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ARTICLE 10 ECHR: FREEDOM OF EXPRESSION IN THE CONTEXT OF TRADEMARKS

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Abstract

The paper analyses the significant proactive role of the European Court of Human Rights (ECtHR) in the resolution of intellectual property disputes in the past few decades. In the examination of the relationship between fundamental rights and intellectual property, the authors focus on the complex and often complicated relation between the right of freedom of expression and the right to trademark protection. The main focus is on the conflict between the trademark rights granted to right holders and the use of their trademarks by third parties as part of their freedom of expression. The recent trend of development of modern functions of trademarks has created additional challenges for the capability of the Article 10 ECHR to sufficiently protect expressive uses. The paper explores ECtHR jurisprudence that reflects the conflict of these rights.

Keywords: trademarks, Article 10 ECHR, freedom of expression, jurisprudence.

I. INTRODUCTION

The role of the European Court of Human Rights (ECtHR) in the resolution of intellectual property (IP) disputes has been extended in the past few decades. The influence of the ECtHR decisions is noticeable at the national courts that use the base law of the ECtHR when solving cases and intensively call for scrutiny over the Court's practice on IP related matters. The Strasbourg Court provides important guidance on how the conflicts pertaining to the IP/ human rights intersection will be adjudicated on the national level¹.

The ECtHR is not dealing with the IP cases as a specialized IP court, but it considers the cases from a viewpoint of a potential breach of human rights enlisted in the European Convention of Human Rights (ECHR). The ECtHR's jurisprudence in dealing with IP issues has been developing throughout the years, and the court became more engaged in ECHR rights relevant for shaping IP protection on a European level. This proves once again that the ECHR is a living instrument and its evolutive character adjusts its interpretation to the present conditions and challenges.

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¹ See more in Christophe Geiger, Elena Izymenko "Intellectual Property Before the European Court of Human Rights" CEIPI Research paper No. 2018-01 (2018), 7.

One of these rights, the right of freedom of expression has conflicted with trademark rights, in particular after the trademark rights have expanded beyond the scope and they gained modern functions during the last decades. This expansion has created uncertainty regarding what types of unauthorized third-party uses of marks are allowed, in particular when it comes to the communicative usage of marks by tv reporters, critics, artists, competitors or third parties in general. It can also lead to government restrictions of protected expression in trademark litigation via court injunctions that ban the use of another's trademarked language².

In addition, the risk of contributory trademark liability for Internet companies such as Facebook creates incentives for these private entities to prohibit certain unauthorized uses of marks on their websites, remove allegedly infringing content, and suspend or terminate the accounts of users who are accused of repeat trademark violations³.

There is an existing very complex and often conflicted relationship between freedom of expression and trademark protection. The freedom of expression protection is related to free creation and dissemination of information and ideas, but when a certain expression contains another's registered trademark, it may be sanctioned and suppressed by the authorities based on trademark protection. In addition, the trademark law might prevent registering certain signs that would otherwise be considered as free artistic or other kind of expression.

The paper focuses on the specific issue of examining the potential conflict between the right of freedom of expression and the right to the protection of trademarks within the scope of ECtHR. We examine if the freedom of expression, as granted under Article 10 in ECHR, can serve as a limitation to trademark rights and to what extent.

According to Geiger and Izymenko⁴, the disputes arising from the interplay of trademarks and freedom of expression before the ECtHR can be classified into two main types:

- those pertaining to the unauthorised use of trademarks by third parties for socially important purposes, including parodic criticism;
- and the claims coming from the potential trademark holders themselves challenging the refusals of their applications for trademark registrations.

We will focus on the first type of cases, i.e., how freedom of expression can be invoked in a conflict with trademark rights by third parties.

II. FREEDOM OF EXPRESSION IN ART 10 OF ECHR

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is one of the key instruments that provide a catalogue of civil and political human rights that are mandatory to be protected in all of the Member states of the Convention. It is the most important form of expression of the commitment of the member states of the Council of Europe to the values of democracy, peace and justice, and, through them, to respect for the fundamental rights and freedoms of the individuals living in these societies⁵.

² See more in Lisa P. Ramsey "Reconciling trademark rights and free expression locally and globally" *International Intellectual Property: A Handbook of Contemporary Research* 341 (Daniel J. Gervais ed., Edward Elgar Publishing 2015), 342

³ Lisa P Ramsey, 'Brandjacking on Social Networks: Trademark Infringement by Impersonation of Markholders' (2010) 58 Buffalo L Rev 851, 857, 867-8.

⁴ Christophe Geiger, Elena Izymenko "Intellectual Property Before the European Court of Human Rights" CEIPI Research paper No. 2018-01 (2018), 42-43.

⁵ *Introduction to European Convention on Human Rights – Collected texts*, Council of Europe Publishing, Strasbourg, 1994.

