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 filled 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 (Hugenholtz-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 (Melnychuk 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 EHCR, 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.

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