

Kluwer Trademark Blog

Your image is your brand – but can your face be your trademark?

Pieter Van Den Bulck (Stobbs IP) · Tuesday, December 19th, 2023

Whether referred to as image rights, personality rights, right of publicity, portrait rights or simply likeness, having control over the use of your “image” can be an important right that – in one way or another and to various degrees – is respected in most jurisdictions. This is particularly true for persons whose image has a high value (actors, singers, models, famous athletes, and maybe even some lawyers).

Celebrities are able to monetise the value of their image by signing lucrative ambassador agreements, sponsorship contracts, collaboration agreements and other licensing deals. However, such exclusive agreements can only be enforced against contracting parties, who, in their turn, will generally expect the celebrity to act against unauthorised use of their likeness. The purpose of the agreement, typically higher sales through exclusive association with a famous person, would otherwise be undermined.

As mentioned, most jurisdictions offer some form of protection for image rights, but the way in which they do differs vastly. In the UK, for example, while there is no specific right of publicity under English law, under some circumstances it may be possible to rely on privacy law or passing-off. Data protection laws can be used to rely upon in some other countries, such as Denmark and Spain, while a small number of countries, such as The Netherlands, have specific image rights regulation. In the Dutch example, it is possible to prohibit the unauthorised use of one’s image based on a legitimate interest (“*redelijke belang*”), which explicitly includes monetisable popularity (“*verzilverbare populariteit*”).

It goes without saying that this patchwork of legislation and case law can make it extremely hard to enforce image rights, especially in an international context that will come into play very easily due to the internet and social media.

Would it not be easier then, to register your image as a trademark?

In two recent decisions the Forth Chamber of Appeal of EUIPO reconfirmed that a person’s face is not devoid of any distinctive character (as the examiners had concluded) and can be registered as a trademark^[1]^[2]. The decisions concerned trademark applications for two portrait photos of Dutch models Roos Abels and Marlijn Hoek, filed for “services of models and photo models for advertising and sales promotion” in class 35 and “modelling, for entertainment purposes or for recreational purposes” in class 41 in the name of their respective companies.



In its decisions, the Fourth Chamber of Appeal pointed out that its decision was consistent with three earlier decisions by the EUIPO's Chambers of Appeal of 2017, 2019 and 2021[3].

A lot of questions related to the enforceability of such "portrait" trademarks in the EU remain unanswered. For example, while trademark protection may be available to persons who are not famous, it is unclear if a "portrait" trademark can also be enforced against (use in the course of the trade of and by) lookalikes. The answer to the last question will depend on a finding of likelihood of confusion or, in the case of reputed trademarks (only of well-known celebrities?), taking unfair advantage of such reputation. One can also wonder if repeated filings are necessary as even celebrities tend to age or may make use of plastic surgery.

Despite these uncertainties, filing a "portrait" trademark seems to be the best proactive strategy to protect one's image in the EU. It is likely to result in additional and easier ways to enforce image rights, which can attract bigger investments from brands, sponsors and partners.

[1] 30/10/2023, R 1266/2023-4, weergave van het gezicht van een persoon (fig.)

[2] 30/10/2023, R 1255/2023-4, weergave van het gezicht van een persoon (fig.)

[3] 16/11/2017, R 2063/2016-4, device (photo) of the head of a woman; 23/10/2019, rR2574/2018-1, fotografía en color del rostro de unapersona; 19/05/2021; R 378/2021-4, weergave van het gezicht van een persoon (fig.)

To make sure you do not miss out on regular updates from the Kluwer Trademark Blog, please [subscribe here](#).

Kluwer IP Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers think that the importance of legal technology will increase for next year. With Kluwer IP Law you can navigate the

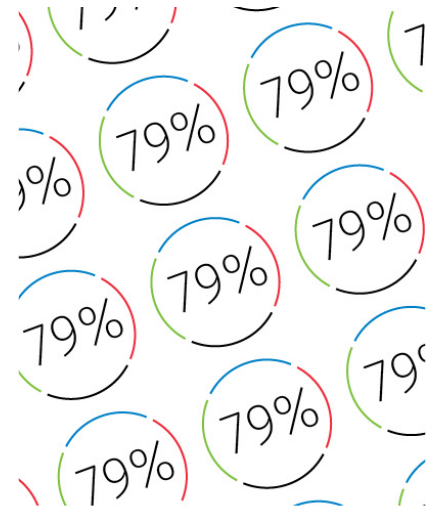
increasingly global practice of IP law with specialized, local and cross-border information and tools from every preferred location. Are you, as an IP professional, ready for the future?

Learn how **Kluwer IP Law** can support you.

79% of the lawyers think that the importance of legal technology will increase for next year.

Drive change with Kluwer IP Law.

The master resource for Intellectual Property rights and registration.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Tuesday, December 19th, 2023 at 4:50 pm and is filed under [Image rights](#), [The Netherlands](#), [United Kingdom](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.