Teil 3 – Externe Beschränkungen

2ter Diskutant – Prof. Bernt Hugenholtz

Focusing on free speech. If we take that quote on the wall really seriously, maybe we don't need even ten minutes. Maybe we should just shut up immediately. I will quote it for you: „Das schönste Glück des denkenden Menschen ist, das Erforschliche erforscht zu haben und das Unerforschliche ruhig zu verehren."

Let's commemorate free speech for a few seconds now. I will come back to the vagueness of free speech later on. The idea expression dichotomy, which is the primary instruments - I am sure you have discussed it yesterday - to avoid a potential clash between copyright and fundamental freedoms such as free speech, that dichotomy collapses when idea and expression merge, when form becomes fact.

A beautiful example is the marketed from the United States, an old one, the "Zapruder" tapes, the short film of the assassination of President Kennedy, made by an amateur filmmaker, who was standing near the road at the right place. It's a copyrighted work, which is only thirteen seconds long, but also more than that. The example has actually let to a court case[1]. And it was often quoted by the great Nimmer, whom I had the pleasure to be a student a long time ago.

A more recent example would be the letter left on the body of Theo van Gogh, the Dutch filmmaker and polemist, who was assassinated this week by a Moslem extremist. It is not enough for the public to describe the "Zapruder" tapes in words or to summarise the letter, found on the body, left by the assassinator. We want to see the real thing. Form becomes fact. We even believe we have a right to do so.

With the emergence of the information society, the idea expression dichotomy increasingly becomes difficult to maintain. The currency of the current age is not just text or even primarily text, but images, sounds, data, digital files in general. Content. It's all about content. And in this age of communication and digitalisation, images are the content. They are not just vehicles of ideas. They are communicating some deeper truth. They have become the ideas themselves. Reporting on television the opening of an exhibition of paintings by Utrillo, simply requires quoting these paintings, showing these paintings on television. It is not enough to describe this in words. This is the point missed unfortunately by the higher courts in the Utrillo- case, that went all the way up to the Cour de cassation and to the disappointment of Christophe Geiger and me and it did not result in an application by the Cour de cassation of free speech[2].

This shift for the culture of quotation does not mean the end of copyright, as Laurence Lessig would advocate, or a serious crisis in copyright, but does necessitate in my view broad, broader than available in many jurisdictions and more flexible limitations. So from that perspective, it is really a bad idea to incorporate into a directive, that supposedly deals with the information society, a closed list of limitations. That is a bad idea.

Now we have to ask the question: is free speech a remedy against overbroad copyright protection? Is free speech a solution? If you look at the case law - and there is lots and lots of case law, much more of case law than you might think, a lot coming from German courts- about this conflict between copyright and free speech, you can

see that free speech, (constitutional protected free speech) is applied in very different ways by the courts.

The first and traditional approach, even if that is revolutionary for some countries, is an interpretation in conformity with free speech as codified in the constitution. That means that the courts (like many courts have done that in the past) have a tendency to interpret existing limitations, which are often narrowly phrased to stretch them a bit so that they comply with the free speech values, which are integrated, reflected into these exceptions. What we can learn from this case law - anyone who knows a bit about free speech knows this from the start- is that this myth of a restricted interpretation of copyright exemptions, as you will read it in many traditional treaties of copyright, is nonsense. In many cases, exceptions should be interpreted broadly in the light of the constitutional values that they reflect. That is the traditional approach.

In much fewer cases, rare cases, you will see an actual direct application in a horizontal way of free speech vis-à-vis copyright exclusivity. Direct limitations outside copyright, with direct reference to free speech as codified in Article 10 of the European Convention of Human Rights. These are rare cases, where the contested use squarely falls outside of any scope of any existing limitation.

A good example from Germany - it is not about free speech directly, but it is a nice example - is "Germania drei, Gespenster am toten Mann". The Bundesverfassungsgericht gave extremely wide latitude on the basis of the freedom of art, which in Germany is ancillary to free speech, to a play right to quote extensively from Berthold Brecht works, much more than he would allow under even broadly interpreted quotation rights[3].

Another example would be - maybe that is even a better example - a decision by a Dutch Court of Appeal in the case of Scientology, where the court argued that reproducing large parts of copyrighted documents of the church of Scientology was allowed even absent any even far fetched application of a quotation right or other existing limitation, because free speech simply required a debate about this movement[4]. I will come back to the case a little bit later on. So that is the rare and unusual direct application.

