Kluwer Copyright Blog

Does copyright law have to balance fundamental rights beyond the written exceptions? Unfortunately, the German Federal Supreme Court has recently left this question open.

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German Federal Supreme Court (Bundesgerichtshof) decisions of April 30, 2020 (I ZR 139/15 and I ZR 228/15)

Recently, the German Federal Supreme Court issued press releases in two cases which are of fundamental importance for the relationship between copyright and conflicting fundamental rights. Specifically, the two cases, *Funke Medien* (also known as "*Afghanistan Papiere*") and *Spiegel Online* (also known as "*Reformistischer Aufbruch*"), concern the conflict between copyright and the fundamental rights of communication. After the Court suspended the proceedings and turned to the European Court of Justice (CJEU) by way of requests for preliminary rulings (C469/17 and C-516/17), the Luxembourg judges presented their answers last summer. Now, it was the turn of the German Federal Supreme Court again.

Balancing of fundamental rights in copyright law

In the proceedings, the question arose whether the fundamental rights to freedom of press and freedom of information can justify exceptions to the authors' exclusive rights beyond the written catalogue of exceptions, which exists in the European copyright systems based on the exhaustive catalogue of Art. 5 of the InfoSoc Directive (Directive 2001/29/EC). This question of the relationship between copyright and conflicting fundamental rights has always been highly controversial in European copyright law. Unlike the American fair use doctrine, there is no such

general clause in European copyright systems that allows judges to balance fundamental rights which conflict with copyright law on a case-by-case basis.

Copyright as a "censorship right" ("*Zensurheberrecht*")

The issue is of particular relevance in the situations under consideration in the two cases, which concerned deliberate uses of copyright law as a censorship right, i.e. in order to suppress unwelcome press releases. This is the case where someone affected by a press publication containing content in which they own the copyright makes a claim for injunctive relief under copyright law in order to avoid the weighing up of interests – and thus consideration of the fundamental rights of freedom of press and freedom of information – which would take place if they were to seek injunctive relief under press law. For example, is there a particular public information interest in the publication in question? Is it important in order to ensure that citizens in a democratic state are sufficiently informed for elections? These aspects are completely irrelevant to claims for injunctive relief under copyright law. At least in Germany, it is settled case law that fundamental rights which conflict with copyright – such as the fundamental rights of freedom of press and freedom of information – are not considered by the judge on a case-by-case basis beyond the written exceptions of the German Copyright Act. Can such an interpretation of copyright law be in conformity with fundamental rights? This is not likely. Therefore, if copyright law is purposely used to undermine the fundamental rights of freedom of the press and information, fundamental rights must be taken into account beyond the written exceptions. Against this background, it was pleasing that the CJEU, while refusing to acknowledge "unwritten" exceptions and limitations, did not generally reject the need for fundamental rights balancing in copyright law.

The particular importance of freedoms of press and information for democratic states

On the contrary, the CJEU has stressed more than once in the two aforementioned judgments the particular importance of the freedom of press and freedom of information. In particular, the Court held that the exceptions for the purposes of quotation (Art. 5 (3) (d) InfoSoc Directive) and news reporting (Art. 5 (3) (c) InfoSoc Directive) must be interpreted in such a way as to strike a fair balance between the author's intellectual property rights and the users' fundamental rights of freedom of press and freedom of information. The Luxembourg judges therefore agreed that the fundamental rights of freedom of press and freedom of information play a part in shaping European copyright law.

Interpretation of the exceptions in light of the fundamental rights of freedom of press and information is not enough

The German Federal Supreme Court adopted this approach of the CJEU and emphasised the significance of the fundamental right of freedom of press and of freedom of information in its rulings. In both decisions, it found in favour of the publishers concerned, thus in favour of their fundamental right of freedom of press and the fundamental right to freedom of information of the general public. For this purpose, the Court chose the approach of interpreting the relevant exception in light of the fundamental rights of freedom of press and of freedom of information: the publication of the press articles did not infringe copyright, as these would have fallen under the exception for the purposes of reporting on current events (§ 50 German Copyright Act). As welcome as this outcome might be, an abusive use of copyright cannot always be stopped by an interpretation of the exceptions in accordance with the fundamental rights of freedom of press and of freedom of information. For instance, the exception of § 50 Copyright Act only applies when

reporting on “current events”. However, a finding of reporting on “current events” will not always be possible in every such abuse of copyright – even if the exception is interpreted very broadly. Indeed, it could be said to be very questionable whether the publication of official documents from the years 2005 to 2012 in the “Afghanistan Papiere” case can sensibly be classified as “current events”. Of course, in situations where copyright is used as a censorship right, the exception for quotations may also apply in a number of cases (§ 51 German Copyright Act). However, the application of this exception will often not succeed, because it only covers works that have already been published. When deliberately secret documents are leaked and published by newspapers to inform about problems, the quotation exception therefore does not apply. It is precisely the publication of such documents, however, for which a democratic society may have a special need. The freedom of information of the general public would be massively violated therefore by the suppression of such documents through copyright law.

The need to strike a fair balance between conflicting fundamental rights in copyright law beyond the written exceptions

According to the foregoing, when using copyright as a censorship right, the fundamental rights of freedom of press and freedom of information must be taken into account beyond the written exceptions – as part of a balancing of conflicting fundamental rights. This is, incidentally, in line with the case law of the European Court of Human Rights (ECtHR). In its “Ashby Donald” decision (ECtHR, No. 36769/08), the Strasbourg Court clearly stated that a fair balance must be struck between copyright and conflicting fundamental rights. The same was stated by the ECtHR in its decision in its “The Pirate Bay” case (ECtHR, No. 40397/12). A number of national courts, including those of the highest instance, have already taken the ECtHR’s approach into account in their case law. The German Federal Supreme Court, however, at least according to the published press releases, unfortunately did not deal with a weighing of interests in its judgments at all. It is important to note that, even after the decisions of the CJEU, the Court would still have had room for a case-by-case weighing of interests when examining copyright injunctions – just not within the framework of an “unwritten exception”. Thus, an action for injunction can only be granted under German copyright law if copyright has been “unlawfully” infringed (§ 97 German Copyright Act). Indeed, copyright has not been “unlawfully” infringed if the interests of the author protected by copyright law have not been affected at all, but rather copyright is abused by him in order to suppress an unwelcome press report and thereby the fundamental rights of freedom of press and freedom of information are violated.

The question of the legitimacy of a weighing of interests under the German Copyright Act therefore remains unanswered – at least for the moment. In this respect, the reasoning in the decisions in the two cases could still be interesting. It remains to be hoped that the German Federal Supreme Court will open itself up to a weighing of fundamental rights in copyright law. The best place for this balancing of interests would be in the framework of the examination of the “unlawfulness” of the copyright infringement. But no matter in which criterion for the right to an injunction such a weighing of interests is finally established, if it is not carried out and copyright is used as a “censorship right”, this violates the fundamental rights of freedom of press and of freedom of information .

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