Kluwer Copyright Blog

The French Supreme Court on freedom of expression versus copyright

Brad Spitz (REALEX) · Tuesday, December 8th, 2015

The French Supreme Court ('Cour de cassation') has caused a stir in France (15 May 2015, No 13-27391), by quashing a judgment of the Court of Appeal of Paris for breaching Article 10-2 of the European Convention on Human Rights ("ECHR"). The Supreme Court held that before condemning an alleged infringer for copyright infringement, the Court of Appeal should have explained in concrete terms, as was requested by the alleged infringer, how a fair balance between the freedom of expression of the alleged infringer and the rights granted under copyright law could result in condemnation.

The facts are extremely interesting with regard to freedom of expression versus copyright. A photographer, who had discovered that three of his photographs had been incorporated in several paintings without his permission, sued the painter of these derivative works for infringement of copyright. The Court of Appeal, in a judgment of 18 September 2013, ordered the painter to pay the sum of 50,000 Euros in damages as compensation for the prejudice resulting from the infringement of the economic and moral rights of the photographer. The Court of Appeal dismissed the defence's argument based on the painter's right to freedom of expression (Article 10-2 ECHR), by ruling that the rights in the alleged infringing works may not, in the absence of a higher interest, prevail over the rights in the works from which they are derived. The Court of Appeal added that otherwise the protection of the "rights of others" (as mentioned in Article 10-2 ECHR) in the field of artistic creation would be undermined. The Supreme Court quashed this ruling for the reasons stated in the first paragraph of this post, and deferred the matter to the Court of Appeal of Versailles.

The Supreme Court's judgment of 15 May 2015 was rendered in the aftermath of the recent cases of the European Court where copyright and freedom of expression have been opposed (see Dirk Voorhoof and Inger Høedt-Rasmussen, ECHR: Copyright vs. freedom of expression). In terms of human rights, the European Court has recognised that the principle of protection of property, stated in Article 1 of Protocol No. 1 of the European Convention on Human Rights, applies to intellectual property (Case 73049/01 (2007), Anheuser-Busch Inc. v. Portugal) and therefore also to copyright (Case 19247/03 (2008), Balan v. Moldova). It has recently, and for the first time, rendered two decisions in cases where it had to rule on whether a condemnation for infringement of copyright could constitute a violation of freedom of expression and information. The first case concerned the condemnation by the civil courts of French photographers who had exploited the images of a fashion show protected by copyright (Case 36769/08 (2013), Donald Ashby v. France). The second case concerned the criminal conviction of the founders of the site <Pirate Bay>, for facilitating the

infringement of copyright by organising the exchange of digital files with music, movies and games (Case 40397/12 (2013), Fredrik Neij and Peter Sunde Kolmisoppi (Pirate Bay) v. Sweden). The Court had to determine, on the basis of Article 10-2 ECHR (which provides that the exercise of freedom of expression may be subject to certain restrictions or penalties as are prescribed by law, and are necessary in a democratic society for the protection of the rights of others), whether the national courts could restrict freedom of expression of people sued or prosecuted under copyright infringement. In both cases, the Court approved the national rulings that sanctioned the infringers on the basis of copyright law, confirming that when it comes to resolving a conflict between two treaty rights – namely freedom of expression (Article 10-1 ECHR) and copyright (Article 10-2 ECHR) – Member States (and the courts) have a wide margin of appreciation (Case 5493/72 (1976), Handyside v. United Kingdom).

This judgment of the Supreme Court has caused a stir in France, as French copyright law is traditionally very protective of copyright owners. The exceptions to copyright and neighbouring rights have to be construed restrictively, in favour of the monopoly granted to the rightholders. Therefore, there is no fair use exemption comparable to that of Section 107 of the US Copyright Act for derivative works (other than for exceptions such as parody and quotation). The French legislator has even created a new copyright exemption as a reaction to the effects of the restrictive application of the exceptions, as in the *Utrillo case (Supreme Court, 13 November 2003, 01-14385)* in 2003, which related to coverage dedicated to an exhibition of paintings by Maurice Utrillo in the framework of televised news lasting two minutes and a few seconds. In this case, the Supreme Court held that the television channel could not rely on the principle of freedom of expression stated in Article 10 of the European Convention on Human Rights to communicate the paintings to the public without the authorisation of the rightholders. Article L.122-5-9° para. 1 of the French Intellectual Property Code ("IPC") now states that authors may not prohibit the reproduction or representation, in full or in part, of a work of graphic art, an architectural work or a plastic work in the written press, broadcasting or online media, for the exclusive purpose of immediate information on an event, subject to stating clearly the name of the author.

