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‘The Portrait of a Gentleman’[1] – The *Cruijff* Case

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In this contribution,[2] I would like to discuss portrait rights and their somewhat contrived relationship with copyright law using a landmark decision of the Dutch Supreme Court on the portrait of Johan Cruijff, one of the most famous footballers of all time.[3] Before doing so, I will briefly elaborate the object of copyright law, taking Bernt Hugenholtz’s PhD thesis on copyright in information and the concept of copyright work as my starting point. Using this thesis and some of my own complementary insights, I will show why sporting achievements fall beyond the scope of copyright law. This means that sports players must look for different ways of protecting the commercial value of the combination of their intellectual and physical performance, which in terms of value does not differ from performances that are protected by copyright. A perusal of the typical sport exploitation model leaves only one real option, i.e. to exploit the image of the person in the media (his or her ‘portrait’). This brings me to an analysis of privacy law as a property system intertwined with copyright law. Hugenholtz’s analysis is most useful in that respect. I will show that the Dutch Supreme Court’s ruling is but one step in the right direction: this ruling removed portrait rights from the copyright law context, where they do not belong, but in my view it still fell short of taking this to its final logical conclusion.

Finally, I will continue the line of viewing portraits as a type of ‘intellectual’ property through to the law of personal data in general (given that a portrait is a piece of personal data). That is complicated but not impossible. The analysis

1. With reference to the novel by Henry James.
2. English translation Nynke Hendriks, a former student of the Institute for Information Law.
3. Dutch Supreme Court 14 June 2013, *Nederlands Jurisprudentie* 2015, no. 112 with commentary by P. B. Hugenholtz. In these proceedings I acted as Cruijff’s lawyer. This may, of course, have influenced my comments in this article but rest assured that it does not detract from my argumentation.

of the 'intellectual' property of information is most useful in that respect. This is a task for the Institute for Information Law (IViR), which in my view should return to its roots, i.e. information.

On 24 November 1989, Bernt Hugenholtz obtained his doctorate from the University of Amsterdam with a PhD thesis titled *Copyright in Information*. I was one of his supervisors.[4] I will quote the conclusions of this thesis which I believe are still valid:

> According to one of the so-called maxims of copyright, information as such is outside the scope of copyright. The purpose of the study is to examine this maxim critically by applying the concept of information, as it has been developed in semiotics and information theory, to the doctrine of copyright law …The concept of information is a word too often used, but rarely properly understood by copyright scholars. Basically information can be defined as any message that reduces the uncertainty of its receiver. The amount of information communicated may be described as its 'surprise value'. Thus, information is, at first glance, a relative and subjective notion, dependent on the receiver's prior knowledge. However, by adding a standardized code (rules regarding possible messages) information becomes a more or less objective concept. Drawing from semiotics (the theory of signs) two aspects of information are distinguished. The syntactical aspect regards the way in which a message (e.g. letters or words) is configured following the rules by the applicable language system. The semantic aspect deals with the relationship between the message and the object to which it refers; semantical information concerns the 'meaning' of the message …

Freedom of choice exercised by the author is an oft-used standard to determine whether something is an original work. On this freedom, Hugenholtz observes:

> In practice the chooser's level of freedom is determined by the applicable 'code'. This code is different in each sector of the information industry. Thus, in the world of art a higher level of creative freedom is accepted than in the world of science. Therefore, in the latter world copyright protection is more difficult to obtain than in the former. *Indeed the borderline between unprotected 'ideas' and protected 'expression' is ultimately drawn on the basis of various social, cultural, economic and technological considerations. In other words, defining the subject matter of copyright is, to a large extent, a question of information policy. … Applying information theory to copyright law adds to the impression that the idea/expression dichotomy is a fallacy. No natural borderlines divide the domain of copyright and the public domain. The idea/expression dichotomy is, in fact, no more than a slogan that not all information is to be protected by copyright.*…With respect to news reports, it becomes clear that the copyright system is not at all suitable for the protection of this type of information. The essence of a news report, its 'news value', does not fit well into the scheme of literary property. [Emphasis added]

