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COPYRIGHT AND FREE SPEECH: THE HUMAN RIGHTS PERSPECTIVE

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ABSTRACT

The relationship between copyright and freedom of expression has long been debated. Unlike the legal discourse in other jurisdictions, most notably the United States, where it is assumed that free speech and copyright do not collide, in Europe both rights have separate legal effect and are considered to be of equal importance. As a result, when an individual refers to the human right of free speech to hold and impart copyright protected material, it triggers the collision between the two rights. This paper highlights and explores these relationships between copyright and freedom of expression in Europe, offering an in-depth analysis of the human rights scope of copyright and free speech, as well as examining the circumstances under which each conflicting right should prevail.

KEYWORDS

Copyright, freedom of expression, intellectual property, human rights, European Court of Human Rights

INTRODUCTION

When lawyers think about intellectual property law, they imagine entrepreneurship and innovation.[1] Although they are undoubtedly right, a European perspective reveals that intellectual property jurisprudence entails much more. In Europe, "human rights law is intellectual property's new frontier."[2] Thus, when analyzing the scope of European intellectual property law, one should not limit oneself to the European Union ("EU") directives or regulations,[3] member-state legislation, administrative regulations, or the Court of Justice of the EU's jurisprudence ("CJEU"). Instead, it is crucial to examine the application of the European Convention of Human Rights ("Convention") and its Protocols[4] to the practice of the European Court of Human Rights ("ECHR" or "Court").

Contrary to the regulation established in many countries, most notably the United States,[5] the European regime is not bound only by the member-states' constitutional protection of intellectual property rights. Article 1 of Protocol No. 1 of the Convention highlights the protection of the right to property: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

The ECHR has further interpreted this right providing that "Article 1 of Protocol No. 1 is applicable to intellectual property as such."[6] Therefore, in addition to constitutional protection under member-states' domestic laws, copyright, as an integral part of intellectual property, enjoys protection under the umbrella of human rights guaranteed by the Convention. Likewise, Article 17(2) of the Charter of Fundamental Rights of the EU *expressis verbis* recognizes that "[i]ntellectual property shall be protected,"[7] thus depicting it in the light of human rights.

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[1] *See*, e.g., Lateef Mtima, ed., *Intellectual Property, Entrepreneurship and Social Justice* (Cheltenham: Edward Elgar Publishing, 2015), 120.
[2] Paul Torremans, *Intellectual Property and Human Rights. Enhanced Edition of Copyright and Human Rights* (Hague: Kluwer Law International, 2008), 25.
[3] *Consolidated Version of the Treaty of the Functioning of the European Union*, Official Journal (2010, C 326/47), Article 288 (ex Article 249 TEC).
[4] *Convention for the Protection of Human Rights and Fundamental Freedoms* (1950, 213 U.N.T.S. 222) [hereinafter "Convention"].
[5] Graeme Dinwoodie, "Copyright Lawmaking Authority: An (Inter)Nationalist Perspective on the Treaty Clause," *Columbia Journal of Law & the Arts* 30 (2007): 355. During the symposium "Constitutional Challenges to Copyright" the author, *inter alia*, discussed constitutional questions centered on, first, relationship between copyright and First Amendment, second, interpretation of Copyright Clause of the Constitution of the United States, and, third, the Congress' authority to enact legislation under the Copyright Clause.
[6] *Anheuser-Busch Inc. v. Portugal*, European Court of Human Rights (2007, no. 73049/01), § 72.
[7] *Charter of Fundamental Rights of the European Union*, Official Journal (2012, no. C 326/391). In its entirety Article 17 of the Charter of Fundamental Rights of the European Union reads as follows:

> 1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to

Similarly, freedom of expression is also recognized as a human right.[8] Furthermore, according to the United Nations Vienna Declaration of Programme of Action, "[a]ll human rights are universal, indivisible and interdependent and interrelated."[9] Moreover, all human rights enjoy equal status and cannot be positioned in any hierarchical order.[10] Thus, contrary to, for instance, the United States, where free speech tends to dominate over other fundamental rights,[11] in Europe both copyright and freedom of expression are of equal importance. As a result, whenever the dispute between copyright and free speech arises, the balance between the conflicting rights has to be found.

In this regard, a particularly important role has been given to the ECHR because, in lieu of the narrow notion of constitutional law, the European human rights law allows parties to bring a claim before the ECHR after "all domestic remedies have been exhausted."[12] Thus, "although the task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the Contracting States rather than with the [ECHR],"[13] the ECHR "can and should intervene only where the domestic authorities fail in that task."[14] In other words, when one of the disputing parties is not satisfied with the final judgment of the highest domestic court or tribunal, it may submit a complaint before the ECHR alleging a violation of free speech or copyright, and seeking monetary damages.