Almost all of the states parties to the Convention have integrated it into their national legislation. The Convention is thus part of the internal legal system and is binding on the domestic courts and all public authorities. The text of the Convention may not be read outside the Court's case law. The Convention functions under the common law system. The judgments of the Court explain and interpret the text. They are binding precedents whose legal status is that of mandatory legal norms⁶. Freedom of expression plays a central role in the Convention as a separate right and as a component of other rights protected under the Convention (such as freedom of assembly). This right at the same time can conflict with many other rights from the Convention, such as the right to respect private life, conscience and religion etc.

As Frowein⁷ emphasizes, "without a broad guarantee of the right to freedom of expression protected by independent and impartial courts, there is no free country, there is no democracy. This general proposition is undeniable".

Since ECtHR's first judgement in 1959, the number of cases that are primarily based on claims of violation of Article 10 of the ECHR) represent only a small percentage of the total number of cases. Namely, by 2020 there are 925 cases based on claims of violation of Article 10 out of a total 23.906 number of cases⁸, but their topics are an impressive contribution to democracies for a variety of issues such as: duties and responsibilities of investigatory journalism⁹, defamation cases and the protection of 'whistle-blowers'¹⁰, racism¹¹ and homophobia¹² or condemnation of speech inciting to violence and hatred¹³.

The complaints to the ECtHR in Strasbourg are addressed only when all domestic remedies have been exhausted. The overall scheme of the Convention is that the initial and primary responsibility for the protection of the rights set forth in it lies with the contracting states. The Court is there to monitor states' actions by exercising the power of review. The domestic margin of appreciation thus goes hand in hand with European supervision. The doctrine of the margin of appreciation is applied differently and the degree of discretion allowed to the states varies according to the context¹⁴

Article 10 Freedom of expression

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

⁶ Bychawska-Siniarska, Dominika. *Protecting the right to freedom of expression under the European convention on human rights: A handbook for legal practitioners*. Council of Europe, 2017, 10.

⁷ Jochen Abr. Frowein, "Freedom of expression under the European Convention on Human Rights", in Monitor/Inf (97) 3, Council of Europe.

⁸ CoE Statistics available on: <https://www.echr.coe.int/pages/home.aspx?p=reports&c%20%80%89=%E2%80%89>. Violations by Article and by State: https://www.echr.coe.int/Documents/Stats_violation_1959_2020_ENG.pdf.

⁹ Steel and Morris v United Kingdom Application No 68416/01, Merits and Just Satisfaction, 15 February 2005 (severe defamation of McDonald's)

¹⁰ Guja v Moldova Application No 14277/04, Merits and Just Satisfaction, 12 February 2008 (whistle-blower who leaked documents to the press).

¹¹ Aksu v Turkey Applications Nos 4149/04 and 41029/04, Merits and Just Satisfaction, 15 March 2012 (anti-Roma sentiment in the book 'The Gypsies of Turkey')

¹² Vejdeland and Others v Sweden Application No 1813/07, Merits and Just Satisfaction, 9 February 2012.

¹³ Zana v Turkey Application No 18954/91, Merits and Just Satisfaction, 25 November 1997 (pro-PKK speech in the Turkish Parliament).

¹⁴ Bychawska-Siniarska, Dominika. *Protecting the right to freedom of expression under the European convention on human rights: A handbook for legal practitioners*. Council of Europe, 2017, 10.

and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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 for 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.

Article 10 in its first paragraphs defines the freedoms protected in a very broad context such as "freedom to hold an opinion and to receive and impart information and ideas" without specifying particular types of expression and distribution. All kinds of expressions fall under the scope of article 10.1 ECHR and in the context of trademark rights protection, all forms of trademark use are part of the subject matter of Article 10.1

The second paragraph refers to the limitations of the right to freedom of expression. Limitations might be analyzed in the light of conflict with trademark rights. The limitation of this right must be foreseen by law, which in the case of a conflict with trademark rights is trademark law. Also, the limitation must strive to achieve one of the legitimate aims as stated in Article 10.2 ECHR, which in the case of trademark rights is "the protection of the reputation or rights of others". This paragraph refers to the limitation of freedom of expression that must be "necessary in a democratic society". The ECtHR interprets the requirement of necessity by examining whether a 'pressing social need' exists for a restriction, whether the restriction is relevant and sufficient, and whether restrictions are proportionate to the legitimate aim pursued, i.e. whether they do not reach further than necessary in case of non-commercial expression, or whether the restriction is justified in principle and proportionate in case of commercial expression¹⁵. However, the courts must act individually in every case in order to examine the necessity of an imposed restriction, not just relying on the national law provision on freedom of expression.

The test of necessity under Article 10.2 ECHR is not of equal strength in all cases in democratic states. The ECtHR in its jurisprudence uses different criteria that specify the strength of the test. According to Voorhoof¹⁶, there are seven key criteria, that in relation to the potential conflict with the trademark law can be formulated as follows.

