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COPYRIGHT AND FREEDOM OF EXPRESSION IN EUROPE

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1. FREE SPEECH AND THE COPYRIGHT PARADIGM

Introduction

Concern over the steady proliferation of intellectual property rights, or, conversely, the declining public domain is no longer limited to the United States. In recent years, an increasing number of prominent European scholars and judges have expressed their anxiety over the seemingly unstoppable growth of copyrights, neighboring rights, sui generis rights, trademarks, and other rights of intellectual or industrial property.[1] Can the rising tide of copyright and related rights be stopped? Recent court decisions from Europe seem to suggest that freedom of expression and information, as guaranteed inter alia in the European Convention on Human Rights ("ECHR")[2], may under specific circumstances limit overbroad protection. Article 10 ECHR[3], long overlooked by scholars and courts alike, may serve, perhaps, not as a dike, but as a lifebuoy for bona fide users drowning in a sea of intellectual property.[4]

Whereas copyright grants owners a limited monopoly with respect to the communication of their works, freedom of expression and information, guaranteed under article 10 ECHR, warrants the "freedom to hold opinions and to receive and impart information and ideas ...".[5] Assuming that every copyrighted work consists, at least in part, of "information and ideas,"[6] a potential conflict between copyright and freedom of expression is apparent.[7] Nevertheless, as recently as 1999, the European Court of Human Rights (the "European Court") has yet to decide its first case dealing with this issue.

There are a number of explanations for the late development of European interest in the potential copyright/free speech conflict. One important factor is the natural law mystique that traditionally has surrounded copyright (*droit d'auteur*) on the European continent.[8] Unlike the law of the United States, where utilitarian considerations of information policy are directly

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[1] Among many others: J.H. Spoor, *De gestage groei van merk, werk en uitvinding* (The steady growth of trademark, work of authorship and invention), Zwolle: W.E.J. Tjeenk Willink 1990; D.W.F. Verkade, *Intellectuele eigendom, mededinging en informatievrijheid* (Intellectual property, competition and freedom of expression and information), Deventer: Kluwer 1990, 11-15; T. Koopmans, 'Intellectuele eigendom, economie en politiek' (Intellectual property, economics and policy), [1994] *Informatierecht/AMI* 110-111; H. Laddie, 'Copyright: Over-Strength, Over-Regulated, Over-Rated?', [1996] *EIPR* 253.

[2] European Convention on Human Rights (ECHR), signed in Rome on 4 November 1950.

[3] Article 10 ECHR reads: "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. [...]. 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."

[4] Early European commentators include: E.W. Ploman and L. Clark Hamilton, *Copyright. Intellectual Property in the Information Age*, London 1980, p. 39; M. Löffler, 'Das Grundrecht auf Informationsfreiheit als Schranke des Urheberrechts', [1980] *Neue Juristische Wochenschrift* 201; H. Cohen Jehoram, 'Freedom of expression in copyright and media law', [1983] *GRUR Int.* 385; id., 'Freedom of expression in copyright law', [1984] *EIPR* 3.

[5] Article 10 ECHR (note 3).

[6] P.B. Hugenholtz, *Auteursrecht op informatie*, Deventer: Kluwer 1989 (discussing 'informational' nature of work of authorship).

[7] See for the United States: Melville B. Nimmer, 'Copyright vs. the First Amendment', 17 *Bulletin of the Copyright Society* 255 (1970); Lionel S. Sobel, 'Copyright and the First Amendment: a gathering storm?', 19 *ASCAP Copyright Law Symposium* 43 (1971). For more recent discussion, see Neil Weinstock Netanel, 'Asserting Copyright's Democratic Principles in the Global Arena', 51 *Vanderbilt Law Review* 217 (1998); Stephen Fraser, 'The Conflict between the First Amendment and Copyright Law and its Impact on the Internet', 16 *Cardozo Arts & Ent. Law J.* 1

[8] F. Willem Grosheide, 'Paradigms in Copyright Law', in: Brad Sherman and Alain Strowel, *Of Authors and Origins. Essays on Copyright Law*, Oxford: Clarendon Press 1994, 203, at 207.

reflected in the Constitution ("to promote science and the useful arts..."[9]), continental-European 'author's rights' are based primarily on notions of natural justice: "author's rights are not created by law but always existed in the legal consciousness of man".[10] In the pure *droit d'auteur* philosophy, copyright is an essentially unrestricted natural right reflecting the 'sacred' bond between the author and his personal creation.[11]

Another factor explaining the paucity of copyright v. free speech case law and literature is a certain reluctance on the part of European national courts and scholars to apply fundamental rights and freedoms in so-called 'horizontal' relationships, i.e. in conflicts between citizens.[12] Also, unlike the situation in the United States, constitutional courts with the power to overturn national legislation that violates provisions of the constitution are absent in many European countries. An important exception is the federal constitutional court in Germany, the *Bundesverfassungsgericht,* that, since 1948, has displayed a measure of constitutional activism comparable to that of the U.S. Supreme Court. Furthermore, because constitutional protection for free speech in Europe nearly always expressly leaves room for restrictions imposed by national legislatures, courts in Europe will be faced with issues of constitutionality only in exceptional cases.

This article will describe the state of European law concerning the conflict between copyright and freedom of expression. To set the stage, I will first set out the constitutional basis of copyright (or the absence thereof) in various countries in Europe. Next, I shall describe the law governing free speech, and in particular the workings of Article 10 ECHR. The analysis will thereafter focus on copyright v. free speech case law that has recently emerged from a number of continental European countries (especially Germany, France and The Netherlands), and from the former 'gate-keeper' to the European Court, the European Commission of Human Rights (the "European Commission"[13]). In closing, I will speculate, on the basis of the case law discussed in this article and ofgeneral ECHR jurisprudence, how the European Court might eventually decide a case in which copyright and free speech interests come into conflict.

Constitutional Basis of Copyright in Europe

Even within the European Union, copyright law in Europe is still very much regulated on a country-by-country basis. Each independent state has its own law that protects copyrights, or

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[9] U.S. CONST. Art I, § 8, cl. 8.

[10] Ploman/Clark Hamilton (note 4), at 13; F.W. Grosheide, *Auteursrecht op maat*, Deventer: Kluwer 1986, at 130.

[11] Grosheide (note 8), at 207. Admittedly, other rationales underlying the copyright equation (economic efficiency, protection of culture, dissemination of ideas) are recognized as well in Europe; see Grosheide (note 10), 129-143.

