the publication for commercial purposes. For this reason the further distribution of the book was banned.[28]

In a recent case Cruijff was less successful in preventing the publication of a book including his image. This case concerned the unauthorized publication of a book of photographs titled *Johan Cruijff - De Ajacied* which included action pictures taken of Cruijff in his time as Ajax player. The District Court of Amsterdam acknowledged that Cruijff has an exploitable popularity, but found that such reasonable commercial interest was outweighed by the publisher's appeal to Article 10 ECHR. The Court considered that Cruijff is a public figure who, also given his achievements in sport in the past, is still continuously in the public eye. A biography of images was found an adequate means to inform the public about a specific part of Cruijff"s period as professional football player. The photos in the book were taken during such period as part of free gathering of news and concerned situations in which the public figure Cruijff knew he was subject to this. For this reason, the public would not think that Cruijff had participated in the realization of this book, so reputational damage was considered out of the question. The Court also took into account that Cruijff had never responded to the offer made by the publisher prior to publication to pay Cruijff a certain financial compensation for the use of the photos. Only in the proceedings Cruijff had claimed he could have stipulated a significantly higher amount for his permission to use his portrait, but failed to substantiate such claim. Also, Cruijff did not provide proof of his claim that he had an exclusive agreement with another publisher.[29]

In another recent case, the Amsterdam Court did prohibit the publication of a *magazine* on the basis of portrait right infringement. The famous violin player André Rieu was considered to have a reasonable commercial interest to object to the publication of a glossy magazine consisting of 131 pages of photographs, mostly portraits of Rieu. The publisher had not denied that these merchandising revenues formed a vital source of income in times of decreasing record sales. The publisher's defense that Article 10 ECHR applied, in this case, was rejected by the Court because the magazine had no news value, as it lacked any reference to Rieu's upcoming concerts. A rectification was also awarded as the Court found that the public had been given the false impression that André Rieu had provided his cooperation to this publication.[30]

An injunction against the use of a portrait on and in a *DVD* has also been ordered. In *Van Basten/Dutch Filmworks* the Court ruled that a DVD named "The most beautiful goals of all time (part 2)" infringed on the portrait rights of the famous football player Marco van Basten.

22 President of the District Court in Arnhem, 18 February 2003, LJN AF 4949 (*Teeuwissen/Bieman de Haas*).

23 President of the District Court in The Hague, 13 April 2006, BMM bulletin 2006-2, p. 80-81 (*Kalou/Achmea*).

24 President of the District Court in The Hague, 17 February 1965, BIE 1966, no. 14, p. 44 (*Donners*).

25 President of the District Court in Utrecht, 16 January 1980, NJ 1980, 481 (*Ruud Krol c.s./Panini*).

26 An exception to standard case law forms: President of the Amsterdam District Court, 12 May 2004, AMI 2004, no. 17, p. 198 (*Jongensdromen*).

27 President of the District Court in Haarlem, 26 June 1974, NJ 1974, 415; BIE 1977, no. 3, p. 11 (*Cruijff c.s./Boom-Ruygrok*).

28 President of the District Court in Haarlem, 26 June 1974, BIE 1977, no. 4, p. 13 (*Cruijff c.s./Martini & Rossi*).

29 District Court in Amsterdam, 14 April 2010, AMI 2010/6, no. 16, p. 198 (*Cruijff/Tirion*).

30 District Court in Amsterdam, 23 March 2011, LJN: BP8933, B9 9498 (*André Rieu Productions/Stijl & Inhoud Media*).

The infringement concerned both the unauthorized use of Van Basten's picture on the cover of the DVD box as well as the inclusion of footage of several historic goals of Van Basten in the DVD itself. The Court found such use as primarily intended to commercially exploit the famous player's popularity. The Court rejected the argument of the distributor that this would in practice mean a restriction of the freedom of information and/or lead to Van Basten having an exclusive right to the footage of his goals.[31]

5. Other Image Rights

5.1. Exploitable elements of one's persona (other than portrait)

As noted above, the image (reputation) of a famous sportsperson - and therefore such person's exploitable popularity - will not merely be connected to one's physical appearance. The public will also associate a sportsperson's image to other elements of his or her *persona*. These exploitable elements, which are also referred to as *indicia*, may be: one's name, nickname, voice, autograph, or other symbols particular to such person, such as the shirt number of a famous football player.

