



Freedom of Speech and the Arts – the Strasbourg perspective

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I. Introduction

Analysis of article 10 ECHR with regard to artistic speech;

No analysis of EU-law at this point

II. Freedom of expression

Article 10, §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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

III. Limitations

§ 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.

III. Limitations

So:

- 3 conditions to be fulfilled;
- Collective interests (morals, territorial integrity,...)
- Individual interests (rights of others, reputation,...)

IV. ECtHR's case-law

- Since 1976:

“Freedom of expression constitutes one of the *essential foundations of such a society, one of the basic conditions for its progress and for the development of every man*. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but **also to those that offend, shock or disturb the State or any sector of the population.**”

(ECtHR, Handyside vs UK, 7 December 1976)

V. General Principles

- Strong protection of “political speech”, because of link with general interest and democracy;
- Lower protection of “commercial speech”

VI. Artistic expression (1.)

ECtHR, *Pryanishnikov v. Russia*, 10 September 2019:

*“The Court further reiterates that freedom of expression includes freedom of artistic expression – notably within freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. **Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society.** Hence the obligation on the State not to encroach unduly on their freedom of expression (see *Müller and Others v. Switzerland*, 24 May 1988, §§ 27 and 33, Series A no. 133, and *Kaos GL v. Turkey*, no. 4982/07, § 47, 22 November 2016).”*

Artistic expression (2.)

- *However, artists and those who promote their work are certainly not immune from the possibility of limitations as provided for in paragraph 2 of Article 10 of the Convention. In accordance with the express terms of that paragraph, whoever exercises his freedom of expression takes on “duties and responsibilities”, and the scope of those duties and responsibilities will depend on his situation and the means he uses (see Vereinigung Bildender Künstler v. Austria, no. 68354/01, § 26, 25 January 2007, and Akdaş v. Turkey, no. 41056/04, § 26, 16 February 2010).*

VII. Artistic expression

For sure limits:

- ECtHR, Müller and others vs. Switzerland, 24 May 1988
- ECtHR (dec.), Karttunen vs. Finland, 10 May 2011;

Most cases seem to be related to public morality (and blasphemy).

VIII. Quid Copyright?

Protected under Article 1, First Protocol (Property rights)

Conflict with Freedom of Expression?

ECtHR, case *Ashby Donald v. France*, 10 January 2013:

« En l'espèce, les photographies litigieuses ont été publiées sur un site Internet appartenant à une société gérée par les deux premiers requérants, dans le but notamment de les vendre ou d'y donner accès contre rémunération. La démarche des requérants était donc avant tout commerciale. De plus, si l'on ne peut nier l'attrait du public pour la mode en général et les défilés de haute couture en particulier, on ne saurait dire que les requérants ont pris part à un débat d'intérêt général alors qu'ils se sont bornés à rendre des photographies de défilés de mode accessibles au public. »

IX. How to solve it?

1. Margin of Appreciation:

States will have to consider all conflicting interests at stake.

2. One might expect ECtHR to develop some key factors:

- context (debate of general interest vs commercial speech);
- intentions of artist;
- “personal” touch
- proportionality...