How far can artistic speech go with the use of famous trademarks & designs?

K.E.A. de Beer

Master student Information Law at the University of Amsterdam
Email: kea.debeer@gmail.com

On the 4th of May 2011 the District Court of The Hague (the Netherlands) reached a decision on the dispute between Louis Vuitton and artist Nadja Plesner. Louis Vuitton claimed Plesner had infringed the design right of Louis Vuitton with her work "Simple Living". The work shows an African child holding a chihuahua dressed in pink and a handbag which resembles a Louis Vuitton handbag. Plesner's work can be seen as a criticism at the media interest in celebrities like Paris Hilton and the lack of interest for the conflict in Darfur. The case shows the difficulties of the use of trademarks or designs of well-known companies as Louis Vuitton by artists as Nadja Plesner. Both Louis Vuitton as Nadja Plesner based their claims on fundamental rights, respectively the right to the protection of property and the right to freedom of (artistic) expression. This article is about the question on how to draw a fair balance between these rights. What are the most important aspects a court has to look at when deciding on which right should prevail in a certain case?
Key words: Freedom of expression, artistic speech, trademark rights, design rights

Hoe ver mogen kunstenaars gaan met het gebruik van bekende merken en modellen?
Op 4 mei 2011 sprak de Rechtbank in Den Haag (Nederland) vonnis uit in de zaak tussen Louis Vuitton en kunstenaar Nadja Plesner. Louis Vuitton stelde dat Plesner inbreuk had gemaakt op het modelrecht van Vuitton met haar werk "Simple Living". Op het schilderij staat een Afrikaans kind afgebeeld met in de armen een chihuahua gekleed in het roze en een tas die lijkt op een Louis Vuitton handtas. Plesner haar werk kan worden gezien als kritiek op de media-aandacht die wordt besteed aan beroemdheden als Paris Hilton en het gebrek aan aandacht voor het conflict in Darfur. De rechtszaak laat de moeilijkheden zien bij het gebruik van merkrechten en modelrechten van bekende bedrijven als Louis Vuitton door kunstenaars als Nadja Plesner. Beide partijen baseren hun claims op fundamentele rechten, respectievelijk het recht op de bescherming van eigendom en het recht op de vrijheid van (artistieke) meningsuiting. Dit artikel gaat over de vraag hoe een belangenafweging tussen deze twee rechten dient te worden gemaakt. Wat zijn de belangrijkste aspecten waar een rechter naar moet kijken bij zijn beoordeling welk recht prevaleert.
Sleutelwoorden: Vrijheid van meningsuiting, artistieke uitingen, merkenrecht, modellenrecht

On the 4th of May 2011 the District Court of The Hague (the Netherlands) delivered its judgment in the dispute between Louis Vuitton and artist Nadja Plesner. In 2008 Nadja Plesner made a painting called "Simple Living". The work shows an African child holding a chihuahua dressed in pink and a handbag which resembles a Louis Vuitton handbag. Plesner sold t-shirts and posters containing the picture of "Simple Living". The work was later integrated in a painting by Plesner called "Dafurnica" which is loosely based on Picasso's "Guernica". "Dafurnica" was offered for sale at an exhibition in Copenhagen. On the invitation to the exhibition the "Simple Living" picture was used. There was also a cardboard print of the picture in front of the building where the exhibition was held. With "Simple Living" the artist refers to celebrity Paris Hilton who is often seen in public carrying the same kind of items as the African child. One of the important themes in Plesner's work is the difference in the amount of media attention to on the hand areas in crisis as in Darfur (Sudan) and on the other hand the entertainment industry. Her work can be seen as a criticism of the media interest in celebrities like Paris Hilton and the lack of interest for wrongdoings in Darfur.[1]

