[NL] Supreme Court Defines Rights to Personal Privacy by non-commissioned Portraits

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On 2 May 1997, the Supreme Court of The Netherlands (Hoge Raad) decided that the publication for advertising purposes of a photograph of a dancer, taken during his performance at a gay event, can amount to a breach of his right to personal privacy.

The Supreme Court based its decision on Articles 21, 30 and 35 of the Dutch Copyright Act (Auteurswet), which stipulate that, in cases of non-commissioned portraits, the portrayed person retains a reasonable interest to oppose the use of his picture for commercial and advertising purposes. The use of a picture for advertising purposes necessarily involves the consequence that the general public associates the person portrayed with the advertised product or service. For this reason, the right to personal privacy of the portrayed person must be respected and balanced against the commercial interests involved in the publication.

In the opinion of the Court the right to personal privacy could not be set aside by the sole argument that the context of the performance in which the photo at issue had been taken was that of a very specific and particular event (in this case a strictly gay club event).

Thus, the Supreme Court reversed the decision previously taken by a Court of Appeal which denied that there had been a breach of the right to personal privacy, considering that the nature of the advertisement and its framework (respectively a gay-oriented magazine and flyers advertising this kind of club events) were not estranged from the context in which the performance took place and that therefore, there was no reason to invoke the protection of the rules safeguarding the personal privacy of the portrayed person.

In this respect, the Supreme Court held that the existence of a reasonable interest to oppose a publication, cannot be made dependent of the factual observation that the nature of such a publication adequately represents the nature of the performance itself.

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