[12] In view of the freedom of expression's primary function as a safeguard against undue state intervention, horizontal application appears unlikely. Indeed, most commentators accept that constitutional freedoms only rarely affect or create rights and obligations between citizens directly. However, both doctrine and case law have gradually recognized that private relationships may be affected *indirectly* under a variety of legal theories. Under German constitutional law, fundamental freedoms reflect essential social values, and thereby must be taken into account when interpreting existing legal norms; see *infra* text accompanying footnote 24. The principle of interpretation 'in conformity with the constitution' is widely applied by courts in Europe. Sometimes, constitutional freedoms serve as benchmarks for interpreting general notions of private law, such as unlawfulness (tort) or good faith. Also, constitutional freedoms may play a role in assessing cases of abuse of law or abuse of a dominant position (competition law). In sum, even though horizontal application *stricto sensu* is probably ruled out, in practice freedom of expression will play an important role in relationships ruled by private law. See Fechner (note 20), p. 188; J.M. de Meij, *Uitingsvrijheid*, 2nd ed., Amsterdam: Otto Cramwinckel 1995, p. 82; E.A. Alkema, 'De reikwijdte van fundamentele rechten. De nationale en internationale dimensies', [1995] 125 *Handelingen Nederlandse Juristen-Vereniging* 22-32, with reference to Article 25(1) of the Swiss Constitution ("Legislature and judiciary see to it that fundamental freedoms become effective between private persons."). Before the European Court, the question of horizontal application is rarely an issue. The Court does not deal with proceedings between private parties; complaints must be directed against states that allegedly have not complied with the European Convention. Thus, 'horizontal' conflicts become 'vertical' ones automatically.

[13] Until 1 November 1998 the European Commission of Human Rights decided over the admissibility of complaints of human rights infringement; only cases deemed admissible by the Commission were brought before the European Court. The European Commission has since then become part of the European Court.

"authors' rights" as the European mainland prefers it, much in the same way as the Copyright Act of the United States. The Member States of the European Union have, until today, preserved their autonomy in this field, but must comply with a handful of harmonization directives that the European Council and Parliament have adopted since 1991.[14]

To fully appreciate the weight given to copyright interests in a case involving fundamental freedoms, it is important to first consider the constitutional basis underlying copyright in Europe. The specific constitutional foundation on which copyright rests in the U.S. (the Copyright Clause in the U.S. Constitution[15]) does not have a parallel in most European countries. As a 'natural' right based on a mix of personality and property interests, copyright in continental Europe has its constitutional basis, if at all, either in provisions protecting rights of personality or in those protecting property. The ECHR does not expressly recognize copyright or intellectual property as a human right. Although neither the European Court nor the European Commission has ever been called upon to consider copyright as such, arguably, a fundamental rights basis for copyright may be construed both from the 'property clause' of Article 1 of the First Protocol to the ECHR[16] and from the 'privacy clause' of Article 8 ECHR[17].

The Swedish constitution (*Regeringsform*) does expressly refer to copyright. Article 19 of Chapter 2 provides that "[a]uthors, artists and photographers shall own the rights to their works in accordance with provisions laid down in law." [18] Because, according to the explanatory memorandum, the rationale of this constitutional provision is to promote "the free formation of opinion", the constitutional protection does not cover producer's rights, such as the neighboring rights of phonogram producers or broadcasters. [19]

Case law and doctrine recognizing an implied constitutional underpinning for copyright are particularly well developed in Germany.[20] The moral rights element, which according to German doctrine is an indivisible part of copyright, is deemed protected under Articles 1(1)[21] and 2(1)[22] of the Federal Constitution (*Grundgesetz*). The copyright owner's economic rights are protected by Article 14(1)[23] which secures private property, subject to the limits set by the

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[14] Council Directive 91/250 on the legal protection of computer programmes, Official Journal No. L 122 of 17 May 1991, 42; Council Directive 92/100 on rental and lending rights and certain rights related to copyright in the field of intellectual property, Official Journal No. L 346 of 27 November 1992, 61; 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; Council Directive 93/98 harmonizing the term of protection of copyright and certain related rights, Official Journal No. L 290 of 24 November 1993, 9; Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, Official Journal of 27 March 1996, No. L 77, 20.

[15] U.S. CONST. Art I, § 8, cl. 8.

[16] First Protocol to the ECHR, Paris, 2 March 1952, Article 1 reads: "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."

[17] Article 8 ECHR reads: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[18] Chapter 2, Article 19 of the Swedish Constitution (*Regeringsform*). Similarly, Article 42(2) of the Portuguese constitution recognizes copyright as a fundamental right.

[19] Jan M. de Meij, 'Copyright and Freedom of Expression in the Swedish Constitution: An Example for The Netherlands?', in: Jan J.C. Kabel and Gerard J.H.M. Mom (eds.), *Intellectual Property and Information Law - Essays in Honour of Herman Cohen Jehoram*, Den Haag/Londen/Boston: Kluwer Law International 1998, 315.

[20] F. Leinemann, *Die Sozialbindung des "Geistigen Eigentums"*, Baden-Baden: Nomos 1998, 52-58; F. Fechner, *Geistiges Eigentum und Verfassung*, Mohr Siebeck 1999.

[21] Article 1(1) of the German Constitution reads: "The dignity of man is inviolable. To respect and protect it shall be the duty of all public authority."

[22] Article 2(1) of the German Constitution reads: "Everybody has the right to self-fulfillment in so far as they do not violate the rights of others or offend against the constitutional order or morality."

[23] Article 14(1) of the German Constitution reads: "Property and the right of inheritance shall be guaranteed. Their substance and limits shall be determined by law."

law. Article 14(2)[24] expressly recognizes that property rights serve a social function, thus providing a constitutional basis for limiting overbroad copyright protection. In a series of land-mark cases initiated by right holders, the German Federal Constitutional Court (*Bundesverfassungsgericht*) was invited to test the validity of a number of copyright limitations against Article 14 of the Constitution.[25] The Court has held that Article 14 justifies certain limitations to the right holder's monopoly for the public good. Thus, even without directly addressing free speech considerations, the German constitution has been held to require that a balance be struck between protecting copyright and the public interest.[26]

In recent years, however, this concern for social welfare has gradually given way to a more protectionist approach. As Leinemann observes, this development seems to run against the tide of history. Whereas the scope of other property rights increasingly is limited by the realities of the modern social welfare state, copyright just keeps expanding.[27]

Article 5 of the German Constitution[28] is another source from which a constitutional 'right' to copyright protection might be derived. This provision protects both the 'freedom of art' and the 'freedom of science'. Because Article 5 guarantees freedom of expression and information as well, it also constitutes an additional constitutional basis for *limiting* the scope of copyright.