Louis Vuitton did not appreciate Plesner's use of the handbag in her work. According to Vuitton, it resembled one handbag in particular called "Audra". The design used for "Audra" is protected by a (European) Community Design Right. Therefore Vuitton requested an order

against Plesner and the gallery to stop further infringement of Louis Vuitton's design right. In preliminary relief proceedings the Court ordered Plesner and the gallery owner to cease and desist any infringement of the design rights of Louis Vuitton.[2] The District Court of The Hague had to review whether the preliminary injunction had to be annulled or not. The Court firstly points out that both parties base their claim on a fundamental right. Plesner claims her right to freedom of expression has been infringed. On the other hand, Louis Vuitton claims an infringement of the right to the protection of property, such as intellectual property rights. The Dutch Court had to decide which of these rights should prevail in these particular circumstances. The Court eventually concludes that in these particular circumstances, "the interest of Plesner to (continue to) be able to express her (artistic) opinion through the work "Simple Living" should outweigh the interest of Louis Vuitton in the peaceful enjoyment of its possession".[3]

Artistic speech vs. trademark & design rights

The *Dafurnica* case shows the difficulties of the use of a trademark or design of a well-known company as Louis Vuitton by an artist as Nadja Plesner. Nowadays, it is not uncommon that certain (well-known) designs and trademarks function as symbols for being part of a certain social group. In the "Simple Living" picture the Louis Vuitton handbag referred to Paris Hilton who symbolises the celebrity which receives a lot of (undeserved) media attention. Designs and trademarks are also associated with the good or bad political and social influence of companies. The symbolism in well-known designs and trademarks makes them very suitable for use in works of art. However, the use of designs and trademarks in art can clash with the interests of the rightholder of the trademark or design right. Depending on the way a trademark or design is used in the work of art, it can damage the reputation of the trademark or design and subsequently (the interest of) the rightholder (Sakulin 2011: 3).

The artist and the rightholder can both claim an infringement of a right which can be found in the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR). The artist can base his claim on the right to freedom of expression as protected by Article 10 of the ECHR. On the other hand, the rightholder can claim protection based on the right to the protection of property, such as intellectual property rights, as guaranteed by Article 1 of the first Protocol of the ECHR.

This article is about the question of how to draw a fair balance between these rights. What are the most important aspects a court has to examine when deciding which right should prevail in a certain case? Does the European Court of Human Rights (ECtHRs) provide guidelines to answer this question in its case-law with regard to artistic speech? In answering these questions this article has been structured as follows. Firstly, I will explain some general principles the ECtHRs has established with regard to freedom of speech. Secondly, I will narrow the focus to artistic speech. Then I will look into some specific aspects which I think are relevant for answering the question which right should prevail. The article will close with a few conclusions.

Freedom of speech

Freedom of speech is a human right which can be found in the constitutions of most of the countries in the world. In Europe, freedom of speech is also guaranteed by Article 10 of the ECHR. The ECHR was drafted by the Council of Europe and all its members are a party to the Convention. The European Union (EU) drafted the EU Charter on Fundamental Rights. Article 11 of the Charter deals with freedom of expression and information. However, in practice the EU respects and follows the jurisprudence of the European Court of Human Rights on freedom of expression.

Freedom of speech protects several categories of information. While in principle, all categories of freedom of speech are protected, the ECtHRs does make a distinction between different kinds of speech with regard to the level of protection. The main categories acknowledged by the ECtHRs are political speech, artistic speech and commercial speech.[4] The Court grants political speech the highest level of protection in comparison to other forms of speech (Castendijk 2008: 51-59). According to the ECtHRs "there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest".[5] The emphasis on matters of public interest lies in the importance of the right of the public to receive information. Article 10 not only protects the right to express information but also to receive it. In these matters, the policy freedom for member states is small. When the information disseminated does not contribute to public debate, the protection of the expression will be lower. An example of a case in which the Court concluded there was no contribution to the public debate is the *Caroline von Hannover* case. Gossip magazines had printed private photos of princess Caroline von Hannover. The Court considers that "the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. It is clear in the instant case that they made no such contribution, since the applicant exercises no official function and the photos and articles related exclusively to details of her private life".[6]

With regard to commercial speech the Court seems to assume that in principle there is no contribution to the public debate. The Court in general grants (pure) commercial speech the lowest form of protection. The European Commission of Human Rights[7] explained that "the level of protection must be less than that accorded to the expression of "political" ideas, in the broadest sense, with which the values underpinning the concept of freedom of expression in the Convention are chiefly concerned".[8] This explains that the focus of the ECtHRs and the Convention is more concerned with political speech and matters of the public interest than commercial speech. Thus especially when expressions fall within the category of commercial expression, the protection will be lower.

