

Alert | Intellectual Property Litigation



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“Under Dutch law, a lookalike in a commercial may be a so-called *portrait* that the person portrayed may be able to resist”: Supreme Court of the Netherlands

Imagine this: what if Dutch Formula-1 racecar driver Max Verstappen would deliver your groceries? That would be something, right? Although – according to a 2016 [commercial](#) – when doing so, Verstappen unfortunately would not be driving his Formula-1 racing car, but rather a plain and ordinary delivery truck. Even still, with Verstappen behind the wheel, your groceries would most likely arrive at your doorstep faster than ever before.

Because Verstappen equals speed, a Dutch online supermarket had an actor that kind of looked like him put on his signature cap and racing suit and drive around in a company truck delivering groceries. The *real* Max Verstappen was not amused, and sued to have the courts declare that the online supermarket had acted unlawfully towards him by publishing his *portrait*.

The online supermarket’s use of his portrait in the commercial, Verstappen stated, infringed his so-called *portrait right*. Under the Dutch Copyright Act (*Auteurswet*), two steps must be taken for an appeal to portrait rights. First, to constitute a portrait, the person being portrayed must be recognizable in an image or film. The requirement of recognizability is broad. For example, the person’s facial features do not need

to be visible by themselves; a distinct body posture or side profile can also constitute a portrait, according to case law.

Second, the person portrayed can act against the publication and claim infringement if they have a ‘reasonable interest’ in doing so. A reasonable interest can be a commercial interest if, for example, one is a well-known person. According to Dutch case law, someone famous enough to use his or her own portrait to benefit financially (e.g., with sponsor deals or appearing in commercials) does not have to allow others to exploit that portrait for profit, without their consent.

In first instance, the lower courts of Amsterdam (*rechtbank Amsterdam*) ruled in favor of Verstappen and granted him €150,000 in damages. On appeal, however, the court of appeal of Amsterdam (*hof Amsterdam*) dismissed Verstappen’s claim, finding that the Dutch public would not mistake the actor for Verstappen. Therefore, the court of appeal found no portrait, no infringement of Verstappen’s *portrait right*, nor any clear-cut damages.

Now, the Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*) has turned the table once more and held that under certain circumstances, an image of a lookalike, for example in a film, can be considered a portrait of the person he or she resembles. This requires not only that this person can be recognized in the lookalike’s picture but also that the possibility of recognition is increased by additional circumstances, such as the manner of presentation of the lookalike (for example, the use of specific makeup and clothing), what the picture actually shows, or the context in which the picture has been made public. The Supreme Court said that even if the viewer understands that the lookalike is not actually the person he resembles, the image can still constitute a portrait. The intended character of the image, such as in this case, a parody, is not important in determining whether there is a portrait. However, that character may play a role in the weighing of interests required by Article 21 of the Dutch Copyright Act, and it may mean that the person portrayed lacks a reasonable interest, within the meaning of that provision, in opposing publication of the portrait.

According to the Supreme Court, the court of appeal’s earlier judgment could only mean Verstappen was recognizable in the lookalike’s image and the possibility of recognition was enhanced by the lookalike’s appearance, clothing, and the scenario of the commercial. However, the court of appeal of Amsterdam’s judgment that there is nevertheless no question of a portrait because it is clear to the viewer that it is not about Verstappen himself, but merely a parody, demonstrates an incorrect interpretation of the law.

The Supreme Court ruled that use of the Verstappen lookalike in the commercial must be regarded as a portrait under the Dutch Copyright Act. However, infringement of the portrait right and damages depend on the second step: whether in this specific commercial – a parody – Verstappen has a reasonable interest to oppose the use of his portrait. This question must now be answered again by yet another court of appeal – the one situated in The Hague (*hof Den Haag*). This court must weigh the interests of both sides and decide on reasonableness.

Notwithstanding being the fastest man alive (in a racecar, that is), Verstappen’s pace in intellectual property litigation (which started in 2018) is decidedly slower. More than four years after he initiated his lawsuit, the final judgment remains to be determined.

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