the OCS, an umbrella non governmental sports organization, is not in a position to deliver public funds. The OCS, respecting the extraordinary efforts of the sports associations and clubs and its affiliated sports federations, has established a sound relationship with its members, fully realizing that they ensure the conditions for daily training and the development of athletes until they qualify to be included into the categorization system.

The best ways to establish good governance in sport are the examples of good collaboration between non governmental sport organizations and governmental institutions. It seems that a common solution has been achieved by realizing that sports subjects have to stick together if they do not want to lose contact with modern trends of the development of sport. Taking into account the specific situation of a small sport nation, the decision was taken to deliver specific tasks to the subjects for whom they were founded on the one hand and to work together in general for the benefit of the progress of our sport on the other hand. Many common activities have been carried out jointly by different subjects from the governmental and the non-governmental sides which are supposed to take care of the Slovenian sport. The relationship and understanding of different positions and responsibilities of governmental and non governmental sides is crucial for a small country like Slovenia. The changes of the Slovenian sport legislation in the near future will be an opportunity to find out the ways how to carry on successful examples of good governance in sport in the future.

# Sport Image Rights in Spain

by Yago Vázquez Moraga and Andreu Sarrias*

## 1. Introduction

Over the last 20 years, professional sport (as a source of entertainment and business) has undergone spectacular growth, in large part due to the development and exploitation of one of the essential rights of human personality: the right to one's own image. Paradoxically, a right with a basically philosophical content, inherent to the legal and social status of the human personality as an external element, has become the financial manna of spectator sport, which today is something more than that.

As stated by Professor Parejo Alfonso[1] in the prologue of the main book on image rights in Sport (*"Los derechos de imagen en el ámbito del deporte profesional (Especial Referencia al Fútbol)"* by the professors Palomar Olmeda and Descalzo González; mainly due to the evolution of technology, economic exploitation rights deriving from the right to one's own image have driven the spectacular evolution that sport in general and football in particular have experienced over the past few years, becoming a matter of enormous social and economic importance, due to television and other forms of media.

Therefore the significance of this comparative study of sport image rights is obvious, particularly if we take into account the incomplete and sector-specific regulation of them in Spain, which the different operators in the sector have taken advantage of, using legal cunning, to fill in the gaps by means of complex and unusual legal formulas that serve their own interests. Therefore the patrimonial aspect of this right has been developed privately through hiring (employment and commercial), by means of which the different operators in the sport market (sportspeople, clubs, Sports Corporations, companies, etc.) have managed to perfect complex legal relationships, always tending to reduce the tax pressure on the income they receive from their respective image rights.

Hence the difficulty of this study, not only because it is more about casuistry than doctrine, but also because of the nature of the concept of "image rights" which, as with the majority of the so-called personality rights, far from having a universal and pacific definition, is often confused with other related fundamental rights, such as the right to dignity and personal and family privacy.

## 2. The right to one's own image: delimitation, content and regulation.

As already stated, there is not a single unequivocal concept of what is understood as the right to one's own image and it can be said that its content and definition varies depending on the level of scientific autonomy that different authors attribute to this right. In this sense, some consider that the right to one's own image forms part of a person's right to dignity, whilst others state that it forms part of the right to privacy, and others include it within the more general principle of respect for human beings. These digressions have sometimes even transcended the case law of the Spanish Constitutional Court[2].

As stated by the professor Blasco Gascó[3], this confusion may have been added to by the fact that *"the right to one's own image is not expressly recognised in all constitutions or in general in the European constitution, including the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4th November 1950 and the Charter of Fundamental Rights of the European Union dated 7th December 2000, but rather, as has been stated; it is protected by the general principle of respect for human beings or respect for one's life and matters related to personal privacy (article 8 of the Convention and article 7 of the Charter)."*

Therefore, although it is true that *de lege lata* it appears that there is a legal lack of definition with regard to the right to one's own image, this should not lead us to erroneously to think that it does not have its own legal autonomy as, it does not only have this characteristic but rather, as explained by professor BLASCO GASCÓ in the aforementioned work, this is manifested in three different ways, given that (i) the right to one's own image has its own *nomen iuris*, (ii) its own conceptual autonomy (developed by means of the Case Law of the Supreme Court and the Constitutional Court) and, furthermore (iii) it also has legal autonomy, not only as a right consecrated in article 18.1. of the Spanish Constitution, but also due to its development by means of Organic Law 1/1982, dated 5th May, regarding civil protection of the right to dignity, personal and family privacy and one's own image.

This autonomy has also been declared by the Constitutional Court on several occasions, among others in its Decisions 231/1988, 99/1994, 81/2001, 139/2001, where, after acknowledging that there is a link between the right to one's own image and the right to dignity and privacy, in all cases the right to one's own image *"is an autonomous constitutional right which has a specific level of protection with regard to*

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1 Parejo Alfonso, L., Prologue to the book by Palomar Olmeda, A. and Descalzo González A., *"Los derechos de imagen en el deporte profesional (Especial referencia al fútbol)"*, Publisher: Dykinson, Madrid, 2001.

2 Compare, for example, the decision of the Constitutional Court number 170/87, dated 30th October, where it would appear that the right to one's own image forms part of the more general fundamental right of personal privacy; with judgement number 139/2001 of the same High Court, in which it is declared that the right to one's own image is an *"autonomous constitutional right, which has a specific level of protection."*

3 Blasco Gascó, R, *"Algunas cuestiones del derecho a la propia imagen"*, in *Bienes de la Personalidad*, Conferences of the Association of Professors of Civil Law (13.2007. Salamanca), Publisher: Murcia University, 2008, pages 13-92

*reproductions of a person's image that, whilst affecting the personal sphere of its owner, do not damage their reputation or reveal their private life; constituting the safeguard of a personal and reserved area (although not private) with regard to the action and knowledge of others. Therefore individuals are attributed the power to prevent the unconditional distribution of their physical appearance, as it constitutes the primary element of the personal sphere of any individual, as a basic instrument for identification and exterior projection and an essential factor for their own recognition as an individual person."*

It is not a trivial matter as, given the number of ways of capturing and reproducing images that exist today, the autonomous constitution of the right to one's own image is a guarantee against all of the illegitimate intromissions to which a person can be subjected.

### 2.1. Definition and constitutional regulation of the right to one's own image

Within the set of fundamental rights incorporated within the Spanish Constitution (hereinafter, "SC" or "Constitution"), which are considered fundamental rights because *"they are the basis for political order and social peace"* (article 10.1 of the SC) serving the essential values of our State under the rule of law, is the fundamental right to one's own image. In this sense, article 18.1. of the Spanish Constitution declares: *"The Constitution guarantees the right to dignity, the right to personal and family privacy and one's own image."*

Furthermore, after regulating a series of fundamental public freedoms in article 20.1 (freedom of expression, information and scientific and artistic creation) point 4 of the SC states *"These freedoms are limited by respect for the rights recognised in this document, the precepts of the laws that develop them and, in particular, the right to dignity, to privacy, to one's own image and the protection of youth and childhood."*

This right is such an important part of the Constitution that it even constitutes a limit on the execution of other fundamental rights, such as freedom of expression, that are so important in a modern democratic society.

In short, in contrast with other constitutional rights that "guide" legislative, political and judicial action, the right to one's own image is a *fundamental right* and is set apart from the actions of public authorities and particularly legislative power, in the sense that the exercise of this right can only be regulated by Law[4] (article 53.1 of the SC) whilst always respecting its essential content.

Before explaining the legal regulation of the right to one's own image, we should try to define it. As we have seen, the lack of a legal definition regarding this right means that its conceptualisation varies depending on the authority that defines it. In this sense, as this right has (as we shall see) two aspects, in order to define it we can either consider its *negative aspect*[5] (the power to prevent a third party from capturing or exploiting one's own image without authorisation) or its positive aspect[6] (the right of each person to freely create their personal image, as another part of their personality).

It is also possible to define the right to one's own image based on either the constitutional aspect of the right (which shall be the case whenever the illegal intromission affects the personal sphere -not property- of the person concerned[7]), or the property aspect of it[8] (all of the rights related to the commercial exploitation of image of an individual).

In short, in accordance with the doctrine of the Constitutional Court[9], from an eclectic point of view, the right to one's own image can be defined as the personality right[10] that gives its holder the power to freely determine their appearance and external physical characteristics, to publish and reproduce them freely and to prevent unauthorised third parties from obtaining, reproducing or publishing recognisable physical characteristics of their physical image without their consent.

Therefore, as with other personality rights, the holder of the image right is the physical person whose image is reproduced and, in principle, it is not possible for the holder to be a legal entity, as in this case their image is protected by other legal precepts, related to their trading name or trademark. However, as stated by Pina Sánchez and Ferrero Muñoz[11], obviously *"it is possible for the resulting ownership of these rights"* to be acquired *"by virtue of a contractual assignment by an individual."*

The right to one's own image, therefore, also has legal protection at two levels:

a *Constitutional protection,* in accordance with its status as a fundamental right (and therefore there is the possibility of appealing to the Constitutional Court).
   This protection empowers the holder of the right to prevent the obtainment, reproduction or graphic communication of one's own image by an unauthorised third party, regardless of their purpose (informative, commercial, scientific, cultural), in order to protect the moral aspect of their holder.

b *Ordinary protection,* that is not recognised as constitutional, and

4 That, in accordance with the provisions of article 81.1 of the SC, must be an Organic Law that "develops" the Constitution directly in essential areas for the definition of this fundamental right" (Constitutional Court Ruling 127/1994, dated 5th May).

