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Intellectual Property and Freedom of Expression: A Tense Relationship

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ABSTRACT
The right to property, in particular the relationship between intellectual property rights and freedom of expression has been subject of several recent judgments of the Court of Justice of the European Union (CJUE). Dealing with the tension between these guarantees, these judgments are particularly interesting from the viewpoint of the European Convention on Human Rights (ECHR), the Protocols thereto and the case-law of the European Court of Human Rights (ECtHR). This article analyzes the structures of the relationship between both guarantees in general and then highlights some issues from the ECtHR´s perspective.

RESUME
Le droit de propriété, en particulier son rapport étroit avec la liberté d'expression, a fait l'objet de plusieurs arrêts récents de la Cour de justice de l'Union européenne (CJUE). Face à la tension réelle entre ces deux garanties, l'analyse des arrêts de la Cour de justice sous le prisme de la Convention européenne des droits de l'homme, de ses Protocoles et de la jurisprudence de la Cour européenne des droits de l'homme (CourEDH) s'avère nécessaire pour comprendre leurs interactions réciproques. Dans ce contexte, l'article examine, dans un premier temps, la coexistence plus ou moins harmonieuse du droit de propriété intellectuelle avec la liberté d'expression et met en perspective, dans un second temps, certaines questions d'actualité associées au positionnement de la CourEDH.

KEYWORDS: European Convention on Human Rights - freedom of expression - freedom of artistic expression - Fundamental Rights Charter - intellectual property - right to property - possessions, copyright - copyright directive - principle of proportionality

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Intellectual Property and Freedom of Expression: A Tense Relationship

Gabriele Kucsko-Stadlmayer*

1. INTRODUCTION

Intellectual property and freedom of expression have always been in a delicate relationship. Published contents are open to their use and misuse, even contrary to the author´s interests. In the digital age, where masses of information are freely accessible and easy to disseminate, the risks of interferences with intellectual property rights are even more widespread. As these rights are not absolute, their limitations move to the centre of attention.

2. THE PROTECTION OF PROPERTY IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS

A. Article 1 of the First Protocol to the Convention

The protection of property was not initially included in the European Convention on Human Rights ('ECHR'), out of fear that this would obstruct the Member States'economic and social policies. The difficulty in reaching agreement resulted in the right being added as Article 1 of the First Protocol to the Convention. This Protocol was adopted in Paris on 20 March 1952. It entered into force, after ten ratifications,[1] on 18 May 1954.

Article 1 of Protocol No 1 of the Convention provides :

> **Protection of Property**
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

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[1] Denmark, Iceland, Ireland, Greece, Luxembourg, Norway, Saarland (before it became an integral part of Germany on 1 January 1957), Sweden, Turkey, UK.

This formulation provides for a qualified right which is far from absolute. It permits expropriation or other deprivation of property, as well as various controls over its use, where this is shown to be in the public interest, the law authorising it is accessible, precise and without scope for arbitrariness, and it complies with the general principles of international law.

In 1979, in the ground-breaking case of *Marckx v. Belgium,* the ECHR held for the first time that 'By recognising that everyone has the right to the peaceful enjoyment of his possessions, Article 1 is in substance guaranteeing the right of property…'.[2] That case, which concerned discrimination of illegitimate children, had a considerable impact on the evolution of family law in a number of Member States. The Court ruled that the applicant as an unmarried mother was discriminated against in disposing freely with her property in comparison with a married mother.

B. Standing

As to who is entitled to assert the right to property, this can be any individual who is neither a State nor a governmental organisation. Even if the latter can own assets, the Convention, in accordance with Article 34, does not protect them.

A particular issue has arisen in relation to 'the piercing of the corporate veil', mostly from 'within' a company. According to case-law, the disregarding of an applicant company's legal personality can be justified only in exceptional circumstances, in particular where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or – in the event of liquidation – through its liquidators.[3] The Court has also dealt with situations concerning the lifting of the corporate veil of a limited liability company in the interest of its creditors – or 'from without'.[4]

As to the standing of bank shareholders in particular, the Court has recently decided the case of *Albert and Others v. Hungary*.[5] The case concerns legislation introducing the mandatory integration of two banks, of which the applicants were shareholders, into a State-controlled scheme. The Court found 'no indication that 'there existed exceptional circumstances precluding the affected companies from bringing the respective cases to the Court in their own names'.[6] The complaints should have been brought by the banks and the applicants could not claim to be victims of the alleged violations of Article 1 Protocol No 1 within the meaning of Article 34 of the ECHR.