In the light of the aforementioned, the purpose of this paper is to analyze how copyright and freedom of expression, as two human rights enshrined in the Convention, are balanced in Europe. Consequently, first I will analyze the scope and notions of copyright and free speech; second I will emphasize the existing conflict between the two rights; and lastly I will determine which right should have precedence when they come into conflict. In order to highlight the equal importance

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> fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
> 2. Intellectual property shall be protected.

[8] *Convention*, *supra* note 4, Article 10. In its entirety Article 10 of the Convention reads as follows:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[9] *United Nations Vienna Declaration of Programme of Action* (1993, U.N. Doc. A/CONF.157/23), § 5.
[10] Gillian MacNaughton and Diane Frey, "Decent Work for All: A Holistic Human Rights Approach," *American University International Law Review* 26 (2011): 460.
[11] Neil Richards, *Intellectual Privacy* (New York: Oxford University Press, 2015), 10.
[12] *Convention*, *supra* note 4, Article 35(1).
[13] European Court of Human Rights, "Interlaken Follow-Up" (July 2010), §2 // http://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf.
[14] *Ibid.*

of and existing collision between copyright and freedom of expression in Europe, and to distinguish this approach from jurisdictions where both rights do not collide,[15] such as the United States, in sections 2 and 3 of the present paper I will occasionally refer to American jurisprudence.

1. THE HUMAN RIGHTS SCOPE OF COPYRIGHT AND FREE SPEECH

1.1. COPYRIGHT

Copyright is recognized as a human right for two reasons: first, "because it is seen as property, and property in turn seen as human right,"[16] and, second, according to a Nobel Peace Prize winner and principal drafter of the Universal Declaration of Human Rights ("UDHR"),[17] René Cassin, "[h]uman beings can claim rights by the fact of their creation."[18] Furthermore, as a substantive provision, Article 27(2) of the UDHR[19] is "quite clear in its inclusion of the protection of the material and moral interests of authors among human rights."[20] Thus, human rights protection to "any scientific, literary or artistic production" appears to parallel Article 2(1) of the Berne Convention, which refers to "literary, scientific and artistic domain."[21]

In the context of the Convention, although copyright has not been *expressis verbis* recognized as a conventional right, it rests in part of the property clause of Article 1 of Protocol No. 1 of the Convention. The importance of copyright as a human right, protected by the Convention, has been emphasized in a number of judgments adopted by the ECHR.

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[15] Neil Richards, *supra* note 11, 10.
[16] Paul Torremans*, supra* note 2, 14.
[17] *Universal Declaration of Human Rights* (1948, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III)) [hereinafter "UDHR"].
[18] Paul Torremans*, supra* note 2, 14.
[19] *UHDR, supra* note 17. In its entirety Article 27(2) of the UDHR reads as follows: "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."
[20] Jonathan Griffiths and Uma Suthersanen, eds., *Copyright and Free Speech. Comparative and International Analysis* (New York: Oxford University Press, 2005), 292.
[21] *Berne Convention for the Protection of Literary and Artistic Works* (1886, 1161 U.N.T.S. 3). In its entirety Article 2(1) of the Berne Convention reads as follows:

> The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

For instance, in *Balan v. Moldova*,[22] the ECHR examined a case concerning a photographer who alleged the violation of his copyright protected under Article 1 of Protocol No. 1 of the Convention as a result of the Moldovan court's refusal to compensate him for an unlawful use of his photograph of a famous Moldovan castle. The applicant complained that in 1996 the Government of Moldova adopted a decision to use his photograph as a background for national identity cards. According to Mr. Balan, he "was not consulted and did not agree to such a use of the photograph."[23]

The ECHR addressed the issue by determining the meaning and implication of the term "possessions." The Court recognized that "the concept of "possessions" referred to in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision."[24] As such, the ECHR concluded that there was no dispute as to whether the applicant could claim protection of his copyrights under the Convention.[25]

While analyzing the ECHR approach in determining whether there has been a violation of intellectual property rights, Laurence Helfer, a professor at Duke Law School, argues that the Court should examine three inter-related aspects. First, whether Article 1 of Protocol No. 1 of the Convention applies to the intellectual property right at dispute; second, whether there has been interference with that right; and, third, if there has been interference, can it be justified as fair and proportional to the interests of others.[26] Therefore, after the existence of copyright within the meaning of Article 1 of Protocol No. 1 of the Convention has been determined, prospective claimants have an obligation to prove that there has been interference with their rights, and that the interference cannot be justified.

