

COPYRIGHT & FREEDOM OF EXPRESSION

– ASSESSING THE CONFLICT BETWEEN COPYRIGHT ENFORCEMENT AND THE FREEDOM OF EXPRESSION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS –

Vildan Drpljanin

Helsinki Committee - Skopje, Vildan.Drpljanin@mhc.org.mk

Abstract

The debate around the interplay between copyright and freedom of expression has been discussed for many years now. Yet questions regarding the potential conflict between the two rights and the extent of this ‘conflict’ still provoke vigorous disagreements and keep the debate at a stalemate. The knot becomes even more complicated when one takes a specific element of copyright, such as copyright enforcement, and confronts it with freedom of expression in the online sphere under a treaty that protects both rights like the European Convention on Human Rights. This poses the dilemma whether states are obliged to guarantee the freedom to ‘receive and impart information and ideas’ even on the expense of one’s monopoly provided by copyrighted work, which consists at least in part of ‘information and ideas’. The article examines the issue and analyses the European Court of Human Rights cases in order to consider the legal options for cohesion or conflict. The legal, social and political complexities, the absence of a European consensus, and the very valid points for and against the existence of a conflict between copyright enforcement and the freedom of expression under the Convention, function as a starting point for further exploration. The adopted approach assesses the conflict between individual protection of property and state obligations regarding the public interest in general from the standpoints of intellectual property law and international human rights law. Thus, the paper transcends copyright, copyright enforcement, freedom of expression and the Convention, and analyses the very principles that underlie the issue at stake.

Keywords: *copyright, copyright enforcement, freedom of expression, European Convention on Human Rights, ECHR, European Court of Human Rights, ECtHR, balancing two rights.*

Copyright Enforcement & Freedom of Expression

‘Copyright and freedom of expression have often been viewed as harmonious and complementary concepts. [...] (F)or example, the (US) Supreme Court characterized copyright law as the ‘engine of free expression.’.’

(Samuelson-2002)

1.ASHBY DONALD AND OTHERS V. FRANCE: BEGINNINGS OF THE DISCUSSION ON EUROPEAN LEVEL

Is it possible to enforce copyright in such a way to encourage freedom of expression rather than conflict it? This was the main question that appeared for the first time in front of the ECtHR in the case of *Ashby Donald and others v. France* (36769/08). The case concerned the justification of the conviction of three fashion photographers for copyright infringement regarding publication of pictures, owned by a fashion company, on an internet site. The photos were taken by one of the photographers and they were published without permission of the fashion houses in question. After exhausting the domestic remedies, the photographers filed an application to the ECtHR and complained about a breach of their right to freedom of expression, protected under Article 10 of the ECHR. The Court declared the application admissible and moved on to examine the merits of the case. The ECtHR recognized that the publication of the photographs was an exercise of the right to freedom of expression and that the conviction of the applicants for these acts amounted to an interference with this right.

Even though the judgement found no violation of Article-10 of the ECHR as the interference was established to be justified, this case illustrated the legal, social, and political dilemmas as to the interplay between copyright enforcement and freedom of expression under the ECHR (Woltag-2010). Ultimately, if copyright enforcement is to remain unregulated at the European level, with a broad Margin of Appreciation (MoA), would it be possible for freedom of expression to stay unhindered? These questions, on which widely differing beliefs and views are strongly held (compare Dembour-2006 to Boyle-2008), have now been the subject of academic discussions for a long time (Greer-2006), but the debate still seems to be at a stalemate. European states aiming to strike a fair balance between the rights of the individual and the interests of the community, in particular between the protection of property and the freedom to receive and impart information and ideas, approach the issue differently and make European consensus on this question unlikely to emerge (Hetcher-2004). In addition to that, the strong division between scholars points out that there is a case to be made both for stronger copyright enforcement as well as copyright enforcement’s restriction. Enjoyment of possessions is certainly a value that underlies human rights in today’s system, but it is also true that the issue of a potential conflict between copyright enforcement and freedom of expression is one in which the interest of the individual cannot be separated from the interest of society as a whole (Abbott-2014). Consequently, it becomes clear

that with regards to this matter, personal gains and the interest of society might be perceived as mutually exclusive.

This shows the delicacy of the subject and some of the potential challenges States might face in their balancing exercises. Given the increasing likeliness that these cases will only become more prevalent in the future, as well as the impact this discussion might have both on copyright and freedom of expression, there are several areas which ought to be explored. This article tackles a few of these legal issues in the hope of contributing useful insights as to how the ECtHR should approach this topic.

2.NECESSITY TO DISCUSS COPYRIGHT AND FREEDOM OF EXPRESSION

‘Thus copyright is antithetical to freedom of expression. It prevents all, save the owner of the copyright, from expressing information in the form of the literary work protected by the copyright.’. These words by Lord Phillips in *Ashdown v Telegraph Group Ltd* (UKSC-2001), capture the essence of the puzzle behind this article.

The right to freedom of expression is conveyed in several international legal documents, starting from the UDHR (Article-19), through the CERD (Article-5(d)(viii)), all the way up to the ICCPR (Article-19). The right is prescribed with specific reference to children in the CRC (Articles-12&13), and it is also enshrined in three regional Conventions; ECHR (Article-10), ACHR (Article-13), and ACHPR (Article-9). Protection and definitions provided by these documents vary and hard law provisions have been followed by many soft law references. Nevertheless, Article-10 of the ECHR, remains by far the most relevant from a European perspective (Hugenholz-2001). This Article guarantees the right to receive and impart information and ideas to everyone and shows the intention for broad interpretation as it is phrased in media-neutral terms applying to both old and new media. On the other hand, copyright is intended to promote literary, scientific and creative arts by providing the creator of an original work with exclusive rights for its use and distribution. Copyright is also protected by international treaties, most notably by the Berne Convention (Article-1) and the UCC (Article-1) and is undisputed in international law (Rome Convention, WIPOCT and TRIPSA). In the European context, the ECHR does not explicitly recognize copyright or intellectual property as a human right, but a fundamental rights basis for copyright and special protection may be derived from the ‘property clause’ of Article-1 of Protocol-1 to the ECHR. Furthermore, ECtHR has made it clear that this Article is applicable to intellectual property (*Melnichuk v. Ukraine* and *Anheuser-Busch Inc. v. Portugal*).