5 This is the opinion, for example, of professor Carreras Sètra (*"Derecho español de la información"* Publisher: UOC, 2006, page 154), for whom *"From a theoretical point of view, we can define the right to one's own image as the right that empowers people:*
*To reproduce one's own image*
*To prevent third parties from capturing, reproducing or publishing one's own image without authorisation."*

6 In this respect, see Pérez De Los Cobos, E, *"Regarding the right to one's own image (with regard to the Constitutional Court Ruling number 170/87,* dated 30th October)" in the Judiciary Magazine (*Revista del Poder Judicial*) number 10, 1988, page 75; which explains that the content of the right to one's own image cannot be reduced to a right of exclusion i.e. to prevent others from using it, because, as professor Blasco Gascó explains (page 12 of the work cited), *"the right to one's own image is the pre-emptive right, linked to the most intimate personality and freedom of a person, to freely decide on their own external appearance."*

7 As declared by the Constitutional Court (Constitutional Court Ruling 81/2001, dated 26th March), *"the intention regarding the constitutional aspect of this right is that individuals can decide which aspects of their person they wish to keep from public view, in order to guarantee a private environment for the development of their own personality away from external interferences."*

8 In this regard, it is important to take into account the distinction made by the Constitutional Court (Constitutional Court Ruling 81/2001, dated 26th March), according to which:
*"It is true that our Law (particularly Organic Law 1/1982, dated 5th May, regarding civil protection of the right to dignity, to privacy and one's own image) grants all people a set of rights regarding the commercial exploitation of their image. However, this legal aspect of the right should not be confused with the constitutional aspect, related to the protection of the moral sphere and human dignity and guaranteeing a private area free of external intromissions. The protection of the economic, property and commercial aspects of a person's image affect different legal interests from those of a personality right and therefore, although they deserve protection and are protected, they do not form part of the content of the fundamental right to one's own image of Article 18.1 of the SC. In other words, despite the growing establishment of property rights over people's images and "the necessary protection of the right to one's own image given the growing development of the media and procedures for the capture, publication and distribution of them" (Constitutional Court Ruling 170/1987, dated 30th October [Constitutional Court 1987, 170], R 4), the right guarantee in article 18.1 of the SC, due to its "completely personal" nature (Constitutional Court Ruling 231/1988, R 3), limits its protection to a person's image as an element of the personal sphere of the subject, as an essential factor for their own recognition as an individual."*

9 According to which the right to one's own image can be defined as *"a personality right that gives its holder the power to control the representation of their physical appearance that allows their identification, which involves both the right to determine the graphic information generated by the physical characteristics that makes them recognisable that may be captured or publicly distributed and the right to prevent the obtainment or publication of their own image by an unauthorised third party,"* (Decision of the Constitutional Court number 72/2007 (First Courtroom), 16th April, 2007).

10 As opposed to other legal systems, such as that of the United States, where the right to one's own image is not considered a personality right, but rather is considered a property right related to an intangible asset. In this respect, as professor Blasco GASCÓ explains (page 32 of the work cited), the equivalent to the right to one's own image in Anglo Saxon law is in the *right of publicity,* deriving from the right to be alone or be left alone as part of the right to privacy. In this aspect, see the work of professor José Luis González (González, J.L., *"The right of publicity and the prohibition of false light" Comment regarding the STS, 1, 24.12.2003,* Indret Magazine (www.indret.com), Working Paper number 243.

11 Pina Sánchez, C. and Ferrero Muñoz, J., *"La comercialización de la imagen en el deporte profesional,"* in the joint work *"El deporte profesional,"* directed by Palomar Olmeda, A., Publisher: Bosch, 2009, page 611.

whose scope of protection is limited to the property aspect of the right to one's own image, which has the protection of an ordinary civil right.

This protection empowers the holder of the right to prevent the use of the name, the voice or the image of a person for advertising, commercial or similar purposes. I.e. the right is protected as an object of legal trade.

2.2. Legal regime of the right to one's own image: Organic Law 1/1982, dated 5th May, regarding civil protection of the right to dignity, personal and family privacy and one's own image

Aware of the importance of the right to one's own image in a modern society, Spanish legislators soon developed and protected this right by means of Organic Law 1/1982, dated 5th May, *regarding civil protection of the right to dignity, personal and family privacy and one's own image* (hereinafter, "OL 1/1982" or "OL").

The main objective of OL 1/1982 was to regulate the civil protection of the fundamental rights established in article 18.1 of the SC, including the right to one's own image. Therefore this regulation developed the provisions contained in article 53.2 of the SC[12], determining the legal channel for defence against the illegitimate interferences or intromissions that may affect these rights, as well as determining the injured party's rights in the event of these intromissions (including the right to compensation for the damages suffered, which must always be set in accordance with the provisions of this OL).

After declaring[13] in its First article, point One, that the right to one's own image "*shall be given civil protection from all types of illegal intromissions*" (specifically by means of "*the legal protection procedure envisaged in article 9 of this Act,*" according to the current text of article 1.2 of the OL), article 1.3 of the OL then proclaims that this right is "*unrenounceable, inalienable and imprescriptible,*" and therefore "*The renouncement of the protection envisaged in this Act shall be invalid, without prejudice to the cases of authorisation or consent referred to in the second article of this Act.*"

OL 1/1982 has the virtue of condensing or at least anticipating all of its regulatory content in a single article (the First article), by outlining the fundamental concepts of the legal regime of the right to one's own image I.e.:

- The right to one's own image is protected against *illegal intromissions.*
- This protection is granted by means of *the legal protection procedure envisaged in* article 9 of the OL.
- The right to one's own image is an *unrenounceable, inalienable and imprescriptible right* (which does not mean that, within the limits mentioned below, it cannot be ceded).
- In turn, the scope of the protection excludes cases in which *authorisation or consent* is given for the exploitation of the right to one's own image by a third party, which cannot be considered an "illegal intromission."

Before going on to study the specific regime applicable to the image rights of professional sportspeople, it is necessary to briefly describe (as a more extensive description would be outside of the scope of this study) the scope of two fundamental concepts of the legal regime of image rights: the express consent required for its use by third parties (which is necessary so that sportsperson can assign their image rights) and the concept of "illegal intromissions" contemplated by the OL.

*a) Express consent*

After establishing (Second article, One) that the scope of protection of the right to one's own image is limited "*by laws and social customs taking into account the area that, by their own acts, each person maintains reserved for themselves or their family,*" the OL prescribes that "*The existence of an illegal intromission in the protected area shall not be considered when it has been expressly authorised by law or when the holder of the right has granted their express consent* " (Second article, Two). This express consent[14], in accordance with the next point of this article "*shall be revocable at any moment, but any damages and losses caused in this case must be compensated, including those for justified expectations*" (Second article, Three, of the OL).

As can be seen, despite the fact that the right to one's own image is an *unrenounceable, inalienable and imprescriptible right;* given the possible value of this right as property which makes it tradable (as in the case of some professional sportspeople), the OL expressly allows the holder of the right to authorise third parties to exercise some of the powers that it confers to its holder. I.e. the OL allows its holder to freely dispose of their right, although within the limits envisaged in the SC and the OL itself (for example, not allowing the renouncement of the right).

This means that, in the event that a third party exploits the image of a professional sportsperson without their consent, this illegal intromission shall be covered by constitutional protection (ordinary and constitutional, as we shall explain in section 6 of this work) whereas, if for example there is a contract for the assignment of image rights (express consent), but the assignee goes too far when exercising them, violating the terms of this assignment, any disagreement in this respect shall be considered to be of a merely contractual nature and these circumstance shall not be considered illegal intromission, therefore receiving only *ordinary legal protection.*

As the form in which this consent must be provided has not been determined (without prejudice to how it has been said it should be expressed) this may be provided in any of the ways envisaged in the Civil Code, i.e. it may be provided verbally, although this is not recommended (not only because it is difficult to prove, but also due to the problems that may arise related to the limits and exact content of consent provided verbally[15].

A good example is the Decision of the Constitutional Court number 1225/2003 (Courtroom 1) dated 24th December 2003[16], in which the proven facts consist in the verbal consent provided by a young person for the capture of his image and its publication in a report regarding fashionable night clubs in Madrid. However, the photograph taken ended up being included in a very different report about drug and alcohol consumption by young people on the so-called "Bakalao Route" in Valencia. Whilst the young person stated that he had not given his consent for the inclusion of his photo in this report, the publisher claimed that he had given his verbal consent for his photo to be taken and therefore it was not necessary to get any further consent for its publication in the aforementioned report. In the end the Supreme Court ruled in the young person's favour, declaring that the consent given had been diverted and used by the publisher, exceeding what was consented to, as the young person only "*authorised the taking of his photograph to illustrate an advertising campaign about fashionable bars in Pozuelo de Alarcón and not to be inserted in reports that the aforementioned newspaper published on young people, synthetic drugs, alcohol and fast driving of motor vehicles, as he was not informed about this at all and therefore could not have authorised it.*" This is why it is recommended that this consent should always be given in writing.

Therefore, one of the essential elements of any contract or agreement for the assignment of image rights, whether in exchange for pay-

12 According to which, any citizen may claim the freedoms and rights recognised in article 14 and Section one of Chapter two before ordinary courts through a procedure based on the principles of preference and preliminary hearings and, if applicable, through an appeal filed with the Constitutional Tribunal. The latter remedy shall be applicable to conscientious objection recognised in article 30.

13 For obvious reasons, from this point onwards we will only refer to the right to one's own image, leaving aside the other fundamental rights that are the object of this OL, i.e. and the right to personal and family dignity and privacy, which we shall only refer to when it is necessary for coherence.

14 It is worth mentioning that, if the holder of the image right is a minor or lacks legal capacity, in accordance with the Third article of the OL, the consent must be provided by them when their maturity permits or, if this is not the case, be granted in writing by their legal representative, with the prior consent of the Public Prosecutor.

15 For example, allowing someone to take a photograph and posing for the camera proves that consent was provided, but what happens if the person that takes the photo later publishes it in a magazine? Does the consent given verbally cover this publication?