The first one is the distinction in the content of the expression, i.e. whether the expression is on a matter of public interest, whether it is artistic expression, or whether it is commercial expression. Second, the particular role of the press or pressure groups in a democratic society can be of influence on the test. Third, the Court distinguishes between value judgements and factual allegations. Fourth, the potential harm of third party trademark use is of importance. Fifth, the intention of the speaker will be weighed. Sixth, the proportionality of the restriction must be examined, in particular, if sanctions or inequalities between the parties could cause chilling effects on public discourse. And seventh, the variable margin of appreciation is of influence¹⁷.

¹⁵ Sakulin, Wolfgang. "Trademark protection and freedom of expression." *An Inquiry Into the Conflict Between Trademark Rights and Freedom of Expression Under European Law*. Great Britain: Kluwer Law International BV, 2011, 94.

¹⁶ D. Voorhoof, 'Artikel 10 - Vrijheid van Meningsuiting', in: J. vande Lantooe and Y. Haeck (eds.), *Handboek EVRM*, Antwerp: Intersentia 2005, 202 in Sakulin, Wolfgang. "Trademark protection and freedom of expression." *An Inquiry Into the Conflict Between Trademark Rights and Freedom of Expression Under European Law*. Great Britain: Kluwer Law International BV, 2011, 95.

¹⁷ Ibid.

The test and its strengths are strongly influenced by the ECtHR granted “margin of appreciation” that differs among Member states of the Convention and which is often combined with the proportionality test.

III. FREEDOM OF EXPRESSION IN CONFLICT WITH TRADEMARK RIGHTS

Freedom of expression, as a norm that regulates human rights, applies as a *vertical* relationship between the state and the individuals. The jurisprudence shows that this relation has been extended beyond and includes cases of *horizontal* conflicts between private parties. In the context of trademarks, this includes potential conflict between the owner of trademark rights and the right of freedom of expression of third parties that use the trademark.

The conflict between trademark rights and protection of freedom of expression was not a focus of the public legal debate since the trademarks were considered only in their commercial function, despite their social, cultural or even political role in a democratic society. The trademarks were only considered as a “sign that serves to identify the goods of a given enterprise and to distinguish them from those of others”¹⁸. The main function of the trademark law is to serve to the protection of consumers against counterfeit products and confusion as to their origin¹⁹.

A conflict between freedom of commercial expression and trademark protection may arise where trademark law protects more than solely confusing use or third-party traders need to use protected trademarks in their commercial communications, for instance in the context of comparative advertising or in other commercial communications that are aimed at informing or communicating with consumers. This type of conflict is purely commercial, that is to say, it is all about providing information and gaining access to consumers²⁰.

The traditional and uncontroversial role of trademarks as a guarantee for quality and distinctive characteristics has been extended in the last decades for uncommercial use of trademarks. Namely, the trademarks have gained a new and not less important role in all aspects of social life, political sphere or cultural life²¹.

Trademarks today have a very important role in communicating the messages of products, affecting increased consumeristic behaviour via traditional media and powerful social media as new mass media. They are a symbol of the power of some companies or political parties but are also present in new artistic compositions. As Wolfgang emphasizes “many of the social, cultural and political uses of trademarks can be referred to as a process of 'social, cultural, and political 'meaning making', whereby individuals use, shape and influence the meaning contained in those signs which they deem to be of great influence over their lives or society. The ability to exert such influence may greatly influence the perceptions of a person's place in society, as well as political and social processes²².”

¹⁸ De Propiedad Intelectual, Organizacin Mundial. *Introduction to Trademark Law and Practice: The Basic Concepts: a WIPO Training Manual*. WIPO, 1993, 15.

¹⁹ Pak, Irina. "The expansion of trademark rights in Europe." *IP Theory* 3 (2012): xiii, 166.

²⁰ Sakulin, Wolfgang. "Trademark protection and freedom of expression." *An Inquiry Into the Conflict Between Trademark Rights and Freedom of Expression Under European Law*. Great Britain: Kluwer Law International BV, 2011, 2.

²¹ For modern functions of trademarks see more in Colston, Catherine, and Kirsty Middleton. *Modern intellectual property law*. Psychology Press, 2005.; Dreshcer, Thomas D. "The Transformation and Evolution of Trademarks- From Signals to Symbols to Myth." *Trademark Rep.* 82 (1992).

²² *Ibidem*.

Trademark law grants protection of the right holders for the cases related to the distinctive character or trademark reputation, but there are certain fields such as satire, parody, criticism which are protected by law by freedom of expression and conflicts may frequently arise.

Trademark holders frequently attempt to use trademark law to silence the criticism aimed at them by various organisations. The latter frequently make use of figurative trademarks, in particular logos, to parody them and to distort them satirically as a means of drawing attention to the risks to the environment or public health that result from these companies' activities or products, or to criticise the social policy of these players in the economy²³.

The horizontal cases of conflict between freedom of expression and trademark protection show that intellectual property tends to become a mechanism for the protection of private interests rather than to protect the public interest. The trademark holder's rights include the 'right to prohibit' which has been often activated in case of criticism to prevent it. Although human rights, in general, may be subject to certain limits imposed by the public interest, the limitation of freedom of expression in a form of prohibition for any use of a protected sign even when it is used for the parodic purpose might lead to serious harm over the liberal values in a democratic society.

