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 definitively confirmed that copyright enforced, restrictions or use of copyright protected works and decisions based on copyright law effectively can interfere 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 is3 not derogatory per se of the public communication of a work. In the judgment of 13 July 2012, the Court found that the conviction of Vyacheslav Szima, a journalist, for fraudulently reproducing and publishing a picture of a Thai model at a fashion show and charging for it was not a violation of Article 10 ECHR. As the Court held the conviction to be a legitimate restriction of the applicant's freedom of expression, there was no interference with the right of freedom of expression and information.
The judgment of 10 January 2013 in the case of De Vries &amp; Ass. v. the Netherlands is the first and will certainly not be the last case before the European Court in 2013 which is internet-related.

5. 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 Ashley Donald and others v. France is because it has to balance two conflicting fundamental rights enshrined in the Convention and its case law: freedom of thought, conscience and religion (Case No. 28013/10); and freedom of expression and information (Case No. 57808/10). Where the balancing exercise between two Convention rights has been undertaken by the national authorities in conformity with the domestic law in the case in point, the European Court of Human Rights has said that it will not interfere (see Article 7, paragraphs 2 and 3). In this type of case, the Court has declared that its role is to examine whether the interference by the authorities takes the form of a criminal conviction or a very high award of damages, both of which may have an inhibiting effect on the exercise of the right to freedom of expression and information (Case No. 57808/10). From this perspective, the Court considers that a fair balance has been struck.

2. Money or message driven?

In the case of Ashley 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 interference with the right to freedom of expression was justifiable under Article 8 of the Convention. Another reason why the European Court accepts a wide margin of appreciation in Ashley Donald and others v. France is because it has to balance two conflicting fundamental rights enshrined in the Convention and its case law: freedom of thought, conscience and religion (Case No. 28013/10); and freedom of expression and information (Case No. 57808/10).

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 recently updated its European Court's case law on New Technologies. In its judgment in the case of MGN Limited v. United Kingdom (ECtHR 18 December 2012), the European Court of Human Rights summarised the case law: "The European Court has repeatedly emphasised that the internet cannot be regarded as a 'place of publication' on which material can be 'published' within the meaning of Article 10 of the Convention. What essentially matters is whether the publication, the article, the expression is intended for a public audience; if so, the right to freedom of expression and information is engaged. If not, the right is engaged only if the article or expression is available in the public domain, i.e. if it can be accessed by any internet user who wishes to read it. In any event, the right of free expression and information is engaged only if, at least potentially, there is an audience for the article or expression and the internet user is able to reach that audience, whether via internet or innovation.[82]"

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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, it found in this case too that the applicant had not complained of a violation of Article 17(2) of the Constitution of the Islamic Republic of Iran, concerning the protection of writers, composers, music publishers, performers and producers of audiovisual works, which does not contain an explicit reference to public domain or to the right to freedom of expression and information (see ECHR Blog fact sheet).