16 See the comment made by professor GONZÁLEZ, JL, *(work cited)* in this regard.

ment or for free, is the express consent or the authorisation that must be provided by its holder for the assignee to obtain, reproduce, publish and exploit their image. Furthermore, this consent must have a *content that is limited by its holder,* specifying what the consent authorises, which powers are granted and which powers are not granted.

Lastly, it is worth remembering that, as we have already stated, the consent provided *may be revoked at any time,* without prejudice to the consequences in terms of compensation that this revocation may have in the event that it causes damages and losses to a third party.

*b) Illegal intromissions*

Together with the general concept of "illegal intromission," Organic Law 1/1982 (Seventh article) specifically lists the actions that shall always be considered illegal intromissions that, for our purposes (image rights) shall be:

- Seventh Article, section Five: "*The capture, reproduction or publication using photographs, film or any other procedure of the image of a person in places or moments related to their private life or outside of them, except in the cases envisaged in article eight, two,*" which shall be commented on below.
- Seventh Article, section Six: "*The use of the name, voice or the image of a person for advertising, commercial or similar purposes*". I.e. that the image is not limited to the physical appearance of a person, but goes further, thereby including any other characteristics that, such as their voice or name, enables the person to be recognised by third parties.

These declarations must be considered taking into account the exceptions that the Law establishes in its Eighth article regarding illegal intromissions where, after excluding from the scope of the protection exceptions that are authorised or agreed by the competent Authority, or that have relevant historic, scientific or cultural interest, the regulation expressly declares (Eighth article, Two) that "*the right to one's own image shall not prevent: a) its capture, reproduction or publication by any means in the case of people that have a public position or a profession with notoriety or public exposure when their image is captured during a public act or in places that are open to the public.*" And in the same sense, in accordance with the aforementioned article, an illegal intromission can not be considered to have been constituted by (b) the "*use of the caricature of these people, in accordance with social customs,*" or (c) "*graphic information about a public incident or event, when the image of a particular person appears merely as an accessory.*"

If we apply these exceptions to the specific case of professional sportspeople, it can be concluded that:

- As professional sportspeople have undeniable fame and public exposure, illegal intromission shall not be considered to be constituted by the capture, reproduction or publication of their image when it is captured in a public act or in a location open to the public, as long as it is not used for commercial and advertising purposes.
- Illegal intromission shall also not be considered to be constituted by the caricature of professional sportspeople.
- Furthermore, the publication of photographs of professional sportspeople that accompany news related to sport events shall not be considered illegal intromissions.

## 3. Legal protection of image rights

As we have seen, Article 53.2. of the Constitution states that all citizens are protected by the fundamental rights "*before ordinary Courts through a proceeding based on the principles of preference and a preliminary hearing and (if applicable) through an appeal to the Constitutional Court.*"

This precept consecrates the principle of subsidiarity in the protection of the fundamental rights, in accordance with which these first have a direct and immediate protection before the Ordinary Courts and Tribunals, i.e. the *ordinary* protection of these rights and, additionally, when this protection fails, they can appeal to the Constitutional Court, which shall give *constitutional protection* to these fundamental rights. In this respect, the Constitutional Court has two functions: one is subjective, related to the protection of the fundamental rights of citizens, and the other is objective and related to upholding the Constitution, as it creates a legal doctrine with regard to the interpretation of the Constitution, which ordinary Courts must comply with.

Within this procedural framework, the right to one's own image is covered by the civil protection proceeding envisaged in OL 1/1982, which incorporates certain material and procedural specialities into the ordinary protection proceeding.

In accordance with article 9.1 of OL 1/1982, legal protection shall be provided against the illegal intromissions that we have already explained, whilst studying the legal system contained in Organic Law 1/1982. To do this (article 9.2) it is possible to take "*all of the measures necessary in order to end the illegal intromission concerned and to re-establish the injured party's full enjoyment of their rights, as well as to prevent or impede subsequent illegal intromissions. These measures may include precautionary measures aimed at achieving an immediate cease to the illegal intromission, as well as the acknowledgement of the right to reply, the declaration of the judgement and the order to compensate the losses caused.*"

One of the pillars of this legal protection consists of the legal consecration of a *iuris tantum* legal presumption: it shall be assumed that there has been a loss whenever an illegal intromission is proven (article 9.3). Furthermore, this intromission shall generate a right to be compensated, that "*shall cover the moral damage evaluated based on the circumstances of the case and the seriousness of the injury actually caused, taking into account (if applicable) the distribution or audience of the media through which it has occurred.*" And in the same sense, article 9.3 concludes that the profit obtained by the party causing the injury as a consequence of it shall also be taken into account.

Finally, section Five, article 9, of the OL 1/1982 establishes a period of validity of 4 years for actions related to protection from illegal intromissions, to be counted from the date that the person entitled is able to exercise them.

The main peculiarity of this proceeding is based on the position that is normally adopted by the defendant that, rather than adopting a defensive attitude, normally makes a type of implicit counterclaim: claiming protection against being prevented from exercising one of the freedoms envisaged in articles 16.1 or 20 of the Constitution (freedom of ideology, of information or expression).

This means that the Judge must weigh up these rights and fundamental freedoms, in order to determine whether there has been an illegal intromission that damages the image rights of their holder, or whether this intromission, for example, is legitimised by one of the exceptions envisaged in the Eighth Article of OL 1/1982 that were referred to previously.

## 4. The assignment of image rights within the framework of the employment relationship of professional sportspeople

The multiple disciplines and variations that exist in sport make it necessary to divide the study of image rights into two different categories: (i) on the one hand, that corresponding to sportspeople that carry out their activities and compete within a collective structure (Sports Corporations, clubs, cycling teams, etc.) and (ii) on the other hand, the image rights of individual sportspeople, such as golf or tennis players, that carry out their activities autonomously, not within the scope of employment relations.

Furthermore, with regard to the first group (team sportspeople) it is also necessary to differentiate the regime applicable to their collective rights (resulting from the sum of the image rights of all of the members of the team, the team itself and the organiser of the competition, league or championship), which are generally granted through a work contract, from the individual rights that, at the same time, can be exploited by the sportspeople individually (generally through commercial contracts, as shall be analysed later).

### 4.1. The assignment of image rights within the scope of employment relationships.

There are many cases in which a business, during the exercise of its management powers, requires its employees to adjust, to a certain

extent, their image to the aesthetic directives of the company, without this in itself representing a violation of the workers' rights to their own image. In this sense, for example, it is normal for a football club to require all of its players to wear the same kit.

This is the case of certain activities, such as sporting activities, that due to their very nature involve a *certain restriction of the right to one's own image*, which implies the capture and reproduction of the image of this type of employee. Although the Statute of Workers' Rights does not contain express regulations in this regard (except for the general regulations regarding the privacy of workers, contained in article 4.2.e of this regulation); this has been confirmed by the Constitutional Court, (among others) in its well known Decision number 99/1994, dated 11th April (First Chamber), according to which: "*it is clear that there are activities that involve, due to a relationship of necessary connection, a restriction of the image rights of those that must carry them out, due to their very nature, such as activities that involve having contact with or being accessible to the public. When this occurs, persons that agreed to carry out this type of tasks cannot later invoke the fundamental right to avoid carrying them out, if the restriction imposed is not aggravated by damaging important parts of the person's dignity (article 10.1 of the SC) or their privacy.*"

Consequently, whenever the nature of a job requires the capture and reproduction of the image of a worker for the effective performance of this job, it is not even necessary to gain the worker's consent, as this is a consequence of the work carried out in accordance with the employment relationship[17]. This is the case of the majority of professional sportspeople (the main actors at any sports event), without which there could not be any competition at all.

The general rule applicable to the exploitation of the image rights of professional sportspeople can be found in Royal Decree 1006/1985, dated 26TH June, *regulating the special employment relations of* professional sportspeople[18] (hereinafter, "RD 1006/1985), which, when regulating the rights and obligations of the parties of a work contract (article 7.3) states "*With regard to the sharing of the profits resulting from the commercial exploitation of the image of sportspeople, this shall be as determined by Collective agreement or individual pact, except in the event of contracting by commercial companies or firms envisaged in point 3 of article 1 of this Royal Decree*[19] ".

I.e. the regime applicable to the image rights of professional sportspeople shall be that envisaged in the Collective Agreement applicable, or that agreed between the sportsperson and the employer in the corresponding work contract.

Firstly, it should be noted that the aforementioned article 7.3. is incomplete in terms of its content and format, leaving certain doubts as to its interpretation. Firstly, due to its general lack of definition, in that it does not specify the extent of the assignment that the professional sportsperson grants to their employing club or sports corporation, or what limits or powers are included therein. Furthermore, it also fails to determine the legal nature of the financial income resulting from the exploitation of the image rights of sportspeople, which may or may not be considered part of their salary.

In fact, one of the main discussions regarding doctrine that have arisen regarding the interpretation of article 7.3 of RD 1006/1985 is related to the legal nature of the financial provisions received by professional sportspeople for the exploitation of their image rights by their employing clubs / Sports Corporations. In this sense, according to some doctrines, this retribution is not considered part of their salary, but rather it is considered financial compensation for the use of the image rights of the sportsperson by the club[20], due to the non-contractual profits that are generated for the latter, which should be shared with the sportsperson.

On the other hand, other doctrines have considered image rights as a salary, arguing that the amounts received by professional sportspeople for the assignment of the rights to exploit their image when this assignment is a product and direct consequence of sporting activity are fully incorporated into the salary, regardless of whether their work contracts or collective agreements make a distinction in this regard, and regardless of whether this assignment is carried out by means of an independent work contract.