The ECHR is the only international Convention that protects both the right to freedom of expression and intellectual property rights, including copyright. As such, it is the sole legal instrument in the international sphere that encompasses the possible tension between two Articles in the context of receiving and imparting information and ideas and having limited monopoly on them. The challenge is thus to determine whether copyright enforcement conflicts with freedom of expression under the ECHR, and if it does, to what extent. The aim of the research question and this article is to test whether these diverging views within Europe, that lead countries to regulate the issue differently, could be unified in a direction offered by human rights and intellectual

property law. Namely, to answer the question if international human rights law (IHRL) and intellectual property law (IPL) offer a direction for the discussion, a mandate or even an obligation for States to regulate and to help clarify the obligations arising from the ECHR in this aspect.

For the purpose of this article, copyright is defined as the protection of authors' and artists' expressive works against unauthorized reproduction or distribution by third parties. Expressive works generally include books, films, photographs, music recordings and computer software, but there is a broad consensus that there is no express limit on what material might be considered to embody protectable artistic expression. That being so, this article takes a broad definition towards what is to be considered expressive work for the purpose of keeping the focus on copyright enforcement rather than on copyright itself. The scope of copyright enforcement may vary and it can include direct removal of content, blocking or restricting access to it, hiding the infringing content and/or punishing and convicting the publishers. Freedom of expression in this article is understood as the right to receive and impart information or a protection of the individual from public authority's interference, aside from the restrictions that are allowed for in accordance with Article 10(2). 'Information' ought to be perceived in its most extensive meaning as long as it fits the definition provided by Article 10(1) of the ECHR. Therefore, the test will be whether the key element of the freedom of expression, the possibility to receive and impart information and ideas, is hindered by the protection of copyright enforcement under the ECHR, in such a way to limit public debate or the general interest (Balkin-2004, Birkinshaw-2010 and Wenzel-2014). This is especially relevant in the age of internet, as both easy access to copyrighted work and a wide platform for dissemination of information and ideas are provided (Kohl-2007). Hence, the yardstick for the article will be the coherence of the ECHR and its underlying principles (Brems-2008) and the present understanding of the issue shall be evaluated based on current interpretation methods and case-law of the ECtHR.

3.THE REALM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

It might seem like IPL and human rights have little in common and that there is almost no risk of conflict between them. However, two events in the 1990s (Helfer-2004), placed intellectual property on the human rights agenda in the USA, raising concerns of a potential conflict and the need for an approach that can guarantee coexistence between the two. Over time, proliferation of intellectual property rights and declining public domain brought the debate to Europe, inspiring many scholars to discuss the growth of copyrights, trademarks, and other rights arising from IPL in the context of human rights.

Even though today many European countries must comply with a number of harmonisation directives adopted by the European Council and Parliament since 1991, copyright law on the continent is still regulated on a country-by-country basis. Ergo, the protection of copyright in the European countries is implicitly provided in constitutional provisions, private property laws, rights of privacy and in the 'property clause' of Article-1 of Protocol-1 to the ECHR. Consequently, the legal protection of both freedom of expression and copyright is undoubtedly guaranteed by the ECHR (Lawson-2012), but the reciprocity between these two rights remains to be clarified by the ECtHR (Voorhoof-2013). Considering that the ECtHR is the only regional or international human

rights body with any jurisprudence on the matter, it is necessary to carefully analyse its judgements to see if they offer a direction for the discussion. So far, the ECtHR has not ruled that copyright enforcement, to whichever extent, is incompatible with any of the Articles of the ECHR, but likewise it has not stated that it is inherently consistent with freedom of expression under Article-10 of the ECHR either. This leaves open the possibility to discuss the interactions between the two Articles.

Namely, Article-10(1) guarantees the ‘freedom to hold opinions and to receive and impart information and ideas...’ and if every copyrighted work consists, at least in part, of ‘information and ideas’ (Hugenholtz-1989), a potential conflict between copyright enforcement and freedom of expression under the ECHR is evident (Voorhoof-2013). While there is a formulation of freedom of expression as a substantive explicit right in the provisions of Article-10 of the ECHR, copyright is only implicitly protected under the ‘property clause’ of Article-1 of Protocol-1 to the ECHR (Sermet-1998). Nevertheless, lack of European consensus between countries on how to set copyright enforcement, absence of jurisprudence on this issue and a need to balance the two conflicting fundamental rights embodied in the Convention, puts the ECtHR in a position where it might have to accept a wide MoA (Lever-2012).

4.CONFLICT BETWEEN COPYRIGHT ENFORCEMENT AND FREEDOM OF EXPRESSION UNDER THE ECHR

Free expression is the ultimate manifestation of human rights values. The expression protected under Article-10(1) of the ECHR is not limited to written and/or spoken words (Macovei-2004), but it also extends to pictures, images, and actions intended to express an idea or to convey information. Knowing that printed documents, radio broadcasts, paintings, films, and information distributed via electronic systems, are also protected under this Article, it follows that the means for production and communication, transmission or distribution of information and ideas are comprehensively incorporated into the Court’s jurisprudence. Hence, it is typical for Article-10 to protect expression that carries a risk of damaging or actually damages the interests of others, which might be applicable to copyright enforcement too. However, freedom of expression under the ECHR protects both the substance of the information and the form in which they are expressed, whilst the protection of copyright safeguards only the expression of facts and ideas, and not the information and the ideas themselves. This puts copyright enforcement in a safe position towards potentially endangering the right to freedom of expression, but the Court is yet to clarify whether the rapid developments of the means of communication could change or affect this in any manner.