5.2. Civil law protection (unlawful act)

In para. 3.7 above, we already concluded that the concept of a portrait has been stretched considerably over the years. As a consequence even 'not-quite portraits' of look-alikes may qualify as a portrait and thus be in breach of a sports person's portrait rights as laid down in the Copyright Act. But even where qualification of an image as a portrait within the meaning of the Copyright Act would be questionable, in such cases the sportsperson portrayed may claim that the use of such image constitutes an unlawful act within the meaning of Article 6:162 of the Civil Code. For example, in case of a picture of a look-alike, where portrait law protection would be denied (e.g perhaps where it is (too) clear that the look-alike is not the actual sportsperson in question), in such case at least protection may be granted to the impersonated sportsperson by virtue of the Civil Code - Article 6:162, unlawful act - completely analogue to the protection granted to a person portrayed under the Copyright Act. [32]

The same legal ground may be applied to take action against the unauthorised use of a sportsperson's indicia, i.e. the abovementioned exploitable elements of one's persona, other than his physical appearance/likeness. Although the Supreme Court has not yet had the opportunity to consider in a judgment whether the rules of portrait law should similarly apply in cases concerning other elements of one's persona, it may be expected that the Supreme Court will indeed apply the same standards in such case. In lower case law, however, the commercial use of a sportsperson's name has indeed been considered unlawful on several occasions.

5.3. Protection of one's Name

In one case, the famous Dutch field hockey player Floris Jan Bovelander successfully objected to the use of (part of) his first name by the company Cruijff Sports. The Court found that such company unlawfully profited from Bovelander's reputation by promoting hockey shoes using the slogan "Floris Johan Cruijff".[33]

In a case concerning the Dutch national football team, however, the unauthorised use of the names of 11 players of the Dutch team in a full-page advertising for milk in national newspapers shortly before an international match, was *not* considered unlawful towards the players concerned. The advertisement showed 11 glasses of milk, each marked with the name of a player of the Dutch team, and headed: "Are we going all out tonight men?" The court found that the use of the names of popular persons in a once-only advertising hitching onto a current topic regarding such persons would only then be unlawful when the promoted product is associated in such a manner with these persons that the public will get the impression that these persons are actually recommending the promoted product to the public. It is questionable whether the Court was right to demand this additional requirement of association (i.e. of creating a wrong impression). There is also much to say for the argument that a popular sportsperson should be able to oppose the use without his consent in commercial advertising of his name as he can the use of his portrait.[34]

5.4. Domain names

Sportspersons often register their names (or nicknames) as domain names. Such domain names will usually be activated and used to point to the sportsman's own website. Alternatively, the registration may be done by a sportsman not to actually use the domain name himself, but rather to prevent third parties from registering the domain name first for such parties' use and benefit. After all, domain names, with any extension, can only be registered once, and are issued on a first come first served basis. Often enough, a third party will be the first to register a sportsperson name, leaving the latter with empty hands. If that third person would have a legitimate reason for registering that specific domain name, it will be difficult for the sportsman to claim a transfer of that domain name. This may be the case, for instance, if the registrant has exactly the same name, or where he has a bona fide intention of running a fan site. Often, however, the registrant may appear to be a so-called 'domain name grabber' who's intention is simply to sell the domain name for a profit.