The case-law of the Court shows it is not always easy to place an expression in one of the three categories. The Court has dealt with cases in which expressions could be qualified as a so-called hybrid form of speech. Examples of these are advertisements containing elements of political speech and political speech presented in a work of art. A popular example of a hybrid form of speech is found in the *Barthold* case. The case concerned Dr. Barthold, a veterinarian who had violated the advertising ban applied to the liberal profession. In an interview for a newspaper he had mentioned the opening times of his clinic for the weekends and at night. The Court was of the opinion that in doing this Barthold was trying to draw attention to a matter of public interest namely the absence of a night service by veterinarians in Hamburg. The Court stated that a strict prohibition of advertising in the liberal professions discourages members of liberal professions to participate in the public debate. Thus the Court concluded that there was a violation of Article 10.[9]

Obviously, the right to freedom of speech is not absolute. It can be limited in accordance with Article 10 (2) of the ECHR, to protect other interests or rights such as national security, the prevention of disorder or crime and the protection of the reputation or rights of others. Rights of others include human rights, such as the freedom of religion or privacy, but also intellectual property rights such as design rights and trademark rights. According to Article 10 (2) a limitation has to be prescribed by law, the limitation has to be based on one of the interests mentioned in Article 10 (2) and it has to be necessary in a democratic society. In practice, this last element is the most important part of the Article 10 (2). The Court has interpreted "necessary" as the

existence of a "pressing social need" to limit freedom of speech.[10] Furthermore, the measure has to be proportionate to its purpose. When assessing whether the interference is necessary in a democratic society, the doctrine of the margin of appreciation plays an important role. The margin of appreciation concerns the amount of policy freedom national authorities have when examining the restriction in question. In cases where the Court allows the national authorities a wide margin of appreciation, the close examination of the restriction will be left to the domestic courts. If the Court does not allow much policy freedom, it will look at the facts more closely and apply a European norm (Castendijk 2008: 43-44). The amount of policy freedom depends on whether a European norm applies to the restriction in question. For example, with regard to religion and morals it is not possible to find a uniform European norm in the legal and social orders of the member states. The national authorities are in a better position than the Court to judge whether a restriction is necessary in a democratic society.[11]

Artistic speech

While it is safe to say that political speech is granted the highest level of protection and pure commercial speech the lowest form, it is difficult to say what level of protection artistic speech can expect of the ECtHRs.

In the *Müller* case the ECtHRs explicitly placed artistic expression within the scope of Article 10 ECHR. The case was about the artist Müller who made a painting for an exhibition. The painting contained abstract figures in different sexual poses. Müller was convicted and fined and the painting was confiscated. According to the Swiss Courts Müller had violated the Criminal Code, which prohibited obscene publications. The ECtHRs first states that Article 10 ECHR "includes freedom of artistic expression - notably within freedom to receive and impart information and ideas - which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds". The ECtHRs continues by stating that artists contribute to this public exchange of information and ideas. Furthermore, the Court is of the opinion that "those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression". [12]

However, artists like everyone who expresses his/her opinion, are not immune from the possibility of limitations, whoever exercises his freedom of expression must act in accordance with certain duties and responsibilities. The scope of the duties and responsibilities depends on the circumstances of the case.[13]