At the same time, the nature of the right to property is centred around the human being as an autonomous subject who is entitled to the peaceful enjoyment of his or her possessions, and all of the actions that follow from it as long as that does not interfere with the public interest. As such, this right represents the core of the liberal idea of freedom (McCarthy-2010). The ECtHR has so far found that, among many others, traditional heritable property, usufruct over land, company shares, intellectual property, and specifically copyright, are all protected under Article-1 of Protocol-1 to the ECHR. Consequently, the protection of copyright includes the safeguarding of copyright enforcement as a necessary tool to guarantee the effective enjoyment of the right. This puts copyright in a unique position where its enforcement engages both the freedom of expression

and the protection of property. The growing of the Internet, and correspondingly the shift of freedom of expression in the digital sphere, as well as the increased need to protect copyright online, indicates that the interplay between the two, ought to become only more common. The time-limited protection of copyright is considered by some scholars as self-contained and as a representation of a perfect balance between encouraging authorship and serving public interest (Stowel-2005). Indeed, through the provision of certain limitations and exceptions to the exclusive rights of the copyright owner, states compensate the freedom of expression, and other public interests, such as education and science, and avoid conflict by allowing everyone, under certain conditions, to use a copyrighted work or part of it. Nonetheless, this article is not considering these scenarios, as they have foreseen the conflict and have adjusted the protection to avoid it, but only the existence of a potential conflict in unregulated areas.

Ultimately, the breadth of the rights to freedom of expression and to protection of property in the ECtHR's jurisprudence might make it difficult to ascertain which elements should prevail in the balancing exercise between the freedom, the right, and the legitimate aims for interference. This leads to potential uncertainty as to the obligations arising from the two Articles and puts states in a position to stick with the negative obligations and to implement only the steps that are more predictable (Dembour-2006). The ECtHR may still allow for interference with freedom of expression as long as it is in accordance with Article-10(2) of the ECHR, namely '*...restrictions or penalties as are prescribed by law and are necessary in a democratic society...*'. Nevertheless, the unpredictability whether copyright enforcement would as a rule be perceived as a legitimate aim for interference with the freedom of expression and if so, to what extent, might weaken copyright enforcement as well as freedom of expression (Ziemele-2009).

5. JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Since *Dima* in 2002 (58472/00), which was the first case on the matter in front of the Court, the ECtHR has adjudicated four other cases related to the interplay of freedom of expression and copyright in the meaning of this article. In *Dima v. Romania*, the ECtHR clearly refused to examine the interpretation of the Romanian Copyright Act, and asserted that domestic authorities have almost exclusive right to resolve matters arising in the area of copyright enforcement. This set a wide MoA in related cases and confirmed the essential role of the national law in determining the protectable subject matter under Article-1 of Protocol-1 to the ECHR. The Court reaffirmed this reasoning in *Anheuser-Busch Inc. v. Portugal* (73049/01) and emphasized that the fundamental question of the extent to which IPL generally should be protected under the ECHR remains mostly within the MoA of the State. The ECtHR refused to give general directions as to the safeguards that should be provided for the protection of property and failed to further substantiate its jurisprudence, but it did establish that intellectual property is unequivocally protected under the Article.

For the first time, the ECtHR clarified that a conviction based on copyright law for illegally reproducing or publicly communicating copyright protected material can be regarded as an interference with the right of freedom of expression in *Ashby Donald and Others v. France*. This means that any interference must be in accordance with the three conditions set out in Article-

10(2) of the Convention. The Court restated that copyright enforcement is indeed to be considered as an interference with the freedom of expression in *Neij and Sunde Kolmisoppi v. Sweden* (40397/12), the case brought by two of the co-founders of 'The Pirate Bay', and that the interference must be in accordance with the three-step test of Article-10(2) of the ECHR. Nevertheless, the Court found no violations in these two cases as it concluded that the interferences with the right to freedom of expression was prescribed by law, pursued a legitimate aim and was necessary in a democratic society.

Finally, the ECtHR found a violation of Article-10 of the ECHR in *Cengiz and Others v. Turkey* (20877/10) deciding on an application brought by lecturers complaining that the blocking of their access to a website was infringing on their right to receive information. This judgement serves as a good example as to how the implicit protection of copyright also safeguards the right to freedom of expression as it gave regular internet users the opportunity to challenge the ban in question, rather than reserving such a right for targeted media platforms or content owners. In this case, the applicants sought to get the ban lifted citing the freedom to receive and impart information as well as the public interest in accessing an information sharing website such as YouTube. YouTube's copyright is what essentially allowed the applicants to lift the ban.

6.THE THREE-STEP TEST

At this stage it is indisputable that copyright enforcement interferes with the right to freedom of expression under the ECHR. Yet, this interference would fail to establish a 'conflict' in the meaning of this article if the exception clauses in Article-10(2) would, as a rule, allow governments to construe copyright enforcement as a legitimate aim for restriction of the freedom of expression. Any restriction to freedom of expression, including the ones deriving from copyright enforcement, must satisfy the three-conditions test set by Article-10(2) of ECHR. Namely, the restriction ought to be prescribed by law, have a legitimate aim and be deemed as being necessary in a democratic society. Even though internet and mobile based electronic information dissemination systems have considerably changed communication practices, these three conditions still represent a good indicator of the validity of restrictions.