If a sportsperson is confronted with domain name grabbing in respect of his name, in case of a .nl domain name (the extension for domain names in the Netherlands) there are different procedural measures available to the sportsman to attempt to recover that domain name. Perhaps the most simple and efficient option would be to file for a dispute resolution procedure with WIPO. Alternatively, the sportsman may file a claim for the transfer of the domain name in preliminary relief proceedings or proceedings on the merits before the Dutch courts. The legal ground for such a claim would be that the domain name grabber's registration in bad faith constitutes an unlawful act within the meaning of Article 6:162 CC.[35]

6. Trademark Protection

6.1. Portrait and name as a trademark

In addition to invoking their portrait rights (as laid down in the Copyright Act) and/or additional civil law protection (unlawful act/unfair competition), sports personalities may also turn to trademark law as an additional means of legal protection of their image, to a certain extent. For trademark protection in the Netherlands, one may apply either for a Benelux trademark (valid for the Netherlands, Belgium and Luxemburg) or for a Community Trademark (valid for the entire EU territory). Depending on the type of trademark, one will adhere to either the rules of trademark law contained in the Benelux Convention on Intellectual Property (BCIP) or the EU Community Trademark Regulation (CTR). Both statutory regimes contain a similar definition of what may qualify as a trademark, in other words: what signs are eligible for trademark protection.

Both article 2.1 BCIP and article 4 CTR provide that any signs capable of being represented graphically may (potentially) qualify as a trademark (under the Convention or Regulation, respectively). Both articles expressly provide that a 'personal name' (CTR) or 'surname' (BCIP) may be registerable as a trademark. Consequently, a portrait or a name of a sports star is, as such, perfectly capable of being accepted as a trademark and therefore of enjoying trademark protection.

However, in order to actually qualify as a trademark and obtain registration - which is an absolute requirement to enjoy trademark protection - a trademark must have distinctive character. In the Netherlands it is generally accepted in case law that a portrait possesses this distinctiveness. The same goes for a sports star's name, or nickname.

With a trademark registration a sportsperson may increase the scope

31 District Court in Amsterdam, 5 December 2007, AMI 2008/2, p. 41, IER 2008, no. 18, p. 80 (*Van Basten/ Dutch Filmworks*).

32 In the *Millecam/Escom* case mentioned in para. 3.6 above, a claim was also based on the doctrine of unlawful act, given that Escom had wrongly profited from her popularity (although the claim was in this case rejected).

33 President of the District Court in 's-Hertogenbosch, 18 November 1997, PRG 1998, 4887 (*Bovelander/Dénor Sportsfashion*).

34 District Court in The Hague, 16 May 1986, IER 1986, no. 56, p. 120 (*Players Dutch national team/The Dutch Dairy office*).

35 For example: President of the District Court in Arnhem, 3 December 2002, DomJur 2002-159; Mf 2003, no. 9, p. 64 (*Jan-Peter Balkenende/Stichting Liever*).

of legal protection against the unauthorized commercial use of his image. Pursuant to article 2.20(1) BCIP (article 9(1) CTR) a trademark owner (or its licensee) has the exclusive right to prohibit any third party, without his permission, the use of any sign which is identical and/or similar to the registered trademark insofar as it concerns use in relation to distinct goods and/or services.

6.2. Limitations to effective trademark protection

There are two essential aspects of trademark law, however, that make it not ideal for effective protection of sports image rights.

First of all, the primary function of a trademark is to distinguish certain goods and/or services of the trademark owner and/or its licensees from those of other parties. This is the so-called origin function of a trademark. Trademark legislation is not designed to protect image rights (such as one's name or likeness) as such, and its usefulness in this respect is therefore limited. A sportsperson's name cannot be registered as a trademark for that sportsperson as a person. However, registration can be useful (and is recommended) particularly with a view to merchandise (even if yet to be produced). In this respect, it should be noted though that the reputation of the sportsperson does not mean that the trademark will immediately also have a reputation in respect of the goods and services for which it is registered: Lionel Messi is a world-famous football player, but that doesn't automatically make Messi a world-famous trademark *for socks* (assuming Messi would register a name mark for such products).