When analysing the case-law of the ECtHRs with regard to artistic speech it is not easy to find consistent patterns in when exactly it establishes a violation of Article 10.[14] Two conclusions can be drawn from the case-law of the ECtHRs. First of all, the description of the possibilities of artistic speech in the *Müller* case meaning the "public exchange of cultural, political and social information and ideas of all kinds" seems to be broader than the category "political speech and the debate on questions of public interest". However, this does not mean that artistic speech cannot fall within the category of political speech. In that case, artistic speech is granted the higher level of protection which is granted to political speech. As art often entails a criticism of (aspects of) society, it is therefore likely that it will be on matters of public interest. With regard to satire the Court has explicitly stated that it is "a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined

with particular care".[15] A significant part of artistic speech will contribute to the public debate and therefore receive a higher form of protection. This leaves this question open of what kind of protection artistic speech can count when it does not belong within the category of political speech? At first sight, the protection seems less than political speech but higher than commercial speech. Commercial speech deserves less protection than political speech since it does not serve the values with which the ECHR is mainly concerned. In my opinion the same cannot be said of artistic speech. The ECtHRs links artistic expression to two of the justification grounds for the right to freedom of expression in Article 10: the self-fulfillment of individuals[16] and the role art plays in the public debate (Sakulin 2010: 138). Furthermore, the Court explicitly acknowledges the importance of artistic expression in the *Müller* case. It also does that by reference to the last sentence of article 10 of the ECHR: "which refers to "broadcasting, television or cinema enterprises", media whose activities extend to the field of art".[17] This also seems to indicate that artistic speech does serve the values with which the ECHR is mainly concerned.

A second conclusion that can be drawn from the case-law of the Court is the relevance of the used justification-ground for the limitation. The relevance of the justification-ground has everything to do with the margin of appreciation for member states. As I said before, especially with regard to issues of religion and morals, the margin of appreciation will be wider. With regard to issues like these there is no European consensus therefore member states themselves will be in a better position to judge whether a limitation of freedom of expression is *necessary in a democratic society*. Therefore, it matters which justification-ground is used for the limitation.[18] When freedom of expression is being restricted because of issues of religion or morals, practice shows it is more "difficult" for the Court to establish a violation of Article 10.

Relevant aspects with regard to artistic speech vs. trademarks & designs

In my opinion five aspects in particular are important to answer the question if the right to artistic freedom or the right to the protection of property should prevail. The five aspects are: the contribution to the public debate, the justification of the intellectual property right, the fame of the trademark or the design, the function of the use of the trademark or the design and the damage to the reputation of the rightholder. I will refer to the *Dafurnica* case in which these five aspects were all dealt with to at least some extent.

Contribution to the public debate

The first question that should be answered is whether the work of art entails a contribution to the public debate and falls within the category of political speech. In the *Karatas* case the Court had to decide whether the conviction of an author of a collection of poems was a violation of Article 10. The poems expressed deep-rooted discontent with the lot of the population of Kurdish origin in Turkey and criticised the Turkish government. The Court pointed out that the poems had a political dimension and emphasised that there is little room for restriction when it comes to political speech.[19] Therefore if a work containing a trademark or design entails a contribution to the public debate the work will enjoy a higher form of protection. As I said before, in my opinion a significant amount of art does contribute to the public debate. Since (well-known) trademarks and designs function as symbols for social groups, ways of life, companies etc. it is not uncommon that when a trademark or design is used in art it entails a matter of public interest. This was the case in the *Dafurnica* judgment, the Court emphasised the theme in Plesner's work meaning the difference in media attention between areas in crisis as Darfur and the entertainment industry. Plesner wants to show that the enormous media interest in celebrities like Paris Hilton

negatively affects the interest for topics which deserve a lot of attention as the situation in Darfur.[20] With her work she is criticising the media and maybe even society as a whole. In doing so, she is contributing to the public debate and thus her work deserves a higher form of protection. In principle, the right to freedom of speech and the right to the protection of property are on an equal base. However, when a work containing a trademark or a design contributes to the public debate it will become more difficult for the right to the protection of property to prevail. Of course, particular circumstances of a case can still lead to the conclusion that there is no violation of Article 10 ECHR because the limitation based on the right of the protection of property was justified.