Elsewhere in Europe, the protection of copyright as a human right also is thought to be implicit in constitutional provisions that guarantee private property, rights of privacy and personality, artistic freedoms, and so forth. In addition, protection for copyright follows directly from Article 27 (2) of the Universal Declaration on Human Rights or Article 15(1)(c) of the United Nations Covenant on Economic, Social and Cultural Rights.[29]

Freedom of Expression and Information in Europe

A right to enjoy freedom of expression and information has been embodied in various international treaties and instruments. From a European perspective, Article 10 of the ECHR is, by far, the most relevant. The freedom of expression and information protected under Article 10 ECHR includes the right to foster opinions, as well as to impart, distribute and receive information without government interference.[30] The provisions of the ECHR may be invoked directly before the courts of the states that are party to it, subject to review by the European Court.

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[24] Article 14(2) of the German Constitution reads: "Property entails obligations. Its use should also serve the public interest."

[25] See, e.g., *Kirchen- und Schulgebrauch*, German Federal Constitutional Court 7 July 1971, [1972] *GRUR* 481; *Kirchenmusik*, German Federal Constitutional Court 25 October 1978, [1980] *GRUR* 44.

[26] Leinemann (note 20) at 58.

[27] *Id.*, at 163-164.

[28] Article 5 of the German Constitution reads: "(1) Everybody has the right freely to express and disseminate their opinions orally, in writing or visually and to obtain information from generally accessible sources without hindrance. Freedom of the press and freedom of reporting through audiovisual media shall be guaranteed. There shall be no censorship. (2) These rights are subject to limitations embodied in the provisions of general legislation, statutory provisions for the protection of young persons and the citizen's right to personal respect. (3) Art and scholarship, research and teaching shall be free. Freedom of teaching shall not absolve anybody from loyalty to the constitution."

[29] Article 27 (2) of the Universal Declaration on Human Rights reads: "Everyone has the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." Article 15(1)(c) of the United Nations Covenant on Economic, Social and Cultural Rights reads: "The States Parties to the present Covenant recognize the right of everyone: […] (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." *See* F. Dessemontet, 'Copyright and Human Rights', in: Jan J.C. Kabel and Gerard J.H.M. Mom (eds.), *Intellectual Property and Information Law - Essays in Honour of Herman Cohen Jehoram*, The Hague/London/Boston: Kluwer Law International 1998, p. 113; M. Vivant, 'Le droit d'auteur, un droit de l'homme', [1997] 174 RIDA 60; A. Kéréver, 'Authors' rights are human rights', [1999] 32 Copyright Bulletin 18.

[30] Caroline Uyttendaele and Joseph Dumortier, 'Free Speech on the Information Superhighway: European Perspectives', 16 John Marshall J. of Comp. & Inf. Law 905, at 912 (1998).

Article 10 ECHR is intended to be interpreted broadly. It is phrased in media-neutral terms, applying to old and new media alike.[31] The term 'information' includes, at the very least, the communication of facts, news, knowledge and scientific information. Whether or not, and to what extent, Article 10 ECHR protection extends to *commercial* speech, has been a matter of some controversy.[32] However, the European Court of Human Rights has made it clear that information of a commercial nature is indeed protected, albeit to a lesser degree than political speech.[33]

According to Article 10 (2) ECHR, the exercise of the freedom of expression and information "may be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society [...] for the protection of the [...] rights of others". Boukema has argued that the term "rights of others" necessarily refers only to the fundamental rights recognized by the Convention itself. It would undermine the meaning of the Convention, he wrote, if human rights and freedoms could be overridden by any random subjective right.[34] However, doctrine and case law have never accepted Boukema's interpretation. Instead, the "rights of others" have been held to include a wide range of subjective rights and interests, certainly including the rights protected under copyright.[35]

Judging from the European Court's recent case law, the "rights of others" has become a broad and unspecific justification for limiting freedom of expression and information. For example, in the *Groppera* case the European Court considered a restriction of the retransmission of foreign radio broadcasts imposed by the Swiss government. The Court upheld the restriction as protecting "the rights of others", based on the government's alleged interest in fostering pluralism on the airwaves.[36] As interpreted by the Court, the "rights of others" has become almost synonymous with the public interest at large. Commentators have concluded, it no longer plays a role in applying Article 10 (2) ECHR to speech restrictions.[37]

The more important test, however, remains. Regulations that restrict the freedom of expression and information must be "necessary in a democratic society". In determining whether a restriction is necessary, the European Court has granted the parties to the Convention a measure of discretion, a so-called 'margin of appreciation'. Restrictions are deemed "necessary in a democratic society" if they answer "a pressing social need" and are proportional to the legitimate aim of the restriction. In this regard, the European Court has to consider whether the reasons adduced by the national authorities to justify the restriction are "relevant and sufficient".[38] In practice, the latitude allowed to national governments varies from case to case, depending largely on the interests at stake and the composition of the Court. States enjoy considerable discretion to restrict freedom of speech in cases involving morality and commercial speech. In cases involving the core freedoms protected under Article

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[31] *Antelecom*, Supreme Court of the Netherlands 26 February 1999, [1999] Mediaforum 149 (holding that Article 10 ECHR is applicable to public telephone network in view of its increasing importance for the exchange of information and ideas).
[32] J.J.C. Kabel, *Uitingsvrijheid en absolute beperkingen op handelsreclame*, Deventer: Kluwer 1981, 39.
[33] See e.g. *Barthold v. Germany*, ECHR 25 March 1985, Publications of the ECHR, Series A 90; *Markt intern*, ECHR 20 November 1989, Publications of the ECHR, Series A 165; *Casado Coca v. Spain*, ECHR 24 February 1994, Publications of the ECHR, Series A 285-A; *Hertel v. Switzerland,* ECHR 25 August 1998, Publications of the ECHR, Reports 1998-VI. See J. Steven Rich, 'Commercial Speech in the Law of the European Union: Lessons for the United States?', [51] Federal Communications Law Journal 263
[34] P.J. Boukema, *Enkele aspecten van de vrijheid van meningsuiting in de Duitse Bondsrepubliek en in Nederland*, Amsterdam: Polak & Van Gennep 1966, at 258.
[35] *Chappell*, ECHR 24 February 1989, Publications of the ECHR, Series A 152A ('Anton Piller' order not considered infringement of privacy right protected under Article 8 ECHR).
[36] *Groppera,* ECHR 28 March 1990, Publications of the ECHR, Series A 173.
[37] E.A. Alkema, [1990] *Nederlandse Juristprudentie* 738.
[38] *Handyside*, ECHR 7 December 1976, Publications of the ECHR, Series A 24; *Sunday Times*, ECHR 26 April 1979, Publications of the ECHR, Series A 30.