4. The other supervisor was Feer Verkade.

So much for Hugenholtz.[5] In other words, he rightly claims it is a myth to assume that the 'essence' of a work determines whether it is a copyrighted work: it is all information and it is the legal context that determines whether a piece of 'information' (either due to its 'content' or its 'form') falls within the scope of protection of copyright law or not. Hugenholtz also rightly refers to social and economic criteria that help to determine whether something is a copyrighted work, although the economic factors fall beyond the scope of his analysis. He refers to the qualification of whether something is a copyright-protected work as 'information politics'. Let's have a brief look at that information politics. Goffman, the US sociologist, developed the theory of the 'frame' to identify the significance of social facts. Nathalie Heinich, the French art sociologist, elaborated on this in *Le Cadre-Analyse d'Erving Goffman*.[6] Briefly put, the 'frame' decides which normative significance we attach to a societal fact. She uses the example, among others, of the Bulgarian artist Christo, known for wrapping famous buildings.[7] In 1985 he wrapped the Pont Neuf in Paris. The bridge thus acquired a different frame and society also began to behave differently towards this public structure. It was a traffic hub (a car route crossing the Seine) with a historical context (architecture from a certain period). By intervening in the political context (Christo received help from the French state and city authorities) and the social context (he deprived the bridge of its transport function), the object lost its societal frame to an artistic frame. The stalls around the bridge no longer sold models of the bridge as souvenirs but instead put 'adaptations' in the form of wrapped chairs in front of the stalls with a notice saying 'wrapped by me'. The wrapping also had legal consequences. The Pont Neuf bridge was no longer a public object that you could freely reproduce as a photo or souvenir because it had become a work of art that Christo had to exploit exclusively in order to cover the costs (the costly project was entirely self-funded by pre- and post-merchandising). There is even a judgment from the Paris court that the Pont Neuf was a copyrighted work for the four weeks during which it was wrapped, and could therefore not be freely photographed by tourists. At the time the 'real' Pont Neuf was still a popular spot for photos of loved ones standing in front of the railings, it has now become a favourite background for selfies.

In short: the social frame determines whether copyright law applies to what I will refer to as an 'information configuration'. There are also social frames in which information either has to be 'free' or 'secret'. The political frame is the best-known example of this. Public information is free because it is a means to gain power. Secret information is a means to stay in power. Democracy therefore,

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5. Hugenholtz did not apply his analysis to moral rights. You can apply the information theory to those rights too. They are intended to protect the authenticity and reliability of disseminated information. They contribute to what Luciano Floridi called the 'triple A' principles of information ethics: 'accuracy', 'accountability' and 'accessibility': Luciano Floridi, *Information. A very short introduction* (Oxford University Press, Oxford, 2010), 7–8. There are also moral sides to this, but I would rather rank those with privacy. I will leave that subject undiscussed in the rest of this article.
6. CNRS Éditions, Paris, 2020.
7. See my '*Christo de inpakker*' [in Dutch], http://www.egbertdommering.nl/?p = 1348.

seeks to closely monitor those information flows. I am aware that this is an extremely succint recap of the French Revolution.[8]

From an economic perspective, it is worth noting that information derives its value from the fact that it is shared with many parties (the 'bestseller'): information often gains in value when it is disseminated widely, just as a network grows in value when more people join it. We refer to this as the network effect of information. This was the subject of extensive analysis in a book by Shapiro, the economist who as a consultant to Google helped develop their business model which exploits the network effect of search engines.[9] A Law Lord who had to decide on the meaning of the Queen Anne Act in eighteenth century England was already well aware of this: 'Knowledge has no value for the lonely proprietor: to enjoy it, it needs to be communicated'.[10] In other words, so-called exclusivity, that pillar of copyright law, is without value in economic terms.[11] If authors want to profit from it, they must ensure that there is an identifiable link between this use (the network effect) and their own 'creation'. However, to get the network effect it may also be necessary for this exclusive information to be freely available in a certain form during a certain period. An author can moreover increase the network effect by 'name and fame'. We are now getting closer to portrait rights and sport. Before embarking on that discussion, I will first analyse the 'frame' of football and copyright law.