In its judgment of 15 May 2015, the Supreme Court clearly decided to soften the rigor of copyright by making it possible to take into account, only where justified of course, other principles of equal value. The Supreme Court has already done so in order to somewhat limit the rights of heirs when they exercise their right to integrity in a work, which is a perpetual and imprescriptible moral right under French law (Art. L.121-1 IPC). Indeed, in a case concerning books that were sequels to Victor Hugo's *Les Misérables*, the Supreme Court (30 January 2007, 04-15543), referring to Article 10 ECHR, quashed a judgment of the Court of Appeal of Paris that had ruled that publishing the sequels infringed Victor Hugo's right to integrity: the Supreme Court considered that the Court of Appeal should have studied the works at issue and demonstrated that these works had altered Victor Hugo's work or created a confusion as to paternity, in order to rule that Victor Hugo's moral rights had been infringed.

The Supreme Court's judgment of 15 May 2015 deferred the matter to the Court of Appeal of Versailles, which will now have to decide – and explain in concrete terms – whether the balance between freedom of expression and copyright should result in the alleged infringer being found liable. The judgment of the Court of Appeal of Versailles is now eagerly awaited.

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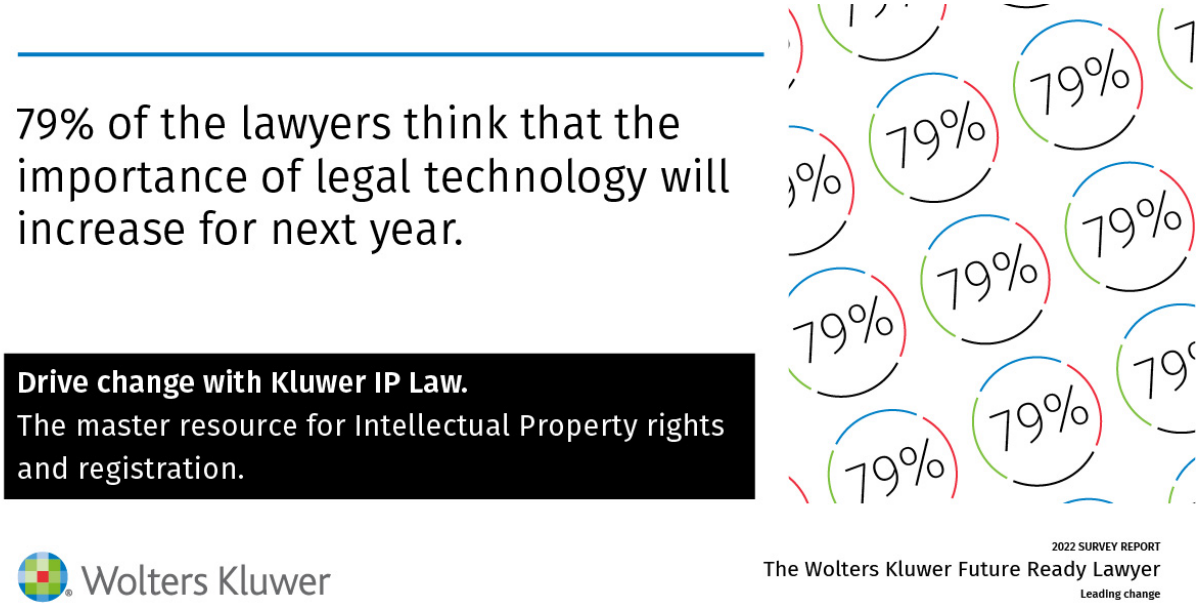

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