The European Commission on Human rights tackled trademark parody in an old 1990s case, giving an extremely restrictive interpretation of Article 10 of the ECHR²⁴. It is a single case of use of a trademark for parodic criticism tested on freedom of speech grounds before the Convention organs. The application to the European Commission was addressed by an Austrian anti-smoking association and its chairman. The Commission considered that a political caricature of the 'Camel' trademark to protest and alert the public against the evil implications of cigarettes to health would not be protected, since the caricature disparaged the product and the 'Camel' trademark. Applicants sold posters, pamphlets and stickers with the slogan "ONLY A CAMEL WALKS MILES FOR A CIGARETTE" ("NUR EIN KAMEL GEHT MEILENWEIT FÜR EINE ZIGARETTE"), depicting a skeleton riding a camel, countering Camel's overly branded slogan "I'd walk a mile for a Camel²⁵." The Commission agreed with the Austrian Supreme Court that the selection of the particular 'Camel' brand to protest against tobacco was unlawful since it was chosen in detriment of other marks, thus making it suffer all the hurdles of representing the entire category. This would "disparage" the mark, unduly discriminating it. The Commission also reasoned that the purpose of the caricature was not only to inform but that it distorted Camel's trademark. There was no commercial/non-commercial distinction or discussion in this case²⁶.

Following the same line of decision-making, there are even some decisions that reflect one type of private censorship in cases where the courts ruled for the prohibition of a trademark in newspaper articles, regardless of the purpose²⁷.

²³ Geiger, Christophe. "Trade marks and freedom of expression—the proportionality of criticism." *IIC* 38, no. 3 (2007): 317-327, 317.

²⁴ Österreichische Schutzgemeinschaft für Nichtraucher and Robert Rockenbauer v. Austria (dec.), no. 17200/90, 2 December 1991, CE: ECHR:1991:1202DEC001720090.

²⁵ In German, the word "Kamel" also denotes a person acting in a foolish or stupid manner.

²⁶ See more about the margin of appreciation in this case in Pontes, Leonardo M. "Trademark and Freedom of Speech: a comparison between the US and the EU system in the awakening of Johan Deckmyn v. Helena Vandersteen." *WIPO Magazine* (18 May 2015) *WIPO/IPL/GE/15* 3 (2018), 41.

²⁷ On the reproduction of a trade mark in a newspaper headline, see decisions of the Supreme Commercial Court, 14 Jan. 2003, *Sté Montreux publications v. Sté M6 et al.*; 5 Nov. 2002, *Assoc. AOI v. Sports loisirs presse SARL*, 2003 Comm. com. élect. 27.

The Marlboro case²⁸, which is explained in detail below in the case study section, refers to the misappropriation of a trademark in an anti-smoking campaign which is considered as an infringement. The trademark has been used to draw attention to the harm that tobacco causes to health: a pool of tar emanating from the Marlboro packet.

In the last decades, the trademark owners have become increasingly inclined to initiate legal action against unconsented use of trademarks to mend the trademark's tarnished image and protect their commercial investment by restoring the favourable consumer image of the trademark²⁹.

There is also another point of view in the light of the conflict of freedom of expression and trademark rights since there are many litigants that misuse the concept of freedom of expression and freedom of information to avoid being punished for intellectual property rights infringement. But as professor Geiger states “the courts are by no means deceived, and only very rarely give intellectual property rights second place to freedom of expression³⁰.”

It is interesting to point out that nowadays in the era where the freedom of expression “constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and each individual's self-fulfilment”, there are cases where the powerful companies control the freedom of expression to protect the trademarks being used even in parodic/criticism context.

Even when speech is regarded as non-commercial the ECtHR is compelled to balance freedom of expression with the economic interests of the trademark owner. Unfortunately, given the teleological and utilitarian preferences of the courts, defendants relying on this constitutional defence have often been unsuccessful³¹.

The case law of national courts when it comes to granting discretion in decision-making shows great inconsistency. Namely, in some cases, the court focused on the deceptiveness of the speech in framing the margin of appreciation³², in other cases, the courts have relied on the commerciality of the specific discourse and the subject matter³³. In the “Camel case³⁴” ECtHR dismissed an application, holding that a political caricature of the 'Camel' trademark which aimed at alerting the public against the evil of cigarettes was not protectable under Article 10.1. Here, the courts upheld the commercial- non-commercial distinction ruling that in deciding on commercial speech, the national courts have the discretion to decide cases. This inconsistency in the law naturally creates a risk of assigning too much importance to the margin of appreciation, resulting in less favourable treatment in cases of mixed speech³⁵.

²⁸ Hachette Filipacchi Presse Automobile and Dupuy v. France (No 13353/05)

²⁹ See more in Levy, Keren. "Trademark parody: A conflict between constitutional and intellectual property interests." *Geo. Wash. L. Rev.* 69 (2000): 425.