Copyright law has consistently excluded sports from its frame. There were good and not so good reasons for this. The not so good reason is that the essence of individual sports performances would not be eligible for copyright protection or 'related' rights. I discussed this problem at great length in my 1986 Dutch article '*Vormen handelingen een werk?*' ('Can human acts be a work of copyright ?') . There are no valid arguments for not regarding a sports performance as a work. The better argument is that there are practical reasons, mainly to do with the conceptual unpredictability and ephemerality of the sporting act.[12] At the time I concluded as follows: 'We will have to count the slap in the face that the futurist Marinetti received [at a performance] at the Teatro Constanzi, Cruijff's unforgettable dribble in the European Cup Winners' Cup Final and the dramatic d1–b3 by Euwe in the fourth move in the second game in the match with Aljechin in 1935 as the world as it was then and history as it is now, and not as the world

8. I would like to refer interested parties to chapters 12–16 of my book *Het verschil van mening. Geschiedenis van een verkeerd begrepen idee* [in Dutch] (Prometheus, Amsterdam, 2016).
9. Carl. Shapiro and Hal R. Varian, *Information Rules, A Strategic Guide to the Network Economy* (Harvard Business School Press, Boston/Massachusetts, 1999).
10. L. Ray Patterson and Stanley W. Lindberg, *The Nature of Copyright* (The University of Georgia Press, Athens/London, 1991), quote on p. 41. He quoted Flaccus, the Roman satirist, who ascribed it to Socrates: '*Scire tuum nihil est, nisi te scire hoc sciat alter.*'
11. An inventor has the choice to keep the invention secret which complicates the sale of its application, or to apply for a patent and make the invention public but the profits of the sale exclusive for a fixed period. So the patent right is a compromise between exclusivity and network effect.
12. Ephemerality was a reason for the CJEU not to class an odour as a trade mark, CJEU 12 December 2012, case C-273/00, ECLI:EU:C:2002:748, *Ralf Sieckmann v. Deutsches Patent- und Markenamt*.

of copyright law.'[13] With the knowledge we now have about art performances, I believe that Marinetti's slap in the face would be the most likely candidate for entering the copyright frame.

Lacking copyright protection, football was exploited differently. Match performance was protected by what is also known as the '*droit de stade*': with its right of use, a football club could control access to the stadium and thus exploit the 'broadcasting rights' for TV, a million dollar business as the Olympic Games have taught us. The fame of the football player started to be expressed in substantial transfer payments and high salaries. When it comes to legal rights to their own performances however, football players were left empty-handed. The broadcasting rights to the match are held by the club via the exclusive right to use the sports grounds, to which they can control media access. The images of the performances are held by the media via copyrights to photo and film. Portrait rights have changed this to some extent, especially when it comes to a portrait *in combination with* sports performance. Let me therefore now turn to portrait rights.

Portrait rights were added to Dutch copyright law in an endeavour to regulate copyright on portrait photographs, i.e. the photographer's copyright. Legal scholars have therefore principally treated them as an appendix to copyright law. Portrait rights, however, have nothing to do with the photographer's copyright. On the contrary, in fact: a copyright in a portrait photo is the appendix to the image of a person, in particular if that person is a famous person. Different copyright statutes regulate the interplay between copyright and portrait rights differently. The Dutch Copyright Act (DCA) is unequivocal about the relationship between the photographer and the portrayed person: the photographer's copyright forms the basic position. The main rule is that the photographer may only disclose a commissioned portrait photo to the public with the consent of the person portrayed. The infamous Article 21 DCA, however, provides that portraits that were not commissioned may be disclosed to the public without consent, unless the person portrayed has a reasonable interest in opposing disclosure. For a long time this was the basis for the case law on portrait rights in the Netherlands.

The foundation for portrait rights must derive from privacy law rather than copyright law. Here too, portrait rights had an unpromising starting position. The fact is that the first generations of privacy law scholars usually dealt with privacy in the moral setting of the need to protect people's private lives. One would really need a Hugenholtz-type PhD thesis to place privacy law in the broader setting of the commercial exploitation functions of information relating to the person. As Bernt's former PhD supervisor I tried to do this, but I did not see a truly broad analysis emerging in legal scholarship.[14]

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13. Included in: Egbert Dommering, *De achtervolging van Prometheus* [in Dutch] (Otto Cramwinckel, Amsterdam, 2008), 223–231.
14. Egbert Dommering, *De Europese informatierechtsorde* [in Dutch] (DeLex, Amsterdam, 2019), 'Commerciële Privacy' pp. 202–217 [in Dutch], and 'Persoonsgegevens als (economisch) zelfbeschikkingsrecht', pp. 267–281 [in Dutch], both new versions of previous articles that I will draw on in what follows.

