

IP and freedom of expression

Can I use someone else's IP rights/data to support my message/business ?

About uses "other than as a trademark", parody and personality rights (image rights and personal data)



IP and freedom of expression

Recent cases

- Trademarks
- Copyright
- Image rights
- Personal data

Trademarks

Article 2.20.1.d)

- *the use other than for the purposes of distinguishing goods or services,*
- *where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark*

Trademarks

- *Pres. Antwerp Commercial Court, 14 October 2013*



Trademarks

- *Pres. Antwerp Commercial Court, 14 October 2013*

In dit geval heeft verweerster alleszins de bedoeling om voordeel te halen uit de merkbekendheid van Louboutin, door de schoenen met de kenmerkende rode zool zeer prominent en goed zichtbaar op de foto af te drukken. Daardoor trekt de affiche nog veel sterker de aandacht dan met meer neutrale schoenen. Verweerster gaf trouwens in voornoemd interview in GVA te kennen dat zij de Louboutins voor deze foto heeft gekocht en aangetrokken, als symbool van dure schoenen die bij veel vrouwen sterk in de smaak vallen en die staan voor de vrijheid van de westerse vrouw. Dit voordeel is ongerechtvaardigd vermits het niet strookt met de legitieme bedoelingen van eiser bij de creatie en de commerciële verspreiding van zijn merk.

Trademarks



Trademarks

- *Pres. Antwerp Commercial Court, 9 May 2014*



**Westmal'
of
halal?**



Trademarks

- *Pres. Antwerp Commercial Court, 9 May 2014*

Door de politieke recuperatie in een politieke campagne (eender van welke strekking) van de respectievelijke merken wordt afbreuk gedaan aan de reputatie ervan.

Door het gebruik van de teken(s) wordt een ongerechtvaardigd voordeel getrokken uit het onderscheidende vermogen en de reputatie van de respectievelijke merken. Dit ongerechtvaardigd voordeel wordt geoptimaliseerd door de band te versterken met de respectievelijke merken (o.a. door de plaats van lancering van de campagne, door het gebruik van een donkerbruin (trappist)kleurige vloeistof in het WESTMALLE TRAPPIST-bierglas, ...). Volledigheidshalve wordt aangegeven dat het “ongerechtvaardigd voordeel” uit de reputatie van het merk dient losgekoppeld te worden van de mogelijke schade die het merk leidt.

Trademarks

- Article 2.20.1 d) does not have equivalents in all Member States
- Art. 5.5. of Dir. 2008/95/EC is optional (no full harmonization)
- No exception (yet) for use “*for the purposes of parody, artistic expression, criticism or comment*”
 - EU Parliament legislative resolution of 25 February 2014 2013/0088(COD)
 - Difficult to understand if 5.5. is not harmonized
 - The concept of parody – known in copyright law - comes extremely close to the criteria of “*taking unfair advantage*” or “*being detrimental to the reputation of the trade mark*”

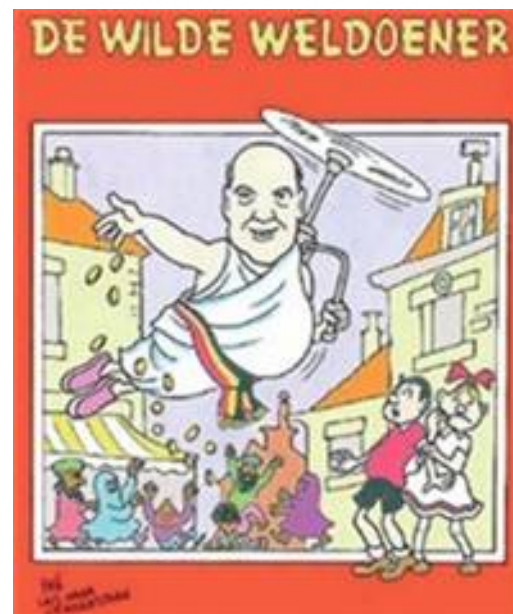
Copyright

Exception for parody & caricature

- Art. 5. 3. Dir. 2001/20 :
- *Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:*
 - *(k) use for the purpose of caricature, parody or pastiche;*
- Art. 22.§ 1. LDA :
- *Lorsque l'œuvre a été licitement publiée, l'auteur ne peut interdire :*
 - *6° la caricature, la parodie ou le pastiche, compte tenu des usages honnêtes;*