10, such as political speech, however, the 'margin of appreciation' will be drawn more narrowly.[39]

The free speech provisions found in most national constitutions in Europe are pale in comparison to the broad scope of Article 10. Many of these provisions date back from the nineteenth century and are phrased in antiquated, media-specific terms. In some countries, in stead of resorting to outdated 'local' constitutional freedoms, citizens may invoke Article 10 ECHR freedoms directly before their national courts. The post-war constitution of the Federal Republic of Germany is a notable exception. It provides for a sophisticated three-tiered freedom formulated in abstract terms: freedom of opinion, freedom of the media and a right to be informed.[40] Another noteworthy exception is Sweden; besides a broadly worded provision protecting the freedom of expression in the general constitution (*Regeringsform*), it provides for two special constitutions that contain elaborate provisions protecting the freedoms of the press and of the electronic media.[41]

2. LIMITS TO COPYRIGHT IMPOSED BY FREE SPEECH CONSIDERATIONS

Late Recognition of Conflict in Doctrine

As I noted at the beginning of this article, the potential conflict between copyright and free speech has long been ignored in European law. Most handbooks are either entirely silent on the issue or mention the freedom of expression only fleetingly in the context of certain statutory limitations. The arguments against the existence of a conflict are well-known. Copyright does not limit the use of 'information'. Copyright does not monopolize ideas. Copyright and freedom of expression are consistent because they both promote speech.

Perhaps the most convincing of these arguments is that copyright, as codified, already reflects a balance between free speech and property rights. In other words, the conflict between copyright and freedom of expression has been 'internalized', and presumably solved, within the framework of the copyright laws. Proponents of this argument point to various aspects of the copyright system for evidence of this balancing: the concept of the work of authorship[42], the idea/expression dichotomy[43], the limits to the economic rights[44], the limited term of protection[45] and, particularly, the limitations or exceptions of copyright discussed below.

More recent European literature on copyright has, however, begun to recognize the independent relevance of the freedom of expression.[46] Even the monumental German

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[39] See text accompanying note 93 *infra*.
[40] Article 5 German Constitution (note 28).
[41] See Jan de Meij, 'Uitingsvrijheid naar Zweeds model: een overladen menu van grondwettelijke delicatessen?', [1998] *Mediaforum* 44.
[42] Most European copyright laws protect only works that are 'creations' in the sense that they are 'original' and have 'personal character'.
[43] The idea/expression (or in Europe, the form/content) dichotomy implies that ideas, theories and facts as such remain in the public domain; only 'original' expression/form with 'personal character' is copyright protected.
[44] The economic rights protected under copyright normally include the rights of reproduction, adaptation, distribution and communication to the public (in all media), but not the reception or private use of a work.
[45] In the European Union the term of protection has been harmonised; copyright normally expires 70 years after the death of the author. See Article 1(1), Council Directive 93/98 harmonizing the term of protection of copyright and certain related rights, Official Journal No. L 290 of 24 November 1993, 9
[46] See, e.g., P.B. Hugenholtz, *Auteursrecht op informatie*, Deventer: Kluwer 1989, 150-170 (discussing potential conflict between copyright in information and freedom of expression and information); D.W.F. Verkade, 'Intellectuele eigendom, mededinging en informatievrijheid', Deventer: Kluwer 1990, p. 38-39 (closed system of limitations may call for direct application of Article 10 ECRM); D. Voorhoof, 'La parodie et les droits moraux. Le droit au respect de l'auteur d'une bande dessinée: un obstacle insurmontable pour la parodie?', in: *Droit d'auteur et bande dessinée*, Brussels: Bruylant 1997, 237, at 243-247 (Article 10 ECHR may provide defense in parody cases).

handbook on copyright, *Urheberrecht Kommentar*, contains an elaborate discussion of the limits freedom of expression imposes on the scope of copyright.[47]

The proposed expansion of the reproduction right, contained in the proposal for a European Copyright Directive[48], has generated particular concern among legal commentators. In commenting upon the Green Paper that preceded the proposal, the Legal Advisory Board (the "LAB"), the body that advises the European Commission on questions of information law, observed:

> "… the LAB notes with concern that considerations of informational privacy and freedom of expression and information are practically absent from the Green Paper. The LAB wishes to underline that these are basic freedoms expressly protected by Articles 8 and 10 of the European Convention on Human Rights, and therefore part of European community law. In the opinion of the LAB, the extent and scope of these rights are clearly at stake, if as the Commission suggests (Green Paper, p. 51-52), the economic rights of right holders is to be extended or interpreted to include acts of intermediate transmission and reproduction, as well as acts of private viewing and use of information.[…] *The LAB therefore recommends that the Commission give sufficient attention and weight to issues of privacy protection and freedom of expression and information when undertaking any initiative in the area of intellectual property rights in the digital environment.* […] *According to the LAB, the broad interpretation of the reproduction right, as advanced by the Commission, would mean carrying the copyright monopoly one step too far.* Freedom of reception considerations may, perhaps, not carry much weight in respect of computer programs. However, the information superhighway will eventually carry the very works for which Articles 8 and 10 of the European Convention of Human Rights were written." [49]

The proposed Copyright Directive has also caused free speech concerns by attempting to 'harmonize' copyright limitations ('exceptions') in the European Union through an exhaustive list of exceptions that national legislatures may apply. Commentators are worried that the directive, if adopted, will deny member states the flexibility they need to accommodate the public interest, especially in the dynamic environment of the Internet. It is reasonable to predict that removing the 'safety valve' of discretion to create new exceptions in the laws of the members states -- where copyright limitations tend to be express, exhaustive and narrowly interpreted -- will put the copyright v. free speech conflict firmly on the map in Europe.

Open Rights, Closed Exemptions

The essential difference between the American notion of a 'utilitarian' copyright and Europe's conception of 'natural' author's rights, is immediately visible in the way U.S. and continental European law is drafted. As Strowel has observed, in Europe economic rights are generally drafted in flexible and 'open' terms, allowing courts to recognize a wide spectrum of protected forms of exploitation.[50] On the other hand, limitations on copyright will tend to be rigorously defined and 'closed'. The opposite is true for copyright in the United States: the copyright owner's economic rights, generally, are narrowly defined, whereas the exemption for *fair use* leaves a wide latitude for a variety of unauthorized uses. Courts and commentators in Europe -- in contrast to the American tradition -- will also have a 'natural' tendency where

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[47] G. Wild, in: G. Schricker (ed.), *Urheberrecht Kommentar*, 2nd ed., München: Beck 1999, § 97, nos. 19-25.
[48] Commission of the European Communities, Amended Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Brussels, 21 May 1999, COM (1999) 250 final.
[49] Legal Advisory Board, Reply to the Green Paper on Copyright and Related Rights in the Information Society, Brussels, September 1995, http://www2.echo.lu/legal/en/ipr/reply/reply.html.; see generally P. Bernt Hugenholtz , 'Adapting copyright to the information superhighway', in: P. Bernt Hugenholtz (ed.), *The Future of Copyright in a Digital Environment*, Information Law Series, Vol. 4, Deventer/Boston: Kluwer Law International 1996, p. 81-102.
[50] A. Strowel, *Droit d'auteur et copyright. Divergences et convergences*, Brussels: Bruylant 1993, p. 144-147. See also A. Lucas, *Droit d'auteur et numérique*, Paris: Litec, p. 173.