It has to be emphasized that the so-called InfoSoc Directive,[27] purported to harmonize the main exclusive rights in Europe, has been criticized for creating legal uncertainty in the EU: "[I]t remains uncertain to what extent [member-states] are free to legislate in areas affected by the InfoSoc Directive."[28] Therefore, even though the member-states of the EU are obliged to follow the InfoSoc Directive, as

[22] *Balan v. Moldova*, European Court of Human Rights (2008, no. 19247/03).
[23] *Ibid.*, § 8.
[24] *Ibid.*, § 32.
[25] *Ibid.*, § 35.
[26] Laurence Helfer, "The New Innovation Frontier? Intellectual Property and the European Court of Human Rights," *Harvard International Law Journal* 49 (2008): 1, 11.
[27] *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, Official Journal (2001, no. L 167) [hereinafter "InfoSoc Directive"].
[28] Eleonora Rosati, "Copyright in the EU: In Search of (In)Flexibilities," *Journal of Intellectual Property Law & Practice* 9 (2014): 585.

well as other directives and regulations enacted by the European Council and Parliament,[29] the ECHR still has to apply a case-by-case analysis of the compliance of domestic copyright law with Article 1 of the Protocol No. 1 of the Convention.

1.2. FREE SPEECH

The British newspaper *The Guardian* once famously stated: "Copyright law strikes its own balance between an author's right to property and the public's right to information, but copyright is by its nature an interference with the right to freedom of expression."[30] As "copyright owners can entirely suppress some forms of speech by seeking injunctions against those who want to express themselves by means of unauthorized uses of copyright-protected material,"[31] the present paper seeks to provide brief analysis of freedom of expression in order to further determine how these rights interact with each other.

Article 10(1) of the Convention highlights that "[e]veryone has the right to freedom of expression."[32] However, it is universally acknowledged that the right to freedom of expression is not absolute.[33] Thus, in the light of the Convention, freedom of expression can be limited if the interference is "prescribed by law," pursues one of the legitimate aims indicated in Article 10(2) of the Convention ("interests of national security," "public safety," "prevention of disorder or crime," protection of "health or morals," or "reputation or rights of others"), and necessary in a democratic society; namely, it should be proportionate to the aim sought.[34] In its jurisprudence, the ECHR has further crystalized the application of the test of necessity.[35] In *Sunday Times v. the United Kingdom*, the Court concluded that the adjective "necessary" is neither synonymous with "indispensable," nor does it have the same meaning as "admissible," "ordinary," "useful," "reasonable," or

[29] *See*, e.g., *Council Directive 91/250 on the legal protection of computer programmes*, Official Journal (1991, no. L 122); *Council Directive 92/100 on rental and lending rights and certain rights related to copyright in the field of intellectual property*, Official Journal (1992, no. L 346); *Council Directive 93/83 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission*, Official Journal (1993, no. L 248); *Council Directive 93/98 harmonizing the term of protection of copyright and certain related rights*, Official Journal (1993, no. L 290); *Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases*, Official Journal (1996, no. L 77).
[30] Charles Swan, "When Does Freedom of Speech Trump Copyright?" (February 2013) // http://www.theguardian.com/media-network/media-network-blog/2013/feb/13/freedom-speech-trump-copyright.
[31] Laurence Helfer and Graeme Austin, *Human Rights and Intellectual Property. Mapping the Global Interface* (New York: Cambridge University Press, 2011), 221.
[32] *Convention*, *supra* notes 4, 8.
[33] Wojciech Sadurski, *Freedom of Speech and Its Limits* (Dordrecht: Kluwer Academic Publishers, 1999), 98.
[34] Shaheed Fatima, *Using International Law in Domestic Courts* (Portland: Hart Publishing, 2005), 380.
[35] *Sunday Times v. the United Kingdom*, European Court of Human Rights (1979, no. 6538/74), § 59.

"desirable."[36] The test instead implies a requirement to show the existence of a "pressing social need."[37]

Free speech, as recognized by Article 10 of the Convention, implicates two facets: first, the right to hold opinions and impart information and ideas; and, second, the right to receive information and ideas.[38] Thus, in the light of the aforementioned, any copyright-related limitation to impart or receive information must be analyzed within the meaning of the three-part test set by Article 10(2) of the Convention.

2. THE CONFLICT BETWEEN COPYRIGHT AND FREE SPEECH

At the European level, most commentators believe that intellectual property rights conflict with human rights.[39] Christophe Geiger sees intellectual property "at the very top of the pyramid of the EU norms, a powerful symbol and a clear sign of the legitimacy of the EU."[40] However, he continues, "intellectual property exists alongside other fundamental rights with which it will have to be balanced."[41]

Nevertheless, some authors have emphasized the idea that there is enough room for individuals to express themselves without "taking the ideas or non-original expressions or even the protected expressions of one's work."[42] Even as late as in 2008, American-minded academics have highlighted that there cannot be a conflict between copyright and freedom of expression, and "[i]t comes as no surprise that the [ECHR] has never heard a case of this matter."[43] Indeed, in *Eldred v. Aschroft*,[44] the Supreme Court of the United States reached the conclusion that free speech and copyright do not collide, and reaffirmed that "the Framers intended copyright itself to be the engine of free expression."[45]

