

Amsterdam Court of Appeal overturns Max Verstappen's victory

akd benelux
lawyers

07 December 2020

Intellectual Property, Netherlands

📌 Facts

- 📌 **Amsterdam District Court decision**
- 📌 **Amsterdam Court of Appeal decision**
- 📌 **Comment**

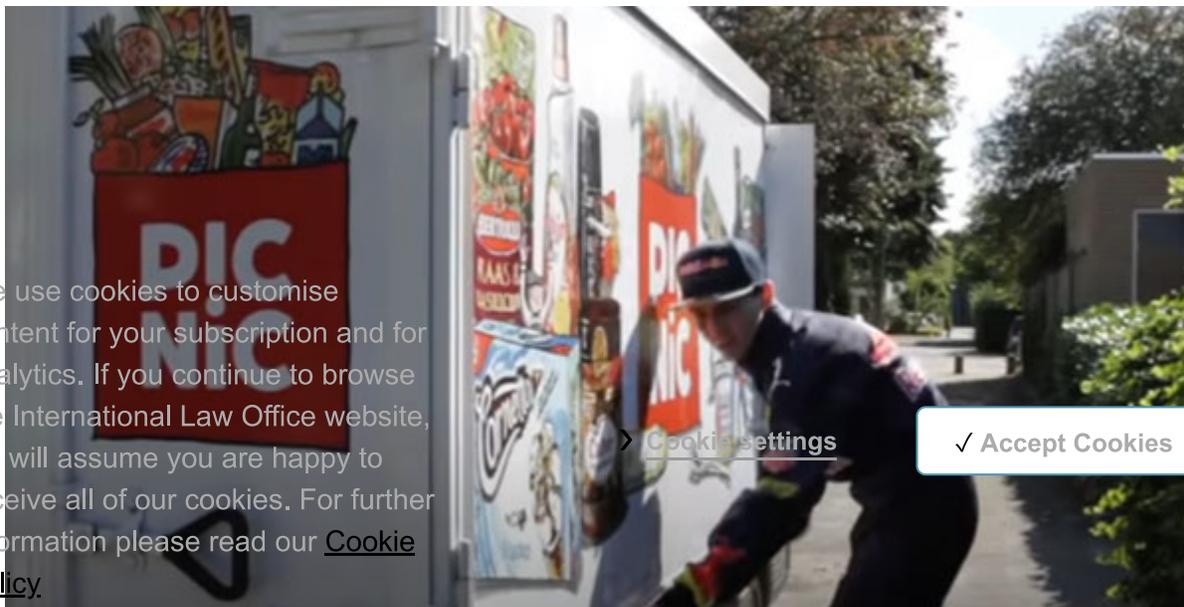
The Amsterdam Court of Appeal recently overturned the victory obtained by Formula 1 driver Max Verstappen before the Amsterdam District Court in a dispute concerning his portrait rights (for further details please see "The considerable value of Max Verstappen's likeness").**(1)** The matter in question concerned the use of a Verstappen lookalike in a video ad.

Facts

Verstappen appeared in a TV ad for supermarket chain Jumbo entitled "Quickly ordered, quickly delivered" (translated), which was launched in September 2016 to promote Jumbo's home-delivery service. In Jumbo's ad, Verstappen delivered groceries to a home in his Formula 1 car.

At the time of the dispute, Picnic, an online supermarket, was a start-up in the grocery delivery field. One day after the launch of the Jumbo ad, Picnic posted an ad on its Facebook page in which it used a Verstappen lookalike.

In the ad – entitled "If you are on time, you do not have to race" – the Verstappen lookalike, wearing a Red Bull outfit and cap, walked past a Jumbo truck, entered a small electric van and delivered groceries to a home.



We use cookies to customise content for your subscription and for analytics. If you continue to browse the International Law Office website, we will assume you are happy to receive all of our cookies. For further information please read our [Cookie Policy](#).

Screenshot of Verstappen lookalike in Picnic's ad

On the same day that Picnic posted the ad on its Facebook page, it received a cease and desist letter on behalf of Verstappen. The next day, Picnic responded that it would cease the use of the ad and removed it from its Facebook page. By this time, the ad had already garnered 100,000 views on Picnic's Facebook page and had been liked and shared many times. The Picnic ad went viral (on online channels outside Picnic's control, such as YouTube), was shared by the mainstream media and appeared on TV talk shows.

Amsterdam District Court decision

Verstappen initiated a civil action before the Amsterdam District Court, requesting, among other things, damages on the grounds that Picnic had violated his portrait rights or otherwise acted unlawfully. More specifically, Verstappen argued that in his capacity as a famous person, he had the right to capitalise on his reputation.

In this regard, Verstappen relied on Supreme Court case law relating to Dutch football legend Johan Cruyff (whose portrait had been used on a book cover). In this decision, the Supreme Court had made a distinction as to what must be tolerated when a portrait is used by persons who are not famous compared with certain famous persons and under what circumstances such use is allowed:

3.6.2 ... Portrait rights are moral rights that are usually valued highly, especially with regard to people that are not well-known by the public. In principle, they do not have to accept that their portrait is made available to the public. However, publication of photographs of professional activities of persons who are well known by the public as a result of their profession and that are made in publicly accessible places, is to some extent inherent to their profession and the therewith associated publicity and interest of the public. Circumstances as general newsworthiness and information of the public are considered of great importance if a publication concerns the professional activities of the person portrayed.