possible to construe economic rights broadly while construing limitations, or 'exceptions', as narrowly as possible.[51]

Also, because the copyright limitations presently existing in various European laws are generally considered, both by courts and commentators, to be exhaustive,[52] and because they do not contain 'catch-all' provisions like fair use, the laws do not provide 'safety valves' to deal with hard cases. Courts have been reluctant to imply exemptions or even to apply existing exemptions to new situations by analogy.[53] A recent decision by the Dutch Supreme Court, however, may signify a breakthrough in this regard. The case involved the reproduction of copyrighted perfume bottles in advertisements by a retailer offering parallel-imported goods for sale. The Court agreed that no express exemption applied to the facts of the case, but went on to hold that there was room to move *outside* the existing system of exemptions, by balancing interests on a rationale similar to that underlying the existing exemptions.[54]

According to some commentators, the *Dior v. Evora* judgment may have opened the door to an American-style *fair use* defense; others, more cautiously, interpret the Dutch Court's decision merely as a form of reasoning by analogy of a sort well known in private law.[55] The *Dior* decision has, however, inspired the Dutch Copyright Committee, an advisory body to the Ministry of Justice, to suggest the adoption of a fair-use provision in the law which would allow for a variety of unauthorized uses under circumstances consistent with Article 9(2) of the Berne Convention.[56] [57]The Minister of Justice has responded favorably to the proposal.[58]

As they currently exist, national laws in Europe reveal a bewildering variety of limitations on copyright, often very detailed.[59] In many cases, the limitations take the form of outright exceptions to the copyright owner's exclusive rights. Less often they are in the form of statutory licenses offering a right to equitable remuneration. These latter schemes are usually complemented by a regulatory framework for the collective administration of rights.

Many of the limitations found in European acts are inspired, either explicitly or implicitly, by concern over freedom of expression and information.[60] Most countries allow, for example, copying for personal use, news reporting, quotation and criticism, scientific uses, archival purposes, library and museum uses, and for access to government information. Many of these would continue to be permitted by the proposed Copyright Directive (Article 5(2)(3)), but mostly in the form of statutory licenses requiring compensation.

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[51] See, e.g., A. Lucas (note 50), p. 171; G. Schricker (ed.), *Urheberrecht Kommentar*, 2nd ed., München: Beck 1999, § 45, no. 15, and § 51, nos. 8-9. But see *Kirchenmusik*, German Federal Constitutional Court 25 October 1978, [1980] *GRUR* 44 (no reason to narrowly construe copyright limitations). See also P. Bernt Hugenholtz, 'Fierce creatures: copyright exemptions towards extinction?', IFLA/IMPRIMATUR Conference, 30-31October 1997, Amsterdam, http://www.imprimatur.net/legal.htm (whether use is permitted by limiting scope of economic right or by express limitation is largely matter of legislative technique; copyright exemptions are not, necessarily, *exceptions*).

[52] See national reports presented at ALAI Study Days, Cambridge, 1998 [precise reference follows].

[53] Cf. *Manifest,* Supreme Court of Sweden (Högsta Domstolen) 23 December 1985, *GRUR Int*. 1986, p. 739 (even if infringing use were justifiable, courts are not allowed to overrule legislature).

[54] *Dior v. Evora*, Dutch Supreme Court (Hoge Raad) 20 October 1995, [1996] Nederlandse Jurisprudentie 682.

[55] F.W. Grosheide, 'De commercialisering van het auteursrecht', [1996] *Informatierecht/AMI* 43.

[56] Commissie Auteursrecht, Advies over auteursrecht, naburige rechten en de nieuwe media, The Hague, 18 August 1998.

[57] Article 9(2) of the Berne Convention reads: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

[58] Minister of Justice, Letter to the Second Chamber of Parliament, 10 May 1999, English translation at http://www.ivir.nl/Publicaties/engvert1.doc.

[59] P. Bernt Hugenholtz and Dirk J.G. Visser, *Copyright problems of electronic document delivery*, Report to the Commission of the European Communities, Luxembourg, 1995.

[60] Council of Europe Steering Committee on the Mass Media, Discussion Paper on the question of exemptions and limitations on copyright and neighbouring rights in the digital era (prepared by L. Guibault), Strasbourg, 1 September 1998, MM-S-PR (98) 7 rev, p. 22-27. Arguably, limitations reflecting constitutional freedoms cannot be overridden by contract; see Institute for Information Law (L. Guibault), *Contracts and Copyright Exceptions*, Amsterdam 1997.

Copyright v. Freedom of Speech: Selected Decisions from National Courts

Just as there has been a paucity of legal literature on the potential conflict between copyright and free speech, so, too, has there been a dearth of relevant case law. Even so, national courts are beginning to recognize that copyright must, under exceptional circumstances, give way to the freedom of expression guaranteed by national constitutions and the European Convention.[61] Cases, mostly from Germany, France and The Netherlands, indicate that courts may curtail copyright, especially when freedom of the press -- traditionally the 'hard core' of the freedom of expression and information in Europe -- is at stake. Freedom of expression defenses have been especially successful in cases where literal copying was considered essential -- for purposes of quotation, for example, or in cases of 'live' broadcasting of works of art. However, courts have shied away from direct application of constitutional law or even of Article 10 ECHR, preferring instead to treat freedom of expression as a normative principle to be used in 'interpreting' existing statutory limitations.[62]

Germany

German courts, beginning in the 1960s, have decided a number of copyright cases in which free speech limitations have been recognized.[63] In 1962, the Berlin District Court permitted an unauthorized re-broadcasting by West-Berlin television of parts of a news item produced in the German Democratic Republic, on the grounds that the freedom of expression guaranteed by Article 5 of the Federal Constitution provided an extra-statutory justification.[64] Similarly, the Berlin Court of Appeal in 1968[65] held that the republication without permission of cartoons stereotyping students by a Berlin periodical, was justified. The copying took place in the context of a critical analysis of the way left-wing Berlin students were being portrayed by the Springer press. The Court held that the publication for this purpose did not infringe the cartoonist's rights, even though the requirements of the statutory quotation right[66] were not met. The Court said that copyright law should be interpreted in the light of the free speech norms reflected in Article 5 of the Constitution.