Copyright

- CJEU Concl. AG of 22 May 2014 (C-201/13) *Vermeer v. Vlaams Belang*



Copyright

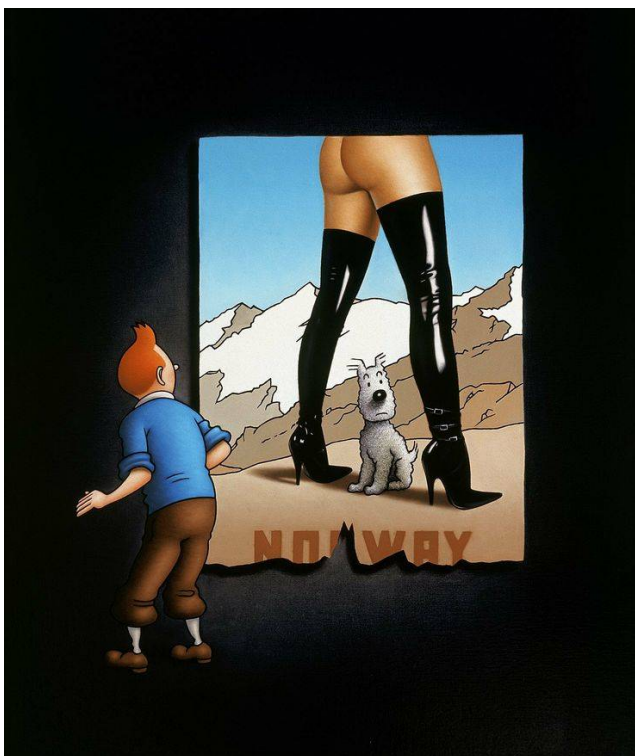
- CJEU Concl. AG of 22 May 2014 (C-201/13) *Vermeer v. Vlaams Belang*
 - First instance Vandersteen won
 - Appeal, asks questions to the CJEU
 1. Is the concept of 'parody' an independent concept in European Union law?
- AG Cruz Villalón says YES....
- But to be filled out by the national judge...

Copyright

- CJEU Concl. AG of 22 May 2014 (C-201/13) *Vermeer v. Vlaams Belang*
 - 2. If so, must a parody satisfy the following conditions :
 - original character of its own;
 - Absence of confusion;
 - be designed to provoke humour or to mock;
 - mention the source of the parodied work?
 - 3. Must a work satisfy any other conditions?
- AG Cruz Villalón says that parody requires :
- Original elements (to avoid confusion with the original work)
 - “mocking” (*intention burlesque*)
 - Fair balance between fundamental rights (including intellectual property and freedom of expression... to be made by the national judge)

Copyright

- Brussels Court of Appeal (9th ch), 14 June 2007



Copyright

- Brussels Court of Appeal (9th ch), 14 June 2007
- Les oeuvres contestées ont bien un caractère humoristique dans la mesure où les associations ou juxtapositions fortuites d'images qu'elles réalisent sont absurdes et burlesques si on les met en relation avec l'oeuvre originale dont elles empruntent des éléments.
- Il s'agit donc d'oeuvres originales qui reproduisent des éléments d'oeuvres préexistantes et qui peuvent être exploitées et donc exposées sans l'autorisation préalable de l'auteur de l'oeuvre préexistante.
- Le juge n'a pas à se prononcer sur ce qui relève, dans le domaine de l'art, du «bon goût». Il suffit de constater que les intimés ne démontrent pas que la démarche d'Ahlberg est de nature à porter atteinte à l'honneur ou à la réputation d'Hergé dès lors que chacun sait que l'érotisme et la pornographie ne font pas partie des sources d'inspiration du célèbre dessinateur.