That being so, copyright enforcement does not usually face a problem of satisfying the first condition, as actions are prescribed by national laws (Pugatch-2006). The same applies to the second condition as the protection of the rights of others is one of the legitimate aims prescribed by Article-10(2). In this situation, the protection of the right to property enshrined in Article-1 of Protocol-1 serves as a legitimate aim to satisfy the second condition. However, in practice, it is mostly the third condition that may appear challenging to prove in copyright enforcement cases. States enjoy certain MoA when deciding if a restriction is deemed 'necessary', but they still must satisfy the general standard and make sure that the restrictions answer a pressing social need and are proportional to the legitimate aim of the restriction.

Even though the ECtHR explicitly recognised the applicability of Article-10 in copyright enforcement cases, it failed to substantially analyse the necessity and proportionality of the restrictions in any of the cases, missing the opportunity to set a standard for future cases. The ECtHR evaded to thoroughly discuss the matter by granting a wide MoA to domestic authorities,

and by relying on very limited arguments. For instance, the whole analysis conducted in *Ashby Donald* focused on the fact that the publication of pictures of models at a fashion show is a commercial speech that does not concern issues of general interest or contribute to public debate. The commercial nature of the speech does not liberate the Court from the obligation to exhaustively observe if the interference with the right of freedom of expression is necessary in a democratic society. Furthermore, the reasoning of the decision did not put a clear set of criteria for categorization of different kinds of expression and did not elaborate on how to decide if public interest or debate of general interest are at stake. The ECtHR has distinguished different speeches in previous cases and asserted that States have a broader MoA in the regulation of speech in commercial matters as opposed to other types of expression. Nonetheless, the unique character of copyright enforcement, together with the absence of jurisprudence on this matter, require a clearer standard on this point. Additionally, apart from the content of the information, Article-10 of the ECHR also applies to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information. In this manner, the case, being the first internet-related judgement, opens a whole new sphere for protection of rights against breaches in the digital world and emphasizes the need of a clear standard (Voorhoof&Rasmussen-2013). The ECtHR seems to devote little attention to these details.

This is even more so because of the indefinite nature of what constitutes a subject of public debate or general interest. The jurisprudence of the ECtHR and the academic literature (Voorhoof-2009) point out that it would depend on the circumstances, which leaves flexibility to the Court for a case by case approach. Therefore, the judgements add to the uncertainty on how to apply the ‘balancing’ test. The Court is yet to take the opportunity to provide guidance to states on how to approach the balancing of protection of private property on the one hand and the freedom of expression on the other. Ultimately, it would not be the first time for the Court to take such a stand since it has previously engaged in setting standards of protection that would guarantee two possibly opposing rights. Namely, in the case of *Axel Springer Verlag AG v. Germany* (39954/08), the Court comprehensively explained the balancing regarding Article-8 and Article-10, and made a clear path for states to follow. Contrastingly, there is an uncertain future for the application of Article-10 in matters of copyright enforcement interfering with the right of freedom of expression or vice versa for the application of Article-1 of Protocol-1 to the ECHR in issues regarding freedom of expression.

The consistent failure of the Court to examine whether the restrictions answer a pressing social need and if they are proportional to the legitimate aim of the restriction, bears the danger of lowering the ‘necessity’ threshold. This leaves ambiguity whether the Court would grant the same wide MoA in cases where copyright enforcement goes against the general interest. More to the point, the Court rarely addresses the proportionality of the interference, which in *Ashby Donald* took the form of criminal conviction and high award of damages, and simply relies on the argument that the applicants have to prove that the penalty imposed by the State is unreasonably harsh. The omission of the Court to provide a more detailed rationale to this conclusion is of a major concern as some of the sanctions might bear a risk of having a ‘chilling effect’ that may unduly restrict the exercise of freedom of expression (Davidson-2009). The Court’s reliance on the MoA is often cursory and based only on the absence of a European consensus on the matter, but the MoA doctrine does not exempt the Court from the responsibility to observe the actions of the states in

respecting the ECHR (Frowein-2009) and the ECtHR is still required to give its own assessment regarding the Articles in question. The wide interpretation of the MoA leaves states with an open door to significantly different interpretations as to when copyright enforcement interferes with freedom of expression, potentially harming the protection of both freedom of expression and copyright enforcement (Kieff-2003). Lastly, the ECtHR never clarified how states should ensure that minimum conditions for protection of freedom of expression and copyright enforcement are satisfied through safeguards and protective procedures even though they are essential for legal stability of the protection of these rights, as well as for their utilization. The ECtHR in its reasoning so far, has implicitly framed the issue as a conflict between two rights, the right to freedom of expression, and the right to protection of property, or at least has failed to clarify that there is no conflict, rather than as a reconcilable divergence between two complementary rights. Considering that many of the countries have some systems in place that keep a balance between the two rights, makes it easier for the ECtHR to guide States as to how to ensure the best degree of protection.

The Court has already paved the way, albeit only to a certain extent, for a balancing exercise under the Convention (Marshall-2009). Based on the ECtHR current interpretation methods and case-law, this can be avoided inasmuch as the Court devotes more time to ensure that the protection under the two Articles is fairly balanced and easy to follow by the states. Clear standards would also guarantee better protection of both rights. If the Court was to leave things to develop at its current pace, that might mean unduly restriction of either one of the rights. Human rights law, together with IPL, offer a direction for the discussion, and a mandate for the ECtHR to call upon states to follow its guidance and to help clarify the state obligations arising from the ECHR in this aspect.

7.CONCLUDING OBSERVATIONS

‘Acknowledging the link between copyright and free speech can help determine the proper contours of a copyright regime that both allows and limits property rights in expression, skewing the content of speech toward change.’ (Tushnet-2000). This article has explored whether Tushnet’s claim inspires a legal obligation for the States and the ECtHR to facilitate a balancing exercise between the freedom of expression and the protection of property under the ECHR.

