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Supreme Court on Max Verstappen's portrait rights

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The Dutch Supreme Court recently overturned a decision that the use of a lookalike Max Verstappen in a video ad did not qualify as a portrait (for further details please see "[The considerable value of Max Verstappen's likeness](#)" (first instance) and "[Amsterdam court of Appeal overturns Max Verstappen's victory](#)" (second instance)).⁽¹⁾

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 (Figure 1).



Figure 1: screenshot of Verstappen lookalike in Picnic's app

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

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. Basically, well-known persons can have an economic interest as to the publication of their portrait (a cashable popularity). Such interests are also protected by article 8 of the European Convention on Human Rights (ECHR) and can be of importance when assessing the interests of the portrayed person against the freedom of expression and freedom of information as protected by article 10 of the ECHR.

The Amsterdam District Court ruled in favour of Verstappen. One of the legal issues was whether the use of a lookalike would fall under 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 and that the lookalike had been used to convey the image of Verstappen (by means use the use of the same cap, racing outfit, hair colour, silhouette and posture).

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 Court did not view the ad as a parody and ruled that Verstappen's commercial interest prevailed. The 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.

Amsterdam Court of Appeal

The Amsterdam Court of Appeal took another approach. 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.

For this reason, the Court decided that the use of the lookalike did not qualify as use of a portrait. 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), a portrait right is not at stake. This also applies if the association is deliberately conveyed, according to the Court.

The Court 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.

Supreme Court

Contrary to the Amsterdam Court of Appeal, the Supreme Court found that the use of a lookalike can qualify as a "portrait". An image of a lookalike, for example in a movie, can – under certain circumstances – be qualified as a portrait of the person they resemble. This does not only require that the person can be recognised in the image of the lookalike, it also requires that the possibility of recognition is increased due to additional circumstances, such as the manner of presentation of the lookalike (eg, by using make-up and clothing), and the context in which the image was made public.

This latter requirement prevents – so the Court explained – an image of someone who coincidentally happens to resemble another person from being regarded as a portrait of that other person. The fact that it is clear to the viewer that the lookalike is not who they resemble does not preclude the possibility of the qualification of a portrait.

Unlike the Amsterdam Court of Appeal, the Supreme Court found that the character of the image (ie, whether it is a parody) is not important to decide whether it is a portrait. Nevertheless, the Court considered that the character of the image can play a role in balancing the interests of the parties, in the sense that it cannot be said that the person who is being portrayed has a reasonable interest to object.

Comment

The matter has now been referred back to another court of appeal (the Court of Appeal of the Hague) to make a new assessment on the matter. The Court of Appeal of the Hague must take as a starting point that the lookalike can qualify as the use of a portrait.

This does not automatically constitute a victory for Verstappen. The Court of Appeal of the Hague will still need to answer the question of whether – when balancing the interests of the parties – Verstappen has a reasonable interest to object. It will be interesting to see how the Court of Appeal of the Hague will weigh the circumstances that the ad would have been regarded as a parody, but – on the other hand – was used for commercial purposes. The allowability of a parody for commercial purposes is not undisputed.

The Court will also address the question of whether evoking Verstappen's image by using a lookalike could otherwise be an unlawful act against Verstappen. The lookalike saga thus continues, and eventually might end up again at the Supreme Court.

The Supreme Court's decision, in any case, illustrates that parties should remain careful in using lookalike given that such use can qualify as a portrait.

For further information on this topic please contact [Bram Woltering](#) at AKD by telephone (+31 88 253 50 00) or email (bwoltering@akd.nl). The AKD website can be accessed at www.akd.nl.

Endnotes

(1) Dutch Supreme Court 22 April 2022, ECLI:NL:HR:2022:621 (Verstappen/PICNIC).