This morning Dr. Rigamonti has rejected this constitutional approach to copyright basically because of its lack of normative contents. Christophe Geiger has already answered to that critic. I would also like to say a few things about it.

Yes, it is a faith notion. Yes, it is almost a religious notion. But it is more than that. These norms not just constitutionally protect free speech, but constitutionally protect privacy rights and I don't think they're entirely devoid of content. They are principles and as such they are faith. And they have to be faith, because they require application in the whole legal system. But they are not entirely empty. In fact, what you can read in Article 10 of the European Convention of Human Rights and its case law based on it, is a strong position pro free press, pro public discourse, pro privacy protection, pro democratic values. These are no empty phrases, these are not just empty phrases, abracadabra, these are norms which colorize the otherwise black and white norms of copyright and they give content to the exceptions. That is what courts do a lot, not just in Germany, often without even knowing that they're actually applying free speech norms in copyright cases. Often they don't even refer to them.

Of course, and I think we all agree on that point, it's much better to integrate, to codify these freedoms ex ante in the copyright system. We all like copyright enough to want that part in our system. And I think we all agree that also as a matter of legal security it is better to give users of the copyright system some legal security.

In a sense, that's also the danger of this constitutional approach: it could lead to really lazy law making, if a lawmaker thinks, that it doesn't matter what we write into copyright laws, because the Constitution or the European Convention will trump it anyway, the freedom is there and let just the court decide. There is a danger inherent in that approach, I admit that. So as a matter of legal security and clarity we have to internalise these norms as much as possible.

As a side note to this, it is interesting to see, and maybe this is something for another "Interessensausgleich"-meeting by the Max-Planck-Institute – my compliment for organising this, this is a very good event, although I missed the first day – that other intellectual property regimes are much less mature in this respect. If you look at trademark law, there is not a well-developed system of exceptions reflecting for instance free speech values as you will find in the copyright system. Even worse is the database right, that should have been taken this into consideration from the start, because you cannot get closer to information in its most narrow defined sense as protected in Article 10 of the European Convention. Then in the framework of database protection, even there are exceptions, I should say limitations, which are much too exceptional and very few are actually reflecting free speech values. I think that is a major problem in the system of database protection.

Finally, let's come back to the exogenous horizontal application of free speech to copyright. I am not such a radical to say that such application is and should remain exceptional. And if you look at the courts, this is the case. The cases where copyright was sacrificed with direct reference to free speech are to be counted on one or two hands. It happens only in those exceptional cases, where freedoms protected by the constitution or by the European Convention are directly at state, are directly affected. News, worthiness, political debate, public order, those are the catchwords, those are the corps of freedoms protected under the free speech jurisprudence in general and you see that reflected in those special cases[5].

The Scientology case again is a perfect example. There was no quotation right, but the court considered a public discussion of this potentially dangerous- or at least highly dubious- church of such importance to society in general, that it allowed very broad freedoms to reproduce copyrighted works by Scientology, informing the public about what this movement really is about. I would argue that I would apply to a newspaper that has managed to reproduce the note left last Tuesday on the body of Theo van Gogh. That's it.

Prof. Reto M. Hilty
Herzlichen Dank, Bernt, nicht nur für die Kürze, sondern auch für die Klarheit der Ausführungen. Ich darf direkt an Herrn Heinemann weitergeben.

[1] Time, Inc., v. Bernard Geis Associates, 293 F. Supp. 130 (SDNY 1968).
[2] Decision of the French Supreme Court, November 13, 2003, IIC 6/2004, 716, comment by C.Geiger; On the Utrillo-case see also C. Geiger, Droit d'auteur et droit du public à l'information, Litec, 2004, n° 457-468.
[3] BVerfG, June 29 2000, Germania 3, GRUR 2001, 149. On this decision, see C. Geiger (supra note 2), n° 481-485.
[4] Gerechtsho's- Gravenhage, September 4 2003, AMI 2003/6, 222, comment by P.B. Hugenholtz.
[5] See on this issue P.B. Hugenholtz, Copyright and Freedom of expression in Europe, in: R.C. Dreyfuss, D.L. Zimmerman, H. First (ed.), Exp