[2] *Marckx v. Belgium*, No 6833/74, 13 June 1979, at 63.
[3] *Agrotexim and Others v. Greece*, No 14807/89, 24 October 1995, at para 66.
[4] *Lekić v. Slovenia*, No 36480/07, 11 December 2018 [Grand Chamber], at para 111.
[5] *Albert and Others v. Hungary*, No 5294/14, 7 July 2020 [Grand Chamber].
[6] Ibid, at para 165.

C. Possessions

The scope of Article 1 Protocol No 1 extends to one's 'possessions'. According to the ECtHR´s case-law, this notion has an autonomous meaning.[7]

The concept of 'possessions' has continually evolved. The Court's case law indicates that it encompasses both immovable and movable property as well as other proprietary interests. Such interests include rights '*in rem*' and '*in personam*'. In all cases a 'possession' must be owned by an individual in their private, not public, capacity.

In 2016, in its key case *Béláné Nagy v. Hungary* the Court held that the concept of 'possessions' is not limited to the ownership of physical goods and is independent from the formal classification in domestic law.[8] Certain other rights and interests constituting 'assets' can also be protected. The key question is, 'whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest'. *Béláné Nagy* concerned disability benefits, which the applicant had lost due to new eligibility criteria.[9]

The 'substantive interest' can also be an economic one, such as a license to serve alcoholic beverages connected with the running of a restaurant.[10] Other examples that may be found in the existing case law include judgment debts, shares, licences, arbitration awards, the entitlement to social security and pensions, leases or the right to exercise a profession. This makes clear that not only 'existing possessions' are protected, but also claims that have an established legal basis. In 1995, in *Pressos Compania Naviera S.A. and Others v. Belgium,* concerning claims deriving from shipping accidents, the Court declared, on the basis of a series of domestic decisions, that a 'legitimate expectation' of obtaining compensation may constitute a 'possession' for the purposes of Article 1 of Protocol No 1.[11] An individual may be regarded as having a 'legitimate expectation' only if there is a sufficient basis for the interest in national law.[12]

A legitimate expectation must be more concrete than a mere hope. In 2002, in *Gratzinger and Gratzingerova v. the Czech Republic*, concerning restitution claims after the dissolution of Czechoslovakia, the Court clarified that neither the hope that an extinguished property

[7] *Molla Sali v. Greec*e, No 20452/14, 19 December 2018, at paras 123-126.
[8] *Béláné Nagy v. Hungary*, No 53080/13, 13 December 2016 [Grand Chamber], at para 73.
[9] Ibid. at paras 73 and 76.
[10] See *Tre Traktörer Aktiebolag v. Sweden*, No 10873/84, 7 July 1989, at para 53 concerning a licence to serve alcoholic beverages, where the Court took the view that the economic interests connected with the running of a restaurant were 'possessions' for the purposes of Article 1 of Protocol No 1.
[11] *Pressos Compania Naviera S.A. and Others v. Belgium*, No 17849/91, 20 November 1995, at para 31.
[12] This was recently clarified in *Béláné Nagy v. Hungary,* No 56665/09, 13 December 2016 [Grand Chamber], at paras 74-79.

right may be revived nor a conditional claim which has lapsed as a result of the failure to fulfil the condition was a 'possession' within the meaning of Article 1 of Protocol No 1.[13]

D. The 'Three rules approach'

Once the Court is satisfied that Article 1 of Protocol No 1 is applicable, it embarks on the substantive analysis of the circumstances of the case, in order to determine whether there has been any interference.

In the landmark case *Sporrong and Lönnroth v. Sweden*, concerning the effects of long-term expropriation permits and prohibitions on construction on the applicant's estate, the Court stated that Article 1 of Protocol No 1 comprises three distinct rules :

> 61. … The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property ; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions ; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose ; it is contained in the second paragraph.

