

Thus it appears that following the decision in *Golan v. Gonzalez*, there exists far greater potential for the review of copyright law with regard to its compatibility with the fundamental freedoms guaranteed under the First Amendment, thereby offering greater scope for the achievement of a satisfactory equilibrium between copyright and the freedom of speech and the right to information within the US legal framework.

B. Europe

Before embarking on an analysis of copyright and the freedom of expression in Europe, it is useful to consider the nature of the copyright law framework within the EU Member States.

Firstly it is pertinent to note that as opposed to trademark and design law, the EU is yet to introduce a community wide copyright.³¹ Rather copyright law in the EU is based upon the individual national copyright laws of the Member States which operate within their respective territories.

However the EU has succeeded in introducing a degree of harmonization in relation to certain specific aspects of copyright law through a series of community directives which relate to such aspects of the law as may have an effect on the free movement of goods and services within the EU.

Hence a consideration of the existing tension between copyright and the freedom of expression in Europe necessarily requires one to consider the nature of the conflict between these competing values as it exists in the individual legal frameworks of specific member states, as well as an overall consideration of European Community (hereinafter “EC”) law in relation to the specific areas in which copyright law has been the subject of community wide harmonization.

31 Dreier and Hugenholz *Concise European Copyright Law* 1 Kluwer Law (2006).

Article 10 of the European Convention on Human Rights³² (ECHR) (which has been ratified by all EC Member States) guarantees the freedom of expression which includes the freedom to receive and impart information. Hence it may be seen that the freedom of expression in Europe is expressed in much narrower terms than in the US.

The fundamental rights guaranteed under the ECHR constitute general principles of Community law which are used as a standard in the interpretation of Community law and a basis for actions against Community institutions.³³

However the guarantee of the freedom of expression under Article 10 is made subject to qualification by formalities as may be prescribed by law and considered to be “*necessary in a democratic society for the protection of the rights of others*”.

Hence it remains possible to argue that the limitations on the freedom of expression imposed by the copyright laws of Member States fall within the scope of a formality prescribed by law which is necessary for the protection of the rights of others under Article 10 of the ECHR. In fact the term “rights of others” has been held to include a wide range of subjective rights which certainly includes the rights protected by copyright.³⁴

With regard to national constitutions, as Professor Hugenholtz points out the protection granted to the freedom of expression does not in most cases reflect the broad scope of Article 10.

However he identifies the German Constitution which provides for a comprehensive three-tiered right to the freedom of expression in-

32 Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5 (1950); See Treaty on European Union Article 6(2) 31 ILM 247; 1992 O.J. (C191) 1.

33 Margot Horspool and Matthew Humphreys *European Union Law* 131 Oxford University Press (4th ed. 2006).

34 P. Bernt Hugenholtz *Copyright and Freedom of Expression in Europe* www.ivir.nl/publications/hughholtz/PBH-Engelberg.doc at 5.

corporating the freedom of opinion, the right to information as well as the freedom of the media as a notable exception.³⁵

The French Constitution³⁶ on the other hand does not contain an express bill of rights. However the preamble to the Constitution expressly states its attachment to the Declaration of the Rights of Man and of the Citizen of 1789 which contains a guarantee of the freedom of speech and of the press.³⁷

This has been interpreted to imply that the principles laid down in this instrument will have constitutional value within the current legal framework in France and further that it is possible for the Constitutional Court to declare unconstitutional legislation that infringes the principles contained in the said document.³⁸ Further in the case of *Danone* the freedom of expression was expressly recognized as a right guaranteed under the Constitution of France.³⁹

In the UK the rights guaranteed under the ECHR have been implemented into the domestic legal framework by the Human Rights Act of 1998. S. 3 of the Act requires that all primary and secondary legislation must be read and given effect in a way which is compatible with the Convention rights.⁴⁰

Furthermore s.12 of the Act imposes a special safeguard with regard to the freedom of expression. This provision introduces a special consideration for the balancing of the interests of the freedom of expression and copyright in the public interest by requiring courts to have particular regard to the importance of the Convention right to the freedom of expression where proceedings relate to journalistic, literary or artistic material, the publication of which would be in the public interest.

35 GRUNDGESETZ [GG] [Constitution] art.5 (F.R.G.).

36 LA CONSTITUTION FRANCAISE (1958) [Constitution].

37 *Déclaration des droits de l'Homme et du citoyen* art. 11 (1798).

38 Decisions of the Constitutional Council 71-44 DC of 16 July 1971 and 73-51 DC of 27 December 1973.

39 Paris 30 April 2003, *Ubiquité-Rev dr. techn. Inf.* 2003/17,81, note J Verbeek and A. Wybo.

40 UK Human Rights Act (1998) s.3 (1).

Hence it appears that although in comparison to the United States it is not possible to always identify a clearly expressed guarantee of the freedom of expression within the domestic legal frameworks of EU Member States, the freedom of expression forms an ingrained value of the normative framework of most of these states.

Thus the existence of a clear conflict can be discerned between the freedom of expression (as recognized within domestic laws as well as under the ECHR) and the laws and principles relating to copyright within these legal frameworks.