Kluwer Copyright Blog

Copyright as censorship right

Viktoria Kraetzig (University of Frankfurt) · Wednesday, January 11th, 2023

Time and again, authors use their copyright to prevent press publications they do not like. Such use of copyright to suppress press reporting interferes with the fundamental right of communication, which not only serves individual expression but also safeguards the existence of a democratic society. In light of fundamental rights, copyright law cannot allow the exclusive right to be used as a "censorship right". It must ensure that in cases of abuse of the exclusive right, a fair balance is struck between copyright and the conflicting fundamental right of communication.

Copyright grants its owner the exclusive right to make his or her works available to the public. In other words: It provides an exclusive right to communication. Copyright is thus by its very nature a restriction on the freedom of communication. This effect can be deliberately abused: Copyright can be instrumentalised as a "censorship right" to undermine the fundamental right of communication, which is one of the very conditions for a democratic rule of law. It is therefore of utmost importance that copyright law itself provides mechanisms that take into account the importance of the freedom of communication as guaranteed in Art. 11 of the EU Charter of Fundamental Rights (CRF) and Art. 10 of the European Convention on Human Rights (ECHR). When copyright is used to suppress free speech, a case-by-case balancing of interests must be undertaken to determine whether copyright or the conflicting freedom of communication shall prevail.

The abuse of copyright law

The use of the exclusive right as a censorship right to prevent press coverage is neither a new, nor a

national development. For instance, aviation pioneer Howard Hughes set up a company that acquired the rights of use to press articles he disliked in order to prevent their publication under copyright law[1]. The organisation calling itself the Church of Scientology has made use of copyright law on several occasions to prevent publication of critical reports that contained verbatim excerpts from internal texts as evidence of the community's practices (see Gallagher, New York Times of 22. April 2002). In another case, the Danish Ministry of Culture went so far as to try to stop an unwanted film about Jesus because it would violate the moral rights of the evangelists[2]. Yet another case took place only recently: Meghan, the Duchess of Sussex, defended herself against the publication of a letter to her father by the press not only because of a violation of her personal right, but also because of a violation of her copyright.

In cases of abuse of copyright, the typical scenario is as follows: A press publication is published which contains copyright-protected content. Usually, it is an online publication, in the context of which a literary work is published; photographs may also be involved. The author or holder of exclusive rights wants to prohibit the publication or at least parts of it. This could be for various reasons. For example, individuals may consider their personal rights to be violated by a publication. Sometimes it is also the State that uses copyright to suppress confidential information. To suppress the press coverage, the rights holder asserts a claim for injunctive relief under copyright law on the grounds of a violation of his exploitation rights.

In Germany, at least, he might succeed in bypassing a balancing of the conflicting fundamental rights by invoking an infringement of copyright. In the implementation of the InfoSoc Directive, only a narrow catalogue of exceptions to the copyright holder's exploitation rights exists (§§ 44a et seq. German Copyright Act). According to settled case law, a balancing of fundamental rights beyond this catalogue of exceptions shall not be undertaken – even if copyright is deliberately used as a right of censorship (German Federal Supreme Court (BGH) I ZR 139/15 and I ZR 228/15 of 30 April 2020). However, there is no exception in German copyright law that could prevent the misuse of copyright. Freedom of citation (§ 51 German Copyright Act) can only apply if the content in question has already been published. Yet there can be a great public interest in unpublished content that points out political problems.

In cases of abuse of copyright, therefore, only the exception for reporting on daily events could apply. However, this exception cannot stop an abuse of the exclusive right either – at least under German copyright law. The German exception in § 50 German Copyright Act is much narrower than the corresponding Directive provision in Art. 5 (3) lit. c) InfoSoc Directive. While the Directive's exception privileges reporting on "current" events, the German exception only covers reporting on "events of the day". It is settled case law of the European Court of Justice (CJEU) that an interpretation in conformity with Union law must not contravene the national method; it must therefore be consistent with the wording of the domestic law provision (C?282/10 of 24 January 2012, para. 25). For this reason alone, the national exception of § 50 German Copyright Act cannot apply in the case of abuse of copyright. Above all, however, the exception is only applicable if a daily event is reported in the "course" of which a work is seen or heard (cf. Art.? 10bis (2) Berne Convention). The work and the daily event cannot thus be identical – as is usually the case when copyright law is abused to suppress press coverage.

