Copyright vs. Freedom of Expression

ECtHR (5th section), 10 January 2013
Case of Ashby Donald and others v. France, Appl. nr. 36769/08

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http://echrblog.blogspot.co.uk/2013/01/copyright-vs-freedom-of-expression.html;
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For the first time in a judgment on the merits, the European Court of Human Rights has clarified that a conviction based on copyright law for illegally reproducing or publicly communicating copyright protected material can be regarded as an interference with the right of freedom of expression and information under Article 10 of the European Convention. Such interference must be in accordance with the three conditions enshrined in the second paragraph of Article 10 of the Convention. This means that a conviction or any other judicial decision based on copyright law, restricting a person's or an organisation's freedom of expression, must be pertinently motivated as being necessary in a democratic society, apart from being prescribed by law and pursuing a legitimate aim.

It is, in other words, no longer sufficient to justify a sanction or any other judicial order restricting one's artistic or journalistic freedom of expression on the basis that a copyright law provision has been infringed. Neither is it sufficient to consider that the unauthorised use, reproduction or public communication of a work cannot rely on one of the narrowly interpreted exceptions in the copyright law itself, including the application of the so-called three-step test (art. 5.5 EU Directive 2001/29 of 22 May 2001). The European Court's judgment of 10 January 2013 in the *case of Ashby Donald and others v. France* unambiguously declares Article 10 of the Convention applicable in copyright cases interfering with the right of freedom of expression and information of others, adding an external human rights perspective to the justification of copyright enforcement. Due to the important wide margin of appreciation available to the national authorities in this particular case, the impact of Article 10 however is very modest and minimal.

Pictures published on the Internet, infringing copyright

In this case, the applicants were Robert Ashby Donald, Marcio Madeira Moraes and Olivier Claisse, respectively an American, a Brazilian and a French national living in New-York, Paris and Le Perreux-sur-Marne. All three are fashion photographers. The case concerned their conviction in France for copyright infringement following the publication of pictures on the Internet site *Viewfinder* of a fashion company run by Mr. Donald and Mr. Moraes. The photos were taken by Mr. Claisse at fashion shows in Paris in 2003 and published without the permission of the fashion houses. The three fashion photographers were ordered by the Court of Appeal of Paris to pay fines between 3.000 and 8.000 euro and an award of damages to the French design clothing Federation and five fashion houses, all together amounting to 255.000 euro. Donald, Moraes and Claisse were also ordered to pay for the publication of the judgment of the Paris Court of Appeal in three professional newspapers or magazines. In its judgment of 5 February 2008 the Supreme Court (Court de Cassation) dismissed the applicants' argumentation based on Article 10 of the Convention

and on Article 122-9° of the French Copyright Act (*Code de la Propriété Intellectuele*). The Supreme Court was of the opinion that the Court of Appeal had sufficiently justified its decision. Accordingly, the applicants could not rely on an exception in French copyright law, allowing the reproduction, representation or public communication of works exclusively for news reporting and information purposes.

In Strasbourg the applicants complained in particular of a breach of their rights under Article 10 (freedom of expression and information) of the European Convention. The European Court declared the application admissible and not manifestly ill-founded (§ 25), but concluded on the merits of the case that the conviction of the applicants because of breach of the French Copyright Act did not amount to a violation of Article 10 of the Convention by the French authorities. The Court was indeed of the opinion that the conviction for breach of copyright and the award of damages was to be considered as an interference with their rights protected by Article 10 of the Convention. However, this interference was prescribed by law, pursued the legitimate aim of protecting the rights of others and was to be considered necessary in a democratic society.

The Court explicitly recognises the applicability of Article 10 in this case : "*La Cour rappelle que l'article 10 de la Convention a vocation à s'appliquer à la communication au moyen de l'Internet (..), quel que soit le type de message qu'il s'agit de véhiculer (..), et même lorsque l'objectif poursuivi est de nature lucrative (..). Elle rappelle aussi que la liberté d'expression comprend la publication de photographies (..). Elle en déduit que la publication des photographies litigieuses sur un site Internet dédié à la mode et proposant au public des images de défilés à la consultation libre ou payante et à la vente relève de l'exercice du droit à la liberté d'expression, et que la condamnation des requérants pour ces faits s'analyse en une ingérence dans celui-ci"* (§ 34). The Court hereby confirms its approach that while freedom of expression is subject to exceptions, these exceptions must be construed strictly, and the need for any restrictions must be established convincingly : "*La liberté d'expression (..) telle que la consacre l'article 10, (..) est assortie d'exceptions qui appellent toutefois une interprétation étroite, et le besoin de la restreindre doit se trouver établi de manière convaincante"* (§ 38).