Notwithstanding different opinions, in the 2013 case of *Ashby Donald and Others v. France*,[46] the ECHR for the first time decided the issue of a direct conflict between free speech and copyright. This case concerned the application of French copyright law (*Code de la propriété intellectuelle*), according to which the French

[36] *Ibid*.
[37] *Ibid.*
[38] Jonathan Griffiths and Uma Suthersanen, *supra* note 20, 290.
[39] Laurence Helfer, "Human Rights and Intellectual Property: Conflict or Coexistence?" *Minnesota Journal of Law, Science & Technology* 5 (2003): 48; Joo-Young Lee, *A Human Rights Framework for Intellectual Property, Innovation and Access to Medicines* (Farnham: Ashgate Publishing, 2015), 191; Willem Grosheide, ed., *Intellectual Property and Human Rights: A Paradox* (Cheltenham: Edward Elgar Publishing, 2010), 5.
[40] Christophe Geiger, ed., *Constructing European Intellectual Property: Achievements and New Perspectives* (Cheltenham: Edward Elgar Publishing, 2013), 15.
[41] *Ibid*., 15-16.
[42] Paul Torremans, *supra* note 2, 142.
[43] *Ibid.*
[44] *Eldred v. Ashcroft*, Supreme Court of the United States (2003, 537 U.S. 186).
[45] *Ibid.*, at 219, citing *Harper & Row Publishers, Inc. v. Nation Enterprises*, Supreme Court of the United States (1985, 471 U.S. 539, 558).
[46] *Ashby Donald and Others v. France*, European Court of Human Rights (2013, no. 36769/08).

fashion houses own the copyright of any photos taken in fashion shows.[47] Although the ECHR did not find a violation of the right to free speech, it clarified that a conviction based upon copyright infringement for illegal reproduction or public communication of a material protected by copyright shall be considered an interference with the freedom of expression.[48]

Thus, *Ashby Donald and Others v. France* introduces a new chapter in the legal theory of balancing copyright and free speech because now more than ever it is clear that copyright-based restrictions upon freedom of expression requires an in-depth analysis of whether restriction is prescribed by law, pursues a legitimate aim, and is necessary in a democratic society.

Taking into account the above-mentioned, the ECHR's reasoning in *Ashby Donald and Others v. France* shall be scrutinized. In 2008, three fashion photographers of American, Brazilian and French nationality brought a case before the ECHR. The applicants Robert Ashby Donald, Marcio Madeira Moraes and Olivier Claisse alleged the violation of Article 10 of the Convention because the French courts convicted them for taking and publishing pictures of fashion shows in Paris on their website without receiving permission from the fashion houses.[49]

For the violation of French copyright laws, the Court of Appeals of Paris ordered the first two applicants to pay fines in the amount of 8 000 EUR, while the third applicant was fined in the amount of 3 000 EUR.[50] Furthermore, all three applicants were jointly and severally ordered to pay damages in the total amount of 15 000 EUR to the French Federation of Fashion (*Fédération française de la couture*), 150 000 EUR to five different fashion houses, and 90 000 EUR to three other fashion houses.[51] The Supreme Court of France upheld the decision of the Court of Appeals of Paris, as in the instant case distribution of copyright protected photographs lacked news reporting and information purpose.[52]

The ECHR recalled that Article 10 of the Convention is applicable to the online communication, and emphasized that the photographs, taken and published on the Internet by the applicants, were of a commercial nature.[53] The applicants' intention to sell pictures, whose copyrights under the French law belonged to the fashion houses, highlighted the tension between the applicants' right to hold and impart information regarding fashion shows in the form of digital photographs, on the one hand, and the fashion houses' copyrights of the photographs, established by French law, on the other hand.

[47] *Ibid.*, §§ 5, 19-24.
[48] *Ibid.*, § 44.
[49] *Ibid.*, §§ 1-8.
[50] *Ibid.*, § 14.
[51] *Ibid.*, § 15.
[52] *Ibid.*, § 18.
[53] *Ibid.*, § 34.

In the light of the applicants' complaint, the ECHR took into consideration the applicants' purpose of commercial speech, and noted that the domestic courts have particularly wide margin of appreciation because commercial speech does not raise a debate of a general interest.[54] The Court further reiterated that protection of the rights and freedoms of others may lead member-states to restrict other rights enshrined in the Convention.[55] The ECHR acknowledged that the balancing of conflicting rights is a difficult task, and, therefore, contracting states should have wide margin of appreciation.[56]

The applicants, on the other hand, argued that their conviction was not necessary in a democratic society because they had received an accreditation to attend the fashion shows at dispute and take pictures.[57] Although the ECHR recognized that the applicants' conviction itself is an interference with the freedom of expression, it referred to the decision of the Court of Appeals of Paris, and concluded that interference can be justified on the basis that French copyright law provisions were breached.[58] As a result, there was no violation of Article 10 of the Convention.