In any case, as explained by professor González Del Río[21], mentioning the position of professor Tovillas Morán, "*the reference that article 7.3 of RD 1006/1985 makes to an individual pact between the parties or what is agreed within the framework of a Collective agreement means that it can be concluded that the regulation does not contain any actual rule regarding the possible financial exploitation of image rights and that it simply recognises this possibility, which must be expressly developed using a Collective agreement or an individual contract between the sportsperson and their sporting entity as a legal instrument.*"

Furthermore, the literal content of the article appears to mean that there is no particular legal obligation to share with the professional sportspeople the profits that their employer may obtain from the exploitation of their image rights, which can undoubtedly lead to unfair situations where there is no applicable agreement (or an agreement that does not mention this matter) or individual pact, especially in the cases of medium-level sportspeople, which do not enjoy the privileges of superstars and the so-called "cracks."

As explained by Palomar Olmeda and Descalzo González[22], the aforementioned regulation means that professional sportspeople may assign their image within the scope of the collective regulation or that of the work contract. Furthermore, a *contrario sensu* interpretation of article 7.3. makes it possible to consider that image rights can be left outside the employment relationship, as they cannot be assigned or be assigned partially (as is common). Therefore, the mere signing of a work contract between a professional sportsperson and a team, club or Sports Corporation is not sufficient to allow the commercial exploitation of the sportsperson's image, but rather, in accordance with the regulation envisaged in OL 1/1982, there should be express consent empowering this assignment and commercial exploitation.

All of this brings us to an initial conclusion: that, given the lack of a true and uniform general regime applicable to professional sportspeople regarding image rights, we should study the general regulations envisaged in the collective agreements that exist for each of the different sports, always taking into account that this regime should be complemented with the specific legal relationship that each sportsperson has with their employing club / Sports Corporation.

### 4.2. Main Collective Agreements

#### *4.2.1. Collective Agreement for professional football activities signed between the National Professional Football League (LNFP) and the Spanish Footballers' Association (AFE) (Official State Gazette number 266, Tuesday 4th November 2008).*

The current Collective agreement signed between the LNFP and the AFE (applicable until the end of the 2010/2011 season) states that "*The salary items that constitute the remuneration of a Professional*

17 This is also the case with so-called audiovisual rights, regarding which, in general, each sportsperson assigns their image rights by virtue of their employment relationship with the club, Sports Corporation or professional team that employs them. The combined value of all of them (footballers, clubs/Sports Corporations and competitions) is the object of these audiovisual rights. However, despite being closely related to image rights, audiovisual rights are a different matter completely and fall outside of the scope of this work, which is why they shall not be discussed.

18 These are defined as "*whoever, by virtue of a relationship established with a regular nature, voluntarily practice a sport on behalf of and within the scope of the organisation and management of a club or a sporting entity in exchange for payment*" (article 1.2 of RD 1006/1985). The status of professional sportspeople is also held by coaches and trainers, but not national selectors and referees.

19 Which states "*The scope of application of this Royal Decree includes relationships of a regular nature established between professional sportspeople and companies in which the corporate object consists of the organisation of sports events, as well as the contracting of professional sportspeople by commercial companies or firms, for the realisation, in each case, of the sporting activities in accordance with the terms of the preceding point.*"

20 This is how it is considered by the ACB-ABP Collective Agreement, which shall be studied in section 3.2.2. below.

21 González Del Río, JM., "*Naturaleza jurídica de los derechos de imagen de ciclista profesional*" (Comment on the Decision of the High Court of Justice of the Basque Country dated 29th January 2008), Aranzadi Sport and Entertainment Law Magazine, Issue 27, Year 2009-3.

22 Palomar Olmeda, A. and Descalzo González, A., *work cited page 77.*

*Footballer are: Engagement / Signing Bonus, Game Bonus, Monthly Wages, Extraordinary Payments, Seniority Bonus and Image Exploitation Rights (if applicable).*"

The proviso "if applicable" is clarified by article 28 of the Agreement (Image exploitation rights) that states that "*In the event that the Footballer exploits their image rights on their own behalf, as these have not been temporarily or indefinitely assigned to third parties, the amount that the Club / Sports Corporation pays the latter for the use of their image, name or figure for financial purposes shall be considered part of their salary, In accordance with the provisions of article 20. In this case, the amount agreed should be recorded in writing, either at an individual or Club / Sports Corporation workforce level.*"

Two conclusions can be made from this precept. Firstly, that when image rights are exploited directly by the player (by means of their assignment to the employing club / Sports Corporation), the amounts received shall be considered part of their salary. On the other hand, if the player has assigned their image rights to a company, the profits that this company receives for their exploitation shall be considered, in principle, of a commercial nature[23]. In this case, this assignment shall always be unrelated to the professional footballer's work contract.

Furthermore, although it is not common, this regulation does not prevent the professional sportsperson from autonomously exploiting their image rights, without assigning them to any Club / Sports Corporation or any third party.

Finally, as an *exception* to this general regime, the Agreement envisages an *exceptional collective assignment:* that agreed for the commercialisation by the AFE and the LNFP of sticker collections, Stick Stacks, Pop Ups, Trading Cards and similar items. In this sense, in its article 38.1, the Agreement establishes that: "*The AFE and the LNFP agree, during the seasons of validity of this Collective Agreement, to the joint exploitation for commercial purposes of the image of the different names and emblems of the Clubs and Sports Corporations affiliated with the LNFP, as well as the image of the footballers on each team of the aforementioned Clubs / Sports Corporations, with regard exclusively to the manufacture, distribution, promotion and sale of stickers, stick stacks, pop ups, trading cards and similar items, with the respective albums to collect them, containing the images and names of the aforementioned footballers with the clothing, emblems and symbols of the Clubs that they belong to.*" The profit obtained from this exploitation shall be shared between the LNFP and the AFE at a ratio of 65% and 35%, respectively.

Again, the brevity of this regulation means that it is easy for there to be conflicts related to the exploitation of the image rights of the professional footballers, as, because the Agreement does not specify the scope of the image rights which (if applicable) the professional player assigns to their employing Club / Sports Corporation, it is possible for there to be conflicts between the image rights that have been assigned to the Club / Sports Corporation and those that the player may exploit by themselves or by means of a third party. Therefore, the regulations that the parties establish in the contracts governing the assignment of the footballer's image rights (regardless of whether this is done via a work or commercial contract) are key, as they should determine the scope and the content of this assignment, in order to avoid the type of conflicts mentioned above.

*4.2.2. Collective Agreement signed between the Basketball Clubs Association (ACB) and the Professional Basketball Players Association (ABP). (Official State Gazette number 29, dated 3rd February 1994).*

Without any doubt, the ACB-ABP Collective Agreement is the clearest, most complete and most detailed set of regulations regarding the exploitation of the image rights of sportspeople (in this case basketball players) of those described here.

The General Provisions (article 11) of the Agreement state that "*Remuneration paid by the Clubs / Sports Corporations to players, either for their professional services or (if applicable) the express assignment of the exploitation of their image rights, shall be legally considered a salary for all purposes, except for items that are excluded due to current legislation.*"

It is surprising that, in the case of men's basketball the Agreement applicable determines that the remunerations paid for the exploitation of image rights is considered part of the players' salary, whilst the Collective Agreement applicable to women's basketball[24] expressly states the opposite (*"except as otherwise legally provided this amount shall not be considered part of their salary[25]"*).

Furthermore, the Agreement (First Additional Provision) clarifies that, for the purpose of calculations regarding annual remunerations, extensions, compensation, etc. envisaged within, and also with regard to the calculation of the financial penalties envisaged in the Disciplinary regime; calculations shall include both amounts paid by the Club / Sports Corporation by virtue of work contracts, as well as others paid by virtue of "*other additional contracts for the assignment of the exploitation of a player's image rights (signed with the same or any other company that (if applicable) is granted the aforementioned image rights), covering all of the amounts received.*" I.e. that these amounts shall be calculated both in the event that this assignment is carried out directly in the work contract, as well as when there is a double assignment (by the player to a company, and by the company to the employing Club / Sports Corporation).

Regardless of the two preceding general provisions (which almost exceed the regulations contained in the other employment agreements studied), the system for the exploitation of the image rights of the ACB is expressly regulated in *Annex III of the Agreement,* which basically envisages two types of exploitation: on the one hand the *joint exploitation* of the collective rights, which is carried out by ACB as the organiser of the competition, and on the other hand, the *exploitation of the individual rights,* which is carried out by each player, within the limits established in the Agreement.

This Annex III begins with a very significant general statement (*"As it is the firm wish of the parties for the legal regime applicable to the commercial exploitation of the image rights to be fully defined"*), stating the wish of the parties to fully regulate the exploitation of image rights, in order to avoid differences in the interpretation of the articles agreed.

Regarding this desire to avoid different interpretations, Annex III starts (Article 1) with a definition of the main concepts regarding the subject matter. I.e.:

*"1. Sponsorship contract: This shall be understood as a contract in which the party sponsored, in exchange for financial assistance for the conduction of sporting activities, undertakes to cooperate with the sponsor's advertising.*
*For the purposes of this Agreement, or any other related agreement, it shall be considered legally equivalent to a patronage contract.*

*1.2 Sponsor: This is an individual or legal entity that, by means of a sponsorship contract, undertakes to pay a certain amount of money in exchange for the public exhibition of the trademark or product that they own.*

*1.3 Sponsored Party: This is the Club / Sports Corporation or the ACB that, by means of a sponsorship contract, undertakes to publicly exhibit a certain trademark or product belonging to the sponsor.*

*1.4 Merchandising: This is a type of commercial exploitation of images that, through the signing of merchandising contracts, allows the*

23 This is supported by Case Law including, among others, the Decisions of the High Court of Justice of Andalusia (Seville) dated 19th January 2005, or that of the High Court of Justice of the Canary Islands (Santa Cruz de Tenerife), dated 14th March 2005, which declared that it is not appropriate to consider amounts that companies receive from sporting entities by virtue of the work contracts that a sportsperson signs with their employer as salary items.

