

GARRIGUES

*The Role of IP for Athletes  
and Image Rights*

*Carolina Pina*



# Image rights

## A definition

The right to one's own image is the ability to decide **when, how and by whom** our physically recognizable features (image, voice and name) can be captured, reproduced or published

This is one of the most disperse legal subjects in the European Union.  
There has been no attempt at harmonization

In the United States there is no federal legislation regulating the so-called right of publicity, although some States have chosen to adopt laws that include and systematize the view held by the courts

# Piecemeal regulation of image rights

EU - US



- **US**, the right of publicity arises from the concept of privacy, referred to in the Fourth Amendment. The right of publicity is considered an economic right (the right of ownership in an intangible asset)



- **CONTINENTAL EUROPE**, conceived as a personality right and, as such, fundamental. The commercial aspect of this right has traditionally been of secondary importance. European experts and the European courts are moving ever closer to the U.S. model because of its greater economic functionality



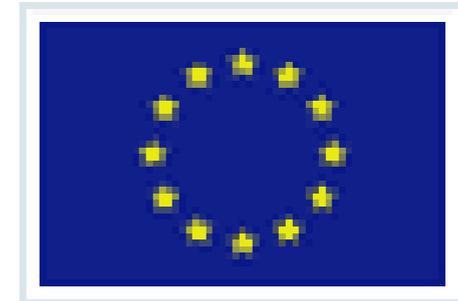
- **UNITED KINGDOM**, does not recognize a general privacy right or a right of personal portrayal as such. Case law protection: passing off and the right of confidence

# Piecemeal regulation of image rights

EU - US

## Piecemeal regulation across the European Union

- The right to one's own image is regulated pursuant to the internal law of each Member State
- There has been no attempt at harmonization.



[europa.eu](http://europa.eu)

## In the United States, the right of publicity is not protected under federal legislation either.

- The right to one's own image is protected via the courts of each State (common law)
- Some states have adopted laws that contain and systematize case law (statutes)



[extendaplus.es/blog/tag/eeuu/](http://extendaplus.es/blog/tag/eeuu/)

**GARRIGUES**

# Piecemeal regulation of image rights

## Contractual implications

### **The heterogeneity of image rights has contractual implications**

- Regulatory and contractual differences in the right to one's own image
- In the global society the dissemination of images knows no borders (Internet, Social Media, etc.)
- Contracts licensing image rights must be exhaustive given the different treatment afforded to these rights internationally
- Objective? To execute ironclad contracts, contracts that envisage every possible contingency that may arise from the use of a third party's image.

# Ownership of the right to one's own image

## The football example

The holder of the image rights is the individual whose image is reproduced

Legal entities can hold the image rights of third parties indirectly

Legal entities do not have an "image"



# Minor's rights

Safeguarding minor's interest

## How are minors' image rights regulated?

- Conditions for maturity: at fourteen, the minor has sufficient maturity to exercise those rights, and twelve years is the minimum age where the image does not affect core values-
- In other cases, authorization from the State Prosecutor's Office

**We must always  
safeguard minors'  
interests**

# Lack of regulation in sport

The image rights of professional sportspersons

## The legal framework

The Sports Law does not regulate these rights.

The regulation of the image rights of professional sportspersons is defined privately, through employment and commercial contracts executed between clubs, sports corporations and sportspersons.



<http://definicion.de/acto-juridico/>

# Image rights

## Characteristics of image rights

### Consent

Governed by the principle of freedom of contract.

Consent does not need to be in writing, but it must be unequivocal.

Limitations: the holder of the right to one's own image cannot license it fully, that is, only the economic aspect of these rights may be licensed.

Freedom to grant consent in any manner – the Spanish courts accept the existence of consent when it has been given:

- Orally
- Gesturally
- Acceptance of economic consideration



[www.czech.cz](http://www.czech.cz)

# Image rights at work

Image rights and employment relationships

## Employment relationships and the use of images

Coaches and managers are considered sportspersons this is not the case of national team managers and referees.