The judgment in the case of *Ashby Donald and Others v. France* is particularly important because of the emphasis that copyright may infringe free speech. Here, due to the fact the applicants' engaged in a commercial speech, the ECHR simply referred to wide margin of appreciation given to the domestic courts, and decided that copyright interests should prevail. However, the present decision does not indicate that a similar approach will be applicable to the cases where speakers argue on the matters related to a debate of general interest. Therefore, it is plausible to assume that, in the light of different factual circumstances, freedom of expression, guaranteed under Article 10 of the Convention, might overcome copyright, protected under Article 1 of Protocol No. 1 of the Convention.

In their analysis of *Ashby Donald and Others v. France*, Dirk Voorhoof of Ghent University and Inger Høedt-Rasmussen of Copenhagen Business School, explain circumstances in which the Court's analysis might differ, providing the precedence to free speech instead of copyright.[59] As such, freedom of expression might trump copyright if the case is a matter of public concern and involves, for

[54] *Ibid.*, § 39.
[55] *Ibid.*, § 40.
[56] *Ibid.*, citing *Chassagnou and Others v. France*, European Court of Human Rights (1999, nos. 25088/94, 28331/95, 28443/95), § 113: "La mise en balance des intérêts éventuellement contradictoires des uns et des autres est alors difficile à faire, et les Etats contractants doivent disposer à cet égard d'une marge d'appréciation importante [The balancing of potentially conflicting interests against each other is difficult to do, and Contracting States must have in this respect a wide margin of appreciation]."
[57] *Ibid.*, § 42.
[58] *Ibid*.
[59] Dirk Voorhoof and Inger Høedt-Rasmussen, "ECHR: Copyright vs. Freedom of Expression" (January 2013) // http://kluwercopyrightblog.com/2013/01/25/echr-copyright-vs-freedom-of-expression/.

instance, political speech, reproduction of works for educational or scientific purposes, or prior restraints, as well as "in cases where journalists and media are exercising their public watchdog function in a democracy, in cases of parody, caricatures or other forms of transformative use and when sanctions risk to have a chilling effect on the freedom of expression and information in a democracy."[60]

Because in *Ashby Donald and Others v. France* the ECHR affirmed the legal analysis of the Court of Appeals of Paris rather than balanced copyright and free speech itself, the balancing test of the two conflicting rights has yet to be developed. Indeed, Voorhoof and Høedt-Rasmussen argue that "a clear set of criteria need to be developed, like the [ECHR] did in [the case of] *Axel Springer Verlag AG v. Germany*,[61] balancing the Articles 8 [which protects right to privacy] and 10 of the Convention."[62]

It must, however, be emphasized that in determining the balancing test for copyright and free speech, the ECHR should avoid the ambiguity and inconsistency it engaged with by balancing privacy and free speech for many years. In this regard, it is worth noting that the ECHR examined its leading "privacy v. free speech" case *Von Hannover v. Germany*[63] in 2004, while the "clear set of criteria", as noted by Voorhoof and Høedt-Rasmussen, were established in cases of *Axel Springer Verlag AG v. Germany* and *Von Hannover v. Germany (No. 2)*[64] only in 2012.

In particular, Article 10(2) of the Convention provides that in order to justify any restriction on the freedom of expression, the restriction must meet a strict three-part test: (1) it should be provided by law; (2) pursue a legitimate aim; and (3) be necessary in a democratic society.[65] In *Von Hannover v. Germany*, the ECHR further extended this test by stating that "the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the [the issue] make to a debate of general interest."[66] In other cases, the ECHR "attached importance to whether [issue] amounted to an intrusion into the applicant's privacy (as, for instance, by entering ... in a person's home), whether the [issue] related to private or public matters and whether the [issue concerned] limited use or was likely to be made available to the general public."[67]

In *Von Hannover (No. 2) v. Germany* and *Axel Springer AG v. Germany*, the ECHR established a six-part test, which is to be applied to all privacy cases. In *Von*

[60] *Ibid*.
[61] *Axel Springer AG v. Germany*, European Court of Human Rights (2012, no. 39954/08).
[62] Dirk Voorhoof and Inger Høedt-Rasmussen, *supra* note 59.
[63] *Von Hannover v. Germany*, European Court of Human Rights (2004, no. 59320/00).
[64] *Von Hannover v. Germany (No. 2)*, European Court of Human Rights (2012, nos. 40660/08; 60641/08).
[65] *Convention*, *supra* notes 4, 8.
[66] *Von Hannover v. Germany*, *supra* note 63, § 76.
[67] *Peck v. United Kingdom*, European Court of Human Rights (2003, no. 44647/98), § 61.