24 Collective Agreement for the activity of professional basketball in the women's league organised by the Spanish Basketball Federation, approved by the Resolution of the General Directorate of Work dated 21st December 2007 (Official State Gazette number 13, dated 15th January 2008).

25 In particular, the Collective Agreement applicable to women's basketball establishes in its article 24.7: "*Collective image rights - This is the amount stipulated between the parties as remuneration for the assignment of the collective image rights (see annex III to this Agreement). Except as otherwise legally provided, this amount shall not be considered part of their salary.*" Furthermore, in Annex III, the Agreement establishes a list of image rights, the annual remuneration for which is set based on the annual remuneration that the player agrees on in the work contract with the employing Club / Sports Corporation.

*commercialisation and sale of photographs, posters or videos of the team, their figures and moments of the matches, as well as the appearance of their image in collections of picture cards, stickers or board games, also including all types of objects that can be sold on the market such as tracksuits, shirts, caps, scarves, flags, pins, pens, key rings, dolls, ashtrays and any other object on which an image can be reproduced [...].*

*1.5 Collective Rights: These apply when the image of the player appears related to the team to which they belong in an official competition, wearing the team's kit, or when they participate in public acts organised by the Club / Sports Corporation or by the ACB.*

*1.6 Individual Rights: These are rights directly related to the image of the player as a person (their privacy) or their image as a sportsperson in general (i.e., wearing sportswear and appearing before the public outside of their working hours, as long as they are not wearing the emblems and kit of the Club / Sports Corporation that they have signed a contract with, or any other that could be confused with them), and*

*1.7 Competing Company: These shall be considered as any companies whose products are similar to those of the companies that sponsor the ACB and its Clubs / Sports Corporations or that carry out activities that directly compete with the companies that sponsor the ACB and its Clubs / Sports Corporations."*

Next, after defining the conceptual framework applicable to the image rights of basketball, the Agreement regulates 3 specific types of exploitation:

a) Collective image rights: article 2 of the Agreement exclusively attributes ACB the right to commercially exploit the collective rights of players when *"acting as members of a Club / Sports Corporation, they participate in official competitions and when they wear the official kit of the Club / Sports Corporation, regardless of the provisions of individual work contracts."*

This exclusivity also applies to the financial income deriving from the commercial exploitation of collective image rights that, in accordance with this Agreement, shall all go to the ACB.

The ACB has the exclusive right to the commercial exploitation of the advertising activities related to merchandising, which cover not only by the objects listed in the preceding definition but *"any other object on which an image can be reproduced."* The only exception envisaged from this exclusive exploitation of merchandising is that envisaged in article 2.5 of the Agreement, by virtue of which it expressly excludes the commercialisation and sale of picture cards, which correspond exclusively to the ABP, which shall also receive the totality of the financial income derived from this exploitation.

With regard to the form in which this commercial exploitation should be carried out, the Agreement makes this the exclusive choice of ACB and the players undertake to cooperate in the execution of the form of exploitation chosen, as long as it respects the players' rights to holidays and rest, and as long as this exploitation does not adversely affect the individual image rights of the players.

Furthermore, with regard to this form of exploitation, the Agreement specifically contemplates the possibility that it is carried out by means of the figure of sponsorship and in this case the Agreement obliges the players to cooperate in the execution of any sponsorship contracts that may be signed by the ACB or the Clubs / Sports Corporations as a result of this obligation *"deriving directly from the assignment of their image rights and that must be compatible with the individual rights of the players regarding their image as people and sportspeople in general"* (article 2.4 of Annex III of the Agreement).

b) Individual image rights: rights whose commercial exploitation corresponds exclusively and individually to the player, as long as they do not wear the official kit of the Club / Sports Corporation to which they belong, or any other clothing that could be confused with it (article 3 of Annex III of the Agreement).

Without prejudice to this exclusivity, in accordance with the principle of contractual good faith, the Agreement puts a limit on the use of this right of exploitation, stating that players must abstain from participating in the advertising of products that compete with other similar products sponsored by the ACB and its Clubs / Sports Corporations, and from promoting companies that carry out activities that directly compete with the companies that sponsor the ACB and its Clubs / Sports Corporations[26].

c) Television match broadcasting rights.

Finally, with regard to the exploitation of the audiovisual rights related to competitions[27], the Agreement determines that *"All income from the broadcasting or rebroadcasting (live or at a later time, total or partial) of basketball matches on television shall correspond exclusively to ACB, in accordance with the provisions of Act 10/1990, dated 15th October, regarding Sport."*

*4.2.3. Collective agreement for the activity of professional cycling (Official State Gazette number 79, Thursday 1st April, 2010).*

The current Collective Agreement for the activity of professional cycling, published by means of the Resolution of the General Directorate of Work, dated 17th March 2010 (Official State Gazette number 79, 1st April, 2010), appears to put an end to discussions regarding the legal nature of financial payments resulting from the exploitation of image rights from cycling. This discussion is due to the fact that preceding Collective Agreements regarding cycling did not expressly determine whether the remuneration of image rights was considered salary, as the article that listed the financial entries considered salary did not expressly include amounts deriving from image rights.

On the other hand, the current Collective agreement clarifies the status as salary of image rights, when it establishes in article 17 that *"The salary items that constitute the remuneration of a professional sportsperson are: monthly wages, image rights, extraordinary payments and engagement / signing bonus."*

Furthermore, in the following article 22, the Agreement contains a definition of image rights, stating that: *"This is the amount received by a racer for the assignment of their image rights for advertising purposes, the specific conditions of which are stipulated in an individual pact,"* in which the remuneration of the cyclist for this concept should be established.

In turn, in its Technical Regulations, the Royal Spanish Cycling Federation (RFEC) has regulated the clothing and advertising of cycling teams.

In conclusion, we should refer to the contract signed between the cyclist and the team in order to find out the extent of and the regime applicable to the assignment of image rights by a professional cyclist.

*4.2.4. Collective agreement for professional handball (Official State Gazette number 219, 13th September 2006).*

After stating (article 21.1) that *"The remuneration paid to professional handball players by the clubs shall be considered a salary for all purposes, except for items that are excluded from this consideration by current legislation,"* in the subsequent article 22, the Agreement lists the items that are always included in the salary received by players, which are:

*"Article 22. Salary items.*

*The salary items that constitute the remuneration of a professional handball player are: monthly wages, extraordinary ratifications, signing*

26 Furthermore, these limitations are qualified in articles 3.2 and 3.3 of Annex III of the Agreement, according to which:
*"The foregoing excludes players involved in advertising for companies that make sports clothing (except as provided for in paragraph 3.3.), when the contract was signed before the contract related to the ACB or its Clubs and Sports Corporations (or is a renewal) and with the sponsor of the annual match that may be organised by the ABP.*
*For the purposes of the provisions of the preceding paragraph, the incompatibility is limited to sponsors of the ACB that are directly linked to the competitions or events organised by this entity.*
*Furthermore, if in the future the ACB decides to unify the sports clothing of the teams, the incompatibility shall also cover the company that is exclusively granted this assignment.*
*3.3 With regard to sports shoes, this shall be regulated by the agreement reached by the players and their Clubs / Sports Corporations, according to the provisions of annex I of the sector's second Collective Agreement (standard contract)."*

*bonuses, special bonuses, match bonuses and (if applicable), Image exploitation rights."*

Therefore, in this case, the regulations envisaged by Collective agreement are only concerned with establishing that the amounts that the handball players receive for the exploitation of their image rights shall be considered a *salary*, without establishing a regime for the exploitation of these rights, which is therefore left outside of the Agreement and, in accordance with the provisions of the aforementioned article 7.3 of Royal Decree 1006/1985, shall be as the parties determine contractually.

### 4.3. Some considerations regarding the assignment of professional sportspeople to the National Selections

A particularity of the aforementioned legal regime is in cases of the assignment of sportspeople to the Spanish national selection for their participation in or preparation for international competitions. In these cases, there is an essential difference with regard to the legal relationships described up until now: the players that are taken on by the national team do not sign any type of work contract with the corresponding sports Federation and therefore, between them (the national selection and the players taken on) there cannot be an employment relationship[28]. This means that the regime described above cannot be applied.

Due to these circumstances, in the case of participation of sportspeople in the Spanish national selection, the legal formula used is based on a type of *forced free expropriation* (uncompensated). In this sense, the assignment of image rights in this case is carried out as follows:

- The player cedes part of their image rights to the employing Club / Sports Corporation through the corresponding work contract.
- In turn, in accordance with Act 10/1990, dated 15TH October, regarding Sport (hereinafter, "The Sport Act") and in accordance with the Articles of Association of the different Sports Federations, the clubs are obliged to assign their players to the national selection *for free.*

Although it is true that this obligation to assign their players can be found in article 29.1 of the Sport Act (*"Sports Corporations and other sports clubs, in order to form the national selection, must provide the members of their sports teams to the corresponding Spanish Federation in the conditions that shall be determined"*), on the other hand, the free nature of this assignment does not have any legal justification. The only thing that the Act says in this regard is that clubs must cede players to the national selection, but in no case does it state that this must be for free.

However, the fact is that the various Spanish Sports Federations were quick to establish the free nature of this assignment. In this sense, for example, the General Regulations of the Royal Spanish Football Association (RFEF) (July 2009 Version), after stating that participation in the national selection is *"a special honour and an important duty"* (article 327.1), states that *"Clubs are obliged to provide their cooperation and installations and to assign, without the right to any payment, any of their team's players that are asked for"* (article 327.2).