Copyright

- Brussels Court of Appeal (9th ch), 16 January 2012

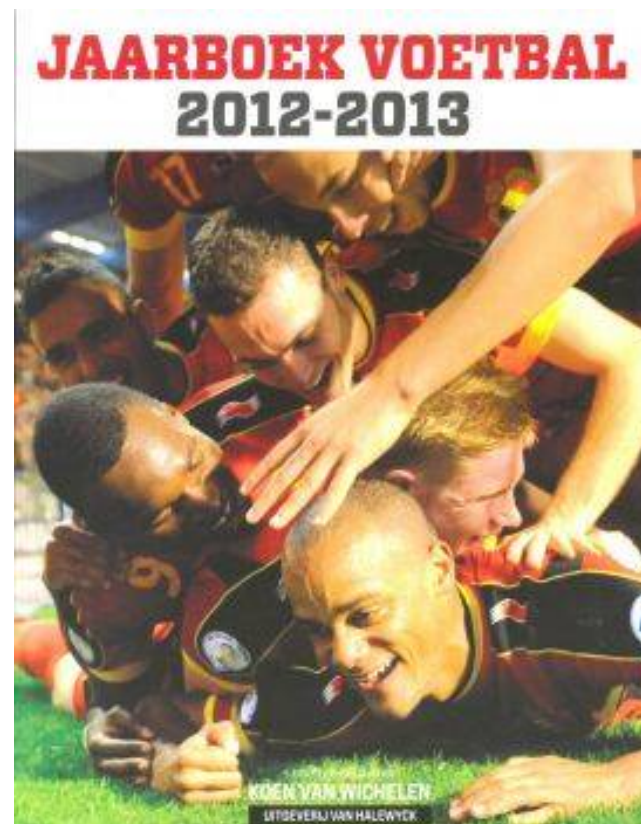


Copyright

- Brussels Court of Appeal (9th ch), 16 January 2012
 - No parody : because it is not « free »
 - *Si tout auteur ne peut s'opposer à ce que l'on puisse railler son œuvre, même sans la critiquer, il est cependant légitime qu'il puisse interdire que celle-ci – déformée, mais néanmoins reconnaissable – soit utilisée pour une promotion commerciale ou celle d'un parti politique. Un tel emploi ne correspond ni à un usage honnête ni à une loi du genre puisqu'il tend à procurer un profit indu, tiré de l'œuvre première, au demeurant bien connue du public. En l'espèce, l'usage de l'œuvre seconde s'inscrit indiscutablement dans le sillage de l'œuvre première.*

Personality rights

- Brussels Court of Appeal, 12 november 2013



Personality rights

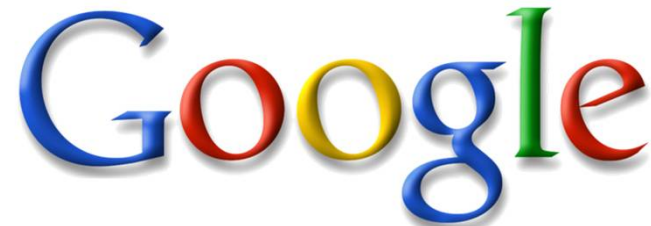
- Brussels Court of Appeal, 12 november 2013

Het recht op afbeelding is geen absoluut recht en wordt onder meer in hoofde van publieke personen – zoals in casu – begrensd door het recht op informatie, dat verbonden is aan het recht op vrijheid van meningsuiting en de persvrijheid (artikel 10 EVRM) (L. Dierickx, *Recht op afbeelding*, Antwerpen/Oxford, Intersentia, 2005, 168). Het recht op afbeelding moet worden afgewogen tegen het recht op informatie. De afbeelding van een publieke persoon mag zonder zijn toelating alleen worden gebruikt voor informatieve doeleinden,

De coverfoto heeft bijgevolg een informatief karakter en vormt geen commercieel gebruik waartegen appellant zich kan verzetten.