Referring to the 1968 decision, the District Court of Berlin in 1977 similarly allowed the broadcast by German public television of four copyrighted photographs of members of the Baader-Meinhof terrorist group (RAF), previously published in Der Spiegel, in a critical news report on Der Spiegel's purported role as a vehicle of RAF publicity. Again, although the facts of the case did not square neatly with the criteria set out in the statutory exemption, the fact that the broadcast involved political speech weighed heavily in the determination that a copyright violation had not occurred.[67] The District Court in Munich went a step further in 1983 by allowing a television station to show a photograph from a pharmaceutical brochure in a program critical of pharmaceutical advertising aimed at juveniles. Although this case did not involve political speech, the Court found that the principles underlying Article 5 of the German Constitution also provided a defense.[68]

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[61] At least one British court now seems to have acknowledged the conflict between copyright and freedom of speech; see Clive D. Thorne, 'The Alan Clark Case – What It Is Not', [1998] *EIPR* 194.
[62] See Löffler (note 4), at 204; Wild (note 47), § 97, no. 23.
[63] See Wild (note 47), § 97, no. 24.
[64] *Maifeiern,* Landgericht Berlin, [1962] GRUR 1962.
[65] *Bild Zeitung*, Court of Appeal (Kammergericht) Berlin 26 November 1968, [1969] 54 UFITA 296.
[66] Article 51 of the German Copyright Act.
[67] *Terroristenbild*, Landgericht Berlin 26 May 1977, [1978] GRUR 108.
[68] *Monitor,* Landgericht München, 21 October 1983, [1984] Archiv für Presserecht 118.

The German Supreme Court (*Bundesgerichtshof*) has been somewhat more cautious in recognizing free speech limitations on copyright. An example is the Court's *Lili Marleen* decision of 1985[69], that involved the unauthorized publication of the 'Lili Marleen' song lyrics in newspaper articles on a forthcoming film portraying the 'real' Lili Marleen (Lale Anderson). The Supreme Court said that Article 5 of the Constitution did not provide a defense, because its protection for freedom of the press was already incorporated into the German Copyright Act. Even so, the Court did accept in principle that "under exceptional circumstances, because of an unusually urgent information need, limits to copyright exceeding the express statutory limitations may be taken into consideration".[70]

A similar outcome can be found in the two *CB-Infobank* cases decided by the German Supreme Court in 1997. The defendant operated a commercial research database containing abstracts of articles published in professional periodicals, and also offered a document delivery service providing full-text copies. The Court found that the public interest in accessing information did not justify departing from the rule that statutory limitations on copyright be narrowly construed. The Court underlined, however, that copyright does not protect information as such, and that information services, therefore, remain free to provide facts, data and bibliographical information.[71]

Austria

In 1996, the Austrian Supreme Court, in a decision that has received criticism,[72] declined to allow freedom of expression, as protected both under Article 13 of the Austrian Constitution and Article 10 ECHR, to be used as a defense in a case involving the unauthorized publication of a contract for the sale of stocks in a magazine article criticizing the sale. In 1997, in a case involving the unauthorized use of copyrighted cartoons to illustrate a news feature, the Supreme Court again refused to accept a free speech defense. The Court asserted that the free speech values involved were sufficiently acknowledged in the relevant statutory limitation.[73]

The Netherlands

Under Dutch law, acts of Parliament ('formal' laws) are not subject to being tested against the Constitution. As a result, freedom of expression defenses rely solely upon Article 10 ECHR, which has direct application and supersedes statutory law. Courts in the Netherlands have long been hesitant, however, to apply Article 10 ECHR in copyright cases. A few recent court decisions may be signs of a change in attitude.

The first, decided in 1994, involved an interview, published in the daily newspaper *De Volkskrant*, with a well-known 'corporate raider'.[74] The piece was illustrated by a photograph taken in the interviewee's office. Prominent in the photograph was one of the many works of art on display in the office, a statuette of an archer, aiming, as it would seem, at the head of its collector. The Dutch licensing society for visual arts, *Stichting Beeldrecht*, claimed damages

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[69] *Lili Marleen*, German Federal Supreme Court 7 March 1985, [1987] GRUR 34.
[70] Cf. *Pelzversand*, German Federal Supreme Court 10 January 1968, [1968] GRUR 645 (freedom of speech may impose limits on unfair competition).
[71] *CB-Infobank I,* German Federal Supreme Court 16 January 1997, [1997] GRUR 459 at 463; and *CB-Infobank II,* German Federal Supreme Court 16 January 1997, [1997] GRUR 464, at 466.
[72] *Head-Kaufvertrag*, Austrian Supreme Court 17 December 1996, [1997] Medien und Recht 93, at 95; see comment by M. Walter, *ibid.*; and R. Schanda, 'Pressefreiheit contra Urheberrecht', [1997] Medien und Recht 97.
[73] *Karikaturwiedergabe*, Austrian Supreme Court 9 December 1997, [1998] GRUR Int. 896.
[74] *Boogschutter*, District Court of Amsterdam 19 January 1994, [1994] Informatierecht/AMI 51; see comment P.B. Hugenholtz, [1994] NJCM Bulletin 673.

for copyright infringement. De Volkskrant admitted that no statutory copyright limitation was applicable -- Dutch law does not recognize a *fair use* defense. Instead, the defendant invoked the protection of Article 10 ECHR. Although it ultimately found for the plaintiff, the Court agreed that under certain circumstances copyright may conflict with Article 10. In doing so, the Court expressly noted the shift that has occurred in legal doctrine since the 1980's. Nevertheless, the Court considered it unnecessary to invoke Article 10 in this case because it concluded that depicting the work of art in such a prominent manner was not really necessary for the purpose of De Volkskrant's news reporting. A year later, in the *Dior v. Evora* decision previously discussed[75], the Dutch Supreme Court confirmed that, in principle, the use of (trademarks and) copyrights may conflict with Article 10 ECHR.

Most recently, in a decision concerning the 'missing pages' of Anne Frank's diary, reprinted without authorization by the Dutch newspaper 'Het Parool', the Amsterdam Court of Appeal in 1998 decided that the freedom of expression and information guaranteed under Article 10 did not override the copyright claims of the Anne Frank Foundation, owner of the copyrights in the diary.[76] After carefully weighing the public interest in having the pages divulged against the interest of the Foundation in protecting, inter alia, the reputation of the Frank family members described in the diary fragments, the Court found for the Foundation, reversing the decision of the District Court.[77]

France

Not surprisingly, French courts, long among the strongest advocates of authors' rights, have been extremely hesitant in accepting free speech defenses in copyright cases. In the seemingly endless string of *SPADEM v. Antenne 2* cases concerning the scope of the freedom to display protected works of art briefly during television broadcasts, not a single French court saw fit to even mention a concern with freedom of expression.[78]

Only very recently, in 1999, has a French court applied Article 10 ECHR directly. The Utrillo estate had brought infringement claims against the national television station France 2, for showing twelve copyrighted paintings in a news item on a Utrillo exhibition. The Paris Court reminded that Article 10 ECHR is superior to national law, including the law of copyright, and then went on to conclude that, in the light of Article 10, the right of the public to be informed of important cultural events should prevail over the interests of the copyright owner.[79]

Copyright v. Free Speech before the European Court

The European Court has never been called upon to consider the conflict between copyright and freedom of expression, or opine on the potential 'necessity' of copyright. The European Commission, formerly the gateway to the European Court, has, however, faced the problem twice.