The justification of the intellectual property right

In the *Dafurnica* case the Dutch Court briefly mentions the motivation of Louis Vuitton to take action against Plesner. It concludes that the main motivation for starting a legal procedure was the (potential) damage to Louis Vuitton's reputation. However, the Court points out that Louis Vuitton based its claim on its design right. A design right primarily aims to establish a sole right for the rightholder to use the appearance of a product registered. The Court does not answer the question whether the reputation of the rightholder may play a role with regard to the function of the design right. It does come to the conclusion that under preliminary judgment this function is to be deemed less essential.

Just as the ECHR refers to the justification grounds for freedom of (artistic) expression it is also necessary to look into the justification grounds for the intellectual property rights. I agree with the Dutch Court that the problem with the design right is that the protection of reputation is not necessarily a justification for a design right. By using the design right to protect the reputation, something it was not originally intended for, it did not make the case of Louis Vuitton stronger. This might be a little different with regard to trademark rights. The justification for trademark rights lies in the different functions of the trademark. First of all, there is the identification function of the trademark. On the one hand, it is necessary for producers or providers of goods and services to be able to distinguish between their products and those of their competitors. On the other hand, it helps consumers to establish the origin of products and make a well-informed decision on what goods and services to purchase (Sakulin 2011: 3). Secondly, there is the advertisement function of a trademark which justifies the protection of the reputation of a trademark. For instance, the European Regulation on the Community Trademark explicitly protects well-known trademarks against damage to their reputation. The line of reasoning of the Dutch Court with regard to the justification of design rights can probably not be applied to trademark rights. However, in any balance between fundamental rights it is necessary to look into the justification grounds for the rights.

The fame of the trademark or the design

One of the important aspects in balancing the rights of the artist and those of the rightholder is to what extent the trademark or design is well-known. It matters whether the trademark or design used belongs to McDonalds, Mercedes, Chanel or to a small local company. With regard to politicians and well-known companies the ECtHRs is of the opinion that the boundaries of acceptable criticism go further than with private individuals. With regard to politicians, the Court has emphasised that a politician "inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance".[21] The same line of reasoning was applied to well-known companies in the *Steel and Morris* case (also known as the *McLibel* case). The case was about

two people who were involved in a small group which campaigned on environmental and social issues. McDonalds sued Steel and Morris for distributing pamphlets containing criticism of McDonalds. The Court pointed out that the limits of acceptable criticism should be wider in the case of well-known companies as McDonalds.[22] This line of reasoning should in my opinion also be applied to famous trademarks and designs. The criterion of "inevitably and knowingly laying themselves open to close scrutiny of their acts" also applies to famous trademarks and designs. As the Dutch Court in the *Dafurnica* case points out, not only does Louis Vuitton sell products which enjoy a considerable reputation, Louis Vuitton stimulates this image by using famous people for its advertisements. The Court is therefore of the opinion that Louis Vuitton must accept critical use as the present one to a greater extent than other rightholders.[23] In practice, I think it will rarely be the case that an unknown trademark or design is used in art. When trademarks or designs are used in art they will usually function as a symbol, which implies that they are well-known to at least some extent. However, I believe the principle is important and the Dutch Court was right in emphasising that Louis Vuitton should accept use of its design rights to a greater extent than less well-known designs.