³⁰ *Ibid*, 320.

³¹ *Puma* (n.1200). *Lamparello v. Falwell*, 420 F.3d. 309, (Va. 2005) In Basma, Dima. *The nature, scope, and limits of modern trademark protection: A luxury fashion industry perspective*. The University of Manchester (United Kingdom), 2016, 334.

³² *Casado Coca v. Spain* [1994] 18 E.H.R.R. 1, App. No.15450/89.

³³ *Markt intern Verlag GmbH and Klaus Beermann (A/165)* [1990] 12 E.H.R.R. 161.

³⁴ *Österreichische Schutzgemeinschaft für Nichtraucher and Robert Rockenbauer v. Austria* (dec.), no. 17200/90, 2 December 1991, CE: ECHR:1991:1202DEC001720090.

³⁵ Basma, Dima. *The nature, scope, and limits of modern trademark protection: A luxury fashion industry perspective*. The University of Manchester (United Kingdom), 2016, 335.

The jurisprudence shows that other types of commercial expressions that are truthful may also be restricted³⁶. There is inconsistent and insufficient protection for mixed speech in different cases of the Member States of the Convention³⁷.

The decisions lead to a conclusion that the economic interests are protected over the freedom of expression under Article 10 of the ECHR in particular when there is an existence of commercial elements.

The recent trend of development of the modern functions of trademarks and the need for their protection creates additional challenges for the capability of Article 10 to sufficiently protect expressive uses.

In addition will be presented two case studies of the ECtHR where trademarks were a central issue, although there are no trademark law issues in the judgments. Nevertheless, these still affect trademark property in the areas of protection of the trademark owner's interest, when the trademark's reputation is considered (McDonald's and Marlboro).

IV. STEEL AND MORRIS V. UNITED KINGDOM³⁸

The case concerns an application lodged by two British nationals, Ms Helen Steel and Mr David Morris, born in 1965 and 1954 respectively and living in London. During the relevant period, Mr Morris was unemployed and Ms Steel was occasionally unemployed, ie she had a low income. The applicants were involved in a small organization called London Greenpeace (not affiliated with Greenpeace International), which ran campaigns primarily on environmental and social issues. In the mid-1980s, this organization launched a protest campaign against the activities of the McDonald's corporation. As part of the campaign, a six-page information booklet was produced and distributed entitled "What's wrong with McDonald's?", each page of which comprised the McDonald's logo. It contained accusations against McDonald's Corporation; for example, the highly critical leaflet dealt with the following issues: "What's the connection between McDonald's and starvation in the Third World?", "Why is it wrong for McDonald's to destroy rainforests?", "What's so unhealthy about McDonald's food?", "How do McDonald's deliberately exploit children?", "In what way are McDonald's responsible for torture and murder?", "What is it like working for McDonald's?". A number of allegations related to the lack of nutritional value in the food served in McDonald's restaurants and the health risks of consuming this food. Finally, McDonald's has been accused of aggressively advertising its services and products, advertising targeting children, and the brutal practice of raising and slaughtering livestock for food production, and creating unsatisfactory working conditions in the corporation.

Since London Greenpeace was not an incorporated body, McDonald's hired private investigators to find out who was responsible for the leaflet. Subsequently, the US and UK McDonald's started a court procedure against five identified activists for libel. Three of the defendants apologised for

³⁶ Ibidem.

³⁷ *S.A Pernod Ricard and S.A Ricard v. Sarl Transfert Creations*, CA Chambéry, Commercial Chamber[2007] n° 06/00449. Trademark parody in France on t-shirts was denied in the absence of specific statutory exceptions, even in the absence of risk of confusion or denigration; IPKAT, 'Dogged pursuit of a trademark parody: *Puma v Pudel* in the Bundesgerichtshof' (*IPKat*, 21 April 2015) <<http://ipkitten.blogspot.co.uk/2015/04/dogged-pursuit-of-trade-mark-parody.html>. >Accessed 13 September 2015. Freedom of Expression is protected under Article 5(1) German Basic Law. In Germany, in a case involving a brand parody on Puma, the German Federal Court of Justice explicitly noted that the property right of Puma in its long-established trademark is valued more than the freedom of speech or the artistic freedom of the defendant.

³⁸ Steel and Morris - United Kingdom No. 68416/01. Judgment February 15, 2005.

the leaflet and McDonald's withdrew proceeding against them so the defamation proceeding continued only against Helen Steel and David Morris.

On 20 September 1990 McDonald's Corporation (US McDonald's) and McDonald's Restaurants Limited (UK McDonald's) brought an action against the applicant seeking damages for defamation they had caused because they had allegedly published a brochure.

The applicants either denied that the information booklet had been published or that its content was defamatory. They applied for free legal aid to conduct their case, but this was denied because free legal aid is not available to a liable party in the United Kingdom. They stated that they were significantly disabled due to denial of funds, not only in terms of legal advice and representation but also in terms of administration, photocopying, research, finding, preparing and paying expert and witness costs. The applicants performed their legal representation in court, although they were provided with some assistance by barristers and solicitors working pro bono.

