

Ashby Donald and Others v. France - 36769/08

Judgment 10.1.2013 [Section V]

Article 10

Article 10-1

Freedom of expression

Conviction of photographers for copyright infringement through publication on the Internet of photographs of fashion show: *no violation*

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no violation

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Facts – The applicants are fashion photographers. Accredited by the French designers' federation *Fédération française de la couture* for different fashion publications, they were invited by various fashion houses to the women's winter 2003/2004 collection fashion shows in March 2003. They had not signed any exclusive agreements. Photographs they took at the fashion shows were sent to a company that published them on line, a few hours after the shows, on a specialised Web site offering photos and videos of fashion shows on a free or pay-to-view basis and for sale. The designers' federation and several fashion houses lodged a complaint with the Central Industrial and Artistic Copyright Infringement Brigade. The applicants were questioned in 2003. They were acquitted by the criminal court in June 2005. The complainants and the public prosecutor appealed. In a judgment of January 2007 the court of appeal set aside the first-instance judgment and found the applicants guilty of copyright infringement. The Court of Cassation rejected their subsequent appeal in February 2008.

Law – Article 10: There had been interference with the applicants' legally protected right to freedom of expression as they had been convicted of copyright infringement for disseminating or representing intellectual works in breach of the authors' rights under the Intellectual Property Code as interpreted by the domestic courts. The interference pursued the legitimate aim of protecting the rights of others, namely the authors' rights of the fashion houses whose creations were featured in the disputed photographs. The photos had been published on the Web site of a company run by the first two applicants, with the aim of selling them or charging a fee to view them. The applicants' approach had essentially been a commercial one. Although there was no denying the public appeal of fashion in general and designer fashion in particular, it could not be said that the applicants had taken part in a debate on a topic of general interest by simply publishing photographs of

fashion shows. The domestic authorities had a particularly wide margin of appreciation in this case considering the aim of the interference and the fact that, as Article 1 of Protocol No. 1 applied to intellectual property, the interference was also aimed at protecting rights safeguarded by the Convention or its Protocols.

The applicants considered that their conviction for copyright infringement was not “necessary” in so far as they had been invited to the fashion shows in question, in their capacity as photographers, to take photographs of the fashions presented with a view to their publication, and the publication of the photographs outside the framework of their accreditation had given rise to no additional risk of copyright infringement because the same pictures had been published at the same time by accredited magazines, and the “press commitment” practice whereby photographers were required to sign exclusive agreements with the magazines that accredited them was no longer really followed. The court of appeal had nevertheless found that the applicants had knowingly disseminated the photographs in issue without the authorisation of the rights holders, that the argument that “press commitment” agreements were unsuitable or no longer standard practice did not absolve them of their liability and that they were accordingly guilty of copyright infringement. The domestic court had therefore not overstepped its margin of appreciation in privileging respect for the fashion designers’ property over the applicants’ right to freedom of expression.

The applicants also contended that the sentences served on them had been disproportionately harsh. They had been sentenced not only to large criminal fines but also to pay substantial damages. They adduced no evidence, however, as to the consequences of these penalties on their financial situation. In any event, the domestic court had fixed these sums following adversarial proceedings the fairness of which was not in dispute, and had given adequate reasons for its decision, explaining the circumstances which it considered warranted such penalties.

In these circumstances and regard being had to the particularly wide margin of appreciation open to the domestic authorities, the nature and gravity of the penalties imposed on the applicants were not such that the Court could find that the interference in issue was disproportionate to the aim pursued.

Conclusion: no violation (unanimously).

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