These three rules (general right to property, deprivation of property and control of its use) are however connected. In *The Former King of Greece v. Greece,* concerning the ownership status of royal property, the Court explained that the second and third rules are to be construed 'in the light of the general principle laid down in the first rule.'[14] This approach structures the ECtHR's method of examination and consists of a number of successive steps.

The Court will begin by considering whether there has there been interference with the applicant's right to the peaceful enjoyment of his or her 'possessions'. If so, the Court will ask first whether the interference amounts to a 'deprivation' of property. If not, the Court will then ask whether there is a 'control of the use' of property. Should it not be possible for the measures which affected the applicant's rights to be qualified as either deprivation or control of use of property, the facts of the case are interpreted by the Court in the light of the general principle of respect for the peaceful enjoyment of 'possessions'.

[13] *Gratzinger and Gratzingerova v. the Czech Republic*, No 39794/98, Decision, 10 July 2002 [Grand Chamber], at para 73.
[14] *The Former King of Greece v. Greece*, No 25701/94 23 November 2000 [Grand Chamber], at para 50.

E. Requirements for an interference

Any interference with the general right to property, a deprivation of property as well as any control of its use[15], shall be allowed only if three basic conditions are satisfied :

- First, a legal basis, this means accessible, precise and foreseeable provisions of domestic or EU law, as for instance elaborated in 2000 in *Beyeler v. Italy* concerning a right of pre-emption over a work of art ;[16]
- Second, a 'public interest', which is, according to *Béláné Nagy*, a 'necessarily extensive' notion ; it means any 'legitimate public or general interest', encompassing various objectives, served by public policy considerations in many factual contexts as well as rights of others ;[17] and
- Third, proportionality. Proportionality requires a reasonable relation between the means employed and the aim sought to be realised by any State measures. This means, that in order to be compatible with the general rule set forth in the first sentence of the first paragraph of Article 1 Protocol no 1, any interference must strike a fair balance between the demands of the general interest and the requirements of the protection of the individual's fundamental rights (also held in *Beyeler*[18]). In other words, the Court must ascertain whether the applicant had to bear a disproportionate and excessive burden.

When examining whether the burden is disproportionate and excessive, the Court has regard to the context of the case, the nature of the legitimate aim pursued and the intensity of the interference. There is no fixed list of relevant factors but these include procedural guarantees, choice of State measures, the applicant's behaviour and compensation. Any deprivation of property normally requires payment of compensation, an amount reasonably related to its value. A total lack of compensation can be considered justifiable only in exceptional circumstances.[19]

In assessing proportionality, the Court allows States a 'margin of appreciation', considering the State authorities to be better placed to assess the existence of both the need and the necessity of the restriction. In *Béláné Nagy,* the margin was considered to be 'wide' with respect to States´ economic and social policies. This applies, for instance, to austerity measures prompted by a major economic crisis.[20] In such cases the Court limits its scrutiny to the question of a manifest lack of reasonable foundation.

[15] For the 'three rules' approach, see *Sporrong and Lönnroth v. Sweden*, Nos 7151/75 and 7152/75, 23 September 1982 [Plenary], at para 61.
[16] *Beyeler v. Italy*, No 33202/96, 5 January 2000 [Grand Chamber], at para 109.
[17] *Béláné Nagy v. Hungary*, No 53080/13, 13 Decembre 2016 [Grand Chamber], at para 113.
[18] Ibid. at para 107.
[19] *Vistinš and Perepjolkins v. Latvia*, No 71243/01, 25 October 2012 [Grand Chamber], at paras 110-113.
[20] Ibid. at para 113.

F. Intellectual Property

Unlike Article 17 of the Charter of Fundamental Rights of the European Union ('CFR'), Article 1 of Protocol No 1 of the ECHR does not explicitly mention intellectual property. At first, the Court was reluctant to influence the development of Europe's intellectual property system by recognising human rights concerns. However, since the 1990s, the Court has recognized that different kinds of intellectual property are protected by this Article.
It is now well-established that it applies to patents,[21] copyrights,[22] and trademarks.[23] A right to publish a translation of a novel falls within the scope of this provision,[24] as does the right to musical works and the economic interests deriving from them, by means of a license agreement.[25]

In 2007, in *Anheuser-Busch Inc. v. Portugal*, the applicant company sold beer in the US under the brand name 'Budweiser', but was denied its registration as a trademark in Portugal. In this context, the Court ruled that the right to property extends to 'intellectual property as such'.[26] In order to determine whether there was a 'possession', the Court used a multi-factor balancing test that looks to 'the bundle of financial rights and interests in issue', including the rights arising under international, regional, and national laws, and their practical economic value.[27] In this inquiry the Court found that the conditionality of the rights and interests under consideration did not affect the applicability of Article 1 of Protocol No 1.[28] Significant weight was placed on the exclusivity of the said rights and interests.