Secondly, in case of a *portrait* mark, in practice protection is limited due to the static registration of the portrait. Any such trademark registration will concern one specific photo of the sportsperson in question. Any unauthorized use by a third party of a sports star's image will seldom concern use of an image in a form identical, or even highly similar, to the portrait of the sports star *as registered.*

In the above referenced *Cruijff/Tirion* case (see para. 4.2.4.5) the Court found that the use by the publisher of the name and the portrait of Johan Cruijff on and in the book concerned did not qualify as 'use' of Cruijff's name mark and portrait mark (Benelux registrations 307509 and 614969).

6.3. Examples and case law

Other than Cruijff, there are relatively few Dutch sportspersons who have strengthened their image protection with trademark registrations. Examples are the former football player Patrick Kluivert and former Formula 1 racer Jos Verstappen. For the latter, his portrait mark registration has actually proven successful, in a case against a magazine publisher in 2000. Prior to the 2001 Formula 1 season, publisher Albion of the magazine "Formula 1" had issued a special edition which previewed the forthcoming racing season, in which all 16 racing circuits for that season were discussed. For each of these circuits, Verstappen's opinion was given in a single sentence by reference to previous interviews in various media. These opinions were provided with a photograph of Verstappen and headed "Jos Verstappen's view". The Court found that not only did this breach Verstappen's portrait rights, but Verstappen could also object to these publications on the basis of his trademark rights pursuant to his registered name mark and portrait mark. Remarkably, the portrait consisted only of Verstappen's helmet and eyes. The Court found this to be sufficient, in combination with the use of his name, to assume infringement.[36]

Fan loyalty or admirance of the sports star will not provide a fan of a sports star a justifiable reason to use such sports star's trademark. This follows from the *Arsenal vs Reed* judgment of the European Court of Justice. In this particular case, football club Arsenal objected to the sale by a Mr. Reed of non-official Arsenal merchandise just outside the Highbury stadium. In his defense, Mr. Reed justified his business by explicitly making it clear to all his customers that he did not sell official club merchandise. This argument was rejected by the Court considering this did not take away the likelihood of *post sale* confusion on the part of the public.[37]

7. Remedies and Sanctions

7.1. Procedures

If the sportsperson's image rights are infringed by third parties, the sportsperson has a number of procedural options for taking action against such infringement.

7.1.1. Summary proceedings

The most obvious - and in practice most taken - route is to initiate summary proceedings (also referred to as preliminary relief proceedings or interlocutory proceedings), as in such summary proceedings (a so-called *kort geding*) injunctive relief can be obtained rapidly. The duration of most summary proceedings is 4-6 weeks. However, in very urgent cases - for example where action is taken to prevent an immediate publication that may cause irreparable harm - a court order may be obtained within only a couple of days.

Summary proceedings may be initiated if the plaintiff can demonstrate he has an urgent need for obtaining a provisional measure. Generally, in cases of image rights infringement the requirement of urgency is easily deemed to be met, in particular if the infringement is continuing. Summary proceedings are initiated by serving a writ of summons upon the infringer(s), followed by a court hearing (2-3 hours) before the President of the District Court, resulting in a preliminary decision. If infringement is likely to be the case, the plaintiff's claims may be awarded. As summary proceedings are relatively informal and quick, this also makes them the attractive procedural option from a cost perspective.

The disadvantage of summary proceedings is that, as a preliminary decision is rendered, only an advance payment of damages can be claimed. The same applies in respect of surrender of profits made from the infringement. Also, due to the preliminary nature of summary proceedings, they should in principle be followed (if injunctive relief has been granted) by proceedings on the merits. However, in practice this will often not be the case, as parties will enter into a settlement after a preliminary decision has been rendered, in order to avoid the substantial costs that parties would incur in connection with subsequent proceedings on the merits.

7.1.2. Proceedings on the merits

Alternatively, a sportsperson seeking to take legal action against infringement of his or her image rights may skip summary proceedings and immediately seek final relief by starting proceedings on the merits of the case (also referred to as ordinary proceedings). The advantage of these proceedings is that the designated District Court will look into the matter in detail and render a final[38] decision. Another advantage is that full damages and/or surrender of profits can be claimed. In cases that lack urgency proceedings on the merits are the only procedural option. However, practice shows that in cases of image rights infringement the sportsperson will usually have an urgent need to obtain immediate injunctive relief as soon as he becomes aware of the infringement. As a result, practically all image rights cases are dealt with in summary proceedings.