During the proceedings, McDonald's was represented by a Chief and Assistant Attorney, specializing in defamation damages, and one and sometimes two lawyers, and other associates.

This was the longest trial in the history of English law and justice - the trial in the first instance lasted 313 days.

At some stage of the proceedings, the applicants were unable to pay for the daily transcript of the court hearing. In the end, with the help of donations from the population, they managed to obtain the required copies of these transcripts. During the trial, one of the applicants signed an affidavit related to the proceedings in another case, in the course of which he mentioned that the libel suit was initiated because of "leaflets that we produced". Contrary to the applicant's procedural objections that the person's solicitor had mistakenly omitted the words "which we allegedly made" in the affidavit, the presiding judge accepted the affidavit as evidence of the defendants' guilt.

On the basis of this affidavit, the court allowed McDonald's to amend its testimony at a later stage in the trial. The applicants were found responsible for publishing an information booklet which, as established by the court, contained several false statements and a number of unfounded statements. The judge ruled to award McDonald's corporation compensation for the harm caused to it. In the applicants' appeal before the Court of Appeal, some of the contentious charges against McDonald's were qualified as commentary and others as substantiated charges. The amount of compensation for damage was therefore reduced. The applicants were denied permission to appeal the decision to the House of Lords.

i. Objections

The applicants complained, within the meaning of Article 6 § 1 of the Convention, that the proceedings had been unfair, primarily because they had not been granted the right to legal aid, and under Article 10 that the proceedings and their outcome had caused disproportionate interference with the right to freedom of expression.

ii. Legal issues

Concerning compliance with the requirements of Article 10 of the Convention, the central issue to be resolved in the context of the requirements of Article 10 of the Convention is whether the act of State interference with the applicants' exercise of their right to freedom of expression was "necessary in a democratic society". The Government argued that, as the applicants were not journalists, they could not enjoy the high level of protection enjoyed by the media within the meaning of Article 10. The Court considers, however, that in a democratic society even small and informal groups of citizens who unite to carry out certain campaigns, such as London Greenpeace, should be able to carry out their activities effectively. There is a strong public interest in allowing

such groups and individuals, whose opinions differ from the majority, to participate in public debates by passing on data and ideas on matters of general public interest such as health and the environment.

The guarantee provided by Article 10 of the Convention to journalists with regard to reporting on matters of public interest is subject to the proviso that journalists must act in good faith to provide the public with accurate and reliable information in accordance with the professional ethics of journalists; the same principle applies to other persons participating in public debates. In the flyer prepared for the campaign, a certain degree of exaggeration and exaggeration is allowed and even foreseen. However, in the case at hand, the allegations against McDonald's were very serious and were presented as statements of fact rather than value judgments.

The applicants, who have denied that they had produced the booklet in the case (despite the Supreme Court's opinion to the contrary), argue that the requirement to bear the burden of proving the truth of each statement contained in the booklet on those who simply circulated it imposes an excessive burden on campaigners such as themselves, and thereby discourage public debate. The applicants also point out that large multinational corporations should not be given the right to go to court with claims for defamation against them, at least without providing evidence of actual financial damage caused to them by the defamation. The applicants further complain that McDonald's lawyers were able to sue for libel and win the case, given that many of the materials included in the booklet were already in the public domain.

Like the Court of Appeal, the Court was not convinced by the argument that these materials were in the public domain, since either the materials relied on by the applicants in support of their arguments did not support the accusations contained in the booklet, or other materials of this nature by themselves needed confirmation.

As regards the part of the complaint concerning the burden of proof, in principle, the requirement to impose on the defendant in a libel case the burden of proof (in accordance with the standard of proof of claims adopted in civil proceedings) of the truth of defamatory statements is not incompatible with the provisions of Article 10 of the Convention. The fact that the plaintiff in the domestic proceedings was a large multinational company does not mean that it should therefore be denied the right to defend itself against defamatory allegations, nor lead to the applicant not being required to prove the allegations. It is true that the actions of large companies are inevitably and consciously exposed to scrutiny and that the limits of acceptable criticism are wider in the case of such companies. However, in addition to the public interest in openly discussing its business, there is also the opposite interest in protecting the commercial success and viability of the company, for the benefit of shareholders and employees but also the wider economic well-being. The State, therefore, enjoyed a margin of appreciation in respect of the remedies it applied in accordance with domestic law to enable the company to establish the truth, to limit the damage from allegations that were likely to jeopardize its reputation.

However, if the State has decided to provide such a remedy to the company, it is essential, in order to protect the opposing interest of freedom of expression and open debate, that a measure of procedural fairness and equality of arms be ensured. An even greater general interest in promoting the free flow of information and ideas about the activities of powerful businesses and a possible "cooling" effect on others are also important factors to be taken in this context. The lack of procedural fairness and equality already established by the Court has led to a violation of Article 10.