A particular wide margin of appreciation

The Court is of the opinion that in this case a wide margin of appreciation is to be given to the domestic authorities, as the publication of the pictures of models at a fashion show and the fashion clothing shown on the catwalk in Paris was not related to an issue of general interest for society and concerned rather a kind of "commercial speech". As the Court points out : "*En l'espèce, les photographies litigieuses ont été publiées sur un site Internet appartenant à une société gérée par les deux premiers requérants, dans le but notamment de les vendre ou d'y donner accès contre rémunération. La démarche des requérants était donc avant tout commerciale. De plus, si l'on ne peut nier l'attrait du public pour la mode en général et les défilés de haute couture en particulier, on ne saurait dire que les requérants ont pris part à un débat d'intérêt général alors qu'ils se sont bornés à rendre des photographies de défilés de mode accessibles au public*" (§ 39).

The member states are furthermore in a position to balance conflicting rights and interests, such as the right of freedom of expression under Article 10 of the Convention with the right of

property as protected by Article 1 of the First Protocol to the Convention. The Court, referring to its 2007 Grand Chamber judgment in *Anheuser-Busch Inc. v. Portugal*, reiterates that "*l'ingérence dans le droit à la liberté d'expression des requérants visait à la protection des droits d'auteur des créateurs de mode. Dès lors que l'article 1 du Protocole n^{o} 1 s'applique à la propriété intellectuelle (..), elle visait ainsi à la protection de droits garantis par la Convention ou ses Protocoles" (§ 40).*

Two crucial elements in this case justify that the national authorities enjoy a particularly wide margin of appreciation. The European Court refers to *"une marge d'appréciation particulièrement importante"* (§ 41). These elements are the *"commercial speech"*-character of the publication of the pictures on the website and the balancing exercise the Court needs to undertake regarding the conflicting rights guaranteed by Article 10 of the Convention and the right of property as protected by Article 1 of the First Protocol to the Convention.

The European Court consequently refers to the Paris Court of Appeal's finding that the applicants had reproduced and represented the pictures without authorisation by the copyright holders, hence infringing the rights of intellectual property of others. The European Court refers to the reasoning by the Paris Court "*que les requérants avaient, en connaissance de cause, diffusé les photographies litigeuses sans l'autorisation des titulaires des droits d'auteurs, qu'ils ne pouvaient se dégager de leur responsabilité en se prévalant du fait que le système de l'engagement de presse était inadapté ou mal respecté, et qu'ils s'étaient donc rendus coupables du délit de contrefaçon. Elle ne voit pas de raison de considérer que le juge interne a excédé sa marge d'appréciation en faisant par ces motifs prévaloir le droit au respect des biens des créateurs de mode sur le droit à la liberté d'expression des requérants*" (§ 42).

Finally the European Court does not consider the fines and the substantial award of damages as disproportionate to the legitimate aim pursued, arguing that the applicants gave no evidence that these sanctions had "financially strangled" them : "*La Cour observe toutefois avec le Gouvernement que, si les requérants affirment avoir été « étranglés financièrement », ils ne produisent aucun élément relatif aux conséquences de ces condamnations sur leur situation financière ».* The Court accepts the reasoning of the domestic courts and their calculation of the damages, with respect for the guarantees of a fair trial not being under dispute in this matter. The Court *"relève en outre que le juge interne a fixé ces montants à l'issue d'une procédure contradictoire dont l'équité n'est pas en cause et a dûment motivé sa décision, précisant en particulier les circonstances qui, selon son appréciation, les justifiaient*" (§ 43).

In these circumstances and taking into account the particular important *margin of appreciation* of the national authorities, the Court concludes unanimously that there is no violation of Article 10 of the Convention.