The ECtHR is reluctant to find violations of Article-10 of the ECHR or Article-1 of Protocol-1 to the ECHR in cases related to freedom of expression and copyright enforcement. At first sight this might lead to the presumption that the ECtHR has already achieved an appropriate balance between the two rights, whilst the truth is that the debate is buried under the layers of the wide MoA granted to the states. The Court’s approach is based on the national legislation on copyright or freedom of expression and it only considers the obligations arising from that State’s (non) regulation of the interplay between them, that is usually framed as one of potential conflict. However, the effective respect for freedom of expression requires precision regarding the rights that are being protected and a split approach by the states does not play in favour of the receiving and the imparting of information. Therefore, a more active approach from the ECtHR regarding the balancing of the two rights would benefit both freedom of expression and protection of property.

Sufficient guidelines that would be able to provide the states with general rules before they are able to capture the details of each case are necessary and instrumental. This leads to the conclusion that the overlap of the elements between the seemingly present conflict of the Articles could be used to enhance the protection of both rights. Although the protection of copyright enforcement by both private or public (criminal) means conceptually does not conflict with the right to freedom of expression, it is the criminal sanctions that hold the risk of causing a ‘chilling effect’ on freedom of expression. The ECtHR could move towards explicitly setting guidelines and invoking positive obligations for the states regarding the regulation of the interplay between freedom of expression and copyright enforcement, if it was to frame properly the important interests behind the Articles. If the Court’s reasoning was to be in line with the coherence of the ECHR in cases related to the issue, based on the ECtHR current interpretation methods and case-law, it must make sure to avoid a potential conflict by setting clear rules and standards for protection.

Careful scrutiny towards everything this article has laid out leads to the conclusion that the conflict between freedom of expression and copyright enforcement is slightly present but easily avoidable. The source of the problem seems to be the Court’s framing of the issue, which is presented as a potential clash between the right to freedom of expression and the right to protection of property, while it actually is a complementary set of rights that could enhance each other’s protection. Granting a wide MoA creates a situation where legal practitioners and national authorities can derive arguments from an extensive and unpredictable list of justifications, potentially unduly restricting the exercise of one of the rights. Since the right to freedom of expression does not contradict the right to protection of property, but the presumption is rather axiological, the Court’s approach to leave a wide MoA to the states is misleading and might weaken the protection of both rights.

Accordingly, copyright enforcement conflicts with freedom of expression under the ECHR only as long as, and to the extent that, the ECtHR does not deliver on its obligation to provide sufficient guidance to states as to how to balance Article 10 of the ECHR with Article 1 of Protocol 1 to the ECHR. Insofar as these conditions are satisfied, the respect of both freedom of expression and the protection of property in terms of the provided definitions, must be a *sine qua non* for the ECHR in relation to the protection of individual rights. The ‘perfect’ balance under the ECHR would construe state obligations around the notion of complementarity of the rights to provide for enhanced protection of free expression, as well as of copyright enforcement.

REFERENCE

BOOKS

1. Alexander, L. (2005). *Is there a right of freedom of expression?* Cambridge University Press.
2. Anderman, S. D., & Ezrachi, A. (Eds.). (2011). *Intellectual property and competition law: new frontiers*. Oxford University Press.
3. Atkinson, B., & Fitzgerald, B. (2016). *Short History of Copyright*. Springer International.
4. Bedi, S. (2009). *Rejecting rights*. Cambridge University Press.

5. Beverley-Smith, H., Ohly, A., & Lucas-Schloetter, A. (2005). *Privacy, property and personality: civil law perspectives on commercial appropriation*, 7th revised edition. Cambridge University Press.
6. Birkinshaw, P. (2010). *Freedom of Information: the Law, the Practice and the Ideal*. Cambridge University Press.
7. Boyle, J. (2008). *The public domain: Enclosing the commons of the mind*. Yale University Press.
8. Brems, E. (ed.) (2008). *Conflicts between fundamental rights* (Vol. 30). Intersentia.
9. Burrell, R., & Coleman, A. (2005). *Copyright exceptions: the digital impact*, 6th revised edition, Cambridge University Press.
10. Cox, A. (1981). *Freedom of expression*. Harvard University Press.
11. Davidson, A. (2009). *The law of electronic commerce*. Cambridge University Press.
12. Dembour, M. B. (2006). *Who believes in human rights? reflections on the European Convention*. Cambridge University Press.
13. Fortner, R. S., & Fackler, P. M. (Eds.). (2011). *The handbook of global communication and media ethics*. John Wiley & Sons.
14. Frankel, S., & Gervais, D. (Eds.). (2014). *The Evolution and Equilibrium of Copyright in the Digital Age* (Vol. 26). Cambridge University Press.
15. Greer, S. (2006). *The European Convention on Human Rights: achievements, problems and prospects*. Cambridge University Press.
16. Heath, C., & Sanders, A. K. (Eds.). (2005). *New Frontiers of Intellectual Property Law: IP and Cultural Heritage-Geographical Indications-Enforcement-Overprotection*. Bloomsbury Publishing.
17. Herman, B. D. (2013). *The fight over digital rights: The politics of copyright and technology*. Cambridge University Press.
18. Hetcher, S. A. (2004). *Norms in a wired world*. Cambridge University Press.
19. Hill, R. (2014). *The New International Telecommunication Regulations and the Internet: A Commentary and Legislative History* (Vol. 57). Springer Science & Business Media.
20. Ichim, O. (2014). *Just Satisfaction Under the European Convention on Human Rights*. Cambridge University Press.
21. Kenyon, A. T. (Ed.). (2016). *Comparative defamation and privacy law* (Vol. 32). Cambridge University Press.
22. Kieff, F. S. (2003). *The Case for Registering Patents and the Law and Economics of Present Patent-Obtaining Rules*. Harvard Law School.
23. Kohl, U. (2007). *Jurisdiction and the Internet: Regulatory competence over online activity*. Cambridge University Press.
24. Krause K. and Scheinin M. (eds.) (2012). *International Protection of Human Rights: A Textbook*, 2nd revised edition. Abo Akademi University Institute for Human Rights.
25. Lever, A. (Ed.). (2012). *New frontiers in the philosophy of intellectual property* (Vol. 18). Cambridge University Press.
26. Lucchi, N. (2006). *Digital media & intellectual property: management of rights and consumer protection in a comparative analysis*. Springer Science & Business Media.
27. Marshall, J. (2009). *Personal Freedom Through Human Rights Law? Autonomy, Identity and Integrity Under the European Convention on Human Rights*. BRILL Publishers.

