

## European Court of Human Rights judgments on the right to freedom of expression

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There can be a tension between copyright and freedom of expression as well as a supportive relationship. Artists, writers and others who produce original content have a copyright in the material they produce. This allows them to monetise their work, enables them to make a living and thus strengthens their right to freedom of expression. At the same time, copyright claims by one producer can stop others using material that is protected under copyright, and in those cases there is a conflict between the two. One particularly clear conflict between freedom of expression and copyright occurs in cases involving the activities of file sharers, including through websites such as the Pirate Bay. A final way in which copyright and freedom of expression have come into conflict is where individuals – often politicians – attempt to stop stories being published about them or having pictures published in the media by claiming that they are covered by copyright.

Under the European Convention on Human Rights, copyright is protected under the right to property, in Article 1 of the First Protocol to the Convention. Where there is a conflict between freedom of expression and the right to copyright, the Court can therefore engage in a ‘balancing’ exercise, weighing the rights of copyrights owners against the right to freedom of expression. Generally speaking, freedom of expression enjoys stronger protection under the Convention since it can be restricted only insofar as is “necessary”, whereas property rights can be restricted when this is “reasonable” (in the English language this is a lower threshold). However, an important caveat to this general rule is that commercial speech enjoys a lower level of protection under the Convention, and so a conflict between purely commercial speech and copyright would result in a different outcome than when a copyright claim is brought to restrict ‘political’ speech.

The following judgments illustrate how the Court has handled these claims in practice.

- ***Ashby Donald and others v. France*** (no. 36769/08), 10 January 2013 (penalty for copyright infringement did not violate the right to freedom of expression)

This concerned fashion photographers who had published, on their website, photographs taken at Paris fashion shows, without permission from the fashion houses concerned. They were sued for breach of copyright and ordered to pay fines and damages totalling €255.000.

The European Court held that this did not violate their right to freedom of expression. The Court took into account that the photographs concerned fashion and did not contribute to a debate on a topic of public interest. It qualified the pictures as “commercial speech”, not “political speech”,

which enjoys a lesser degree of protection. The Court balanced the photographers' right to freedom of expression to the right of copyright owners to protect their rights, and found that the restriction on the publication of the photographs was legitimate. While the Court acknowledged that the fines and damage award were very high, it stated that no evidence had been put forward to argue that this threatened the livelihood of the photographers.

- ***Neij and Sunde Kolmisoppi v. Sweden*** (admissibility decision, no. 40397/12 March 2013) (penalty for copyright infringement imposed on founders of file-sharing website did not violate right to freedom of expression)

This concerned an application by the founders of the file sharing website, Pirate Bay, who claimed that their conviction under Swedish copyright law violated their right to freedom of expression. They argued that they had merely provided the technical infrastructure for users to share files, and that any illegality in file sharing was the responsibility of the users, not theirs. The European Court agreed that the right to freedom of expression protected the setting up of a website and other technical infrastructure. However, the Court disagreed that the conviction violated the right to freedom of expression. It held that the majority of files shared were commercial, and that the Pirate Bay served commercial speech more than political.

- ***Anheuser-Busch Inc. v. Portugal*** (Grand Chamber, judgment of 11 January 2007, no. 73049/01) (copyright claim by rival beer brewer did not violate right to copyright)

This concerned the American beer brewing company, Anheuser-Busch, which produces the "Budweiser" beer which is sold across the world. In 1981, it applied to have the name registered as a trade mark in Portugal. This application was opposed by a Czech company which had registered "Budweiser Bier" in 1968. In 1995, the US company obtained a court order cancelling the Czech registration and registered its own trademark. The Czech company challenged that decision and, following lengthy court proceedings it was successful. The US company's trade mark registration for "Budweiser" was therefore set aside. It applied to the European Court of Human Rights arguing that this violated its right to copyright.

The European Court held that the US company's rights had not been infringed. It held that the Portuguese courts had balanced the two companies' competing interests, and that the findings of the Portuguese Supreme Court were not arbitrary or manifestly unreasonable. The Supreme Court had reached its decision on the basis of the material it considered relevant and sufficient for the resolution of the dispute, after hearing representations from the interested parties.

- ***Krone Verlag GmbH & Co. KG v. Austria*** (26 February 2002, no. 34315/96) (injunction against publication of photograph of politician in connection with suspected unlawful activity violated the right to freedom of expression)

This concerned a newspaper that had published a series of reports on the financial situation of a Mr Posch who was employed as a teacher while also being a member of the Austrian National Assembly and the European Parliament. The articles alleged that he unlawfully received three salaries and were accompanied by photographs of Mr Posch. Posch then obtained an injunction under the Austrian Copyright Act on the grounds that his face was not generally known, and that the

publication of his photograph therefore infringed his rights. The newspaper appealed to the European Court of Human Rights.

The European Court held that the injunction violated the newspaper's right to freedom of expression. The Court observed that the newspaper had accused Mr Posch, a politician, of earning money illegally, which was, without doubt, a matter of public concern. The Court found that the Austrian courts failed to take into account the essential function the press fulfils in a democratic society and its duty to impart information and ideas on all matters of public interest. Moreover, it was of little importance whether a certain person (or his or her picture) was actually known to the public. In view of Mr Posch's position as a politician, there was no doubt that he had entered the public arena. Therefore, there was no valid reason why the newspaper should have been prevented from publishing his picture.

- ***News Verlags Gmbh & Co. Kg v. Austria*** (judgment of 11 January 2000, no. 31457/96) (publication of photograph of suspect did not violate copyright)

This concerned the editor and owner of the magazine, "News", which had published several reports on a letter bombing campaign against politicians and others in the public eye. The reports named the suspect and published his photograph. The suspect went to court and obtained an injunction stopping his photograph being published, under Austrian copyright law. The magazine complained to the European Court of Human Rights that this violated its right to freedom of expression.

The Court held that the injunction violated the magazine's right to freedom of expression. The offences with which the suspect had been charged had a political background and were directed against the foundations of democracy; the publications therefore concerned an issue of public interest. The Court considered that none of the photos disclosed details of the suspect's private life; and it disagreed that there were any legitimate copyright or privacy claims to justify the injunction.

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