Because German law allows copyright to be used as a right of censorship, two cases landed at the CJEU which can be classified as cases of abuse par excellence: *Funke Medien* and *Spiegel Online*. In *Spiegel Online*, a few days before an election, a politician running for election to the German parliament sought to suppress a publication he had written in the past about sexual acts between

minors and adults – he was successful (Court of Appeal Berlin (Kammergericht), 15 O 546/13 of 27 July 2017). The state was also able to prevent documents from being published by invoking copyright law in the *Funke Medien* case. Here, the claim of infringement seemed particularly abusive because the documents in question were administrative documents written by civil servants (Court of Appeal Köln (OLG), 6 U 5/15 of 12 June 2015). It was already very questionable whether they could be protected by copyright at all as Advocate General Szpunar pointed out in his Opinion (see para. 14 et seq.).

No balancing of interests beyond the written exceptions and limitations

In the two proceedings, the German Federal Supreme Court referred the identical question to the CJEU. In essence it asked whether freedom of information and freedom of the press, enshrined in Art. 11 of the Charter of European Fundamental Rights, are capable of justifying, beyond the exceptions or limitations provided for in Article 5(2) and (3) InfoSoc Directive, a derogation from the author's exclusive rights of reproduction and communication to the public of that directive. The CJEU's answer was clear: Not even fundamental rights can justify a derogation from the exploitation rights beyond the exceptions and limitations listed in Directive 2001/29 (*Funke Medien*, para. 64 and *Spiegel Online*, para. 49). The Court based its reasoning on Recital 32 InfoSoc Directive, according to which the exceptions and limitations in Article 5(2) and (3) are listed exhaustively. Furthermore, the effectiveness of the harmonisation of copyright achieved by the directive would be jeopardised if each Member State were allowed to provide for derogations from the author's exclusive rights outside the exceptions and limitations exhaustively provided for in the directive . One can argue whether the Court's answer deserves approval – all the more so as the exceptions and limitations of Art. 5(2) and 5(3) are only optional to be implemented by the Member States.

Need for a balancing of fundamental rights

The Court also emphasised, however, that the exceptions and limitations in question must be implemented in national law in such a way that they ensure a fair balance between copyright and the freedom of communication (para. 64 and *Spiegel Online*, para. 49). How the Member States achieve this balance of interests is solely their responsibility. According to Art. 288(3) TFEU, a directive can formulate an obligation to achieve a result, but can never lay down requirements for the dogmatic implementation of this result in their domestic law. The Member States can therefore incorporate the balancing of interests in exception provisions – as the directive does. Yet, if the national exception provision ("Schranke" as it is called in Germany) which implements Art. 5 (3)(c)InfoSoc Directive in national law, is formulated too narrowly to be applicable in cases of abuse, the national copyright system must find another way to strike a fair balance between the conflicting fundamental rights. In Germany, for example, there is only a right to injunctive relief under § 97(1) German Copyright Act if the copyright is "unlawfully" ("widerrechtlich") infringed. If copyright is used as a censorship right and no exception can apply, the fair balance as required by the CJEU must be achieved within the interpretation of the term of "unlawfulness" (Widerrechtlichkeit). How Member States strike a fair balance between copyright and the fundamental right to communicate is for them alone to decide. They must, however, implement the Court's material finding that the use of copyright protected content is privileged for reporting on

current events within the meaning of Art. 5 (3)(c) of the Directive.

Freedom of communication as a cornerstone of democracy

As the CJEU has stressed, the right to property is not absolutely protected under Article 17 of the Charter (*Funke Medien*, para. 72 and *Spiegel Online*, para. 56) – it may be limited by conflicting fundamental rights. The fundamental right of freedom of expression and to information is of utmost importance for a pluralistic democratic constitutional state – in fact it is vital for it, as the CJEU and the European Court of Human Rights (ECtHR) have repeatedly pointed out in their case law. Accordingly, in *Spiegel Online*, the CJEU underlined that the interpretation of copyright must take into account that the purpose of the press, in a democratic society governed by the rule of law, justifies it in informing the public, without restrictions other than those that are strictly necessary – and vice versa (para. 72).