Relying on Article 7 (no punishment without law), the applicants also alleged that, in refusing to apply an exception to copyright law provided for under an Article of the French Intellectual Property Code, the Court of Cassation failed to apply the principle that the criminal law must be strictly interpreted. The European Court however dismissed this part of the application as manifestly ill-founded.

Comment

The judgment of the European Court of 10 January 2013 is interesting for several reasons.

1.Emerging internet cases.

First of all, the judgment illustrates that cases of (alleged) breaches of fundamental rights and freedoms, enshrined in the European Convention and its Protocols, situated in the digital, online world have started to find their way to the European Court of Human Rights. During the past few years and months the European Court has delivered several judgments in "internet"-cases related to freedom of expression and information, such as in *Times Newspapers Ltd. v. United Kingdom* (ECtHR 10 March 2009), *Editorial Board of Pravoye Delo and Shtekel v. Ukraine* (5 May 2011) and in its Grand Chamber judgment in *Mouvement Raëlien Suisse v. Switzerland* (13 July 2012).

In *Szima v. Hungary* the case concerned a sanction of the person who had editorial control over a police trade union's website. She was also the author of a series of blogs and articles that were considered as instigation to insubordination by the Hungarian authorities. The European Court accepted that there was a sufficient "pressing social need" to interfere with the applicant's freedom of expression (ECtHR 9 October 2012).

In *Peta Deutschland v. Germany* a civil injunction preventing the applicant association *inter alia* from publishing seven specified posters via the internet, comparing the atrocities of the genocide of the Nazi-regime with animal suffering and hence *banalising* and *instrumentalising* the holocaust, was not considered as a violation of Article 10 (ECtHR 8 November 2012).

In a judgment of 18 December 2012, the European Court came to the conclusion that the decision taken and upheld by the Turkish authorities to block internet access to Google Sites amounted to a violation of Article 10. The decision to block Google Sites had been taken to prevent further access to one particular website hosted by Google which included content deemed offensive to the memory of Mustafa Kemal Atatürk, the founder of the Turkish Republic. With its judgment in *Ahmet Yildirim v. Turkey* the European Court of Human Rights has reinforced the right of individuals to access the internet, as in its ruling against the wholesale blocking of online content, it asserted that the internet has now become one of the principal means of exercising the right to freedom of expression and information (ECtHR 18 December 2012).

Due to this emerging case law related to internet and other new forms of technology, including rights and freedoms guaranteed by the Convention, the European Court has updated its fact sheet on the European Court's case law on New Technologies (see http://www.echr.coe.int/ECHR/EN/Header/Press/Information+sheets/Factsheets/).

The judgment of 10 January 2013 in *Ashby Donald and others v. France*, concerning a copyright infringement following the publication of pictures on an Internet site, is the first and will certainly not be the last case before the European Court in 2013 which is internet-related.

2.Money or message driven?

Secondly the Court's judgment is a clear illustration of the difference between, on the one hand, expression and content contributing to an issue of public debate or a debate of general interest for society, and on the other hand, "commercial speech". Speech, messages, pictures and content which are merely money driven do not enjoy the added value of the protection guaranteed by Article 10 of the Convention. In the Court's view, the margin of appreciation in such circumstances is a very wide one, even in a case where the interference by the authorities takes the form of a criminal conviction or a very high award of damages, both 'sanctions' with a risk of having a chilling effect.

This approach was also recently confirmed in *Mouvement Raëlien Suisse v. Switzerland*, in which the Court stated : "*Whilst there is little scope under Article 10 § 2 of the Convention for restrictions on political speech (..), a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion (..). Similarly, States have a broad margin of appreciation in the regulation of speech in commercial matters or advertising*" (§ 61, also referring to ECtHR 20 November 1989, *Markt intern Verlag GmbH and Klaus Beermann v. Germany* and ECtHR 24 February 1994, *Casado Coca v. Spain).*

This aspect is also emphasised in the case *Ashby Donald and others v. France*. Hence no doubt in this case : *"La démarche des requérants était donc avant tout commerciale*". There is indeed no indication that the applicants were involved in a debate of general interest (see e.g. ECtHR 25 March 1985, *Barthold v. Germany*, ECtHR 25 August 1998, *Hertel v. Switzerland,* ECtHR 17 October 2002*, Stambuk v. Germany,* ECtHR (GC) 30 June 2009*, Vereinigung Gegen Tierfabriken Schweiz VGT v. Switzerland* and ECtHR 8 November 2012 *Peta Deutschland v. Germany*). The three fashion photographers only made the catwalk pictures of Paris fashion shows accessible to the public.

