

Kluwer Copyright Blog

Bastei Lübbe: “Fundamental Rights as a defence to circumvent enforcement of Copyright protection? No!”, says CJEU.

Pim ten Thije (Institute for Information Law (IViR)) · Monday, February 11th, 2019

Introduction



The Court of Justice of the European Union (CJEU) has ruled in [Bastei Lübbe GmbH & Co. KG v. Michael Strotzer \(C-149/17\)](#) that “the owner of an internet connection used for copyright infringements” cannot invoke his fundamental right to private life to circumvent the possible enforcement of remedies against such infringements. This judgment is the latest step in the CJEU’s copyright case law on balancing fundamental rights in the Charter. In this case, the CJEU found a balance between the right to property, as it applies to copyright (Article 17(2) Charter), and the right to private life (Article 7 Charter).

This post first provides a summary of the facts of the case, followed by a brief discussion of the relevant provisions of the applicable law in Articles 3, 8(1) and 8(2) [Information Society Directive \(2001/29/EC\)](#), and Articles 3(1) and 3(2) [Enforcement Directive \(2004/48/EC\)](#). It then discusses the judgment, its predecessors in CJEU case law and its potential implications.

Facts

German publisher Bastei Lübbe holds, as a phonogram producer, the relevant copyright and related rights in the audio version of a book. On the 8th of May 2010, this book was shared over Mr.

Strotzer's internet connection and downloaded via internet exchange software. Bastei Lübbe brought an action at the Amtsgericht München (Munich District Court) against Strotzer, as the owner of the IP address at which the infringement took place.

Mr. Strotzer denied any infringement of copyright over his (self-proclaimed) secure internet connection. His parents were the only other users of this connection, but he claimed they (a) did not own the audiobook in question; (b) did not know it existed; (c) did not use the online exchange software; and (d) his own computer was switched off at the time of the infringement.

The local Munich Court dismissed the action, reasoning that there were other *possible* infringers. Bastei Lubbe appealed to the Landgericht München I, which held that Strotzer was "seriously likely to have committed the copyright infringement". The Court did not see how the facts of the case allowed for a third party to have used his internet connection at the time of the infringement.

The Landgericht held that the current interpretation of the German Copyright Act by the German Federal Court of Justice could preclude Strotzer from being held liable, as *the applicant* should allege and prove the infringement. Under this interpretation, the owner of the internet connection is presumed to be the perpetrator of any infringement over his network, unless he presents facts to show that the network was not secure or was made *knowingly* available to others (para 20). Strotzer did so by disclosing the identity of other persons (his parents), who had access to his connection and were, therefore, capable of having committed the alleged infringement. Since those persons were his family members, Strotzer was not obliged to provide further details relating to their use of his connection, having regard to the protection of family pursuant to Article 7 Charter and the corresponding provisions of the German Basic Law.

Against this background, the Landgericht made a preliminary reference to the CJEU, asking whether this defence, possible under German law, was in accordance with Article 8(1) and 8(2) InfoSoc Directive, and Article 3 Enforcement Directive. Article 8(1) InfoSoc Directive requires Member States to make sanctions and remedies available to rights holders. In the case of sanctions, they must meet the known "effective, proportionate and dissuasive" criteria (Article 3(2) Enforcement Directive). In regards to remedies, it is sufficient that they are provided in the law. Article 3(1) Enforcement Directive adds the "fair and equitable" criteria for "measures, procedures and remedies" against intellectual property infringement. All these criteria seem to be met in the present case.

The Judgment – How to Balance Fundamental and IP Rights?

In this judgment, the CJEU makes clear the need to balance the fundamental rights at issue in line with the Charter itself, as the Member States have done when implementing directives into national law. According to the Court, the German Copyright Act does not strike the right balance in this instance.

First, in accordance with Recital 9 InfoSoc Directive, copyright deserves a high level of protection, as it is crucial for intellectual creation. This protection is ensured by the measures in Articles 8(1) and 8(2) InfoSoc Directive, as discussed above. The Court then reiterates that remedies within the EU should be similar so far as possible, so as to further a homogenous market (as stated in recital 10) and meet the criteria of effectiveness, proportionality and dissuasiveness (in Article 3(2) Enforcement Directive).

The Court then carries out a balancing act between (1) the protection of intellectual property rights

as guaranteed by the German Copyright Act and Article 17 Charter; (2) the proper discovery process for evidence (Article 6(1) Enforcement Directive); and (3) the respect of other fundamental rights in the Charter.

The need for such a balancing exercise is twofold. First, when Member States transpose directives into national law, they must take into account the fundamental rights in the Charter. Authorities and national Courts interpreting EU rules must also safeguard implementation in line with those rights (para 45). Second, Article 52(1) Charter states that “any limitation on the exercise of the rights and freedoms recognised by the Charter must respect the essence of those rights and freedoms”. This means that “a measure which results in serious infringement of a right protected by the Charter” is not susceptible of striking a fair balance “between the fundamental rights which must be reconciled” (para 46, citing Case C-580/13, [Coty Germany](#)).

Regarding Article 7 Charter, the Court states that it applies to everyone and not just family members of those prosecuted. Still, the latter enjoy special protection in that they need not incriminate each other. This safeguard is not lessened by Article 8(3)(d) Enforcement Directive, which allows for the implementation of such extra protection in national law (paras 48-50). However, and this is the principled balance the Court strikes: if a national law would always make the right to private life prevail over the right to intellectual property in infringement proceedings, then this national legislation would fail to correctly ensure the effective enforcement of intellectual property rights. Such a national law would make it practically impossible to obtain evidence on an alleged infringement of copyright and therefore not be in line with the requirements of EU legislation in this field (paras 51–52).

This reasoning could mean that the “extra” protection claimed by Strotzer cannot be recognized, as it would “guarantee almost absolute protection” for his family members. But that is for the national court to decide. Importantly, the CJEU notes that this would not be the case if *Bastei Lübbe* were to have *another* “effective remedy” against the infringement under national law, allowing it to hold an infringer liable in tort (para 53).

Concluding Remarks – What next?

The Court has steadily been developing case law on the balancing of fundamental rights in the context of enforcement of intellectual property rights since *Laserdisken* in 1998, and including landmark cases such as *Promusicae*, *Scarlet Extended*, *Coty* and *McFadden*, to name a few. *Bastei Lübbe* is the latest addition to this evolving body of case law. Arguably, its main contribution is to clarify the existence of certain limits to the protection of the right to private life in this context. Going forward, it will be interesting to see how future judgments will interpret the Court’s reference to “other effective remedies in national law”, and how this will affect the scope of Article 7 Charter.

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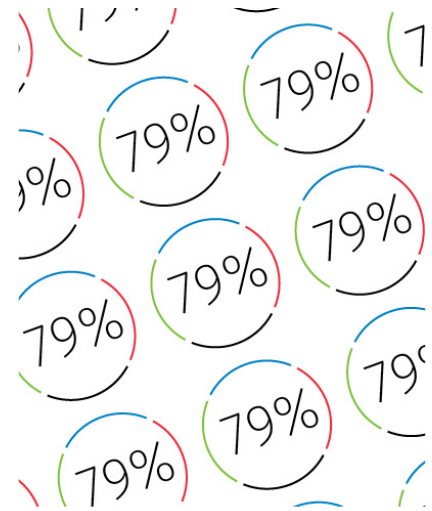
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