Therefore some doctrines consider this obligation of free assignment of players as *expropriation* and perhaps unconstitutional, as article 33.3. of the Spanish Constitution declares that *"Nobody may be deprived of their property or rights without just cause related to public or social interest, by means of the corresponding compensation and in accordance with the provisions of the Act."* In this specific case, although it is true that this compulsory assignment does have a legal justification, as it is required by the Sport Act; in contrast to the provisions of the Spanish Constitution, it does not envisage any compensation that could legitimise the sacrifice of the Club / Sports Corporation, i.e. the compulsory assignment of their players. Although it is true that the Act does not require that this be free of charge, in practice, as we have seen, the Sports Federations have taken it upon themselves to demand that it be free of charge[29].

In any case, without wishing to go into legal arguments, it seems reasonable to think that if a club is paying for the exploitation of the image rights of a player (either through their work contract or through contracts for the assignment of image rights), the Sports Federation that demands this player and therefore exploits and profits from the commercialisation of their image, should pay some type of compensation to the club that is the holder of these image rights. However, right now, given the current legal regime, Clubs / Sports Corporations cannot refuse to assign their players to the National Selections or refuse to allow the different Federations from exploiting their images within the framework of the sports competitions in which they participate.

## 5. The individual commercialisation of image rights.

Having analysed the regulations agreed on in the different Collective Agreements in accordance with the provisions of article 7.3 of Royal Decree 1006/1985, which in most cases is completely insufficient, it appears appropriate to highlight (without providing an exhaustive list) the main regulations governing image rights that, in practice, exist within the scope of professional sport.

This list does not include the assignment of collective image rights, which is normally carried out through work contracts in order to achieve a type of communion between the image of the company, the employing Club / Sports Corporation and the team's players (and trainers, coaches, etc), so that the sum of all of the members of the team and the team's trademark (sporting history, shields, tradition, symbols, etc.) can be exploited collectively (shirts, team photo, etc.). And this is not included in this section as, as we have explained, this assignment is inherent to sporting activity as otherwise, if it was necessary to obtain the consent of all of the participants of the sports event, the system would not work.

Focussing on the individual commercialisation of these rights, it is no secret that the different ways in which teams and players have arranged the exploitation of their image rights is due to the wish of the parties to reduce the amount of tax applicable to the income of the professional sportspeople, as we shall look at in the corresponding section[30]. But this should not lead us to think that this is the case for all professional sportspeople, as only some of them have the fame necessary to generate large amounts of profit by exploiting their image rights. And generally these sportspeople are the most well known and those that the world's most important teams pay the highest salaries (with the resulting tax issues).

In any case, regardless of the specific formula used for the assignment of rights; in order to avoid contingencies and controversies during the exploitation of image rights (which can easily occur when a sportsperson cedes some of their rights to a company and others to a Club / Sports Corporation, and there are conflicts between the two grantees of the rights) it is essential that the contract for the assignment of image rights that a player signs expressly states:

1. The specific scope of the assignment of their rights, i.e. which specific powers are assigned and which parts of their image rights are reserved for individual exploitation by the sportsperson.
2. Whether this assignment of image rights is exclusive or not.
3. The form of remuneration (this may consist in one part that is fixed and another part that is variable, depending on the results of this exploitation).

27 Regarding which, we repeat the statement made in the preceding footnote number 17.

28 This link has been defined by the Court of Justice of the European Communities (Decision dated 11th April 2000) as an autonomous link of a financial nature between the sportsperson and the Federation.

29 Compensation is only envisaged when the player demanded suffers, for example, some type of injury that prevents them from subsequently providing their services to the Club / Sports Corporation that has assigned them (this compensation, therefore, has nothing to do with that envisaged by the Spanish Constitution for cases of forced expropriation). In this sense, for example, article 327.2 of the aforementioned General Regulations of the Royal Spanish Football Association (RFEF), after requiring the free assignment of players to the national selection, states that *"Footballers called to any of the National Selections must be insured by the RFEF, at the expense of the latter, for the whole period during which they are under the discipline of the National Selections, and the clubs must always be the beneficiaries of this insurance."*

*Essentially,* the main legal formulas used nowadays for the assignment of the image rights of professional sportspeople are:

5.1. Assignment of image rights through third parties (work and commercial contracts).

This formula, which is possibly the most commonly used for team sport, takes the form of a double contract with the Club / Sports Corporation:

- On the one hand, the player signs a work contract with the club that employs them, through which they are paid for their professional services.
- On the other hand, the player signs a contract for the assignment of image rights with a third party (normally a company).
- In turn, this third party assigns these rights to the employing Club / Sports Corporation, by virtue of a contract for the assignment of image rights of a commercial nature.

This system benefits both the sportsperson and the sporting entity that hires them, as: (a) the professional negotiates their salary in "net" amounts, (b) the Club / Sports Corporation reduces the tax payable on the amounts paid to the sportsperson.

Sometimes clubs and sportspeople, when using the aforementioned contractual system (which is completely legal) have gone too far when applying it and have committed excesses (simulation of contracts, assignment of rights without a price or at a ridiculously low price, etc.) which have led to problems with the Spanish Tax Authorities. An example is the judgement passed by the Supreme Court[31] on 1st July 2008, regarding a particular case in which the implementation of this system was actually a contractual simulation, in which the High Court stated that:

*"The Club benefits from the use of nominee companies. The sportspeople, particularly foreigners, negotiate their overall remuneration with the clubs in net terms, i.e. after tax, which means that they demand higher payment if a withholding is applied; in short, they transfer the tax charge for withholdings to the Club. If, by means of nominee mechanisms, this withholding can be avoided it is obvious that this benefits the Club.*

*Apart from this circumstantial evidence, there are specific cases that immediately demonstrate the Club's participation in the creation and use of nominee companies:*

*This observation is important as it proves that the Club is not unaware of the simulating mechanism created and that its statements regarding its lack of knowledge of these relationships is not credible."*

Another variation of this legal formula is that: (1) the sportsperson signs a work contract with Club / Sports Corporation; (2) in turn, the sportsperson assigns their image rights to a company; on the other hand, (3) the company granted the rights assigns their exploitation to another third party (normally a television channel or a producer) so that the latter can exploit them in exchange for the corresponding financial remuneration.

With regard to the problems that may arise from this contractual formula (apart from tax problems, which shall be analysed in the corresponding section) it has been said, and in theory it is possible (although in practice it is not very common) for there to be a disassociation or difference between the period of validity of the work contract and the validity of the contract for the assignment of image rights by the third party to the club, so that, during the period of validity of the contract for the assignment of image rights, the player may have been transferred to a new Club / Sports Corporation and therefore their work contract has been rescinded.

Apart from the fact that, as far as we know, in practice this has proved to be very uncommon, we do not share the opinion of some authors that state that this possible contractual disassociation may make it impossible to exercise the power of unilateral resolution of a work contract that employment legislation attributes to professional sportspeople (article 13.i) of Royal Decree 1006/1985). And we do not share this opinion[32] because, this being the case, we believe that the sportsperson could also renounce the contract for the assignment of image rights, as this is, as we have seen, a power conferred by the Second article, section Three, of Organic Law 1/1982. This is without prejudice to any compensation payments that may apply in this case.

5.2. Assignment to the employing Club / Sports Corporation of all of the image rights of the professional sportspeople.

Apart from the aforementioned formula, since the beginning of the 2000/2001 season, some Clubs / Sports Corporations (mostly football) have started to directly exploit all of the image rights of some of the players in their ranks. This formula, rather than a system for the assignment of rights, is actually more of a business model that is normally used by more important football teams with higher incomes. In the case of Spain, we could even call this model the "Florentino model" as it was the president of Real Madrid, Florentino Pérez, who made it famous in Spain by implementing it at Real Madrid CF.

As explained by Ferran Soriano, the former Financial Vice-president of FC Barcelona, from the point of view of this model, the profit and loss account of a football club looks more like that of a global entertainment company such as *Walt Disney* or *Warner Bros*, which have content in the form of characters (Mickey Mouse or Bugs Bunny, for example) - they make films, arrange merchandising and operate theme parks. In the case of football the characters are the players, the films are the 90 minute television programmes, the merchandising are shirts, caps and various objects and lastly, the theme parks are the sports installations rented to companies.

This means that the teams that use this model consider footballers (or rather, certain footballers) as financial investments and expect them not so much to score goals, but rather to result in a fast increase to the Club's income, thanks to the exploitation of their image rights.

In this way and in contrast to the normal procedure during the hiring of sportspeople (who normally assign the collective aspect of their image rights, reserving those of an individual nature for themselves), here the assignment of image rights is almost complete and the Clubs / Sports Corporations exploit most aspects of the image rights of their players. By doing so, the Clubs / Sports Corporations try to offset the high signing bonuses of their players, receiving in exchange any remuneration that they generate, directly or indirectly, through the commercialisation of their individual and collective images.

Obviously, as explained by Palomar Olmeda y Descalzo González[33], *"the system is real and acceptable if it is selective and focussed on footballers that, due to their importance or social or sporting relevance, really have the capacity to generate an image that can be commercialised and this, obviously, is not the case with all of them."*

Although nothing prevents the total assignment of these rights being carried out through the work contract between the player and the Club / Sports Corporation (in which case this shall be considered an employment agreement and the remuneration received by the player for this concept shall definitely be considered a *salary*), this assignment is normally carried out by means of a double contract system, through an exclusive contract for the assignment of image rights that the sportsperson signs with the Club / Sports Corporation that employs them.

This assignment contract, as it is an unusual type of contract, shall be regulated by the provisions of the Civil Code for contracts and obligations and, in this regard, must set out in detail the scope of the assignment of the image rights, defining in detail the content of the consent provided by the sportsperson for the commercialisation of their image rights.