3. THE RIGHT TO PROPERTY AND THE RIGHT TO FREEDOM OF EXPRESSION

A. The Problem

Intellectual property rights, often resulting from creative activity, can be related in various ways to freedom of expression. The rights may coincide, but also collide. A typical situation is that a publication in the media interferes with intellectual property rights of other individuals.

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[21] *Smith Kline and French Laboratories Ltd v. the Netherlands*, No 12633/87, Decision of the Commission, 4 October 1990 ; *Lenzing AG v. the United Kingdom*, No 38817/97, Decision of the Commission, 9 September 1998.
[22] *Melnychuk v.* Ukraine, No 28743/03, Decision, 5 July 2005 ; *Neij and Sunde Kolmisoppi v. Sweden*, No 40397/12, Decision, 19 February 2013.
[23] *Csibi v. Romania*, No 16632/12, Decision, 4 June 2019 ; *Dor v. Romania*, No 55153/12, Decision, 25 August 2015.
[24] *SC Editura Orizonturi SRL v. Romania*, No 15872/03, 13 May 2008.
[25] *SIA AKKA/LAA v. Latvia*, No 562/05, 12 July 2016.
[26] *Anheuser-Busch Inc. v. Portugal*, No 73049/01, 11 January 2007 [Grand Chamber], at para 72.
[27] Ibid. at para 76.
[28] Ibid. at para 78.

B. The Right to Freedom of Expression

This guarantee is enshrined in Article 10 of the ECHR, which reads :

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

Since the 1976 judgment of *Handyside v. UK,* the Court has reiterated that freedom of expression constitutes one of the essential foundations of a democratic society, a basic condition for its progress and each individual's self-fulfilment.[29] Thus, it is of high significance for the values of liberal democracy and the democratic society protected by the Convention.

This protection extends to any expression notwithstanding its content, disseminated by any individual, group or type of media. It includes a freedom of artistic expression for those who create, perform, distribute or exhibit works of arts.[30] The only content-based restriction concerns the dissemination of ideas inciting hatred and racial discrimination. In view of Article 17 of the Convention, Article 10 may not be invoked for an abuse of rights, such as promoting ideas contrary to the spirit of the Convention like speech stirring up hatred or violence[31] or Holocaust denial.[32]

The right to freedom of expression guarantees not only the right to impart information and ideas, but also the right of the public to seek and to receive them. This covers, under certain circumstances, an NGO´s access to a survey with the names of public defenders and the

[29] *Handyside v. the United Kingdom*, No 5493/72, 7 December 1976 [Plenary], at para 49.
[30] See, e.g., *Müller and Others v. Switzerland*, No 10737/84, 24 May 1988 *; Lindon, Otchakovsky-Laurens and July v. France*, Nos 21279/02 and 36448/02, 24 May 1988 [Grand Chamber]; *Vereinigung Bildender Künstler v. Austria*, No 68354/01, 25 January 2007.
[31] *Perincek v. Switzerland*, No 27510/08, 15 October 2015 [Grand Chamber], at paras 113-15.
[32] *Kühnen v. the Federal Republic of Germany*, No 12194/86, Decision of the Commission, 12 May 1988 ; *Pastörs v. Germany*, No 55225/14, 3 October 2019.

number of their appointments,[33] a University professor's access to YouTube,[34] and journalists' access to asylum reception centres to report on the refugee crisis in Hungary.[35] The role of the press as a 'public watchdog' is considered essential for the democratic society, and all the more so where state activities and decisions escape democratic or judicial scrutiny.[36] Even if Article 10(2) allows restrictions, where freedom of the press is at stake, the authorities have only a limited margin of appreciation. There is 'little scope' for restrictions on debate of questions of public interest.[37]

C. Conflict Between the Right to Property and the Freedom of Expression

Considering this broad scope, it is obvious that freedom of expression can conflict with other rights like intellectual property rights, particularly at a time where electronic communication plays a huge role in the development of all political, social and economic relations. When such conflict occurs, a balance must be struck, considering the 'duties and responsibilities' which Article 10(2) provides.