Compared to summary proceedings, proceedings on the merits are more formal and include more procedural steps, both required and optional ones - examples of the latter are witness hearings or obtaining expert opinions. As a result, proceedings on the merits will take approximately 1 - 1,5 years (or even longer in case of extra procedural steps or complications). Not surprisingly, the legal costs involved in proceedings on the merits are substantially higher than in summary proceedings.

7.2. Claims

7.2.1. Injunctions

In case of infringement of image rights, the sportsperson concerned may bring several claims, the most obvious claim being an injunction, i.e. a claim to cease and refrain from any infringing acts.

36 District Court in Amsterdam, 16 October 2002, IER 2003/18 (*Verstappen/Albion*).

37 European Court of Justice, 12 November 2002, BIE 2003/51 (*Arsenal/Reed*).

38 Any decision in proceedings on the merits is a final decision in first instance. Within three months following the judgment, any party to the proceedings may (but is never under any obligation to) file for an appeal.

7.2.2. Other (non-monetary) claims

In addition, if the infringement entails an unauthorized publication already made, a rectification may be claimed. Other possible claims include a recall of infringing products from the market place or surrender and/or destruction of infringing product. Also, the infringer may be summoned to provide information on its suppliers and/or customers or information on the number of infringing publications printed and/or issued.

All the above claims (including the injunction claim), as well as the monetary claims to be discussed below, may be strengthened by an incremental penalty sum which the infringer shall forfeit if he does not conform to any such claim awarded by the Court.

7.2.3. Damages

In addition the aforementioned claims, a sportsperson may also file various monetary claims: for compensation of damages, for surrender of profits made from the infringement, and/or for compensation of legal costs incurred.

If a sportsperson's image rights are infringed, he will generally suffer a loss, and therefore may file a claim for damages. However, the sportperson concerned will need to demonstrate that such damages are attributable to the infringer, or that the infringer is accountable by law or according to generally accepted standards. Also, questions may arise as to how the damages should be calculated and whether it is concrete enough to be claimable.

Case law shows that, in determining the level of damages, the courts will often make an assessment on the basis of what they find reasonable, considering the particular circumstances of the case. For example, in the earlier-mentioned case of the amateur boxer Arnold Vanderlijde, the District Court made the following consideration, that has later been followed by other courts in several judgments:

"The loss suffered by the claimant (Vanderlijde) in relation to the illegal publication of his portrait can be set at the amount that the claimant would have been able to stipulate from the defendant if he had been asked for his consent for its publication."

An important element in such an assessment is of course the level of popularity of the particular sportsperson concerned. The assessment is to be made on a case by case basis: the criterion is what the sportsperson in question could have stipulated, rather than what a sportsperson in general could negotiate for consent for a similar publication.

7.2.4. Surrender of profits

Apart from a claim for damages, a sportsperson may also bring a claim for the surrender of profits made from the infringement. If a sportsperson's trademark rights are infringed he or she may bring a separate claim for surrender of profits, in addition to a damages claim, pursuant to article 2.21(4) BCIP. If the infringement is made in bad faith, both claims may be awarded cumulatively. If an image rights infringement is rather based on the portrait rights conferred upon the sportsperson under the Copyright Act, or on the basis of unlawful act (article 6:162 DCC), a claim for surrender of profits will be regarded as a form of damages.

A claim for damages and/or a claim for surrender of profits may be brought in proceedings on the merits. However, as mentioned above, in summary proceedings one may only bring a claim for advance payment of damages or advance payment of profits made from an infringement. Such advance payment claims will not easily be awarded. The Supreme Court has ruled that in such cases the President of the District Court should adopt a reticent attitude in awarding such a claim for advance payments. The plaintiff will have to convince the President of the District Court that preliminary relief is of the essence[39].