30 See Section 5 of this study.

31 Decision of the Supreme Court (Administrative Disputes Chamber, Section Two), dated 1st July 2008.

32 Furthermore, as explained by Pina Sánchez and Ferrero Muñoz, it is possible to *"cite certain Civil Law judgements, such as a decision of the Provincial Court of Valencia* [Decision of the Provincial Court of Valencia (Seventh Section) dated 29th January 1999], *which determined that contracts for the assignment of rights cannot exist in isolation from work contracts, then their content means that they are inextricably linked. This unity exists when the image is assigned as a consequence of a player having joined the team of the hiring company or club and this assignment cannot continue to exist when the player joins the team of another Club."* (Pina Sánchez, Carolina and Ferrero Muñoz, Javier; *"The commercialisation of image in professional sport,"* in the joint work by Various Authors: Professional Sport, directed by Palomar Olmeda, Publisher: Bosch, Barcelona, 2009.

### 6. The taxing of image rights.

These operations related to the assignment of image rights shall generate income subject to taxation by the Personal Income Tax (IRPF) or by the Non-Residents' Income Tax (IRNR), depending on whether the individual that obtains the income is considered a tax resident in Spain or a non-resident.

Income from the assignment of image rights shall be considered working income from investments or economic activities. Furthermore, Act 35/2006, dated 28th November, regarding IRPF (the IRPF Act), envisages a system of attribution of income in accordance with a special regime created in order to avoid the use of formulas for tax evasion by taxpayers subject to IRPF, by tracking the income from the assignment of an individual's own image (almost always sportspeople) with which there is a employment relationship.

As noted in the preceding paragraphs, the tax problem related to the assignment of image rights was a consequence of the search, mainly by football clubs, for alternative remuneration formulas that reduced the tax burden applicable to the hiring of elite sportspeople. This practice became more widespread during the period in which the hiring of players started to represent a large monetary and tax cost for Clubs, given the common practice of both resident sportspeople and foreigners of negotiating their remuneration in net amounts, i.e. tax free.

Remuneration for the services provided by players to clubs is considered to be of an employment nature and is therefore taxed as working income at marginal rates and a large amount is withheld. Consequently, the assignment of image rights to nominee companies that carry out their exploitation represents, as stated above, an option that makes it possible to obtain income and to greatly reduce the tax burden, both for the players and for the clubs.

However, the classification of the income generated by this type of assignment of image rights has generated enormous difficulties (both legal and tax-related). Due to these difficulties and evasive practices related to image rights, Act 13/1996 implemented a tax regime, as a Solomonic solution for resident sportspeople with an employment relationship that is based on the 85/15 rule, which shall be discussed further below.

#### 6.1. Taxation on income from the assignment of image rights obtained by residents subject to Personal Income Tax (IRPF)

Individuals with tax residence in Spain that obtain income from the assignment of their image rights (normally sportspeople) shall pay tax on their worldwide income in Spain. As an exception to this rule, non-residents that, due to their transfer to Spain and even if they become Spanish tax residents, may choose instead to pay Income Tax for Non-Residents (IRNR), as non-residents, during the year in which they obtain Spanish tax residence and the following five years, if they comply with the requirements envisaged in the IRPF Act.

The type of income that is obtained from the assignment of image rights depends on the conditions in which the assignment is carried out and the type of income that is obtained by the person that assigns them for the conduction of the activities that enable them to obtain income from the assignment of their image. Taxpayers that obtain income from the assignment of their image rights are almost always sportspeople. Income for the assignment of one's own image can be obtained as a worker, businessperson or due to the mere obtainment of income from an investment or, alternatively, the special tax system may apply. Below is a brief description of these four types of income:

*a) Obtainment of income from work*

Sportspeople linked to a sports club obtain income that fits within the category of income from work. Within the range of types of income that they can obtain due to their status as workers, such as wages, bonuses, incentives, extraordinary payments, etc; players may also obtain income from the assignment of their own image. The aforementioned Royal Decree 1006/1985 expressly envisaged in article 7.3. that the remuneration of the work of sportspeople can include income from the commercial exploitation of their image rights.

This classification, which appears irrefutable when the assignment of their image to the club is inherent to and a consequence of the services provided by a sportsperson within the framework of a work contract, is more doubtful, at least in theory, when the IRPF Act classifies the assignment of image rights in its article 25.4.d) as income *from equity investments*. Therefore it appears that there are alternatives to the taxation of these rights as income from work. If classified as working income, the income from the assignment of image rights is subject to taxation based on the general scale, at the highest rate, and is subject to the corresponding withholding.

The evolution of the tax treatment of image rights and the implementation of the 85/15 rule by the Act 13/1996, was a result of the need to give legal coverage to the treatment as working income of the income obtained from the assignment of image rights, given the widespread practice of Spanish clubs (that began in the 90s) of reducing the tax burden on the hiring of elite sportspeople by means of the assignment of image rights by them to nominee companies (normally non-resident), which greatly reduced the amount of tax payable, given the fact that the commercial exploitation was carried out by the nominee company rather than the player.

The conflict between the Tax Authorities and the clubs has been resolved in an unsatisfactory manner by the Courts, as they have recognised the possibility that there may be an assignment of the rights to a nominee company[34] and that the income obtained by it from their exploitation are not included within the work remuneration obtained by the worker, but, in the formulas used during the years in conflict, prior to 1997 (year in which the Act 13/1996 entered into force) this alternative possibility of taxation is not allowed as it is argued that the contracts for the assignment of image rights were simulated with the sole purpose of reducing the tax burden for items that were previously included in the payroll of players[35].

In turn, the legislator reacted by introducing the 85/15 rule, so that it is permitted to receive income from the assignment of image rights as another type of income or via a nominee company, as long as these do not exceed 15% of the total compensation received from the club for the services provided by the player.

*b) Obtainment of income from economic operations*

This type of income is produced when the party assigning the image rights obtains income that is not related to an employment relationship, but rather resulting from an economic activity for which it has its own material and human resources to exploit. This is the case of sportspeople that carry out their activities in these conditions, such as tennis or golf players, that receive payments for their activities during

33 Palomar Olmeda, A. and Descalzo González, A., *work cited*, page 88.

34 A clear example of this express recognition is the distinction made by the Supreme Court in its decision dated 15th October 2009 (Appeal number 7150/2003):
*In order to resolve this situation there are three hypotheses: a) That the player, due to their working relationship, assigns their image rights to the Club expressly. b) That the contract regulating the working relationship does not contain any stipulations regarding image rights. c) That the player expressly reserves these image rights. According to the first two hypotheses, either due to agreement between the parties or due to the application of the aforementioned current legislation (Decree 1006/85 and the 1992 Collective Agreement for footballers) the nature of this income is that of "income from personal work" and is subject, therefore, to withholding. According to the third hypothesis (the reservation of the "image rights" of their holder), the nature of the income and whether they are subject to withholding depends on their type of exploitation (always with regard to the legislation in force when the events occurred).*

35 In our opinion, a much better explanation of these conclusions is provided by Ortiz Calle, E. ("The income deriving from the assignment of the image rights of professional sportspeople: their controversial Legal and Tax Classification," Sport and Entertainment Law Magazine, number 26, 2009, pages 113 to 126), when he states that, "regarding the "artificial nature" of the practice, the only relevant legal and financial effect of this double assignment is the reduction of the tax cost of the operation, as it avoids a taxable transaction with the resulting reduction in the tax burden. And the fact is that there is no valid financial motive (according to the business purpose test) that rationally justifies this triangular relationship, as the commercial exploitation of the image rights is carried out by the Club at which the player provides their services and therefore the prior assignment of these rights by the footballer to the nominee company is unnecessary; i.e. the behaviour does not have any business purpose other than to make a tax saving."

their participation in sports events, trophies, etc, as well as (particularly in the case of elite sportspeople) for the assignment of their image rights.

In this case, it can be more easily stated that income from the assignment of one's own image constitutes income from activity rather than equity investments, as article 25.4.d) of the IRPF Act specifically excludes from the concept of equity investments income from assignments obtained within the scope of an economic activity. There is economic activity when the right to one's own image is exploited by its holder, at their own cost and risk, and they have the resources to obtain the maximum possible income from its exploitation.

*c) Income from investments*

In accordance with the aforementioned article 25.4.d) of the IRPF Act, income from the assignment of the right to exploit a person's image or consent or authorisation for its use generate income from investments.

This type of income arises when the holder of the image rights assigns them to a third party that carries out their exploitation in return for payment. Obviously, this is the case as long as this assignment is not carried out within the framework of a work activity or an economic exploitation, as explained previously.

It should be highlighted that, due to the application of the rules for the determination of the tax base of IRPF set out in articles 45 and 46 of the IRPF Act, income from investments related to the assignment of image rights are included in the general tax base rather than the savings tax base and are likely to be taxed at the marginal rate (43%) rather than the reduced rate applicable to savings (19%).

*d) Special tax regime for the taxation of income from the assignment of image rights. The 85/15 rule.*

This special regime was introduced by Act 13/1996, dated 30th December, *regarding Tax, Administrative and Social Measures,* as a reaction by the legislator to the aforementioned practice of interposing a company between the club and the player and ceding it the image rights, in order to substantially reduce the amount of taxation, so that part of the income that the worker should have received as working income was received by the nominee company. This resulted in a reduction of the sportsperson's working income and the corresponding withholding, transferring the taxation of part of their remuneration to a company (resident or non resident) that paid substantially less tax and the player only had to pay tax again if they obtained income from the nominee company, but in this case the tax was paid as income from investments, in the form of dividends or similar items.