Hence, the more the publication in question is of general interest, the more the freedom of communication weighs in the balance of interests. This jurisprudence is in line with the case law of the ECtHR: Only a "pressing social need" can justify a restriction of the freedom of communication. According to the ECtHR, if a Convention state restricts or prohibits an expression which serves to participate in the political discourse and can have an influence on the democratic decision-making process, Art. 10(2) of the ECHR should leave the member states all the less margin of appreciation for a restriction of the freedom of communication ECtHR, No. 13585/88, para. 59) – and vice versa. In its much-cited *Ashby Donald* decision, the ECtHR put this in concrete terms: First, the character of the information at issue should define the margin of appreciation ("le type d'information", ECtHR, No. 36769/08, para. 39; see also ECtHR, No. 40397/12). In the context of political speech, it should be difficult to restrict freedom of expression since the press must fulfil its vital role as a "public watchdog" (ECtHR, No. 13585/88, para. 59). Secondly, the nature of the expression of opinion is of relevance ("le type de discours", ECtHR, No. 36769/08, para. 39). The relevant factor is therefore whether the expression is for commercial purposes. According to the ECtHR, the margin available to Convention States to restrict fundamental rights of communication is wide if the expression in question concerns economic events – in particular commercially motivated communication – without political relevance.

If in such a case-by-case balancing of interests, which applies the above-mentioned balancing parameters, copyright is not found to prevail over the freedom of communication, then the claim for injunctive relief must not be granted. It is the task of the courts to ensure that copyright cannot be misused as a right of censorship to suppress free speech. Any other interpretation violates the freedom of communication as one of the very conditions for a democratic rule of law.

This article is a summary of the author's PhD thesis "Das Urheberrecht als Zensurrecht" ("Copyright as censorship right") which was recently published.

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[1] Rosemont Enters., Inc. v. Random House, Inc., 366 F. 2d 303 (2d Cir.1966).

[2] Jehoram, GRUR Int. 1983, 385, 389

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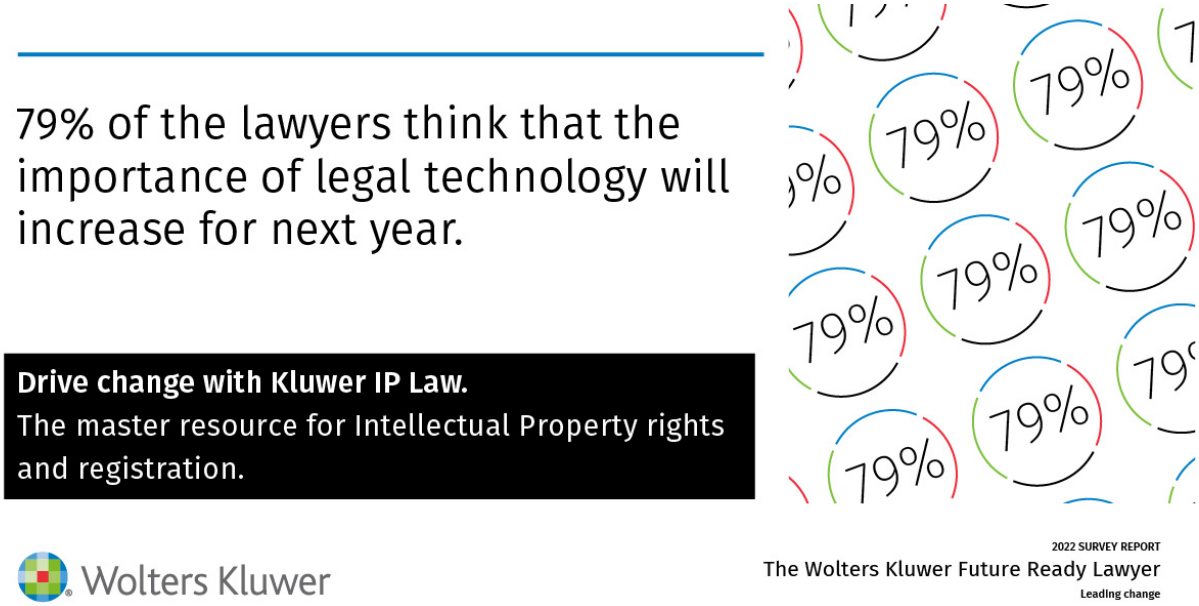

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