Hannover (No. 2) v. Germany, the ECHR highlighted five of the factors: (1) contribution to a debate of general interest; (2) how well known is the person concerned and what is the subject of the report; (3) prior conduct of the person concerned; (4) content, form and consequences of the publication; and (5) circumstances in which the photos were taken.[68] In *Axel Springer AG v. Germany*, the severity of the sanction imposed was given as an additional factor.[69] Furthermore, the wording of "circumstances in which the photos were taken" was replaced by "method of obtaining the information and its veracity."[70] Therefore, the Court's approach demonstrates not only inconsistency among the tests used during the years, but also highlights different language used for the same principles and included in the judgments published on the same day.

In terms of balancing two conflicting human rights, *Ashby Donald and Others v. France* can be considered parallel to *Von Hannover v. Germany*, because in both cases the ECHR for the first time highlighted the tension between freedom of expression and a different right of others, namely, copyright and privacy. However, due to the rapid development of modern technology, e.g. when even the three-year-olds share information with their iPads,[71] the ECHR should develop a balancing test for copyright and freedom of expression as soon as possible.

3. SHOULD COPYRIGHT OR FREE SPEECH PREVAIL?

As described above, unlike the American courts,[72] the ECHR has concluded that, as a general matter, copyright produces interference with freedom of expression. Therefore, the underlying question raised by the case of *Ashby Donald and Others v. France* is: how should copyright be balanced against free speech, and which right should have precedence? It has been established that "the application of copyright law compromises general free speech principles."[73] However, it does not mean that freedom of expression will always trump copyright. "The free speech rights of commercial pirates, who merely reproduce the copyright works of others for mass distribution, should be accorded little weight."[74] After the legal doctrine established this argument in 2005, it took eight years for the ECHR to examine a case on this matter.

[68] *Von Hannover v. Germany (No. 2)*, *supra* note 64, §§ 108-113.
[69] *Axel Springer AG v. Germany*, *supra* note 61, § 95.
[70] *Ibid.*, § 93.
[71] *See*, e.g., Guy Adams, "'The day I realized my toddler was addicted to the iPad': Three-year-old William tugged at the duvet and woke his father demanding the tablet… at 4am" (January 2014) // http://www.dailymail.co.uk/femail/article-2548365/As-revealed-one-three-children-use-tablet-talk-fathers-alarming-story-The-day-I-realised-toddler-addicted-iPad.html.
[72] *Eldred v. Ashcroft*, *supra* note 44.
[73] Jonathan Griffiths and Uma Suthersanen, *supra* note 20, 29.
[74] *Ibid*.

Only a few weeks after the ECHR adopted the *Ashby Donald and Others v. France* judgment, on February 19, 2013, the Court released a decision in the case of *Neij and Sunde Kolmisoppi v. Sweden*,[75] also known as *The Pirate Bay* case. In this case, the founders of one of the world's largest file sharing services on the Internet, the website *The Pirate Bay*, were convicted and sentenced for eight and ten months imprisonment, as well as ordered to pay damages in the amount of approximately five million euros for the violation of the Swedish Copyright Act (*Upphovsrättslagen*).

The case concerned the alleged violation of the applicants' right to receive and impart information by sharing copyright protected material. In examining the case, the ECHR took into account various factors, for example, the nature of the competing interests involved and the degree to which those interests require protection in the circumstances of the case, and concluded: "Since the Swedish authorities were under an obligation to protect the plaintiffs' property rights in accordance with the Copyright Act and the Convention, the Court finds that there were weighty reasons for the restriction of the applicants' freedom of expression."[76]

However, neither in *Ashby Donald and Others v. France* nor in *Neij and Sunde Kolmisoppi v. Sweden* did the ECHR establish an exhaustive list of clear criteria that should be evaluated when balancing freedom of expression and copyright. Therefore, the Court should take into consideration the comparative and international perspective of intellectual property law. Since the Convention and its Protocols are binding on those states that have signed and ratified them,[77] the jurisprudence of the contracting states is of particular importance.

For instance, while analyzing English case-law, Michael Birnhack of Tel Aviv University has highlighted that in the case of *Ashdown v. Telegraph Group Ltd.*,[78] the domestic newspapers have wanted the English courts to recognize copyright protection as an exception under Article 10(2) of the Convention.[79] In other words, the newspapers argued for the exclusion of copyright protection from the right to freedom of expression. The High Court's response was brief: "The balance between the rights of the owner of the copyright and those of the public has been struck by the legislative organ of the democratic state itself, in the legislation it has enacted. There is no room for any further defences outside the code which establishes the

[75] *Neij and Sunde Kolmisoppi v. Sweden*, European Court of Human Rights (2013, no. 40397/12).
[76] *Ibid*.
[77] *Vienna Convention on the Law of Treaties* (1969, 1155 U.N.T.S. 331), Article 26. In its entirety Article 26 of the Vienna Convention on the Law of Treaties reads as follows: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."
[78] *Ashdown v. Telegraph Group Ltd*., Court of Appeal of England and Wales (2001, 4 All ER 666).
[79] Michael Birnhack, "Acknowledging Conflict between Copyright Law and Freedom of Expression under the Human Rights Act," *Entertainment Law Review* 24 (2003): 6–7.

particular species of intellectual property in question."[80] Therefore, the English jurisprudence emphasizes that copyright cannot be interpreted broadly outside the scope of statutory or Conventional provisions, as an ultimate limitation to freedom of expression.