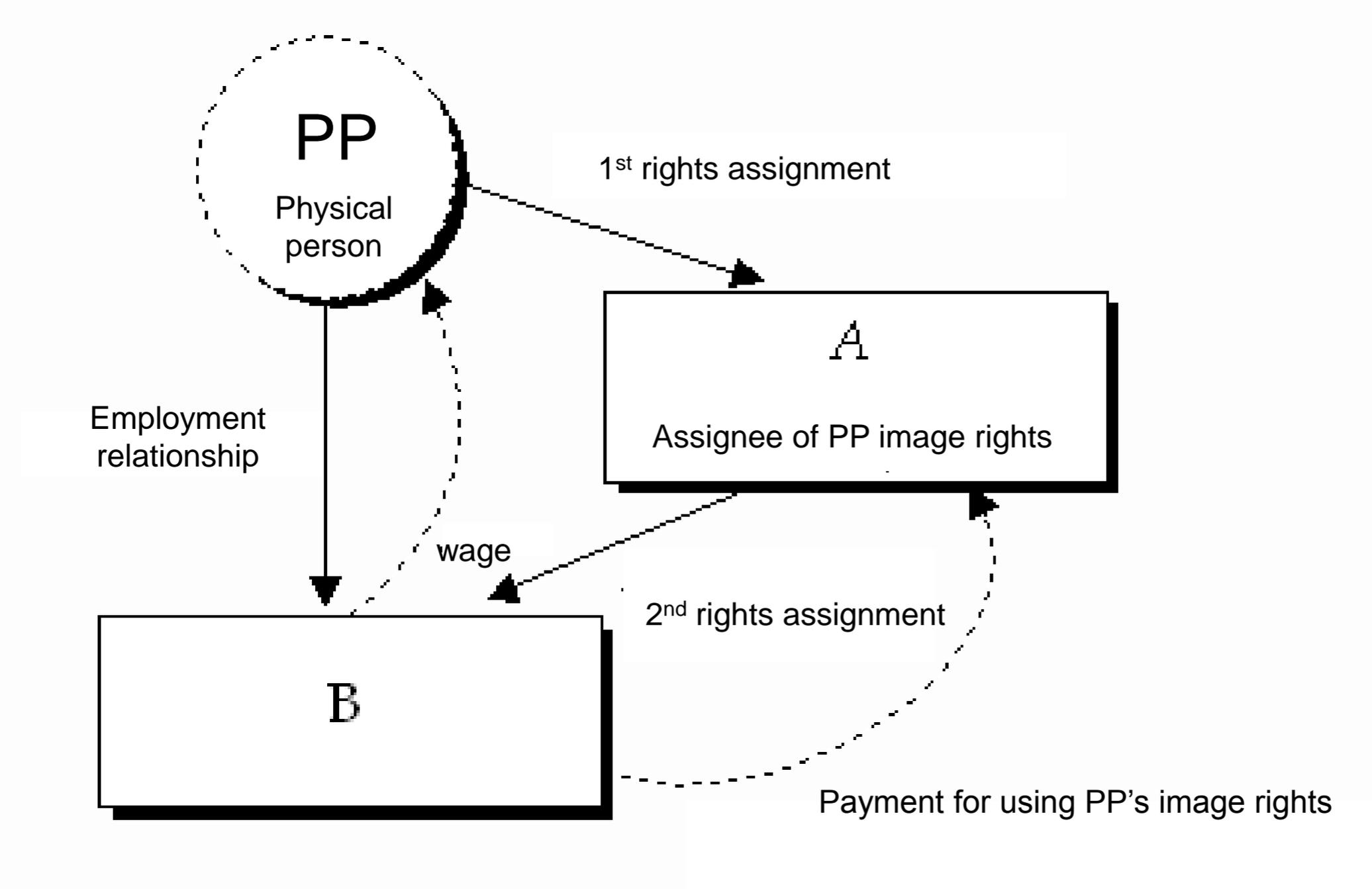


[www.czech.cz](http://www.czech.cz)

**GARRIGUES**

# Duality of contracts

Reduction of the tax impact



# Reduction of the tax impact

Lionel Messi case

## Lionel Messi set to face trial over alleged tax fraud after appeal rejected

- Argentina forward's appeal rejected by judge in Barcelona
- Messi and father Jorge deny €4m fraud
- Lionel Messi appears in Spanish court

Guardian sport

The Guardian, Friday 3 October 2014 14.11 BST

# Image rights in sport

## Commercial relationships

### **Commercial relationships for tennis and golf players**

It is different for independent, self-employed sportspersons such as tennis and golf players, who do not depend on an employer and who only sign commercial contracts. In these cases the clauses of the individual contracts signed by the sportspersons and the rules of the competition in which they will be participating prevail.