Just like in copyright law, one must first describe the piece of information to be 'identified' that can lead to the commercial exploitation of the huge network effects that evolve from celebrity. A portrait is a piece of personal data that has sufficient individual characteristics to serve as an object of property. A similar kind of personal data would be one's name.[15] In terms of information theory, 'portrait' and 'name' have sufficient syntactic and semantic characteristics. Once a portrait or a name becomes big, the similarity with a well-known trade mark is considerable. It becomes a *distinctive sign* in society and commercial transactions. A famous person's portrait and name (Elvis Presley, Madonna) become signs in the market (derived from the preceding private and public life of the now famous person) which not only serve to designate the person, but which can also be used to designate a whole range of related (merchandising) products. In the case of a sports person these are his or her sporting 'creations' related to his portrait and name. A lookalike imitating someone's portrait is essentially a form of passing off, similar to profiting from the reputation of a trade mark. Whether the lookalike infringes someone's portrait rights is therefore a non-issue in my opinion, given that the lookalike clearly benefits from a famous portrait. However, one should exempt the use of a lookalike as parody of a portrait, in essentially the same way as the parody exception in copyright law and trade mark law provide room for free humorous use.

A portrait that becomes a distinctive sign acquires what I refer to as a 'retro effect', by which the historical images of the at the time not yet famous person gain in value for the past, the present and the future. Hence, 'news value' no longer constitutes the essential characteristic of the portrait.

Commercially exploitable celebrity is also tied up with the 'free public domain' of news and historical events. Reporting of sports events and the role of individuals form part of it. The social event of the celebrity appearing in public is another example. As in copyright law, that public domain should be distinguished from subsequent commercial use aspects. The fact is that copyright law distinguishes between the freely reproducible news fact and the restricted right the media have to adopt news facts on the one hand, and the 'news performance' of the press and the historical discourse that is subject to a limited right to quote words/images on the other. Similar dividing lines will have to be used in portrait law. This means that the courts should apply the same critical rules they apply in copyright for quotation and newsreporting. The courts should be aware that the use of the famous portraits in publications increases the value of those publications; so they should apply a critical threshold for the re-use of portraits in so-called 'current', 'historical', 'biographical' and 'anthological' compilations. It is here that the 'retro effect' of valuation plays an important role. This insight is slow to get through to legal scholars and courts, as the Dutch Supreme Court's ruling in the *Cruijff* case shows.

15. The fingerprint has a similar distinctive character for distinguishing individuals, but in society is less suitable as a marker of distinction. It does have that identification function in identity documents under constitutional law.

I will now move on to the *Cruijff* case. In the Netherlands, many of the aspects discussed collided in this case. It was about the Dutch photo book *Johan Cruijff – De Ajacied* ['Johan Cruijff – Ajax Player'] published on 5 November 2013. The photos in the book had come from the archive of De Jong, a photographer who had taken the pictures during matches in which Cruijff had played in the 1960s–1970s, when he was still playing for Ajax. In 2013, this was clearly already some time ago. There was some text in the book but the lion's share was taken up by photos. The Dutch Supreme Court therefore rightly qualified the book as a 'historical photo book'. The case was about whether Cruijff could stop the exploitation of the book because it hampered his own exploitation of pictures of himself (at the time Cruijff had just turned 65 and was busy preparing all kinds of publications about himself).

In its opening finding (para. 3.4) the Dutch Supreme Court 'liberated' portrait rights from copyright law:

> It follows from the right to respect for one's private life, the content of which is in part determined by Article 8 ECHR, that if the disclosure of a portrait to the public infringes such right, the person portrayed in principle has a reasonable interest within the meaning of Art. 21 of the Dutch Copyright Act that opposes such disclosure to the public. Cf. Dutch Supreme Court 1 July 1988, LJN AB7688, NJ 1988/1000 (Vondelpark) and Dutch Supreme Court 2 May 1997, LJN ZC2364, NJ 1997/661 (Discodanser).