7.2.5. Compensation of legal costs

Finally, a claim may be brought - both in summary and in final relief proceedings - for (partial) compensation of legal costs incurred. The legal system in the Netherlands provides for the unsuccessful party to be ordered to pay only a relatively low fixed rate to compensate the successful party for procedural costs (usually no more than €1,000 in civil cases). Since the implementation of the EU Directive 2004/48 on the enforcement of intellectual property rights in the Dutch Code of Civil Procedure (CCP), however, any party in legal proceedings concerning the enforcement of an IP right may claim that all reasonable and proportionate legal costs and other expenses actually incurred by such (successful) party shall, as a general rule, be borne by the unsuccessful party.[40]

In this respect, the question has arisen whether the portrait rights in Dutch law would qualify as an IP right within the meaning of the CCP or not. According to established case law, the answer is no. In a number of judgments[41], District Courts have ruled that a portrait right is not an intellectual property right, but rather a justifiable limitation on copyright, for the protection of the person portrayed against unlawful infringement of such person's right to privacy or other (commercial) interests. Although portrait law is codified in the Copyright Act, it is not a copyright, but rather to be considered a *species* of the 'common' unlawful act doctrine as laid down in the Civil Code. This also applies in cases concerning a strictly commercial interest, namely exploitable popularity, of sportspersons.

In this respect, any image rights infringement claim that can also be based on a trademark registration offers a significant advantage. As a trademark is obviously an IP right, any proceedings brought on the basis of (also) a trademark right, will allow a claim to be brought for the compensation of all (reasonable and proportionate) legal costs and other expenses incurred by the successful party in the proceedings. Case law shows that the Dutch courts are usually willing to accept at least (the larger) part of the claimed amounts as being reasonable and proportionate, and therefore payable by the other party. The downside of this 'advantage' is that - conversely - if a trademark based claim for alleged image rights infringement is rejected, the defending party may likewise claim full compensation of its incurred legal costs, payable by the sportsperson who unsuccessfully claimed image rights infringement.

8. Sponsorship Obligations by Virtue of Membership or Employment Contract

8.1. Contractual exploitation of image rights

As noted in the chapters above, a sportsperson in the Netherlands may enjoy a reasonable level of image rights protection. In many situations, a sportsperson will be able to prohibit the use by a third party of such sportsperson's image without his or her consent. In principle, it is the sportsperson who holds the commercial exploitation rights in respect of his image. A sportsperson is free to decide to whom he wishes to grant rights to the use of his portrait, name or other indicia. Such rights may usually be granted by way of a contract under which the sportsperson grants to a third party the right to use his image for commercial purposes, and for which grant of rights (often referred to as a license) the sportsperson receives a financial compensation in return.

Such third party will usually be a sponsor of the sportsperson concerned. Often, the image rights license will be part of the (written) sponsorship agreement entered into between the sportsperson and his sponsor. A sponsor may profit from the commercial association of his product or company with a sportsperson's image not only by obtaining a right to use the sportsperson's image, but also by putting the sportsperson under the obligation to promote the sponsor's brand name by using (often: wearing) the sponsor's branded product when exercising his sport or otherwise being in the public eye.

In practice, however, the freedom of a sportsperson to exploit and license his image rights is often limited also by agreements between the sportsperson and his sports club. Such agreements may either take the form of an employment contract or follow from a sportsperson's membership of the club and/or of the relevant national sports federation.

8.2. Conflicting sponsorship

It is not always clear to the sportsperson what obligations arise for him from in particular his membership of the sporting club or - conversely

39 Supreme Court, 14 April 2000, NJ 2000/489 (*H.B.S. Trading v. Danestyle*).

40 Article 1019h of the Dutch Code of Civil Procedure

41 For example: District Court in Amsterdam, 5 December 2007, AMI 2008/2, p. 41, IER 2008, no. 18, p. 80 (*Van Basten/Dutch Filmworks*); District Court in Amsterdam, 23 March 2011, LJN: BP8933, B9 9498 (*André Rieu Productions/Strijl & Inhoud Media*).

