ECHR: Copyright vs. freedom of expression
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Please refer to this post on Kluwer Copyright Blog: "ECHR: Copyright vs. Freedom of Expression". Please see video at: http://content.kluwerlaw.com/exclusive/2013/1219/20131219freedom-expression/1913659/

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Although the European Court did not find a violation of Article 10 in the case of Ashley Donald and others v. France, the judgment in this case has definitively confirmed that copyright enforcement, restrictions on the use of copyright protected works and services based on copyright law can be regarded as interference with the right of freedom of expression and information.

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 Convention. Such interference must be in accordance with the three conditions established in the second paragraph of Article 10 of the Convention. This means that it can only be considered an interference as a last resort, in cases where the applicant has been convicted and sentenced for an infringement of copyright law which was not shown to be necessary in a democratic society, and from which he has already been freed by the courts.

It is, in other words, no longer sufficient to justify a conviction on any other judicial under restrictions on artistic or journalistic freedom of expression on the basis that copyright law has been infringed. Nor is it sufficient to consider that the unaudited communication or reproduction of a work consisted of one of the narrowly defined exceptions in copyright law. Nor is it sufficient to consider that the activities involved were non-commercial in nature. As the Court said in its judgment of 5 February 2008 in the case of Ghent University v. Belgium (App. no. 35375/02): "When the Court comes to consider the existence of an interference with the right of freedom of expression, it will have to have regard to the nature of the impugned act, the purpose of the law imposing it and the harm which it must have been intended to prevent, having regard to the Social, cultural and political standards prevailing in the member state concerned." (§ 72.)

The Court explicitly recognises the applicability of Article 10 in this case: "The Court reiterates that the article 10 of the Convention is applicable to the communication to the public on the internet (..), and that it follows in such case the principles of a fine balance necessary to safeguard the right of freedom of expression. The Court is of the opinion that in this case a wide margin of appreciation is to be given to the domestic courts and their calculation of the damages, with respect for the guarantees of a fair trial not being indispensable in this context." (§ 83.)

A particular important 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 to the publication of the pictures in question, so that the balance is struck between the right to respect of private life enshrined in Article 8 (which is given a wider scope of application in the context of the media) and the right of freedom of expression and information under Article 10 of the Convention. The Court concludes unanimously that there is no violation of Article 10 of the Convention.
Secondly, the Court's judgment is a clear illustration of the difference between, on the one hand, expression and carried content and an issue of public debate or a debate of general interest for society, and on the other hand, "concentration-speech", images, pictures, and content which are entirely money driven in order to attract the public and generate income. When such content is focused on the personal protection of individuals or companies, it is not surprising that the Court finds such protection to be a legitimate justification for copyright law.

In this respect, the Court clearly stated that the balance between the protection of copyright and the protection of the fundamental rights of individuals and companies is not to be considered as an exclusive matter. In its judgment, the Court emphasized the need for a fair balance between the protection of copyright and the protection of the fundamental rights of individuals and companies, and it declared that the protection of these rights must be considered in a context in which the Court must consider the facts and the circumstances of the case.

In conclusion, the Court's judgment is a clear illustration of the need for a fair balance between the protection of copyright and the protection of the fundamental rights of individuals and companies. The Court emphasized the need for a fair balance between these rights in a context in which the Court must consider the facts and the circumstances of the case.


