



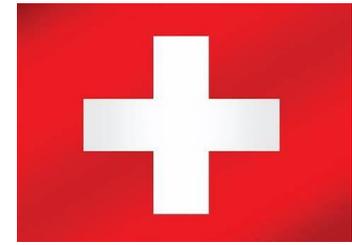
UiO : Centre for European Law  
University of Oslo

# The Copyright/Human Rights Status of Countries Associated to the EU

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*Prof. Ole-Andreas Rognstad, Department of Private Law/Centre for  
European law, University of Oslo, Norway*





# Copyright/Human Rights Status of Countries Associated to the EU

- European countries that are non-EU Members but still associated to the EU by way of bilateral or multilateral Agreements
- Specifically, the EEA/EFTA states (Norway, Iceland, Liechtenstein), UK and Switzerland
  - (Current or former members of the EFTA that have not been or are no longer members of the EU)
- Emphasis on the EEA Agreement
- Common trait: The EU Charter of Fundamental Right does not apply to these countries
  - UK: Se the Withdrawal Act Article 5(4)
- However: All are parties to the ECHR (and other international HR instruments)



## EEA – special traits

- The EU copyright acquis is part of the EEA Agreement
- The homogeneity principle (EEA Main Part Article 1, cf. Recitals 4 and 15) implies that the rules shall be interpreted in the same manner as in the EU
- The EFTA Court: Effect based homogeneity; implies an indirect effect of the CFREU



# EEA-Fundamental Rights Principles

- The EFTA Court: «The EEA Agreement is to be interpreted i light of fundamental rights»
  - Often with express references to the ECHR
  - More rarely direct references to the CFREU, although it happens



# EEA-Fundamental Rights Principles

- However, rights not included in the ECHR but the CFREU are referred to as FR principles in the EEA
  - Examples
    - Case E-14/11 *Schenker I*
    - Case E-10/14 *Devici*
    - Case E-15/10 *Posten Norge*



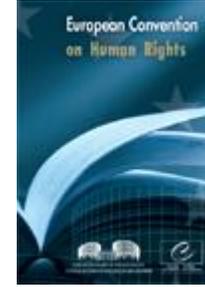
# EEA – Copyright and FR, conclusion

- Little case law from the EFTA Court on copyright issues, no case law on copyright/FR interface
- Nevertheless, the general framework suggests that the FR protection will be very similar to that of the EU
- Not necessarily express references to Article 17(2) CFREU; perhaps more likely ECHR P1-1 with a following statement that copyright is protected as a fundamental right
- Are limits to the homogeneity principle. Case C-265/19 *RAAP*?



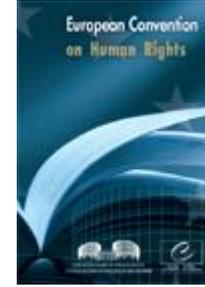
## Situation for non-EEA countries (UK and Switzerland)

- Situation different from that of the EEA
- Detailed regulation of IP in the trade agreements, but no institutional supranational framework to secure a principle of homogeneity
  - A different question: Internal implementation like the UK Withdrawal Act's reference to 'retained EU law'
- In any case: All associated countries have obligations under the ECHR, including its P 1-1, and do apply its principles
- Cf. also CFREU Article 52(3)



# CFREU and ECHR Compatibility

- EU perspective: Article 52(3) CFREU
  - In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.



# CFREU and ECHR Compatibility

- ECHR perspective: The Bosphorus Doctrine (*Bosphorus v. Ireland*, 2005; *Avotins v. Latvia*, 2016)
  - The presumption implying that EU Member States do not violate the ECHR when implementing EU law, since the EU is considered as an supranational organization that protect fundamental rights in an equivalent manner as the ECHR
  - Exception: when in the circumstances of a particular case it is clear that the protection of Convention rights was manifestly deficient



# ***Bosphorus* and countries associated to the EU**

- ECHR: Indicates that *Bosphorus* does not apply to the EEA
  - *Konkurrenten.no v. Norway* (2019)
  - *LO and NTF v. Norway/Holship* (2021)
- Two main reasons (in *Konkurrenten.no*; in *Holship* only (i))
  - (i) Lack of supremacy and direct effect
  - (ii) The EEA Agreement does not include the CFREU
  - Both reasons disputable
- FR status not considered as equivalent to the EU; even less so for non-EEA countries (like UK and Switzerland)



## Conclusion on Copyright/HR status for Associated Countries

- The CFREU is neither included in the EEA Agreement nor the bilateral trade agreements
- The adherence to the ECHR nevertheless secure FR in the associated countries
- For the EEA/EFTA states the principle of homogeneity implies that the protection will be very much the same as in the EU

# Excursion: Possible ECHR/CFREU tension, quotation from works not already made public?



- Combining the CJEU findings in C-469/17 (Funke Medien) paras. 62-64 and C-516/17 (Spiegel Online) paras. 86-89 may lead to the conclusion that quotations from works not already made available to the public are not shielded by FR in the EU
- May conflict with Article 10 ECHR

# Excursion: Possible ECHR/CFREU tension, quotation from works not already made public?



- Is not necessarily remedied by Article 52(3) CFREU or the Bosphorus doctrine(?)
- If so, the countries associated to the EU (incl. EEA/EFTA states) may find themselves in a different position than EU states