- it is not always clear to the club and/or sports federation how far their rights extend regarding the use of the image or other indicia of the sportsperson affiliated to such sports club or federation. This may lead to situations where image rights are granted by the sportsperson to his sponsor which conflict with the rights granted by such sportsperson's club or federation to its sponsor. These are often referred to as cases of conflicting sports sponsorship. Such conflicts may result in legal proceedings. In the Netherlands, there have been a number of court cases concerning conflicting sponsorship rights.

In 1977, the Court in Utrecht ruled in a case between the Royal Dutch Swimming Association (the KNZB) and swimmer Enith Brigitta. The KNZB put swimmers under the obligations to wear Speedo swimwear in competitions for national selection. One of the Netherlands' top swimmers, Enith Brigitta, refused to wear Speedo swimwear as she had her own swimwear sponsor. The Court found for the KNZB and confirmed that the KNZB may indeed commit its swimmers to wear its sponsor's clothing. In case of non-compliance, a swimmer may be refused selection for international competitions. In weighing the parties' respective interests, the Court considered that the KNZB's interest in promoting swimming in general, using the sponsorship moneys from Speedo, was to prevail over the interests of the individual sportsperson, who in this case also still held the amateur status. [42]

A year before, the Court in Utrecht had been faced with another case of conflicting sponsorship. The Royal Dutch Football Association (the KNVB) had entered into a sponsor contract with Adidas, under which the Dutch team players were obliged to wear Adidas boots. The football players concerned were 'not amused' as it had been customary for years for such players to enter into their own football boot contracts with personal sponsors. The Court found against the KNVB deeming the KNVB's action unlawful, as the association had not consulted with the players in advance about this change to the current practice, whilst the financial benefit of the sponsorship contract with Adidas was enjoyed only by the KNVB.[43]

Another case concerned a conflict in 1989 between football club Ajax and its player Brian Roy, and their respective sponsors. After Ajax had entered into an employment contract with Brian Roy under which Roy was forbidden to make himself available for advertising purposes without Ajax's express consent, Ajax and its sponsor Umbro brought a case against Brian Roy and his sponsoring clothing supplier Borsumij to prevent Brian Roy from wearing Borsumij clothing any longer. Some time prior to signing with Ajax, Roy had already entered into a clothing sponsoring contract with Borsumij, and this contract still existed side by side with the employment contract with Ajax. The Court rejected the claims of Ajax and Umbro, mainly because the contract between Borsumij and Roy predated the employment contract with Ajax and Ajax was aware of such contract when Roy signed with Ajax.[44]

From swimming to football, from football to skating: a case brought by one of the Netherlands' top skaters, Rintje Ritsma, and his sponsors against the Royal Dutch Skating Association (the KNSB). The question put to the Court was whether Ritsma was obliged to follow the clothing rules laid down by the KNSB. Pursuant to these rules, in international matches Ritsma had to appear in a skating outfit provided by the KNSB, with (predominantly) the KNSB sponsors' logos on it. Although there was no contractual link between the KNSB and Ritsma, the Court nevertheless considered that Ritsma was bound by the KNSB's clothing rules. This obligation followed from the membership relationship between the KNSB and Rintje Ritsma, as Ritsma was a member of a skating club which in turn was affiliated to the KNSB. The statutes of the KNSB impose on its members (the skating clubs) and their members (the skaters) an obligation to comply with the KNSB's statutes and regulations. [45]

42 President of the Utrecht District Court, 27 April 1977, BIE No. 3 (*KNZB/Enith Brigitta*).

43 Utrecht District Court, 23 February 1976, see H.T. van Staveren, *Het voetbalcontract: op de grens van sportregel en rechtsregel*, Deventer: Kluwer 1981, p. 152 (*Notten c.s./KNVB*).