3.6.3. Especially when persons are well-known because of their professional activities, the publication of their portrait may also be of economic interest to the portrayed person. Such interests are also protected by article 8 ECHR and can be of importance while assessing the interests of the portrayed person against the freedom of expression and freedom of information as protected by article 10 ECHR. How much importance is given to the suggested commercial interest of the portrayed person depends on the circumstances of the case. If there is only a commercial interest, a cashable popularity of the person portrayed, and if there are no circumstances that can overrule this interest, then it can be of importance whether a reasonable remuneration has been offered. What can be seen as a reasonable remuneration has to be determined by the circumstances of the case. A remuneration must always do justice to the degree of popularity or fame of the portrayed person and must be in accordance with the value of the commercial exploitation-interest of the portrayed person. When it is established or not contradicted that a reasonable remuneration has been offered (and protection of privacy is not an issue), additional circumstances will be necessary in order to conclude that publication is indeed illegitimate. These circumstances must be clarified, well-argued, by the portrayed person. One example is that the publication may be harmful to the way the person portrayed wishes to exploit his popularity.

The Amsterdam District Court ruled in favour of Verstappen.

A legal hurdle that had to be overcome was the scope of a 'portrait' as mentioned in the Copyright Act. According to standard case law, not only facial features but also other identifying factors (eg, typical body posture) can constitute a 'portrait'. On this basis, the Amsterdam District Court reasoned that Picnic had used Verstappen's portrait. According to the Amsterdam District Court, Picnic's lookalike had all of the specific characteristics of Verstappen, namely, the same:

- cap;
- racing outfit;
- hair colour;

We use cookies to enhance your navigation.

Cookie settings

✓ Accept Cookies

- silhouette; and
- posture.

Thus, the court ruled that the lookalike had been used to convey Verstappen's image.

Consequently, the court had to balance the interests of Verstappen with those of Picnic.

Picnic advocated that the ad was a parody and that it had posted it only on its own Facebook page. The Amsterdam District Court did not view the ad as a parody and ruled that Verstappen's commercial interest prevailed. The Amsterdam District Court awarded Verstappen damages amounting to €150,000 based on its estimation of what would have been reasonable remuneration had Picnic hired Verstappen to appear in its ad. The Amsterdam District Court reached this amount based on, among other things, evidence that Verstappen had received €100,000 for opening a new business location as a mystery guest (for three hours) in a private setting and information that he had received €300,000 a year for the Jumbo ad.

Amsterdam Court of Appeal decision

Confronted with having to pay €150,000 in damages, Picnic appealed the Amsterdam District Court's decision.

The Amsterdam Court of Appeal took another approach and – in Formula 1 terms – 'disqualified' the district court's qualification of the lookalike as a portrait of Verstappen. Although the lookalike evoked the image of Verstappen, particularly due to the similar (but not identical) facial features and various elements of the scene, it would have been clear to viewers' of Picnic's ad that it was not Verstappen himself, but rather that the ad was a parody of his performance in Jumbo's ads. Verstappen's face was not depicted.

According to the Amsterdam Court of Appeal, a person is protected against the disclosure only of their portrait, which does not go so far as to extend to the distribution of visual material in which certain characteristics of theirs are portrayed or imitated by another person when there is no reasonable doubt that it is not the person in question but rather someone who resembles them (eg, because of the parodical nature of the images). This also applies if the association is deliberately conveyed.

The Amsterdam Court of Appeal did not consider that although no portrait right had been violated, evoking Verstappen's image by using a lookalike could otherwise be an unlawful act against Verstappen or Jumbo. This could be the case if the image would hurt Verstappen's reputation or Jumbo's business interests. According to the Amsterdam Court of Appeal, this was not the case as the ad was clearly not defamatory and there were no indications that Verstappen's business interests had been hurt (Jumbo had renewed its contract with Verstappen).

Comment

It is no secret that Verstappen likes to win. Thus, it remains to be seen whether he will bring the matter before the Supreme Court. An interesting point of contention is whether a lookalike qualifies as a 'portrait' in the sense of the Copyright Act and whether exceptions regarding parodies exist for commercial use.

The Amsterdam Court of Appeal's decision appears to have opened up the possibility of using lookalikes for parody purposes – even in ads. Nonetheless, parties should tread carefully, as much depends on the circumstances of the case (eg, the degree of resemblance and the manner of depiction). In this specific case, the argument of unlawful comparative advertising could have been raised, as the lookalike passed a Jumbo truck and the ad was clearly inspired by that of Jumbo. However, Jumbo was not a party to the proceedings; in fact, it communicated that it had no interest in objecting to the ad since it appreciated its humour.

For further information on this topic please contact Bram Woltering at AKD by telephone (b.woltering@akd.nl) or email (b.woltering@akd.nl). The AKD website can be accessed at www.akd.nl.

For further information please read our [Cookie Policy](#).

Endnotes

(1) Amsterdam Court of Appeal, 2 June 2020, ECLI:NL:GHAMS:2020:1410.(Picnic).

The materials contained on this website are for general information purposes only and are subject to the disclaimer.

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription.



Bram Woltering

We use cookies to customise content for your subscription and for analytics. If you continue to browse the International Law Office website, we will assume you are happy to receive all of our cookies. For further information please read our [Cookie Policy](#).

> [Cookie settings](#)

✓ Accept Cookies