Readers will counter that this finding still refers to Article 21 DCA. However, in the Dutch Supreme Court's interpretation quoted here, Article 21 is situated within the frame of Article 10 of the Dutch Constitution and Article 8 of the European Convention on Human Rights (ECHR), i.e. the privacy Articles of the Dutch Constitution and the European Convention. One could call it a reminder of the privacy nature of Article 21 DCA. The quoted cases refer to earlier cases of the Court on portrait rights in which the Court already hinted at the privacy context.

The Dutch Supreme Court then continued with a long and complex consideration:

> The question of whether disclosure to the public is unlawful with respect to the person portrayed must be assessed by weighing up the right to respect for their private life protected by Article 8 ECHR and the right to freedom of expression and information protected by Article 10 ECHR, which rights must be weighed up with due regard to the particular set of circumstances of the given case in order to determine which of the interests involved outweighs the other. In weighing these up, the person of the person portrayed, the place and manner in which the image was created, the nature and degree of intimacy with which the person portrayed is depicted, the character of the image, the context of the publication, the accuracy of other information supplied in the publication, as well as the societal interest, the news value or informative value of its disclosure to the public may be relevant interests. Persons who enjoy fame or public interest may also have legitimate expectations when it comes to respect for their private life (cf. ECHR 24 June 2004, No. 59320/00, LJN AQ6531 , NJ 2005/22 (Caroline von Hannover I)). What is more, the protection that may be derived from

> Article 8 ECHR is not limited to private activities but may also extend to activities of a professional or business nature (cf. ECHR 5 October 2010, No. 420/07, LJN BP3541, NJ 2011/566 (Köpke) and ECHR 16 December 1992, No. 13710/88, LJN AD1800 , NJ 1993/400 (Niemietz)).

What is noteworthy in this finding is the lack of precision in determining the content of the essential information elements that I distinguished earlier. There is no precise definition of the term 'news value'. It is also noticeable that the term 'informative value' is used without being defined in more detail. The judgment then goes on to use the equally opaque term 'general news value'. Nor is the link between the significance and restrictions of quotes in a historical context discussed. The fact is that it was not a historical text book but a 'photo book'. The photographer and the publisher raised the defence that it was a 'photo biography'. I am quite sure that, had a historian used photographs in a history book without consent of the photographer, and conducted a defence like that against the photographer's copyright, he would not have got away with it. Nor is a clear distinction made between the commercial and moral side of the expression 'private life'. The end result is a nebulous assessment framework that the Dutch Supreme Court would never have accepted for interpreting commercial intellectual property rights. The Court showed, for example, little understanding of the fact that celebrity is acquired in the public sphere. It found as follows:

> As for persons who enjoy fame due to their professional activity, it should however be noted that disclosure to the public of photos that relate to that professional activity and that were made in publicly accessible places, is to some extent inherent to their professional activity and the concomitant fame and interest of the public. Consequently, if the disclosure to the public relates to the professional activity of a person who is famous due to that activity, considerable weight will, as a rule, be attached to factors such as general news value and informing the public compared to that person's mere opposition to the disclosure to the public.

This is actually a contradiction in terms: your portrait has commercial value because you acquired public fame but you cannot exploit that fame because it was acquired in public. This is exactly what Cruijff took issue with: he felt discriminated against compared to less well-known people. He said: 'I'm being punished for my fame.' If we make a comparison with a trade mark, his position is even worse: a famous trade mark gets more protection than an ordinary trade mark.

The Dutch Supreme Court's next finding then swung the other way again:

> It is precisely people who are famous due to their professional activity that may have a commercial interest in the disclosure to the public of their portrait. Such interests are also covered by the protection of Article 8 ECHR and can be included in the weighing up against the right to freedom of expression and information protected by Article 10 ECHR. What weight should be attached to the commercial interest claimed by the person portrayed in a given case depends on the specific set of circumstances. If cashable popularity is the only interest at stake for a person portrayed and

> there are no circumstances to justify disregarding that interest, the assessment may turn on whether reasonable compensation was offered. What constitutes reasonable compensation in this context must be determined on the basis of the specific set of circumstances. The compensation should, in any event, be commensurate with the degree of popularity or celebrity of the person portrayed and should be in line with the value of the interest that that person has in its commercial exploitation. If it is established or undisputed that reasonable compensation was offered (and the protection of privacy interests is not at issue), there will in principle need to be ancillary circumstances to justify a ruling that disclosure to the public was unlawful with respect to the person portrayed. These circumstances will need to be asserted, with reasons given, by the person portrayed. For example, if publication is detrimental or harmful to the manner in which the person portrayed would like to exploit his or her celebrity.