Given the proliferation of these practices, the Administration reacted, on the one hand, by inspecting the clubs and classifying amounts obtained by the company ceded the exploitation of the sportsperson's image as the sportsperson's *working income.* The final argument used by the inspection to reach this conclusion was that the whole process of assignment of rights was a simulation, as in reality what was being paid to the sportsperson was remuneration for the assignment of image rights, which was previously received as a salary. This criteria has been confirmed by various decisions of the Supreme Court such as those dated 25TH June 2008, 1ST and 10TH July 2008[36], as well as the more recent decision dated 15TH October 2009. On the other hand, the legislator introduced, with effect from 1ST January 1997 onwards, the special tax regime to prevent these practices and this regime has stayed almost unchanged up to the current date. It is currently set out in article 92 of the IRPF Act and applies when:

1. The worker (the player) has assigned their right to the exploitation of their image or has consented to or authorised its use by another person or entity (resident or non resident). For these purposes, it is irrelevant whether the assignment, consent or authorisation has taken place when the individual was not a taxpayer.
2. The player provides their services to a person or entity within the scope of an employment relationship (the Club).
3. The person or entity (the Club) with which the taxpayer has an employment relationship, or any other person or entity linked to them in accordance with the terms of article 16 of the Consolidated Text of the Corporation Tax Law; has obtained, by means of arranged acts with resident or non-resident persons or entities, the assignment of the right to the exploitation of (or consent or authorisation for the use of) the image of the individual.
4. The taxation shall not apply when the working income obtained during the tax period by the player within the framework of the employment relationship are not less than 85% of the sum of the aforementioned income, plus the total payment made by the club for the assignment of image rights[37].

In practice, with this regulation the legislator is allowing the assignment of image rights to companies, even if they are in territories with low or no taxation but, in turn, limiting the amount that can be ceded to 15% of the sum of the working income and that obtained from the assignment of the image rights. If this limit is exceeded, the taxation rule applies.

If the taxation of income applies for remuneration in cash or in kind, the entity with which the player has an employment relationship (the Club) must make a pre-payment for the value of the income subject to taxation (currently at the rate of 19%)[38].

The amount taxed shall be the value of the payment received by the entity granted the assignment of image rights, in cash or in kind, plus the value of the pre-payment, minus the value of the payment received by the player for the assignment of image rights to the entity granted the assignment, as long as it was obtained during a tax period in which the player was a Spanish tax resident.

The taxation of income shall be applied to the general tax base of the player during the tax period in which it is received. If it is obtained in a foreign currency, the exchange rate valid on the date of payment or receipt of the income shall apply.

There are two types of temporary taxation that are subject to controversy: (i) In the case of income received by non-residents prior to the time at which the sportsperson was a Spanish resident, the taxation shall be carried out during the first tax period in which the player is considered a resident. Another controversial case occurs (ii) if the payments are made once the player has ceased to be a resident - these are allocated to the last business year in which the player was a resident. Consequently, the time limits of the taxation rules are extended enormously and their practical application is complicated when there have been assignments before or after the obtainment or loss of residency, such as in cases in which the player was resident, stopped being so, and then recovered tax residency after a period of time.

When appropriate, the tax allocation shall deduct from the player's Personal Income Tax (IRPF) tax liability, apart from the pre-payments, (i) any income tax similar to Spanish income tax that has been paid by the entity granted the assignment of the rights corresponding to the income attributed, (ii) the IRPF or Corporation Tax paid in Spain by the first person or entity granted the assignment, that corresponds to the income subject to taxation, (iii) the amount paid for the distribution of dividends by the first entity granted the assignment, (iv) the tax paid in Spain by non-resident players for the payment obtained for the first assignment of the right to exploit their image and (v) any tax that is similar to our IRPF paid abroad for the first assignment of the right to exploit their image. In no case shall tax paid in countries or territories considered tax havens be considered deductible.

36 For more details about the arguments used in these decisions see the article by Martinez Pico J.G., "Assignment of the image rights of footballers: tax classification of the remuneration paid by the Club to the companies ceded the rights as working income: withholdings." Sport and Entertainment Law Magazine, issue 25 (2009), pages 61-70.

37 The rule does not specify whether the amounts that should be considered for the calculation of the 85/15 are gross or net. The most common interpretation is that they are gross, excluding withholdings and tax pre-payments (Quintana Ferrer, Esteban, Taxation of Sport, Published by Bosch, 2008, page 210).

38 It is surprising that this pre-payment must be made by the Club on the player's behalf (and they can deduct it in their tax declaration), whilst the Club does not have any way to offset (pass on) or reduce (deduct) this tax burden. This pre-payment has been harshly criticised by certain doctrines.

The application of the regime is carried out without prejudice to the provisions of the international treaties and conventions signed by Spain (Double Taxation Agreements, DTA). When the entity granted the assignment is a resident of a country with which Spain has signed a DTA, the rules established in the DTA shall have priority.

In this respect, according to article 17 of the OECD Model Tax Convention (OETC MCD), the income of artists and sportspeople is taxed in the State in which their activities are carried out. Furthermore, Article 17 includes an anti tax avoidance clause in section 2, which envisages that, when nominee companies are used by sportspeople subject to the employment regime, income shall not pay tax in the state of residence of the entity granted the assignment, but rather in the state in which the activities are carried out. This anti tax avoidance clause is included in most DTA's signed by Spain, the most well known exception being the DTA signed with Holland.

Despite this regime, other similar forms have appeared that try to avoid its application, mainly by means of the assignment of celebrity rights[39] or registration rights[40]. Another alternative used to avoid the tax regime is to involve other entities, such as sponsors or television channels[41] that break the rigid scheme envisaged by the special regime.

6.2. Taxation of the assignment of image rights obtained by non-residents subject to Income Tax for Non-Residents (IRNR)

Sportspeople that are not considered Spanish tax residents shall pay tax as non-residents, along with those that, although they are subject to Personal Income Tax (IRPF), choose to opt for the special regime of paying tax as Non Residents envisaged in Article 93 of the IRPF Act, also known as the tax regime for impatriates. In the event that there is a DTA with the country of residence, this shall be applied in order to determine the taxation in Spain, and if there is none, the IRNR Act shall apply.

*a) Taxation in accordance with a Double Taxation Agreement (DTA)*

The obtainment of income from the assignment of image rights may result in taxation in Spain. If there is a DTA in force, this shall have priority. The aforementioned article 17 of the OETC MCD and the anti tax avoidance clause contained in Article 17.2 may prevent the assignment of image rights to nominee companies from resulting in a lack of taxation in the State in which the sportsperson provides their services or carries out their activities. In DTAs that do not contain this clause, the taxation shall only apply in the state of residence of the entity granted the assignment. The only other way of taxing this income is to try to classify the income from the assignment of an individual's own image as royalties and apply article 12 of the OETC MCD in which, in turn, Spain has established the corresponding reservations regarding the criteria of taxation exclusively in the State of the beneficiary in order to be able to tax income from royalties in the source State (Spain).

*b) Taxation in the Absence of a DTA*

In the absence of a DTA the provisions contained in Article 13.1.f.3 of the Income Tax for Non-Residents (IRNR) Act shall apply, which states that royalties paid by persons or entities resident in Spanish territory, or by permanent establishments located within or that use Spanish territory, considering royalties, among other items, personal rights that can be assigned, such as image rights.

In this regard, there may be difficulties when taxing income received by non-residents from entities that are also non-residents. In practice, this occurs in the case of income received by residents that opt for the special tax regime for impatriates. These sportspeople, despite being Spanish residents, are not taxed on their worldwide income, but rather their taxable income is determined in accordance with the rules for non-residents. I.e. when their income is taxed in Spain in accordance with the rules of the IRNR[42].

Consequently, it can be seen that income for the assignment of image rights not paid by companies or permanent establishments situated in Spanish territory is only considered to be obtained in Spain if the income is considered to be obtained or used in Spain. This criteria regarding use can generate difficulties in terms of its practical application when the "use" or actual exploitation of the image rights, which is likely to generate income in any part of the world, takes place not only in Spain but in any other country. In these cases, the most reasonable action is to apply a percentage or fixed fee to the total received in order to determine which income from the assignment of image rights is used in Spain and, therefore, is subject to taxation in Spain[43] and which part is received abroad and not subject to taxation

39 As with the conflicts due to the assignment of image rights outside of employment relationships, the Administration argues, confirmed by the Resolution of the Central Administrative Economic Court dated 20th November 2003, that it is necessary to take into account their true legal nature and, although these operations are classified as transfers of celebrity rights, what they really represent is the assignment of image rights. This is also the essence of the Decision of the National High Court dated 23rd April 2009.

40 See Resolution of the Central Administrative Economic Court dated 15th June 2005.

41 There have been cases of television channels being used as the nominee company between the Club and the players so that the latter makes the payment of the image rights directly to the companies granted the rights of the players and therefore, in accordance with its literal text, it is not possible to apply the 85/15 rule.

42 According to the text of article 93 of the IRPF Act due to the last provision (13.1) of Act 26/2009, dated 23rd December, effective from 1st January 2010, the application of the tax regime for impatriates is limited to workers whose remuneration envisaged deriving from their work contracts in each of the tax periods in which this special regime is applied does not exceed 600,000 Euros per year.

43 Note that the tax regime for impatriates, article 93 of the IRPF Act, does not allow the deduction from the resulting tax bill of amounts paid in other States for the obtainment of income from the assignment of image rights.

## Robert Siekmann Newly Appointed Sports Law Chairholder in Rotterdam

On 1 August 2010, Dr Robert C.R. Siekmann, Director of the ASSER International Sports Law Centre, was appointed Professor of International and European Sports Law at the Faculty of Law of the Erasmus University Rotterdam.

The special Chair was established by a Foundation to which inter alia belong representatives of the Netherlands Olympic Committee, the Municipalities of The Hague and Rotterdam and the Province of Southern Holland. Both cities contribute essential financial support which makes it possible to create an extra PhD assistantship at the University in Rotterdam.

One of the core areas of the Chair's research programme concerns the study of legal aspects related to the organization of and participation in Olympic Games, European and World Championships and international club competitions.