44 President of the District Court in Breda, 1 November 1989, LJN: AH2909 (*Ajax-Umbro v. Brian Roy-Borsumij*).

45 Sportzaken [Sports Cases] 1997/1 no. B19 and B20 (*Ritsma and De Vegt v. KNSB*).

46 Court of Appeal in Amsterdam, 8 November 1996, Sportzaken [Sports Cases], no 1, p. 78 et seq.

8.3. Membership obligations

Clearly, a sportsperson may enter into arrangements with his club as to the use of his image. As the abovementioned case between Ajax and Brian Roy shows, older agreements will take precedence. In exchange for the rights granted by the sportsperson to his club, the sportsperson will receive a (generally financial) consideration from his club. The sportsperson and the club thus arrive at a contractual agreement based on negotiations.

In the case of a membership relationship between the sportsperson and his club or federation, a contractual relationship is not required to arrive at the same result. As illustrated by the aforementioned judgment between Ritsma and the KNSB, a sportsperson may be under the obligation to comply to the sponsorship commitments made by the federation even though the sportsperson did not himself enter into any contractual agreements with the sponsor concerned directly. This possibility is provided by Article 2:46 of the Civil Code (CC), pursuant to which associations (sports federations) can also impose obligations on their members (sportspersons) vis-à-vis third parties. This statutory provision states as follows:

"To the extent that the contrary does not follow from its articles of association, the association may stipulate rights for and on behalf of its members and, in so far as this has been explicitly provided for in the articles, may enter into obligations for and on behalf of its members. It may take legal action for and on behalf of its members to enforce such stipulated rights, including the right to claim damages."

It is therefore required that the articles of association explicitly provide for the possibility that the association contracts with third parties for and on behalf of its members, thereby committing to obligations towards third parties to be fulfilled by its members.

In the 1996 judgment *KNVB vs. Feyenoord*, the Court of Appeal in Amsterdam ruled that in such case the articles of association must be very clear in this respect. Articles of association containing only general and vague indications will not suffice. In this particular case the Royal Dutch Football Association (the KNVB) wanted to bind all the Dutch football clubs competing in the Dutch premier league ("Eredivisie") vis-à-vis a third party regarding the television broadcasting rights to home games. The Court of Appeal found that the articles of the KNVB were not concrete enough in this respect and too generally worded for Feyenoord (or any other member club for that matter) to be deemed to be bound by the obligations entered into by the KNVB towards the third party in question. For a person to be bound by a stipulation of this kind, the articles must contain a clear provision for this purpose, describing the nature of the obligation concerned. Otherwise, the situation would be such as if the clubs had given the KNVB full discretionary powers. [46]

It follows from the above that sportspersons can be bound vis-à-vis a third party, including in respect of their image rights, if the articles and regulations of the club or federation where they are under contract or of which they are a member, contain sufficiently clear provisions setting out what obligations can be imposed on them.

8.4. Conclusion

Sportspersons will generally have exclusive and enforceable rights to their own image - meaning their depiction, name and other indicia - and hence will also be able to exploit or commission others to exploit these rights. They must, however, be aware that they are in a dependent position vis-à-vis their sports club, the relevant national sports federation, the Dutch Olympic Committee, etc., as the latter decide to a significant extent whether a sportsman is selected for competitions (including international competitions) and the conditions on which that selection takes place. Obligations may be imposed on the sportsperson, either contractually or through the membership relationship, and the sportsperson will risk not being selected in case of non-compliance. Of course, the rights of a club or federation are not unlimited. The attitude and conduct of a club or federation towards 'its' players or athletes must be one reflecting reasonableness and fairness, should it not want to risk being called to order by a judicial body. In case of conflicting sponsorship arrangements, the parties will therefore generally have to come to the negotiating table to make conclusive agreements as to how

the exploitation of the available (image) rights are to be arranged or how such rights may be divided between the club's or sports federation's sponsor, on the one hand, and the sportsperson's sponsor, on the other hand. From time to time, however, cases of conflicting sponsorship do nevertheless arise, as is illustrated by the judgments referenced above.