28. Mazziotti, G. (2008). *EU digital copyright law and the end-user*. Springer Science & Business Media.
29. Means, G. (2017). *The modern corporation and private property*. Routledge.
30. Pugatch, M. P. (Ed.). (2006). *The intellectual property debate: Perspectives from law, economics and political economy*. Edward Elgar Publishing.
31. Richardson, M., & Thomas, J. (2012). *Fashioning intellectual property: Exhibition, advertising and the press, 1789-1918* (Vol. 14). Cambridge University Press.
32. Stamatoudi, I. A. (2001). *Copyright and multimedia products: A comparative analysis*, 3rd revised edition. Cambridge University Press.
33. Zeno-Zencovich, V. (2008). *Freedom of expression: A critical and comparative analysis*. Routledge-Cavendish.

SECTIONS IN BOOKS

1. Bomhoff, J. (2008). ‘The Rights and Freedoms of Others’: The ECHR and its Peculiar Category of Conflicts between Individual Fundamental Rights.’, pp. 1-29, in Brems, E. (ed.) (2008) *Conflicts between fundamental rights* (Vol. 30). Intersentia.
2. Hugenholtz P. (2001) ‘Copyright and Freedom of Expression in Europe’, pp. 343-363, in Dreyfus R., Zimmerman D. and First H. (eds.) (2001) *Expanding the Boundaries of Intellectual Property*. Oxford University Press.
3. Lawson R. (2012) ‘The European Convention on Human Rights’, pp. 423-462, in Krause K. and Scheinin M. (eds.) (2012) *International Protection of Human Rights: A Textbook*, 2nd revised ed. Abo Akademi University-Institute for Human Rights.
4. Scheinin M. (2012) ‘Characteristics of Human Rights Norms’, pp.19-37, in Krause K. and Scheinin M. (eds.) (2012) *International Protection of Human Rights: A Textbook*, 2nd revised ed. Abo Akademi University-Institute for Human Rights.
5. Strowel A. and Tulkens F. (2005), ‘Freedom of Expression and Copyright under Civil Law: Of Balance, Adaptation, and Access’, pp. 287-313, in Griffiths J. and Suthersanen U. (eds.) (2005) *Copyright and Free Speech. Comparative and international analyses*. Oxford University Press.

JOURNAL ARTICLES

1. Balkin, J. M. (2004). Digital speech and democratic culture: A theory of freedom of expression for the information society. *New York University Law Review*, Vol. 79(1), pp. 1-55.
2. Bonadio, E. (2011). File Sharing, Copyright and Freedom of Speech. *European Intellectual Property Review*, 33(10), pp. 619-631.
3. Callies D.L. and Breemer J. D. (2000), The Right to Exclude Others from Private Property: A Fundamental Constitutional Right. *Washington University Journal of Law & Policy* 3, pp. 39-59.

4. De Beer, J., & Clemmer, C. D. (2009). Global trends in online copyright enforcement: a non-neutral role for network intermediaries? *Jurimetrics*, pp. 375-409.
5. Denicola, R. C. (1979). Copyright and free speech: Constitutional limitations on the protection of expression. *California Law Review*, Vol. 67, pp. 283-316.
6. Dzehtsiarou, K. (2011). Does consensus matter? Legitimacy of European consensus in the case law of the European Court of Human Rights. *Public Law*, pp. 534-553.
7. Dzehtsiarou, K. (2011). European Consensus and the Evolutive Interpretation of the European Convention on Human Rights. *German Law Journal*, Vol. 12, pp. 1730-1745.
8. Helfer L. (2004) 'Human Rights and Intellectual Property: Conflict or Co-Existence?', *Netherlands Quarterly of Human Rights* Vol. 22(2), pp. 167-179.
9. Helfer, L. (2008). The New Innovation Frontier-Intellectual Property and the European Court of Human Rights. *Harvard International Law Journal*, Vol. 49, pp. 1-52.
10. Morawa, A. H. (2002). 'The 'Common European Approach', International Trends, and the Evolution of Human Rights Law. A Comment on Goodwin and I v. The United Kingdom', *German Law Journal*, Vol. 12, pp. 535-553.
11. O'Flaherty M. (2012). 'Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34', *Human Rights Law Review* Vol. 12(4), pp. 627-654.
12. Samuelson, P. (2002). 'Copyright and freedom of expression in historical perspective', *Journal of Intellectual Property Law* Vol. 10, pp. 319-344.
13. Sermet, L. (1998). 'The European Convention on human rights and property rights'. *Council of Europe, Human Rights Files*, Vol. 11, pp. 1-72.
14. Shany, Y. (2005). Toward a general margin of appreciation doctrine in international law? *European Journal of International Law*, Vol. 16(5), 907-940.
15. Tushnet, R. (2000). Copyright as a model for free speech law: What copyright has in common with anti-pornography laws, campaign finance reform, and telecommunications regulation. *Boston College Law Review*, Vol. 42, pp. 1-79.
16. Voeten, E. (2007). The politics of international judicial appointments: evidence from the European Court of Human Rights. *International Organization*, Vol. 61(4), pp. 669-701.
17. Voeten, E. (2008). The impartiality of international judges: Evidence from the European Court of Human Rights. *American Political Science Review*, Vol. 102(4), pp. 417-433.
18. Voorhoof D. (2009), 'Freedom of Expression under the European Human Rights System', *Inter-American and European Human Rights Journal* Vol. 2, pp. 3-48.