# The use of images in sporting events

## National teams

### The link between the team and the use of images

There is no employment relationship between the sporting federation and the sportsperson chosen for the national team.

When analyzing the relationship between a sportsperson and the federation, the Court of Justice of the European Union ruled that it is an independent relationship of an economic nature (decision by the CJEU of April 11, 2000 C-51/96 and C-191/97.)

It should be borne in mind that the link between the sportsperson and his club or sports corporation is not suspended while he is playing with the national team – obviously with the exception of the management and control of the activities.



[www.elmundo.es](http://www.elmundo.es)

# The use of images in sporting events

## The Olympic Games

### The use of images in the Olympic Games

According to the IOC it is precisely the fact that all rights related to the organization, marketing, broadcasting and reproduction are retained which enables this organization to ensure the continuity of the event.

While the Olympic Games are being held, participants cannot use their image unless it is with official sponsors. For example, the IOC banned participants in London 2012 from advertising unofficial brands between July 18 and August 15, with the breach of this rule leading to heavy penalties, including, ultimately, disqualification from the Games.



[www.olympic.org/](http://www.olympic.org/)

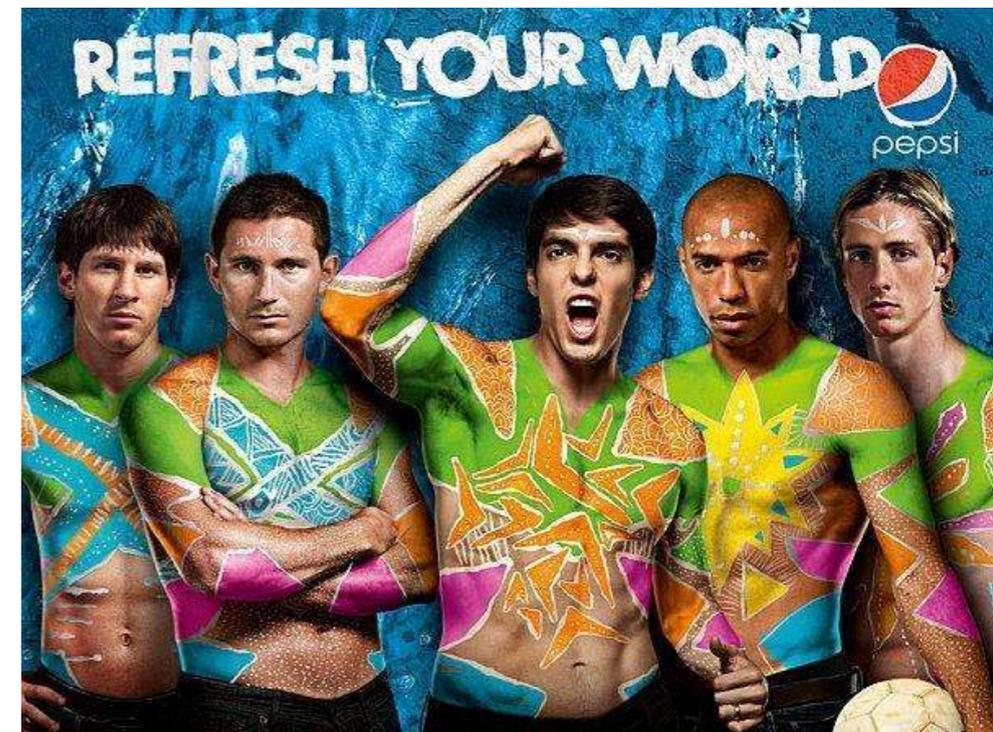
# Disputes in the use of rights

Holders of rights and organizers of events

## Disputes in use

Participation by sportspersons in different sporting events (for example in the case of soccer with the national team and the club) leads to numerous disputes as a result of the overlap in the use of the image rights by the various organizers.

When they are called up by the national team, the respective federations hold the sportspersons image rights and can, in turn, make contracts with enterprises which sponsor the national team. Such enterprises may not be the same as the sponsors of the club or sports entity to which the sportsperson belongs, or even the sportsperson's sponsors individually.



