By Dirk Voerman, Assistant Editor at Kluwer Copyright Blog

"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 definitely confirmed that copyright enforcement, restrictions at the use of copyright protected works and caricatures based on copyright law ultimately can be regarded as interference with the right of freedom of expression and information.

For the first time in a judgment on an internet matter, the European Court of Human Rights has clarified that a clarification based on copyright law for depicting murder victims or publishing photographs protected material can never be regarded as an interference with the right of freedom of expression and information under Article 10 of the Convention. Such interference would have to be prescribed by law and justified by a particularly weighty reason in a democratic society arising from the necessity of repressing terrorism.

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 a fashion show was for the benefit of the modelling agency. However, the French courts should have been more cautious in the evaluation of the damages, with respect for the guarantees of a fair trial not being respected.

The Court explicitly recognises the applicability of Article 10 in this case: “La Cour rappelle que l'article 10 de la Convention s'applique à la liberté d'expression et d'information dans le cadre de l'exercice du droit à la liberté d'expression et d'information applicable en dossiers de procédure disciplinaire (..).”

A particular important wide margin of appreciation

The Court of Appeal of Paris, in its judgment of 13 February 2008, dismissed the applicants' argumentation based on Article 10 of the Convention and on Article 12 of the Rome II Regulation of the Code of private international law of the European Union.

These exceptions must be construed strictly, and the need for any restrictions must be established by reference to the objective pursued.

It is, in other words, no longer sufficient to justify a sanction or any other judicial order restricting one's activities or purporting a 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 constitutes an issue of general interest for society, even if the act constitutes an infringement of copyright law.

Therefore, two crucial elements in this case justify that the national authorities enjoy a particularly wide margin of appreciation. The Court of Appeal of Paris is entitled to refrain from interfering with the applicants' freedom of expression.

These elements are the "commercial speech"-character of the publication of the pictures on the website and the non-commercial nature of the reproduction and representation of the pictures on the website.

The pictures were posted on a website of the fashion company in Paris. The applicants were Robert Ashby Donald, a Brazilian national, Marcio Madeira Moraes, a French national, and Olivier Claisse, an American national. Their photographs were published on the website Viewfinder of a fashion company in Paris.

In this case, the applicants were Robert Ashby Donald, Marcio Madeira Moraes and Olivier Claisse, respectively an American, a Brazilian and a French national. Viewfinder, the company which published these photographs, received a cease and desist communication from the Paris Court of Appeal which even went so far as to compare the reproduction of these photographs to "the commitment of a crime against humanity." The applicants, respectively an American, a Brazilian and a French national, subsequently brought a case in front of the French domestic courts, the National Court of Cassation in Paris, and the Supreme Court of Cassation for the authorization to publish these pictures on the website.

Nevertheless, the French Supreme Court of Cassation dismissed the applicants' argumentation based on Article 10 of the Convention and on Article 12 of the Rome II Regulation of the Code of private international law of the European Union.

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-Seine, respectively.

Infringement of copyright and the award of damages was to be considered as an interference with the applicants' rights protected by Article 10 of the Convention.

Moreover, the court was of the opinion that the conviction for breach of the French Copyright Act did not amount to a violation of Article 10 of the Convention. The conviction for breach of the French Copyright Act incurred a fine of 8,000 euros for each of the applicants and an award of damages to the copyright owners of respectively 10,000 euros.

Indeed, these exceptions must be construed strictly, and the need for any restrictions must be established by reference to the objective pursued. Both the applicants' publication of the pictures of the fashion show in Paris was not related to an issue of general interest for society and concerned rather a kind of "commercial speech". Moreover, the objective was not to preserve the public order in any way, but to make the exclusive rights of the copyright owners become enforceable. These exceptions must be construed strictly, and the need for any restrictions must be established by reference to the objective pursued. The Court of Appeal of Paris was indeed of the opinion that the conviction for breach of the French Copyright Act was to be considered as an interference with the applicants' rights protected by Article 10 of the Convention.

However, these circumstances were not sufficient to justify a sanction or any other judicial order restricting one's activities or purporting a 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 constitutes an issue of general interest for society, even if the act constitutes an infringement of copyright law.

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The balancing test arguments can be derived from an extensive and unpredictable sample of legal, financial, and social judgments. 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 successfully in this particular case. In the case of Axel Springer Verlag AG v. Germany and Von Hannover nr. 2 v. Germany, the deferential approach by the European Court, due to the appropriate way the French courts have handled the case in matters that concern prior restraint, such as the blocking of internet sites, artistic freedom of expression, and freedom of information, has recently been confirmed in Mouvement Raëlien Suisse v. Switzerland, in which the Court demonstrated in the Court's Grand Chamber judgments of 7 July 2014, paragraph 82, that indeed a balancing exercise was found to be appropriate.

The article was also published on the ECHR Blog. A printable PDF-version of the article can be downloaded here.