Personal data protection

- CJEU 13 May 2014 (C-131/12), Google v Agencia Española de Protección de Datos and Mario Costeja González



Personal data protection

- CJEU 13 May 2014 (C-131/12)
 - 16 years ago, Mr González was forced to auction real-estate auction for the recovery of social security debts
 - Legal publication in « La Vanguardia »
 - Still available on the journal website and thus also on Google
 - Complaint to the privacy commission (AEPD) asking the removal
 - Rejected in relation to the journal
 - Granted in relation to Google
 - Google appealed

Personal data protection

- CJEU 13 May 2014 (C-131/12)
 - Google is processing personal data
 - Irrelevant that Google processes all the information available on the internet without selecting between personal data and other information
 - Google is the data controller
 - the processing of personal data carried out in the context of the activity of a search engine can be distinguished from and is additional to that carried out by publishers
 - Google determines the purposes and means of that activity
 - Irrelevant that publishers could have used exclusion protocols ('noindex' or 'noarchive')

Personal data protection

- CJEU 13 May 2014 (C-131/12)
 - As a data controller, is Google obliged to remove even if it is still on the internet ?
 - Google claims that it is not proportionate : requests should be made to the publisher and then it will be removed from the index when the page is crawled again
 - Google is less able to assess the request (than the publisher)
 - There are two separate processings : one can be licit without the other being licit
 - In this case, La Vanguardia is processing the data 'solely for journalistic purposes' (Art. 9 of Dir 95/46)
 - Google may not rely on that provision

Personal data protection

- CJEU 13 May 2014 (C-131/12)
 - The inclusion in the list of results, displayed following a search made on the basis of a person's name, of a web page
 - makes access to that information appreciably easier for any internet user making a search in respect of the person concerned and
 - may play a decisive role in the dissemination of that information,
 - So, it is liable to constitute a more significant interference with the data subject's fundamental right to privacy than the publication on the web page.

Personal data protection

- CJEU 13 May 2014 (C-131/12)
 - This interference prevails over :
 - Google's business interests
 - The interest of the public to access the information
 - Except where the information is of public interest
 - Factors considered :
 - Length of time (16 years)
 - Sensitive nature of the information (bad credit history)
 - Not anyone of public interest

Personal data protection

- CJEU 13 May 2014 (C-131/12)

https://support.google.com/legal/contact/lr_eudpa?product=websearch&hl=en

A recent ruling by the Court of Justice of the European Union found that certain users can ask search engines to remove results for queries that include their name where those results are *inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed*.

In implementing this decision, we will assess each individual request and attempt to balance the privacy rights of the individual with the public's right to know and distribute information. When evaluating your request, we will look at whether the results include outdated information about you, as well as whether there's a public interest in the information—for example, information about financial scams, professional malpractice, criminal convictions, or public conduct of government officials.

If you have a removal request, please fill out the form below. Please note that this form is an initial effort. We look forward to working closely with data protection authorities and others over the coming months as we refine our approach.

Search removal request under European Data Protection law

You will need a copy of a valid form of photo ID to complete this form. Fields marked with an asterisk * must be completed for your form to be submitted.



We're working to finalize our implementation of removal requests under European data protection law as soon as possible. In the meantime, please fill out the form below and we will notify you when we start processing your request. We appreciate your patience.

Personal data protection

- CJEU 13 May 2014 (C-131/12)
 - Google has received < 50K requests to this date (incl 12K during the first 24 hours)
 - Internal team is in place for review
 - First removals are expected end of this month
 - Censored results will be flagged
 - Others will have to follow (Bing, Yahoo!, etc)