LEGISLATION

1. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.
2. 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 No. L 248 of 6 October 1993, 15-21.

3. Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 *on the legal protection of databases*, Official Journal No. L 77 of 27 March 1996, 20-28.
4. 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 No. L 167 of 22 June 2001, 10-19.
5. Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 *on the enforcement of intellectual property rights*, Official Journal No. L 195 of 2 June 2004, 16-25.
6. End of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869, United Nations, Treaty Series, vol. 299, 33 I.L.M. 1197, 1994.
7. European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02.
8. Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ('Banjul Charter')*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, 1982.
9. Organization of American States (OAS), *American Convention on Human Rights, 'Pact of San Jose'*, Costa Rica, 22 November 1969.
10. UN Educational, Scientific and Cultural Organisation (UNESCO), *Universal Copyright Convention* (as revised on 24 July 1971 and including Protocols 1 and 2), 6 September 1952, U.N.T.S. No. 13444, vol. 943, pp. 178-325.
11. UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.
12. UN General Assembly, *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, 26 October 1961, 496 United Nations, Treaty Series, vol. 43, U.K.T.S. 1964, p. 38.
13. UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.
14. UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.
15. UN General Assembly, *Universal Declaration of Human Rights* adopted by General Assembly Resolution 217 A(III) of 10 December 1948.
16. United International Bureaux for the Protection of Intellectual Property, Geneva, *Berne Convention for the Protection of Literary and Artistic works*, of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967.
17. World Intellectual Property Organization, *WIPO Copyright Treaty (WCT)*, done at Geneva on December 20, 1996.

CASE-LAW

1. *Akdeniz v. Turkey*, Application Number 20877/10, European Court of Human Rights, 11 March 2014.
2. *Akdivar and Others v. Turkey*, Application Number 99/1995/605/693, European Court of Human Rights, 1 April 1998.
3. *Anheuser-Busch Inc. v. Portugal*, Application Number 73049/01, European Court of Human Rights, 11 January 2007.
4. *Ashby Donald and others v. France*, Application Number 36769/08, European Court of Human Rights, 10 January 2013.
5. *Ashdown v Telegraph Group Ltd*, Application Number 2001 EWCA Civ 1142, 2002 R.P.C. 5., Supreme Court of the United Kingdom, July 18, 2001.
6. *Axel Springer Verlag AG v. Germany*, Application Number 39954/08, European Court of Human Rights, 7 February 2012.
7. *Balan v. Moldova*, Application Number 19247/03, European Court of Human Rights, 29 January 2008.
8. *Beyeler v. Italy*, Application Number 33202/96, European Court of Human Rights, 5 January 2000.
9. *Bramelid and Malmström v. Sweden*, Application Numbers 8588/79 and 8589/79, 12 December 1983.
10. *Brein v Mininova*, LJN BJ6008, 250077/HA ZA 08-1124, Dutch district court of Utrecht, 26 August 2009.
11. *Chorherr v. Austria*, Application Number 13308/87, European Court of Human Rights, 25 August 1993.
12. *Dichand and Others v. Austria*, Application Number 29271/95, European Court of Human Rights, 26 February 2002.
13. *Dima v. Romania*, Application Number 58472/00, European Court of Human Rights, 16 November 2006.
14. *Dudgeon v. the UK*, Application Number 7525/76, European Court of Human Rights, 22 October 1981.
15. *Groppera Radio AG and Others v. Switzerland*, Application Number 10890/84, European Court of Human Rights, 28 March 1990.
16. *Handyside v. the United Kingdom*, Application Number 5493/72, European Court of Human Rights, 7 December 1976.
17. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 United States Supreme Court, 539, 105 S. Ct. 2218, 85 L. Ed. 2d 588, 20 May 1985.
18. *Herrmann v. Germany*, Application Number 9300/07, European Court of Human Rights, 26 June 2012.
19. *Konstantin Markin v. Russia*, Application Number 30078/06, European Court of Human Rights, 22 March 2012.
20. *Lingens v. Austria*, Application Number 9815/82, European Court of Human Rights, 8 July 1986.
21. *Markt Intern Verlag GmbH and Klaus Beermann v. the Federal Republic of Germany*, Application Number 10572/83, European Court of Human Rights, 20 November 1989.
22. *Marônek v. Slovakia*, Application Number 32686/96, European Court of Human Rights, 19 April 2001.

