

EIPIN Conference 2013

Topic 14: Freedom of Expression and the Right to Information: Implications for Copyright



Dirk Voorhoof

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KØBENHAVNS UNIVERSITET

www.psw.ugent.be/dv

Module III

Looking Closer:

Practical Interaction between Human Rights and IP (*)

(*) ... between IP and other Human Rights ?

Emerging conflicts between Copyright and FoEI

Conflicting human rights

... an how to balance them.

Article 1, First Protocol Property right

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the **public interest** and subject to the conditions **provided for by law** and by the general principles of international law

Case law ECtHR : also IP

Anheuser-Busch GC 2007

Art 17, 2 EU Charter Fundamental Rights /Art. 15 ICESCR

Limitations/restrictions limited

Three-step test EU Infosoc Directive

Article 10 ECHR

Freedom of expression and information,
no interferences by public authorities, unless ...
necessary in a democratic society
(duties and responsibilities)

Rights of others

Proportionate, pressing social need

Restrictions to be narrowly interpreted

Art. 11 EU Charter Fundamental Rights

Art. 19 ICCPR

CJEU 24 November 2011, C-70/10, § 45 – Scarlet Ext.

“national authorities and courts must strike a fair balance between the protection of copyright and the protection of the fundamental rights of individuals (..)”

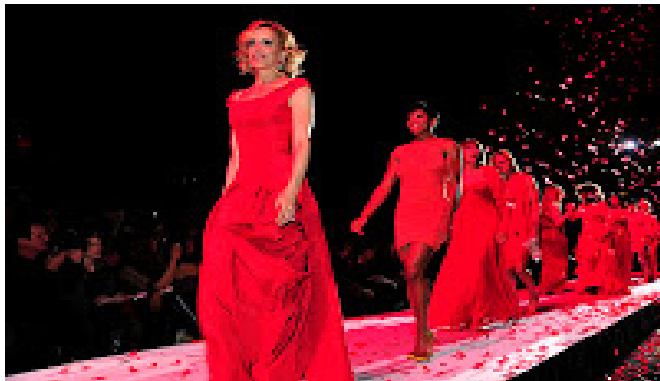
An injunction to install an internet filtering system is a measure of enforcement of copyright that *“could potentially undermine freedom of information”*, since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications ...

Article 1, Protocol No. 1 ECHR

Property right = also Copyright

Ashby Donald and others v France

10 January 2013



Neij and Sunde v Sweden

19 February 2013



<http://echrblog.blogspot.nl/2013/01/copyright-vs-freedom-of-expression.html>

<http://kluwercopyrightblog.com/2013/03/20/echr-copyright-vs-freedom-of-expression-ii-the-pirate-bay/>

Ashby Donald ao v France also FoEI



ECtHR : 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

Injunction, fine, damages, ...

- only if :
1. prescribed by law
 2. legitimate aim (“rights of others”)
 3. **necessary in a democratic society !**

Neij and Sunde v Sweden also FoEI



ECtHR : In the present case, the applicants *put in place the means for others to impart and receive information* within the meaning of Article 10 of the Convention.

The applicants' convictions interfered with their right to freedom of expression.

Such interference breaches Article 10 *unless* it was “prescribed by law”, pursued one or more of the legitimate aims referred to in Article 10 § 2 and was “necessary in a democratic society” to attain such aim or aims.

FoEI / Copyright



Not only FoEI right under Article 10 ECHR (11 EU)

Also Copyright under Article 1, Prot. No. 1 ECHR (17, 2 EU)

Positive obligation by state to protect copyright against infringements :

“genuine, effective exercise of the rights protected by that provision does not depend merely on the State’s duty not to interfere, but may require positive measures of protection”

ECHR FoEI - Copyright



In the present case, the Court is called upon to weigh, on the one hand, the interest of the applicants to facilitate the sharing of the information in question and, on the other, the interest in protecting the rights of the copyright-holders.

Thus, the respondent State had to *balance* two competing interests which were both protected by the Convention.

In such a case, the State benefits from a *wide margin of appreciation*.

Moderate impact Art. 10 / Copyright



**Balancing =
wide margin of appreciation**

**Reduces impact of ECHR
and esp. of scrutiny by the ECtHR**

**“Structural” :
conflicting human rights**



Impact Art. 10 / Copyright depends also on type of information

The width of the margin of appreciation afforded to States varies depending on a number of factors, among which the *type of information* at issue is of particular importance

“Situational” or “contextual”



“commercial speech”

“commercially run TPB”

“distributed material in respect of the applicants were convicted cannot reach the same level as that afforded to political expression and debate”



Art. 10 / Copyright



Reason 1 : conflicting human rights

Reason 2 : *in casu* no contribution to “political expression and debate”

Margin of appreciation is particularly wide

“Relevant and sufficient reasons” = enough

Proportionality : motivated in the light of the case (NTD)
even criminal punishment (prison sentences)

European Court of Human Rights

2013

Copyright v Freedom of Expression : 2 - 0

Practical impact interaction Copyright/FoEI?

**1. Article 10 ECHR is ‘external’ factor:
to be integrated in application of copyright**

**Enforcement of copyright
that interferes with FoEI
must be in accordance with Article 10 ECHR.**

**Exceptions, limitations IN Copyright Act
must be sufficient (and sufficiently broad)
to meet the needs of FoEI.**

Practical impact interaction Copyright/FoEI?

2. Wide margin for national authorities

But ECHR : binding, direct applicability in MS
Wide margin / conflicting HR does not exclude
effective scrutiny by ECtHR - ECtHR GC Axel Springer 7/2/2012

Margin will be less wide in cases of
- political expression / public debate

See also ECtHR TV Vest Pensjonistparti 11/12/2008

- parody/satire** ECtHR VBK v. Austria 25/1/2007, ECtHR Eon v France 14/3/2013
- “news”, media, journalism...**

Practical impact interaction Copyright/FoEI?

3. Other relevant factors !

See case law ECtHR on Article 10 ECHR

Proportionality of interference

- ECtHR Ahmet Yildirim 18/12/2012
- CJEU Scarlet Ext. 24/11/2011

Is no abstract balancing, interference needs justification
as 'pressing social need' / necessary in democratic society Art. 10 § 2

Contextualisation

Relevant criteria - Article 10 ECHR

- who
 - what (content : political speech v commercial speech)
 - about whom
 - how (form)
 - to whom
 - when / why / where
 - with what intention
 - with what (possible) effect / impact / harm
-
- + procedural guarantees (judicial review)
 - + proportionality (nature and severity of sanction)
 - + alternatives? NTD?
-
- + chilling effect?

Conclusion

FoEI as ‘external’ factor in copyright (application/enforcement)

Weak impact Art. 10 ECHR so far

- conflicting HR
- ‘fair’ balance
- wide MoA

‘Added value’ of Article 10 is still to be demonstrated,
but is virtual in cases of

- journalism, public debate
- parody/satire
- ‘fair use’
- disproportionate measures of enforcement of copyright
- disproportionate sanctions

Art. 10 ECHR vs. Art. 5,5

EC-Directive Copyright 2001/29/EG

3-step test

- exception is only applied in certain *special cases*
- which do not conflict with a *normal exploitation* of the work
- and do not *unreasonably prejudice* the *legitimate interests* of the rightholder

Perspective of Art. 10 ECHR is to be integrated in 3-step test of Art. 5,5 Dir. 2001/29