In addition, under the Convention, damages for defamation must have a reasonable proportion of proportionality in relation to the reputation suffered. No steps have indeed been taken to enforce

the awarded damages against the applicants, however, the fact remains that the rather large amount awarded to them is still enforced. In such circumstances, the damages in the present case are disproportionate to the legitimate aim it serves. In conclusion, having regard to the lack of procedural fairness and the disproportionate damage awarded, the Court finds that there has been a violation of Article 10 of the Convention on this issue (adopted unanimously).

iii. Compensation

By applying Article 41 of the Convention. The European Court awarded the applicants compensation in the amount of EUR 20 thousand and EUR 15 thousand, respectively, in compensation for non-pecuniary damage suffered by them. The court also ruled in favour of the applicants for reimbursement and EUR 47,311.17 of legal costs and other expenses incurred in connection with the proceedings.

iv. Note

In a democratic society, criticism is of fundamental importance³⁹. Independently from the judgment presented here, Rahmatian⁴⁰ says that in proceedings started for criticism (or trademark parody) the national courts are quite careful regarding the human rights aspect of cases.

To our knowledge, this was the first case when the ECHR considered the freedom of publishing critical and hard-hitting opinions enjoyed by journalists admissible in the case of a campaign group of private persons as well. This sentence of the judgment (judgment para 90) is cited not only by Hudson⁴¹ and Grabenwarter⁴², but also by J. P. Costa⁴³, the president of the ECHR at that time, in his report held in Helsinki. It is also mentioned by several commentators, e.g. by Leach⁴⁴ or Jacobs, White and Ovey.⁴⁵

None of the courts can afford to make unilateral judgments, and the ECHR is not an exception to that either. This judgment also starts with reference to “the protection of the reputation or rights of others” (judgment para 86) and then multinational concerns are specified (judgment para 94), i.e. McDonald’s.

McDonald’s is presumably the greatest fast-food chain in the world: they operate almost 35.000 restaurants in 118 countries, the number of their employees is about 440.000. As of the 1980s, the companies of the holding have been experiencing several similar attacks (also in the UK), the American holding wanted to make a deterrent example of the activists in order to protect their name and trademark.

The British courts proceeded with indisputable attention, but yet they did not pay proper attention to the freedom of expression i.e. to Article 10 of the Convention.⁴⁶

³⁹ Grabenwarter, Ch., *European Convention on Human Rights*, page 46

⁴⁰ Rahmatian, Andreas. "Trade marks and human rights." *Intellectual property and human rights* (2008): 335-357, page 350, Examples from the French court practice: Stop Esso, Camel with a cigarette in its mouth.

⁴¹ Hudson, Anthony. "Free Speech and Equality of Arms—The Decision in *Steel & Morris v. United Kingdom*." *European Human Rights Laws Review* 3 (2005): 301-309. “[...] strong public interest in enabling such groups and individuals outside the mainstream [...]”.

⁴² Grabenwarter, Ch., *European Convention on Human Rights*, page 30.

⁴³ Council of Europe, *European Court of Human Rights*, 5.6.2008.

⁴⁴ Leach, Philip. *Taking a case to the European Court of Human Rights*. Oxford University Press, 2011.

⁴⁵ Rainey, B., Wicks, E., Ovey, C., Jacobs, White & Ovey: *The European Convention on Human Rights* (6th edn, OUP 2014), 444.

⁴⁶ Sándor Vida, *Trademark Property and Human Rights*, *Acta Juridica Hungarica* 56, No 4, pp. 231–248 (2015)

V. THE MARLBORO CASE⁴⁷

There are no trademark law issues in the judgment. Nevertheless, this still affects trademark property. This case is a negative example when a well-known trademark (Marlboro) is subject to surreptitious advertising and in the meantime also a third person (owner of the magazine) wants to exploit the trademark's good reputation.

i. The circumstances of the case

The case concern the prosecution of two magazines - "Action oto moto" in the first case and "Entrevue" in the second - and their chief editors.

The first magazine, Action oto Moto, featured a photograph of Formula 1 driver Michael Schumacher celebrating his victory at the Australian Grand Prix podium with the name of the 'M' cigarette brand on his sleeve - the sponsor of his racing team. On the right sleeve of the other pilot's suit was the name of another brand of cigarettes - "W". In accordance with the anti-tobacco and anti-alcohol laws, the court imposed a fine of 30,000 euros to the editor-in-chief for indirect or illegal advertising of tobacco products. The publishing company was jointly liable for the full amount of the fine. The verdict was upheld by the Court of Appeal, and the Court of Cassation later declared the cassation appeal inadmissible.