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[75] *Dior v. Evora,* Dutch Supreme Court (Hoge Raad) 20 October 1995, [1996] Informatierecht/AMI 51; see *supra* text accompanying footnotes 55 and 56.
[76] *Anne Frank Fonds v. Het Parool*, Court of Appeal Amsterdam 8 July 1999, [1999] Informatierecht/AMI 116.
[77] President District Court of Amsterdam 12 November 1998, [1999] Mediaforum 39.
[78] *Du côté de chez Fred,* Court of First Instance Paris 15 May 1991, 150 RIDA 164, reversed Court of Appeal Paris 7 July 1992, 154 RIDA 161, affirmed Supreme Court (Cour de Cassation) 4 July 1995, 167 RIDA 263. The case eventually came before the European Commission, whose decision is discussed below. See also *Tuileries*, Supreme Court (Cour de Cassation) 4 July 1995, 167 RIDA 259.
[79] Court of First Instance Paris 23 February 1999, Case 98/7053 (unpublished).

De Geïllustreerde Pers N.V. v. The Netherlands

The case of *De Geïllustreerde Pers N.V. v. The Netherlands*[80] concerned the Dutch public broadcasters' monopoly in radio and television program listings. Before the Commission, publisher De Geïllustreerde Pers complained that the Dutch copyright in (non-original) program listings, and the broadcasters' refusal to license, were at odds with Article 10 ECHR. The Commission, however, concluded that the broadcasters' copyright did not restrict freedom of expression and information in the first place, and, thus, Article 10(2) was not at issue. The Commission's rationale for this conclusion is difficult to fathom. Although it acknowledged that the program listings were 'information' within the meaning of Article 10, the Commission observed:

> "In the first place, such lists of programme data are not simple facts, or news in the proper sense of the word. […] The characteristic feature of such information is that it can only be produced and provided by the broadcasting organisations being charged with the production of the programmes themselves [...] The Commission considers that the freedom under Art. 10 to impart information of the kind described above is only granted to the person or body who produces, provides or organises it. In other words, the freedom to impart such information is limited to information produced, provided or organised by the person claiming that freedom being the author, the originator or otherwise the intellectual owner of the information concerned. It follows that any right which the applicant company itself may have under Art. 10 of the Convention has not been interfered with where it is prevented from publishing information not yet in its possession."[81]

The Commission added that "the free flow of such information to the public in general" was not at stake, since Dutch audiences could obtain the information from a variety of mass media.

The Geïllustreerde Pers decision has been criticized by many commentators.[82] The Commission's conclusion that third parties may never invoke Article 10 freedoms with respect to 'single-source' data is obviously erroneous. Freedom of expression under Article 10 is not confined to speech that is original with the speaker. Moreover, the Commission was arguably wrong in suggesting that freedom of expression and information is not restricted as long as the free flow of information 'to the public in general' is not impeded. The existence of alternative communications channels may be an element in measuring the 'necessity' of a restriction, but to declare that no restriction exists if alternative channels are available is clearly at odds with the meaning and purpose of Article 10.

France 2 v. France

The second, more recent, European Commission decision involving potentially overbroad copyright claims is equally disappointing in its reasoning.[83] During a television news broadcast by France 2 (Antenne 2), covering the reopening after major restoration work of the theatre on the Champs-Elysées, the camera focused several times, for a total duration of 49 seconds, on the theatre's famous fresco's by Edouard Vuillard. The visual arts collecting society SPADEM, representing the Vuillard estate, demanded, and eventually obtained

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[80] *De Geïllustreerde Pers N.V. v. The Netherlands*, European Commission of Human Rights 6 July 1976, European Commission of Human Rights Decisions & Reports 1976 (Volume 8), 5; cf. *KPN/Kapitol*, President District Court Dordrecht 8 September 1998, [1999] Informatierecht/AMI 7 (copyright in telephone subscriber listings not considered infringement of Article 10 ECHR because (a) freedom of the public to receive information not impeded, and (b) listings could be licensed).

[81] *Ibid.*

[82] H. Cohen Jehoram, [1979] 28 Ars Aequi 153; P. van Dijk & G.J.H. van Hoof, *De Europese Conventie in Theorie en Praktijk*, 2nd ed., Nijmegen: Ars Aequi 1982, 358.

[83] *France 2 v. France*, European Commission of Human Rights 15 January 1997, Case 30262/96, [1999] *Informatierecht/AMI* 115.

compensation.[84] The *Cour de Cassation* held that France 2 could not invoke the statutory right to quote briefly from copyrighted works for informational purposes.[85] The Court ruled that communicating an entire work to the public does not, by definition, amount to a "brief quotation" within the meaning of the law.

Before the European Commission, France 2 complained that the Cour de Cassation's analysis was at odds with Article 10 ECHR. The Commission disagreed. Although it acknowledged that, in principle, copyright is a restriction on the freedom of expression and information protected under Article 10, the Commission rightly observed that copyright law is "prescribed by law", for the purpose of protecting the "rights of others". The Commission then added, rather surprisingly:

> "... it is normally not for the organs of the Convention to decide, in respect of Article 10 (2), possible conflicts between the right to communicate information freely, on the one hand, and the right of the authors of the works communicated, on the other hand."[86]

The Commission then found that the principles of copyright and free expression were both satisfied by reducing SPADEM's claim to a simple matter of paying royalties. The Commission held "that under the circumstances of the case the French courts had good reason to take into account the copyrights of the author and the right holders in the works that were otherwise freely broadcast by the applicant."[87]

In its reasoning and outcome the France 2 case is similar to the European Commission's decision in the case of *Nederlandse Omroepprogramma Stichting (NOS) v. The Netherlands*. Here, the Commission was invited to consider the scope of real property rights in the light of Article 10.[88] Plaintiff, the Dutch national public broadcasting organization, complained that the right of the Dutch Football Association (KNVB) to financial compensation for radio and television coverage of football matches held under its auspices, violated its right to receive and impart information. Previously, the Dutch Supreme Court had ruled that the KNVB was entitled to compensation because of its property rights in the stadiums where the matches take place.[89] The European Commission dismissed the complaint:

> "[I]t cannot be considered an interference with the right to freedom of expression as guaranteed by Article 10 of the Convention if the organiser of a match limits the right to direct reporting of the match to those with whom the organiser has concluded agreements on the conditions for such reporting."

CONCLUDING ANALYSIS

How will the European Court eventually decide a conflict between copyright and freedom of expression? Both the national cases and the decisions by the European Commission discussed in this article provide a number of clues. Also, we may learn from the vast body of Article 10 ECHR cases decided by the Commission and the Court in non-copyright matters.