The first case which raised this issue was *Ashby Donald and Others v. France* in 2013.[38] The applicants were fashion photographers and had published photos of fashion shows on the Internet for commercial purposes. Since they had not obtained authorisation, they were convicted for infringement of copyright. The Court held that Article 10 was applicable, its scope also covering photos and electronic means of communication such as the Internet, even if it pursued a profit-making aim. The conviction was considered lawful and pursuing the legitimate aim of protection of the rights of others : the fashion houses´ copyright. In its analysis of proportionality, the Court reiterated the importance of freedom of expression for any democratic society, but, at the same time, that the States´ margin of appreciation varied depending on the type of information in question. First, the Court considered that the margin of appreciation in the commercial area was wide, if no topics of general interest were concerned. Second, the Court held that the impugned measure aimed at protecting the right to property, and thus at another right under the Convention. For these reasons, the Court found the margin of appreciation to be 'particularly important'[39]. Consequently, the Court found no violation of Article 10.

A similar approach was taken in *Neij and Sunde Kolmisoppi v. Sweden* in 2013. The applicants had provided file sharing services on their website, thus enabling users to come into contact with each other and to exchange digital material. In the course of those activities, the applicants were convicted for violations of various copyrights, although they had, themselves, not disseminated protected material. Again, Article 10 was applicable. As

[33] *Magyar Helsinki Bizottság v. Hungary*, No 18030/11, 8 November 2016 [Grand Chamber].
[34] *Cengiz and Others v. Turkey*, Nos 48226/10 and 14027/11, 1 December 2015.
[35] *Szurovecz v. Hungary*, No 15428/16, 8 October 2019.
[36] *Görmüs and Others v. Turkey*, No 49085/07, 19 April 2016, at paras 48 and 63.
[37] *Stoll v. Switzerland*, No 69698/01, 10 December 2007 [Grand Chamber], at paras 105 and 106.
[38] *Ashby Donald and Others v. France*, No 36769/08, 10 January 2013, at paras 34, 38-39 and 42.
[39] Ibid. at para 41.

in the later case of *Delfi v. Estonia* in 2015,[40] the Court in *Neij and Sunde Kolmisoppi* underlined the important role of the Internet in enhancing the public´s access to news and facilitating the sharing and dissemination of information and the extension of freedom of expression not only to the content of information but also to the means of its transmission or reception. Nevertheless, the Court held the application to be manifestly ill-founded.

The Court reasoned that the conviction pursued the legitimate aim of protecting the rights of others, namely the plaintiffs´ copyright to the material in question – a weighty interest, the protection of which the State had to ensure under its positive obligations under Article 1 Protocol No 1. Thus, the State had to balance two competing interests both protected by the Convention. Further, the protection of a commercially run website could not attract the same level of protection as that afforded to political expression and debate. As a result, the Court confirmed that the State benefitted from a particularly wide margin of appreciation.

These principles have been confirmed in many later judgments, such as *Akdeniz v. Turkey* in 2014.[41] The applicant was a University lecturer who complained that the access to certain commercial music streaming websites had been blocked because of an infringement of copyright legislation. The Court found that the applicant had no victim status. Although he had used these websites frequently, he still had other means of listening to music and was not hindered from participating in public debates of general interest.[42]

4. The Right to Property in European Union Law

A. Article 17 of the Charter of Fundamental Rights

A qualified right to property akin to the right guaranteed by Article 1 of Protocol No 1 of the Convention is enshrined in Article 17 of the CFR. It reads :

> **Right to property**
>
> 1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