23. *Melnychuk v. Ukraine*, Application Number 28743/03, European Court of Human Rights, 7 July 2005.
24. *Mouvement Raëlien Suisse v. Switzerland*, Application Number 16354/06, European Court of Human Rights, 13 July 2012.
25. *Müller and Others v. Switzerland*, Application Number 10737/84, European Court of Human Rights, 24 May 1988.
26. *Neij and Sunde Kolmisoppi v. Sweden*, Application Number 40397/12, European Court of Human Rights, 19 February 2013.
27. *Otto-Preminger-Institut v. Austria*, Application Number 13470/87, European Court of Human Rights, 20 September 1994.
28. *Paeffgen GmbH v. Germany*, Application Numbers 25379/04, 21688/05, 21722/05 and 21770/05, European Court of Human Rights, 3 June 2005.
29. *Saliba and Others v. Malta*, Application Number 20287/10, European Court of Human Rights, 22 January 2013.
30. *Smith Kline & French Lab. Ltd. v. the Netherlands*, Application Number 12633/87, European Court of Human Rights, 10 July 1991.
31. *Stevens v. the United Kingdom*, Application Number 11674/85, European Court of Human Rights, 3 March 1986.
32. *Thoma v. Luxembourg*, Application Number 38432/97, European Court of Human Rights, 29 March 2001.
33. *Vo v. France*, Application Number 53924/00, European Court of Human Rights, 8 July 2004.
34. *Wittek v Germany*, Application Number 37290/97, European Court of Human Rights, 12 December 2002.
35. *X and Y v. the Netherlands*, Application Number 8978/80, European Court of Human Rights, 26 March 1985.
36. *Öztürk v. Turkey*, Application Number 22479/93, European Court of Human Rights, 28 September 1999.
37. *Şener v. Turkey*, Application Number 26680/95, European Court of Human Rights, 18 July 2000.

REPORTS

1. Explanatory Report to Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, *European Treaty Series - No. 41*, Strasbourg, 16 September 1963.

UN DOCUMENTS

1. UN Human Rights Committee, General Comment No. 34 on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011.

2. UN World Summit on Information Society, 12 December 2003.

WEBSITES

1. Abbott M. F. (2014), Intellectual Property, International Protection, MPEPIL, June 2014. Available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1531?prd=EPIL>, last accessed 19/05/2018.
2. BBC (2014), Pirate Bay fugitive Peter Sunde arrested in Sweden, 2 June 2014, Available at: <https://www.bbc.com/news/technology-27663839>, last accessed 25/05/2018.
3. Cottier T. (2010), Industrial Property, International Protection, MPEPIL, November 2010, Available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1530>, last accessed 27/05/2018.
4. Forbes (2014), Pirate Bay Co-Founder Peter Sunde Released from Prison, 10 November 2014, Available at: <https://www.forbes.com/sites/chanellebessette/2014/11/10/pirate-bay-co-founder-peter-sunde-released-from-prison/#58cc5d2d68c4>, last accessed 29/05/2018.
5. Frowein A. J. (2009), European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), MPEPIL, November 2009. Available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e790>, last accessed 07/06/2018.
6. Riel v. Marina (2016), in the blogpost entitled 'Cengiz and Others v. Turkey: a tentative victory for freedom of expression online' on the 'Strasbourg Observers' blog. Available at: <https://strasbourgobservers.com/2016/01/05/cengiz-and-others-v-turkey-a-tentative-victory-for-freedom-of-expression-online/>, last accessed 10/06/2018.
7. The Guardian (2015), Last remaining Pirate Bay founder freed from jail, 2 June 2015, Available at: <https://www.theguardian.com/technology/2015/jun/02/last-remaining-pirate-bay-founder-freed-from-jail-fredrik-neij>, last accessed 13/06/2018.
8. The Independent (2015), Pirate Bay founder Gottfrid Svartholm freed from prison after three years, 29 September 2015, Available at: <https://www.independent.co.uk/news/pirate-bay-founder-gottfrid-svartholm-freed-from-prison-after-three-years-a6671241.html>, last accessed 25/06/2018.
9. The right to property – Introduction (2018), Available at <http://echr-online.info/right-to-property-article-1-of-protocol-1-to-the-echr/introduction/>, last accessed 08/07/2018.
10. Voorhoof D. and Høedt-Rasmussen I. in the blogpost entitled 'Kluwer Copyright Blog Kluwer Copyright Blog'. Available at www.copyrightblog.kluweriplaw.com, last accessed 03/08/2018. ECHR: Copyright vs. freedom of expression.
11. Voorhoof D. and Høedt-Rasmussen I. in the blogpost entitled 'Kluwer Copyright Blog Kluwer Copyright Blog'. Available at www.copyrightblog.kluweriplaw.com, last accessed 22/08/2018. ECHR: Copyright vs. Freedom of Expression II (The Pirate Bay).
12. Wenzel N. (2014), Opinion and Expression, Freedom of, International Protection, MPEPIL, April 2014. Available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e855>, last accessed 19/09/2018.

13. Woltag J. C. (2010), Internet, MPEPIL, September 2010. Available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1059>, last accessed 22.11.2018.

MISCELLANEOUS

1. Carss-Frisk, M. (2001). A guide to the implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights. *Human rights handbooks*, (4).
2. European Court of Human Rights - *Factsheet on freedom of expression, the internet and new technologies*, thematic factsheet, August 2017.
3. Guide on Article 8 of the European Convention on Human Rights issued by the ECtHR.
4. Jolly, A., & Philpott, J. (2009). *The Handbook of European Intellectual Property Management: Developing, Managing and Protecting Your Company's intellectual Property*, London: Kogan Page.
5. Law, M., Stewart, D., Letts, L., Pollock, N., Bosch, J., & Westmorland, M. (1998). *Guidelines for critical review of qualitative studies*. McMaster University Occupational Therapy Evidence-Based Practice Research Group.
6. Letsas, G. (2013). The ECHR as a living instrument: Its meaning and legitimacy. *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, 2, 106.
7. Macovei, M. (2004). A guide to the implementation of Article 10 of the European Convention on Human Rights. *Human rights handbooks*, (2).
8. McCarthy, F. (2010). *Article One of the First Protocol to the European Convention on Human Rights: the evolution of a right in Europe and the United Kingdom* (Doctoral dissertation, University of Glasgow).