It would undoubtedly have been different if the pictures posted on the Internet had contributed to a public debate e.g. on women's rights in the world of fashion, or on public health issues related to anorexia and young girls being tempted to look like models in the glossy fashion magazines. In this case the photos were solely used in a commercial setting, while the pictures contained no further message than reproducing the images of the Paris fashion shows. It is not because the website or the media platform is part of a commercial company, that the invoked freedom of expression will receive a lower degree of protection from the scope of Article 10 of the Convention. What essentially matters is whether the publication, the article, the expression or the pictures contribute to a debate of general interest, a notion which is broadly interpreted by the European Court of Human Rights : "*what constitutes a subject of general interest will depend on the circumstances of the case*" (ECtHR (Grand Chamber) 7 February 2012, *Axel Springer AG v. Germany*, § 90. See also D. VOORHOOF, "Freedom of Expression under the European Human Rights System", *Inter-American and European Human Rights Journal / Revista Interamericana y Europa de Derechos Humanos* 2009/1-2, 3-49).

If the publication or the public communication of the litigious pictures had contributed to such a debate of general interest, and if the publication of the pictures had been justified in this

context (ECtHR 18 January 2011, *MGN Limited v. United Kingdom* and ECtHR (Grand Chamber) 7 February 2012, *Von Hannover nr. 2 v. Germany),* a more strict scrutiny by the European Court from the perspective of Article 10 would have been necessary, and at the same time reducing the margin of appreciation available to the national authorities.

3.Copyright law enforcement must be in accordance with Article 10 of the Convention

Another reason why the European Court accepts a wide margin of appreciation in *Ashby Donald and other v. France* is because it has to balance two conflicting fundamental rights enshrined in the Convention and its Protocols. In such a context the Court is required to verify whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention and its Protocols. In this case the Court had to balance on the one hand, freedom of expression protected by Article 10 and, on the other, the right to property enshrined in Article 1 of the First Protocol. Especially since its Grand Chamber judgment in *Anheuser-Busch Incl. v. Portugal* in a trademark dispute*,* there can be no doubt that "*Article 1 of Protocol No. 1 is applicable to intellectual property as such*" (ECtHR (Grand Chamber) 11 January 2007, § 72). Indeed, in *Melnychuk v. Ukraine*, which concerned an alleged violation of the applicant's copyright, the Court had earlier decided that Article 1 of the First Protocol was applicable to intellectual property (ECtHR (decision) 7 July 2005, *Melnychuk v. Ukraine)*.

Where the balancing exercise between two Convention rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, it requires strong reasons for the European Court to substitute its view for that of the domestic courts (ECtHR (Grand Chamber) 7 February 2012, *Axel Springer AG v. Germany*, § 88). However, the circumstance itself of the balancing of conflicting rights does not exclude a thorough analysis by the Court of the findings and reasoning by the national courts, as is demonstrated in the Court's Grand Chamber judgments of 7 February 2012 in the cases of *Axel Springer AG v. Germany* and *Von Hannover nr. 2 v. Germany*.

The European Court of Justice in some recent judgments has also confirmed this approach when it had to balance the enforcement of copyright on the internet with other rights. The EU Court of Justice in *Scarlet v. Sabam* (24 November 2011) has reiterated that "*the protection of the right to intellectual property is indeed enshrined in Article 17(2) of the Charter of Fundamental Rights of the European Union ('the Charter'). There is, however, nothing whatsoever in the wording of that provision or in the Court's case-law to suggest that that right is inviolable and must for that reason be absolutely protected*" (§ 43).