[40] *Delfi AS v. Estonia*, No 64569/09, 16 June 2015 [Grand Chamber], at paras 110 and 133.
[41] *Akdeniz v. Turkey*, No 20877/10, Decision, 11 March 2014. See also *Dor v. Romania*, No 55153/12, 25 August 2015, at para 51; compare and contrast V*ereinigung Bildender Künstler v. Austria*, No 68354/01, 25 January 2007, at para 26.
[42] The particular width of the States´ margin of appreciation in commercial matters and advertising as well as in cases of competing Convention rights, was also confirmed in *Delfi v. Estonia*, No 64569/09, 16 June 2015 [Grand Chamber] ; *Dor v. Romania*, *Bohlen v. Germany*, No 53495/09, 19 February 2015 and *Høiness v. Norway*, No 43624/14, 19 March 2019.

2. Intellectual property shall be protected.

B. Scope

One key difference is that Article 17 explicitly provides for a right to fair compensation in the event of a deprivation of property. Otherwise the CJEU has repeatedly stated that the case-law of the ECHR must be taken into account pursuant to Article 52(3) of the CFR in interpreting the rights contained therein.

C. Interpretative Approach

In Ledra Advertising e.a. v. Commission and ECB C-8/15, concerning the diminution in value of bank deposits following the restructuring of the banking system in Cyprus, the CJEU explicitly contemplated the limits of the right to property guaranteed by Article 17 of the CFR :

> '69. It must be remembered that the right to property guaranteed by that provision of the Charter is not absolute and that its exercise may be subject to restrictions justified by objectives of general interest pursued by the European Union.'

Specifically, the CJEU considered that :

> '70.… as is apparent from Article 52(1) of the Charter, restrictions may be imposed on the exercise of the right to property, provided that the restrictions genuinely meet objectives of general interest and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right guaranteed.'

It can be seen, that in determining whether there has been a disproportionate interference with the right to property, the CJEU engages in a similar balancing exercise to the ECHR's three rules approach.

This position was more recently clarified by the European Court of Justice in *Commission v Hungary C-235/17*, 21 May 2019, concerning the restriction of rights of usufruct over agricultural and forestry land :

> '88. … account must also be taken of the provision made by Article 52(1) of the Charter, under which limitations may be imposed on the exercise of the rights recognised by the Charter, as long as the limitations are provided for by law, respect the essence of those rights and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general

> interest recognised by the European Union or the need to protect the rights and freedoms of others.
>
> 89. It follows from a reading of Article 17(1) of the Charter in conjunction with Article 52(1) thereof, first, that when the public interest is invoked in order to justify a person being deprived of his or her possessions, compliance with the principle of proportionality as required by Article 52(1) of the Charter must be ensured with regard to the public interest concerned and the objectives of general interest which the latter encompasses. Secondly, such a reading implies that, if there is no such public interest capable of justifying a deprivation of property, or — even if such a public interest is established — if the conditions laid down in the second sentence of Article 17(1) of the Charter are not satisfied, there will be an infringement of the right to property guaranteed by that provision.'

D. Balancing the Protection of Property with the Freedom of Expression

Just as the ECHR has contemplated the tension between the right to property and the freedom of expression, notably in the context of intellectual property, so too has the CJEU. Intellectual property is explicitly protected by Article 17(2) of the Charter, and many of the cases that have become before the CJEU have concerned copyright law in particular.

5. THE RECENT JUDGMENTS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

A. The « Copyright Directive »

The recent judgments of the CJEU in this field of tension and in particular the opinions of Advocate General *Maciej Szpunar* are carefully reflecting the principles of the Strasbourg jurisprudence. In the cases *Funke Medien,*[43] *Pelham*[44] et *Spiegel Online*,[45] which all concerned conflicts between freedom of expression and intellectual property within the terms of Directive 2001/29/EC[46] ('copyright directive'), the CJEU and the Advocate General proceeded in a balancing of the conflicting rights, similar to the Strasbourg approach.[47]

[43] Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* [2019] ECLI:EU:C:2019:623.
[44] Case C-476/17 *Pelham GmbH, Moses Pelham, Martin Haas v. Ralf Hütter, Florian Schneider-Esleben* [2019] ECLI:EU:C:2019:624.
[45] Case C-516/17 *Spiegel Online v Volker Beck* [2019] ECLI:EU:C:2019:625.
[46] 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, OJ L 167, 22 June 2001.
[47] See *Funke Medien*, *Medien NRW GmbH v Bundesrepublik Deutschland* [2019] at point 53, 57, 61, 74; *Spiegel Online v Volker Beck* [2019] at point 58.