Eric Barendt has raised a similar question as to whether "copyright infringements are automatically excluded from protection by ... Article 10 of the [Convention]."[81] He argues that Article 10 of the Convention cannot exclude copyright infringements from protection because some infringements are worthy to a debate of general interest.[82] For example, parody, satire and appropriation of art uses existing work, but is not considered a copyright violation because it is a product of the work itself.[83]

Since copyright, being the "strong" right, interferes with the "weak" free speech,[84] the potential balancing test should be analyzed from the perspective of freedom of expression, as it is the right upon which the limits are imposed. Eric Barendt suggests that four aspects of free speech, and its relation with copyright, should be scrutinized: first, the speaker's audience; second, the form and content of speech; third, the speaker's motives; and, lastly, an in-depth scrutiny of legislation intended to promote free speech.[85] However, since Barendt writes about uncomplicated relationship between copyright and free speech in the United States, his analysis should be read critically. Nonetheless, it is worth further examining the American approach, as some revelations might be applicable to the jurisprudence of the ECHR.

For instance, Melville Nimmer, an attorney who famously argued the case of *Cohen v. California*,[86] has written that copyright infringers are "not engaging in self-expression in any meaningful sense."[87] The argument, however, can be refuted because parodists and satirists often use their work to "instigate public debate on controversial issues."[88]

Moreover, Ronald Dworkin has argued that freedom of expression should be valued irrespective of any interest of a general public.[89] When analyzing the application of commercial speech, this argument does not always ring true. Looking back at the facts of *Ashby Donald and Others v. France*, the convicted

[80] *Ashdown v. Telegraph Group Ltd*., *supra* note 78, 696.
[81] Jonathan Griffiths and Uma Suthersanen, *supra* note 20, 16.
[82] *Ibid*., 18.
[83] *Ibid*.
[84] Paul Torremans, ed., *Copyright and Human Rights: Freedom of Expression, Intellectual Property, Privacy* (Hague: Kluwer Law International, 2004), 61.
[85] Jonathan Griffiths and Uma Suthersanen, *supra* note 20, 19–29.
[86] *Cohen v. California*, Supreme Court of the United States (1971, 403 U.S. 15).
[87] Melville Nimmer, "Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?" *University of California Los Angeles Law Review* 17 (1970): 1180, 1192.
[88] Edson Beas Rodrigues, *The General Exception Clauses of the TRIPS Agreement: Promoting Sustainable Development* (New York: Cambridge University Press, 2012), 243.
[89] Ronald Dworkin, ed., *The Philosophy of Law* (Oxford: Oxford University Press, 1977), 15.

photographers referred to their freedom of expression in order to sell pictures of Paris fashion shows. If the purpose of photographers would be to obtain photos of extremely thin models in order to raise awareness of eating disorders, and to protect models themselves and young women who try to emulate them, the ECHR might have had adopted a decision in favor of the applicants.[90] Therefore, the purpose of speech is of particular importance in order to determine whether freedom of expression should prevail over copyright.

Furthermore, Jeremy Waldron provides another interesting perspective of interaction between copyright and free speech.[91] He argues that when both rights collide, copyright is recognized as a "strong" right while free speech is considered as a "weak" right.[92] Thus, according to Waldron, copyright infringers would not have rights as speakers.[93] Similarly, some authors argue that "a public interest ..., however important, cannot trump property rights: [c]opying someone's copyrighted work without permission, even though it is used for the copier's own expression, is not justified."[94]

Looking at it from the European perspective, it might be partially true. If the communication truly entails violation of one's copyright, such speech would be prohibited and speaker convicted, as it was shown in *Ashby Donald and Others v. France.* However, if the notion of "infringement" is interpreted broadly as an interference with copyright, certain exceptions might be applicable. For instance, in theory, if free speech interests constitute a "fair use" defense, copyright infringers would have a right to speak. Although at the first sight appealing, in practice, however, no EU member-state would be able to expressly adopt the American "fair use" approach because Article 5 of the InfoSoc Directive[95] provides a list of limitations from which member-states can choose when drafting their domestic laws, but to which they cannot add.[96]