[www.spainsn.com](http://www.spainsn.com)

GARRIGUES

# Disputes in the use of rights

Contractual clauses as a preventive measure



GARRIGUES

# Disputes in the use of rights

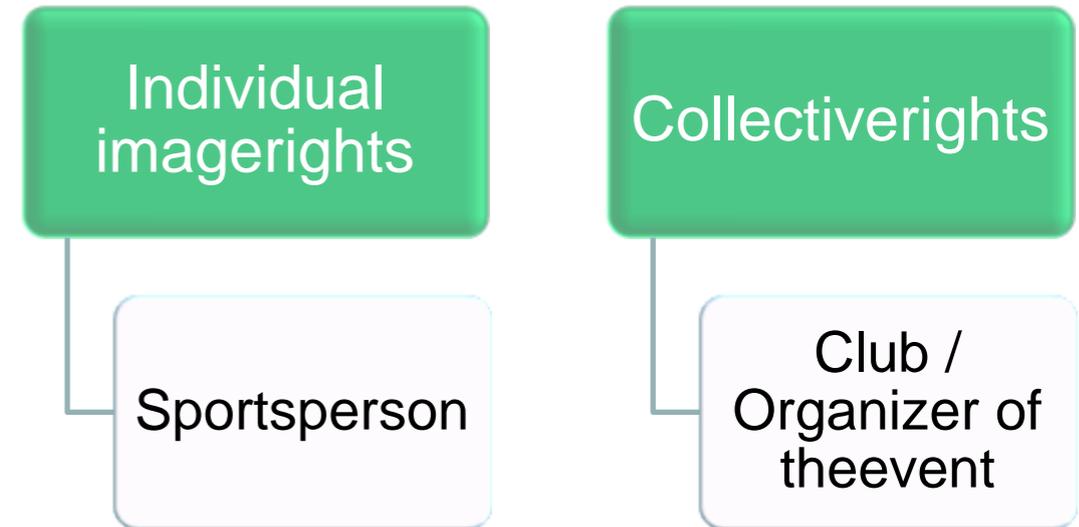
Right-holders and events' organizers

## Disputes in use

It is necessary to look for new ways of dealing with the realities faced by image rights in professional sport at the present time.

For this purpose, it could be appropriate to start by making the basic distinction between individual image rights which are owned by the sportsperson and collective rights, which are owned by the club or organizing entity.

This distinction, which is well-established in Spanish basketball, is starting to gain ground in the world of soccer thanks to FIFA's recent recommendations.



# Content of image rights' licenses

FIFA's recommendations



## Professional Football Player Contract Minimum Requirements (Circular 1171/2008)

- “The Club and the Player have to agree how the Player’s image rights are exploited, if applicable .
- As a recommendation and principle the individual player may exploit his rights by himself (if not conflicting with clubs sponsors/partners) whilst the Club may exploit the Player’s image rights as part of a group and/or the whole squad.”

# Exclusive rights vs. public interest

## Videogames



**NFL PLAYERS**  
ASSOCIATION

### **Collective management in the NFL**

The NFL recognizes that players have authorized the NFLPA to act as their agent in the Group Licensing Program.

The group licensing programming is defined as the use of six or more names, signatures, voices, images, photographs likenesses and/or biographical data or information of players in the NFL or in relation to products

However, videogame manufactures question the need for such licenses, on the grounds that certain uses of players' images should not be monopolized exclusively by competition organizers. These manufacturers base their claim on the following (i) the transformative use test, which claims protected under the First Amendment for use that is covered by freedom of expression and (ii) defense of public interest.

# Exclusivity clauses

## Schumacher case



EL COMERCIO/PIÑA

The Fundación Príncipe de Asturias had to hire a Maserati at short notice so that Michael Schumacher could attend the ceremony and collect the Príncipe de Asturias Sports Award, because, owing to contractual commitments, the “Kaiser” could only be seen in public with a Maserati or a Ferrari

Effects of  
**exclusivity** on the  
licensing of image rights

谢谢大家！

**Thank you!**

[carolina.pina@garrigues.com](mailto:carolina.pina@garrigues.com)