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[84] See *supra* text accompanying note 77.
[85] Article 43-1 of the Act of 11 March 1957 (currently article L 111-1 of the Code of Intellectual Property).
[86] Translation from French by the author.
[87] *Ibid.* (translation by the author).
[88] *NOS v. The Netherlands*, European Commission of Human Rights 11 July 1991, Application No. 13920/88.
[89] *NOS v. KNVB*, Supreme Court of the Netherlands 23 October 1987, [1988] Nederlandse Jurisprudentie, 310.

The somewhat related field of unfair competition law has generated a number of interesting decisions by the European Court.[90] The recent case of *Hertel v. Switzerland* is particularly noteworthy.[91] Swiss scientist Hertel had published an article in a popular journal on the potential health hazards of consuming food prepared in microwave ovens. The article suggested that microwave cooking has a carcinogenic effect. According to the national courts, Hertel's behavior amounted to an act of unfair competition, since the publication had a potential negative effect on microwave oven sales. Before the European Court, Mr Hertel invoked his right to freely express his scientific opinions.

The Court reiterated that Member States enjoy a wide 'margin of appreciation' in balancing the freedom of expression and information against principles of unfair competition law, and accepted that unfair competition law was applied to such non-competitive behavior as scientific publishing. However, the Court did find that Mr Hertel's freedom of expression was unnecessarily restricted because there was no evidence that microwave oven sales had effectively declined as a result of Mr Hertel's publication.

The Hertel decision confirms that commercial speech enjoys only limited protection in Europe.[92] The European Court allows Member States a wide latitude in applying speech restrictions derived from commercial law and the law of unfair competition. This line of cases suggests that Article 10 will allow the unauthorized use of copyrighted works for predominantly commercial purposes only in exceptional cases.

Clearly, not all content-related speech restrictions are treated equally by the European Court. In a long line of cases not concerning copyright, the European Commission and the European Court have consistently granted a higher level of protection to political speech than to 'ordinary' expression. In doing so, they have either implicitly or expressly recognized the democracy-enabling function of the freedoms protected by Article 10.[93] The Commission and the Court also appear to have given artistic speech a preferred position, even though artistic freedoms are not expressly recognized by the Convention and an *exceptio artis* that would have made creative artists immune from restrictions has never been accepted.[94]

Not surprisingly, the traditional 'core' of the freedom of expression and information, the freedom of the press, has generally been well protected. In several cases the Court has emphasized the special role the press has to play in society, e.g., as 'public watchdog'.[95] The Commission and the Court have been especially critical of acts of government censorship, even though Article 10, in contrast to many national constitutions, does not contain an express ban on censorship.

In deciding whether speech regulations meet the test of necessity "in a democratic society" (proportionality), the following factors have been taken into account.[96] First and foremost, the

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[90] *Barthold*, ECHR 25 March 1985, Publications of the ECHR, Series A 90; *Markt intern*, ECHR 20 November 1989, Publications of the ECHR, Series A 165.

[91] *Hertel*, ECHR 25 August 1998, Publications of the ECHR, Reports 1998-VI. See A. Kamperman Sanders, 'Unfair Competition Law and the European Court of Human Rights. The Case of Hertel v. Switzerland and Beyond', paper presented at 7th Annual Conference on International Intellectual Property Law and Policy, Fordham University School of Law, New York, 8-9April 1999, paper on file with the author.

[92] See *supra* text accompanying footnote 33.

[93] Chr. McCrudden, 'The Impact on Freedom of Speech', in: Basil Markesinis (ed.), *The Impact of the Human Rights Bill on English Law* Oxford: Oxford University Press 1998, p. 90.

[94] Dirk Voorhoof, 'Critical perspectives on the scope and interpretation of Article 10 of the European Convention on Human Rights', Mass media files, No. 10, Strasbourg: Council of Europe Press 1995, p. 35.

[95] *Handyside*, ECHR 7 December 1976, Publications of the ECHR, Series A 24; *Sunday Times*, ECHR 26 April 1979, Publications of the ECHR, Series A 30; McCrudden (note 92), 98-99.

[96] J.G.C. Schokkenbroek, *Toetsing aan de vrijheidsrechten van het Europees Verdrag tot bescherming van de rechten van de mens*, Zwolle:

degree of public interest in the speech appears to play a crucial role; restrictions on political speech will more easily be found unwarranted than impediments to commercial communications. A second factor is the substantiality of the restrictions: minor impediments will more easily meet the test than major ones. A third factor appears to be the aim of the regulation; for instance, a restriction for reasons of national security will more readily be judged proportional than restrictions on other grounds. A fourth factor is the level of European consensus; if similar restrictions exist in most other Member States, the European Court will be hesitant to find infringement of Article 10.[97] This does not mean, however, that national deviations will never meet the test of necessity. Especially in areas of the law where norms tend to diverge, such as morality and unfair competition, the Court will allow a wide 'margin of appreciation'.

In sum, our analysis of European case law suggests that freedom of expression arguments are likely to succeed against copyright claims aimed at preventing political discourse, curtailing journalistic or artistic freedoms, suppressing publication of government-produced information or impeding other forms of 'public speech'. In practice, this might imply that the Court would be willing to find infringement of Article 10 where national courts fail to broadly interpret or 'stretch' existing copyright limitations to permit quotation, news reporting, artistic use or re-utilization of government information. The Court might also be willing to find national copyright laws in direct contravention with Article 10 if they fail to provide exceptions for uses such as parody.[98]

In contrast, the European Commission has been reluctant to accept freedom of expression and information arguments in cases where property rights in information are merely exercised to ensure remuneration, and the flow of information to the public is not unreasonably impeded. For European legislatures the message is clear: as long as licenses are made available under reasonable conditions, or statutory licenses apply, the European Court is unlikely to find that copyright and Article 10 collide.

European case law also suggests that speech restrictions in line with European consensus will more readily be accepted than national peculiarities. Considering the increasingly important role of the European Union as pan-European copyright legislator, this is a sobering conclusion. Even if, according to many commentators, recent European Directives have upset the 'delicate balance' between copyright and the public interest, it is improbable the European Court, in light of its deference to consensus, will be easily convinced to apply Article 10 in order to restore the equilibrium.

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W.E.J. Tjeenk Willink 1996, p. 220 ff.

[97] Schokkenbroek, p. 226; Colin Warbrick, '"Federalism" and Free Speech: Accommodating Community Standards – the American Constitution and the European Convention on Human Rights', in: Ian Loveland (ed.), *Importing the First Amendment*, Oxford: Hart 1998, p. 183.

[98] Except for France and Belgium, copyright laws in Europe do not provide for express parody exemptions.