

Portrait rights: Johan Crujiff's cashable popularity

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"When it is established or not contradicted that a reasonable remuneration has been offered, additional circumstances will be necessary in order to conclude that publication is indeed illegitimate."

In an interesting case about the portrait rights of the legendary Dutch football (soccer) player Johan Crujiff, the Supreme Court of the Netherlands recently ruled that a portrait right is not an exclusive right and that a commercial interest can make a difference, unless a reasonable remuneration has already been offered.

Johan Crujiff argued that the publication by the defendant, a Dutch publisher, of a photo book about the years that Crujiff played for Ajax Amsterdam, infringed his 'right of self-determination', as the publication had no news value and was therefore not 'necessary'. Crujiff argued that he had a reasonable, commercial interest in opposing the publication, stated that the book also infringed his right of privacy, possibly harmed his reputation and demanded that the book should be taken off the market.

In short, the Appellate Court concluded earlier that there is no right of self-determination with regard to the use of a portrait, as such a right would unduly hinder the freedom to receive and provide information or ideas by means of photographs. Portrait rights cannot be compared with exclusive IP-rights. Permission is required only with regard to a portrait that was commissioned by the person portrayed. The photos in this case were made by a professional news photographer and consisted mainly of images of Crujiff as a player for Ajax.

The Supreme Court accordingly ruled that Crujiff had no reasonable interest to object to publication. Freedom of expression and freedom of information (newsworthiness) prevailed over Crujiff's private interests. With regard to the professional activities of famous and well known persons, the Supreme Court concludes that newsworthiness and the interest of informing the public must weigh heavily in balancing the competing interests. "The photos are an illustration of Crujiff's talent and have an informative value for the public that is interested in football."

A well-known person as Crujiff could however have a commercial interest, based on his so-called 'cashable popularity'. Such a commercial interest depends on the circumstances of a case. If a commercial interest is established, the reasonable remuneration must be in line with the degree of popularity of the person portrayed and the economic value of his exploitation-interest. If a reasonable remuneration has been offered (as was the case in this procedure), only incidental circumstances can lead to the conclusion that publication is illegitimate.

In the words of the Supreme Court itself:

"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."

Crujiff did not substantiate that the offered remuneration was not sufficient, there were no other relevant circumstances. Crujiff was therefore unable to stop the exploitation of his popularity by the publication of the book.

A full summary of this case will be added to the Kluwer IP Cases Database (<http://www.kluweripcases.com/>).