The function of the use of the trademark or the design

Trademarks and designs can be used in art in different ways. In assessing whether this is a violation of the intellectual property rights it is necessary to assess whether the use is functional. If the use of the trademark or design has no particular function in the work of art and is just integrated in the work of art as a free ride with the reputation of the well-known company, the artistic expression shows elements of commercial speech. Therefore, when the use is not functional the work runs the risk of falling within the category of commercial speech and thus being granted a lower form of protection. Not only does the use have to be functional, in my opinion it also has to be proportional. The way the trademark or the design is used should be proportional to the function of the use. In other words, the trademark or design should not appear in a way which does not justify the purpose of the use. In the *Dafurnica* case the Dutch Court regarded the use of the image of the handbag as functional and proportional. It goes even further by stating that it therefore does not serve a mere commercial purpose. The Dutch Court emphasised correctly that Plesner did not use this particular handbag as a free ride with Louis Vuitton's reputation in a commercial sense. The particular handbag was used to refer to Paris Hilton who represents a celebrity to whom the media pay a lot of attention. The handbag was used to make her point about the unfair (and perhaps disturbed) division in media attention. The fact that another luxury item, being the chihuahua, was also presented in the picture strengthens this line of reasoning.[24] The attention to the Louis Vuitton handbag was not excessive; it was about making the reference to Paris Hilton and thus making a statement about media behaviour. The use of the design was therefore functional and proportional.

The damage to (the reputation of) the rightholder

In the *Dafurnica* case it was very questionable whether the use of the design caused damage to the reputation of Louis Vuitton. Plesner did not in any way suggest that Louis Vuitton was involved with the conflict in Darfur in any kind of way. Furthermore, the Dutch Court was of the opinion that it did not seem very plausible that the public would believe this was the case.[25] The fact that Plesner did not use the handbag as a criticism at Louis Vuitton and did in that sense not damage the reputation of Vuitton was an argument to let her right to artistic freedom prevail. When trademarks and designs are used in art, it is possible that it will cause damage to the rightholder of the trademark or design right. The art work can contain a direct criticism at the rightholder which could damage his reputation. There can also be indirect damage by using the

design or trademark as a symbol without directly criticising the rightholder. If for instance the picture of "Simple Living" had been slightly different and parts of the public would start to think that Louis Vuitton actually had a connection with the situation in Darfur, Louis Vuitton could have argued that the work damaged its reputation. However, the occurrence of damage itself is not enough to limit the artistic freedom but it is a factor that should be part of the assessment of which right should prevail.

Conclusion

The ECtHRs leaves no doubt whether artistic expression should fall within Article 10 ECHR. As every form of speech, artistic speech can be limited. One of the legitimate aims which can limit the right to freedom of speech is the protection of the rights of others. Intellectual property rights such as trademark rights and design rights are examples of rights of others.

Several aspects are important in assessing whether a trademark or design right can limit artistic speech. In their assessment courts should look at the particular circumstances and take the aforementioned five aspects into account. While none of the aspects are decisive on their own some are more important than others. In my opinion, the first and probably the most important question is whether the work contributes to the public debate. If the work of art falls within the category of political speech it receives the highest level of protection. In that case, courts can still establish a lawful limitation of the artistic expression but this will become more difficult. The same line of reasoning applies to the aspect of the fame of the trademark or the design. If the trademark or design used in the work of art is well-known, rightholders should withstand use of their intellectual property to a greater extent than unknown trademarks or designs. The third important aspect is the functionality and the proportionality of the use of the trademark or the design. Artistic speech can justify the infringement of an intellectual property right but it has to be functional and proportional. The aspects of the justification for the trademark and design right and the damage to the rightholder are of less importance in my opinion but they should at least be taken into account in the assessment.

In analysing the aspects in the *Dafurnica* case one can conclude that the Dutch Court had to deal with an 'easy' example. All aspects were in favour of the artist, this will not always be the case. It becomes especially interesting if a work of art does not contribute to the public debate, the other aspects will have to decide whether there is a violation of the right to freedom of expression. Assuming we have not seen the last example of an artist using a trademark or design in his or her work it will be interesting to observe how the case-law with regard to artistic freedom and trademark rights and design rights will develop.

Notes

1 District Court of the Hague 4 May 2011, case-number 389526 / KG ZA 11-294, p. 2.5 - 2.7. An English translation of this court case can be found at: http://www.nadiaplesner.com/Website/Verdict_English.pdf.