In the second case, Entrevue magazine published an article about money in sports. He accompanied it with a photograph of Michael Schumacher showing the logo of the cigarette brand ("M."). Another photo showed Michael Schumacher's helmet in the colours of the 'M' cigarette brand with the following caption: "Michael Schumacher," Formula 1 ": 65 million euros per year (430 million francs), including a salary of 34 million euros per year and advertising contracts for the rest ...". In addition, the magazine's penultimate page contained a series of satirical photomontages, one of which was two packs of 'M' cigarettes cut into two human figures in unnatural contact, with the caption "Caution: Smoking Causes Anal Cancer" ... The court found that the photomontage was not tobacco propaganda or advertising, but imposed a fine of 20,000 EUR on the editor-in-chief for direct advertising or promotion of tobacco or tobacco products in connection with the published photographs. The publishing company was jointly and severally liable. The Court of Appeal upheld the decision of the lower court and found the defendant guilty of illegal advertising of tobacco products and held the applicant company civilly liable for satirical photomontage. The Cassation Court dismissed the appeal.

ii. Legal issues

Compliance with Article 10 of the Convention.

None of the cases concerned publication in a "commercial" journal in the strict sense of the word, and therefore the discretion enjoyed by the state was limited. In the first case, the illegal publication focused on the car trade and was new in nature. In the second case, illegal photographs of sports events were part of a news article about income in sports. The question was whether the disputed measures were proportionate to the aim pursued.

The applicants were prosecuted for publishing photographs showing the manufacturer's logo and in the second case for publishing a photomontage using the same brand of cigarettes. Limiting cigarette and tobacco-related advertising is an important part of a broader strategy to combat social evils such as smoking. Fundamental health considerations, on the basis of which legislation was adopted in France and the European Union, could take precedence over economic demands and

⁴⁷ Hachette Filipacchi Presse Automobile and Dupuy v. France (No 13353/05) and Société de Conception de Presse et d'Édition and Ponson v. France (No 26935/05) March 5, 2009.

even some fundamental rights, such as the right to freedom of expression. There is a European consensus on the need for strict regulation of tobacco advertising, and the general trend of such regulation can be seen at present around the world. The Court must disregard the actual impact on tobacco consumption of a ban on advertising, including indirect advertising. The fact that illegal publications were seen as encouraging people, especially young people, to purchase such goods is a “relevant” and “sufficient” reason for the Court to justify interference.

Regarding the first case, there is no doubt that the purpose of the photo was to advertise cigarette brands among other goods, and even if the controversial logos took up very little space, they were easily recognizable and directly associated with success in sports.

In the second case, the logos of cigarette brands took up more space in the photographs and were especially visible and directly related to success in sports.

The Court considers that in both cases the applicants may have hidden illegal logos, which is technically uncomplicated without changing the essence of the photographs or the reality of the information disseminated. As media professionals, the applicants were able to make these minor changes. In addition, the readership of these magazines included young people, and it was necessary to take into account the impact of logos on these readers who are especially attentive to success in sports or finance.

Finally, although the amounts that the applicants were obliged to pay were certainly not insignificant, in assessing their value they must be compared with the income of high circulation magazines such as those involved in the present case. Given the importance of protecting public health, the imperative to take action to protect society from the evils of smoking, and the existence of a European consensus on the prohibition of tobacco advertising, the restrictions imposed on the applicants' freedom of expression in the present case responded urgent social need and were not disproportionate to the legitimate aim pursued.

iii. Decision

The judgment refers not only to the French legal provisions and practice but also to the Community law as well as the documents of the Council of Europe, the World Bank, as well as the framework contract of the World Health Organisation, i.e. a wide range of provisions on the prohibition of advertising tobacco products.

In both cases, the applicants challenged Article L. 3511-5 of the Health Code, which allowed audiovisual media to broadcast motorsport competitions in France - without removing the cigarette marks depicted on cars, driver's suits or on the track - when the events took place in countries where advertising of tobacco is allowed. While it was not yet technically possible to remove inscriptions, logos or advertisements on footage used by broadcasters, it was possible to refrain from making photographs with such symbols or to erase or obscure them on the pages of magazines. The print media had the necessary time and technical means to modify their illustrations and hide any logos that were suggestive of tobacco products. The obvious reason for the different provisions is that while in case of broadcasting sports events the viewers pay attention to the event itself and so the advertisement has a secondary role and when the broadcasting stops, it will be forgotten to some extent, but press advertising (especially in case of magazines) is persistent and by handing over press products to other readers it can make its effect more widely, particularly in case of an interesting article.

The reference literature⁴⁸ mentions this judgment as an example for a measure in favour of health protection which also extends to tobacco advertising. Leach⁴⁹ writes a brief summary on the judgment and refers to another judgment of the ECHR (similarly in the subject of advertising a tobacco trademark), in which the court refused the complaint as well.

The Court of Cassation actually confirmed that live coverage of the races was the only exception to the ban on indirect advertising of tobacco products. Thus, the audiovisual media were not in a similar or comparable situation.

In the cases, the requirements of Article 14 of the Convention in conjunction with Article 10 of the Convention were not violated (adopted unanimously).

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⁴⁹ Leach, Ph., *Taking a Case to the European Court of Human Rights*, 6, 502.

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