B. Fair Balancing of Competing Rights

In *Funke Medien NRW* C-469/17 the CJEU recognised that the exceptions and limitations provided for in the Directive, enacted to implement the WIPO Copyright Treaty and harmonise aspects of copyright law across Europe,

> '60. […] are specifically aimed at favouring the exercise of the right to freedom of expression by the users of protected subject matter and to freedom of the press, which is of particular importance when protected as a fundamental right, over the interest of the author in being able to prevent the use of his or her work, whilst ensuring that the author has the right, in principle, to have his or her name indicated.
>
> 61. [The Article] requires that the exceptions and limitations provided for in Article 5(1) to (4) of the directive be applied only in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.'

Concerning the relevant criteria for balancing the freedom of expression with the right to property, the European Courts have not set out a defined list of factors. Also in this regard the CJEU refers to the case-law of the ECtHR. In *Spiegel Online C-516/17,* it considered :

> '58. As is clear from the case-law of the European Court of Human Rights, for the purpose of striking a balance between copyright and the right to freedom of expression, that court has, in particular, referred to the need to take into account the fact that the nature of the 'speech' or information at issue is of particular importance, inter alia in political discourse and discourse concerning matters of the public interest.
>
> 59. In the light of the foregoing considerations, the answer to the second question is that, in striking the balance which is incumbent on a national court, a national court must, having regard to all the circumstances of the case before it, rely on an interpretation of those provisions which, whilst consistent with their wording and safeguarding their effectiveness, fully adheres to the fundamental rights enshrined in the Charter.'

C. Is the List of Exceptions and Limitations to Intellectual Property Exhaustive?

The precise formulation of certain exceptions and limitations to intellectual property in Article 5(1) to (4) of the copyright directive leads to the recurring question whether they are exhaustive. If they were, they could, if interpreted restrictively, unduly limit the balancing exercise between freedom of expression and the right to property.

In *Funke Medien*, the CJEU held :

> '63. The requirement of consistency in the implementation of those exceptions and limitations could not be ensured if the Member States were free to provide for such exceptions and limitations beyond those expressly set out in Directive 2001/29, since the Court has moreover previously held that no provision of Directive 2001/29 envisages the possibility for the scope of such exceptions or limitations to be extended by the Member States.
>
> 64. […] freedom of information and freedom of the press, enshrined in Article 11 of the Charter, are not capable of justifying, beyond the exceptions or limitations provided …

Thus, the CJEU emphasised the exhaustive character of the exceptions to the copy right as enshrined in Article 5 of the copyright directive, relying of the binding force of EU law in general.

Before the ECtHR, this question has never been invoked. Apart from that, the perspective of the Strasbourg Court is different: Its task is never the interpretation of European Union law. It assesses, on the basis of the specific facts of an individual case, whether the Convention was violated. However, under the hypothesis that a decision would interfere with freedom of expression in the interests of an author´s copy rights, and Article 5 of the directive would not offer sufficient margin of interpretation for a fair balance of the competing rights, a violation of Article 10 of the ECHR cannot be excluded. This could trigger a debate on the question whether the directive protects sufficiently the Convention rights. This is by the way a cautionary note that Advocate General Szpunar rightly expressed in his opinion in the case *Funke Medien*.[48]

The judgments of the German Federal Court of Justice that followed the CJEU´s judgments in *Funke Medien*, *Pelham* and *Spiegel Online* were published on 30 April 2020. They consider that Article 5 of the copyright directive gives Member States « a considerable margin of appreciation » for striking a fair balance between the competing interests and the necessary proportionality assessment.[49] This shows, implicitly, a strong orientation towards the ECtHR´s jurisprudence.

[48] See the opinion of General Advocate *Szpunar* in *Funke Medien NRW GmbH v Bundesrepublik Deutschland* [2019], at § 42.
[49] BGH 1 ZR 139/15, at para 29, 50; see also BGH 1 ZR 228/15, at para 29-30; BGH 1 ZR 115/16, at para 26.