European Court of Human Rights: Ashby Donald and others v. France

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For the first time in a judgment on the merits, the European Court has clarified that a conviction based on copyright law for illegally reproducing or publicly communicating copyright-protected material can be regarded as an interference with the right of freedom of expression and information under Article 10 of the European Convention. Such interference must be in accordance with the three conditions enshrined in the second paragraph of Article 10 of the Convention. Due to the important wide margin of appreciation available to the national authorities in this particular case, the impact of Article 10 however is very modest and minimal.

All three applicants in this case are fashion photographers. They were convicted in France for copyright infringement following the publication of pictures on the Internet site Viewfinder. The photos were taken at fashion shows in Paris in 2003 and published without the permission of the fashion houses. The three fashion photographers were ordered by the Court of Appeal of Paris to pay fines of between EUR 3,000 and EUR 8,000 and an award of damages to the French design clothing Federation and five fashion houses, amounting in total to EUR 255,000. The photographers were also ordered to pay for the publication of the judgment of the Paris Court of Appeal in three professional newspapers or magazines. In its judgment of 5 February 2008 the Supreme Court (Court de Cassation) dismissed the applicants' argumentation based on Article 10 of the Convention and on Article 122-9° of the Code de la Propriété Intellectuelle (French Copyright Act). The Supreme Court was of the opinion that the Court of Appeal had sufficiently justified its decision, as the applicants could not rely on an exception in French copyright law, allowing the reproduction, representation or public communication of works exclusively for news reporting and information purposes.

In Strasbourg the applicants complained in particular of a breach of their rights under Article 10 of the European Convention. The Court explicitly recognises the applicability of Article 10 in this case, considering the conviction of the applicants and the order to pay damages as an interference with their right to freedom of expression, which also includes the publication of pictures on the internet. The Court, however, is of the opinion that a wide margin of appreciation is to be given to the domestic authorities in this case, as the publication of the pictures of

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models at a fashion show and the fashion clothing shown on the catwalk in Paris was not related to an issue of general interest to society and concerned a kind of “commercial speech”. Furthermore, the member states are considered to be in a position to balance conflicting rights and interests, such as the right of freedom of expression under Article 10 of the Convention with the right of property (including intellectual property), as protected by Article 1 of the First Protocol to the Convention.

The European Court agrees with the French Court’s finding that the applicants reproduced and represented the pictures without the authorisation of the copyright holders, hence infringing the rights of the intellectual property of others. The European Court refers to the reasoning by the Paris Court, emphasizing that it saw no reason to consider “that the national judge had overstepped his/her margin of appreciation by giving prevalence to the rights of fashion creators over the right to freedom of expression of the applicants”. The European Court does not find the fines and the award of damages disproportionate to the legitimate aim pursued, arguing that the applicants gave no evidence that these sanctions had “financially strangled” them and referring to the guarantees of a fair trial not being under dispute in this matter. In these circumstances and taking into account the particularly important margin of appreciation of the national authorities, the Court concludes unanimously that there is no violation of Article 10 of the Convention.

Arrêt de la Cour européenne des droits de l’homme (cinquième section), Affaire Ashby Donald et autres c. France, requête n° 36769/08 du 10 janvier 2013

https://hudoc.echr.coe.int/eng?i=001-115845

Judgment by the European Court of Human Rights (Fifth Section), case Ashby Donald and others v. France, Appl. nr. 36769/08 of 10 January 2013

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