This finding signals an emancipation of portrait rights from the photographer's copyright to the portrait photo, because the level of the compensation for the use of the photo depends on the exploitation opportunities of one's 'own' celebrity in the here and now, rather than on the exploitation potential of the photo book of the photographer who uses the photos of the celebrity.

All in all, a step has been taken towards developing the commercial side of privacy law as property law. A much more sophisticated analysis of the different relevant elements is, however, required.

Let me conclude with a macro perspective. My colleagues often accuse me of such perspectives, so I don't want to disappoint them here. The development of privacy law as property law will turn out to be only a first step. Given the huge network effects of online information platforms that are exploited by means of personal data, I foresee that this is the direction in which all personal data are headed. Here too, the moral perspective still prevails among privacy scholars, but this is bound to change. The internet has become an individualised mass medium. By using cookies and other tracking technologies, personal data have become currency for the dispatch of targeted advertising to website visitors. These data encompass certain characteristics of persons such as location, education, age, and measured preferences. It is more difficult to construct these as property rights than it is for portrait rights. This means that a whole new category of commercially valuable information is being created that will continue to gain in importance compared to information covered by traditional intellectual property rights. It will become a new (pseudo) property system of information, just like the new system that was created at the time for information in and around the world of sports and sports persons and the pseudo copyright protection of databases.

It is not easy to develop a property right for a (single) piece of personal data. The first objection is that the object is difficult to define. In copyright law terms, one might say that personal data always bear 'the stamp of the author'. This is evident for a portrait, but it is more complicated if a piece of data only relates to a single aspect of the person. What is more, the term will be increasingly interpreted 'in its context' because 'personal identifiability' is inferred from a combination of data that may well be held by more than one party or that may

refer to more than one person.[16] The second problem is that it involves data that only gain value in a modified form in combination with other (personal) data, such as modified profiles or collections of them. Any copyright or database right to a profile or collection of profiles will be vested in the processor of the data rather than the data subject. The data subject has, albeit unwittingly, simply supplied raw materials free of charge: hence, this could lead to a conflict between a commercial privacy right and an intellectual property right to data. The third problem is that personal data increasingly function as important 'steering instruments' in the organisation of our society and should therefore be freely available for use to a number of commercial and public functions. From this perspective personal data has the feature of a collective good.

This is an area that will develop dynamically in the years to come. It is my guess that there will be a similar development as in the domain of the legal protection of investments in databases.

To conclude, this essay shows that the analysis of apparently distinct legal areas – such as the work concept in copyright law, the legal status of sports performances, the portrait concept in privacy law and personal data in data law, the economy of networks, the freedom of expression – based on the concept of 'information' is useful to fine-tune and deepen the definition of the problem of the regulating of information markets and networked (nowadays called platform) markets. That was the basic idea behind the Institute for Information Law at the University of Amsterdam that Hugenholtz and I set up with others in the late 1980s.[17] The founders of IViR developed this vision at the time that the widespread use of computers took effect, the telecommunications market opened up and the introduction of cable and satellite technologies were radically changing the media landscape. After that, the Institute closely analysed in the same perspective the legal aspects of the next phase: the transformation towards the internet in which computers and networks became connected. In the past ten years, which can be seen as the consolidation of the internet era, it has, to my regret, distanced itself from that foundation and in a way became more technology oriented, while the different disciplines again tend to be locked in the old traditional departments of copyright, privacy, freedom of expression and networks. It should return to this fruitful conceptual basis of 'information'. That seems an appropriate wish to end with in this volume of contributions, dedicated as it is to an important 'player' in the domain of information law over the past years.

16. CJEU 20 December 2017, (*Nowak*, C 434-16), *Nederlandse Jurisprudentie* 2018, 314; CJEU 29 July 2019 (*Facebook ID*, C-40/17), *Nederlandse Jurisprudentie:* 2020, 97.
17. Willem Korthals Altes, Gerard Schuijt, Geert-Jan Kemme and the late Jan Kabel.