Nevertheless, applying those principles to the exceptions mentioned in Article 10(2) of the Convention, "copyright law should not be taken for granted as immune from judicial review and its details should not enjoy an *a-priori* immunity."[97] In the examined cases of *Ashby Donald and Others v. France* and *Neij and Sunde Kolmisoppi v. Sweden*, the ECHR bluntly upheld interferences with freedom of expression because the copyright infringements were associated with commercial

[90] Dirk Voorhoof and Inger Høedt-Rasmussen, *supra* note 59.
[91] Jeremy Waldron, "From Authors to Copiers: Individual Rights and Social Values in Intellectual Property," *Chicago-Kent Law Review* 68 (1992): 841.
[92] *Ibid*.: 856–862.
[93] Jonathan Griffiths and Uma Suthersanen, *supra* note 20, 23.
[94] Michael Birnhack, *supra* note 79, 23.
[95] *InfoSoc Directive*, *supra* note 27.
[96] Trevor Cook, "Exceptions and Limitations in European Union Copyright Law," *Journal of Intellectual Property Rights* 17 (2012): 243.
[97] Michael Birnhack, *supra* note 79, 20.

speech. Nevertheless, if the motives of the speech are within the scope of a debate of general interest, and address the society at large, copyright interests protected under Article 1 of Protocol No. 1 of the Convention have to be limited in favor of freedom of expression guaranteed by Article 10 of the Convention.

Both Eric Barendt[98] and Michael Birnhack[99] have emphasized that in order to resolve the tension between copyright and freedom of expression, it is necessary to look in prior copyright law doctrines. For instance, one such doctrine is related to the idea–expression dichotomy. As a result, the copyright protection would be only applicable to the form of copyright protected material, not the information it carries.

By the same token, William Cornish highlights that "copyright protects the expression of an idea rather than the idea itself."[100] However, it would be burdensome for the ECHR to apply the idea–expression dichotomy, as, for example, in the examined cases of the fashion photographers and of *The Pirate Bay*, the means of speakers' expression carried much less weight than the substance it contained. As a general matter, speakers do not seek to obtain permission for conducting certain actions, like publishing photographs on the Internet or sharing files with friends. Instead, the speakers in dispute are willing to distribute materials with specific content, which, however, might be copyright protected. Nonetheless, depending on the factual circumstances, the application of the idea–expression dichotomy might be useful for the ECHR while providing a more detailed analysis on balancing copyright and freedom of expression.

Consequently, the ECHR has a challenging task to take into consideration all of the different aspects of domestic copyright regulation and interpretation of Article 1 of Protocol No. 1 of the Convention, in order to establish an exhaustive and clear balancing test under the notion of "necessary in a democratic society" of Article 10(2) of the Convention.

CONCLUSIONS

Although the relationship between copyright and freedom of expression has long been examined in the United States, the issue has emerged only recently in European legal doctrine and jurisprudence. As a matter of the Conventional provisions, the right to property has historically been seen as a stronger right than freedom of expression. Therefore, contrary to the United States, where right to

[98] Jonathan Griffiths and Uma Suthersanen, *supra* note 20, 24-25.
[99] Michael Birnhack, *supra* note 79, 8-11.
[100] William Cornish, *Intellectual Property: Patents, Copyrights, Trademarks & Allied Rights* (London: Sweet & Maxwell, 1999), 382.

freedom of speech tends to overcome other constitutional rights, the domestic laws of European countries guarantee much stronger protection to copyright.

Nevertheless, in Europe both freedom of expression and copyright are considered not only constitutional rights, but also human rights. Consequently, human rights are of equal importance. As a result, neither the ECHR nor the domestic courts are entitled to give precedence to only one particular right. Instead, both domestic and international courts are required to balance the two conflicting rights.

Since the European national courts only recently have started to balance copyright and free speech, it becomes clear that an exhaustive balancing test has yet to be developed. In this context, the ECHR currently has dealt only with the cases related to commercial speech. As such, the Court has unanimously decided these cases in favor of copyright. Nevertheless, the fact that the ECHR has recognized the exercise of copyright protection as an interference with freedom of expression indicates that, in the light of different factual circumstances, the Court may rule in favor of free speech.

In order to provide a consistent case-law, the ECHR should soon adopt a new balancing test, because as of now the outcome of each particular case brought before the ECHR is difficult to predict. Therefore, the ECHR should treat the conflict between copyright and free speech similarly to how it examines the relationship between privacy and free speech. In this regard, however, it must be emphasized that the balancing tests applied to right to privacy and freedom of expression were historically constantly changing, and only in 2012 did the Court develop an overarching six-part test. This test is a substitute for the well-established three-part test where any interference to freedom of expression: (1) should be provided by law; (2) pursue a legitimate aim; and (3) be necessary in a democratic society.

Therefore, the ECHR should modify the existing legal provisions emerging from Article 10(2) of the Convention, and evaluate speaker's audience, motives, and the content and form of speech in each particular case.

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