2 District Court of the Hague 4 May 2011, case-number389526 / KG ZA 11-294, p. 2.12.

3 District Court of the Hague 4 May 2011, case-number 389526 / KG ZA 11-294, p. 4.6.

4 EHRM 24 February 1995, nr. 15450/89 (*Casado Coca/Spain*), p. 35.

5 ECHR 25 November 1996, nr. 17419/90 (*Wingrove/United Kingdom*), p. 58.

6 ECHR 24 June 2004, nr. 59320/00 (*Caroline von Hannover/Germany*), p. 76.

7 The European Commission of Human Rights was a special 'tribunal' which examined court cases before they were sent through to the

European Court of Human Rights. Currently individuals can file a complaint directly with the European Court of Human Rights.

8 European Commission of Human Rights 5 May 1979, nr. 7805/77 (*X. & Church of Scientology/ Zweden*), p. 5.

9 ECHR 25 March 1985, nr. 8734/79 (*Barthold/ Germany*), p. 54-58.

10 ECHR 26 April 1979, nr. 6538/74 (*Sunday Times/United Kingdom*), p. 59.

11 ECHR 29 October 1992, nr. 14234/88; 14235/88 (*Open Door/Ireland*), p. 68.

12 ECHR 24 May 1998, nr. 10737/84 (*Müller and others/Switzerland*), p. 27 and 33.

13 ECHR 25 April 2004, nr. 68354/01 (*Vereinigung Bildener Künstler/Austria*), p. 26.

14 See on this: A. Nieuwenhuis & S. Koning, 'Kunst in Straatsburg – Een analyse van de jurisprudentie van het EHRM', *Mediaforum* 2010-3, p. 70-78 and C.M. Strengers, 'Het EHRM en zijn angstvallige houding ten aanzien van de artistieke expressie', *Nederlands Juristenblad* 2008-15, p. 878-882.

15 ECHR 25 April 2004, nr. 68354/01 (*Vereinigung Bildener Künstler/Austria*), p. 33.

16 ECHR 25 April 2004, nr. 68354/01 (*Vereinigung Bildener Künstler/Austria*), p. 26.

17 ECHR 24 May 1998, nr. 10737/84 (*Müller and others/Switzerland*), p. 27.

18 See on the distinction between justification-grounds: A. Nieuwenhuis & S. Koning, 'Kunst in Straatsburg – Een analyse van de jurisprudentie van het EHRM', *Mediaforum* 2010-3, p. 70-78.

19 ECHR 8 July 1999, nr. 23168/94 (*Karataş/ Turkey*), p. 50.

20 District Court of the Hague 4 May 2011, case-number 389526 / KG ZA 11-294, p. 2.5.

21 ECHR 8 July 1986, nr. 9815/82 (*Lingens/ Austria*), p. 42.

22 ECHR 15 May 2005, nr. 68416/01 (*Steel and Morris vs. the UK),* p. 94.

23 District Court of the Hague 4 May 2011, case-number 389526 / KG ZA 11-294, p. 4.8.

24 Idem.

25 Idem.

Works cited

O. Castendijk and E. Dommering, '*European Media Law'*, Alphen aan de Rijn, KLI 2008.

W. Sakulin, *Trademark protection and freedom of expression: an inquiry into the conflict between trademark rights and freedom of expression under European, German, and Dutch law*, Rotterdam, Dissertation 2010.

W. Sakulin, 'Merkenrecht en de vrijheid van meningsuiting', *Mediaforum* 2011-1: 2-14.

Kim de Beer obtained her degree in Law from the University of Amsterdam (UvA) in 2008. She wrote her thesis on the regulation of players' agents by the FIFA. She is currently following the UvA's Master's Course on Information Law. Her main interests are copyright, freedom of speech, art & law and sport & law. She has completed a research internship at the Institute for Information Law (IViR). In 2010 she also was a research assistant at IViR for six months, mainly focusing on copyright law. Currently she is finishing her thesis on the compliance of ambush marketing legislation with freedom of speech principles. In addition to finishing her thesis, she works at the Dutch Performing Arts Fund as a legal advisor.