According to the CJEU "*the protection of the fundamental right to property, which includes the rights linked to intellectual property, must be balanced against the protection of other fundamental rights*", including the right of freedom of expression and information guaranteed by Article 10 of the Convention (CJEU 24 November 2011, C-70/10, *Scarlet Extended NV v. Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM)*; CJEU 16 February 2012, C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*. See also CJEU (GC) 16 December 2008, C-73/07, *Tietosuojavaltuutettu / Satakunnan Markkinapörssi Oy, Satamedia Oy*).

The CJEU clarified that "*in the context of measures adopted to protect copyright holders, national authorities and courts must strike a fair balance between the protection of copyright and the protection of the fundamental rights of individuals who are affected by such measures*" (CJEU 24 November 2011, C-70/10, § 45). From this perspective, the CJEU considered that an injunction to install an internet filtering system as a measure of enforcement of copyright "*could potentially undermine freedom of information*", since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications (compare with ECtHR 18 December 2012, *Ahmet Yildirim v. Turkey*).

In the case of *Ashby Donald and others v. France* the European Court of Human Rights did not need to undertake itself such a balancing exercise, as it found that the French judicial authorities have done this exercise in a proper way. As the Court stated, it saw no reason to disagree with the findings by the French courts : "*Elle ne voit pas de raison de considérer que le juge interne a excédé sa marge d'appréciation en faisant par ces motifs prévaloir le droit au respect des biens des créateurs de mode sur le droit à la liberté d'expression des requérants*" (§ 42). The Court followed the same reasoning regarding the proportionality of the fine and the award of damages the applicants are ordered to pay (§ 43).

The reluctant approach by the European Court, due to the appropriate way the French courts have handled the case and especially due to the fact that it 'only' concerned an interference in the context of "commercial speech" does not exclude at all that in other cases the European Court may scrutinize in a more strict way the balancing of a conflict between the right of freedom of expression and copyright. That will especially be the case in matters that concern prior restraint, such as the blocking of internet sites, artistic freedom of expression, political speech, use of official documents, reproduction and public communication of works for educational or scientific purposes or NGOs participating in debate on matters of public concern such as health and environmental issues. Similarly, in cases where journalists and media are exercising their public watchdog function in a democracy, in cases of parody, caricatures or other forms of transformative use and when sanctions risk to have a *chilling effect* on the freedom of expression and information in a democracy. In such cases interferences with the right of freedom of expression and information, based on copyright law, will indeed need to undergo a more careful balancing test between Article 10 and Article 1 of the First Protocol.

Some national courts, within their margin of appreciation, already have referred to or have applied Article 10 in cases where the enforcement of copyright law otherwise could lead to a violation of the right of freedom of expression and information guaranteed by Article 10 of the Convention (see e.g. Cass. Fr. 19 October 2006 *Camel/Japan Tobacco v. CNMRT*; Rb. Amsterdam, 22 December 2006, *Staat der Nederlanden v. Greenpeace* http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=AZ5624 *and* Rb. 's-Gravenhage (Summary Proceeding) 4 May 2011, *Louis Vuitton v. Nadia Plesner,* http://www.boek9.nl/files/2011/IEPT20110504_Rb_Den_Haag_Plesner_v_Louis_Vuitton.pdf) .

Although the European Court did not find a violation of Article 10 in the case of *Ashby Donald and others v. France*, the judgment in this case has definitely confirmed that copyright enforcement, restrictions on the use of copyright protected works and sanctions based on

copyright law ultimately can be regarded as interferences with the right of freedom of expression and information. This requires inevitably a balancing test between the rights involved. In terms of predictability of the outcome of such a balancing test, a clear set of criteria need to be developed, like the Grand Chamber did in *Axel Springer AG v. Germany*, balancing the Articles 8 and 10 of the Convention (see §§ 89-109). As long as it is unclear which criteria should be used in this balancing exercise and how they should be applied, legal advisors and counsels, whose predictability is founded in legal sources, might be troubled when the balancing test arguments can be derived from an extensive and unpredictable sample of legal, financial, commercial, ethical, technical or factual elements or justifications. Unfortunately the facts and circumstances in the case of *Ashby Donald and others v. France* did not give a real opportunity to the European Court to give preliminary assistance in this matter. This leaves however an uncertain future for the application of Article 10 in matters of copyright enforcement interfering with the right of freedom of expression and information.

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