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Unfair Competition Law and the European Court of Human Rights: the Case of Hertel v. Switzerland and Beyond

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ESSAY

Unfair Competition Law and the European Court of Human Rights: The Case of *Hertel* v. *Switzerland* and Beyond

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INTRODUCTION

This essay concerns itself with the decision of the European Court of Human Rights in the case of *Hertel* v. *Switzerland*[1] and how the Court overcame its previous reservations and found itself competent to deal with a previously elusive issue of unfair competition law. This essay will explore the implications of the application of the fundamental principle of the freedom of expression, and the right to receive information on unfair competition and intellectual property law.

I. THE CASE OF *HERTEL V. SWITZERLAND*

In *Hertel*, the European Court of Human Rights ("ECHR") upheld the application of provisions of unfair competition law outside of a traditional competitive relationship setting. At the same time, the Court held that the specific application in question, that which prohibited Mr. Hertel on pain of criminal penalties from stating that food prepared in microwave ovens is a danger to health,[2] was

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1. Hertel v. Switzerland, 59 Eur. Ct. H.R. (ser. B) (1998).

2. Hertel was also enjoined from making statements that microwave irradiated food leads to changes in the blood of those consuming it, that these changes were indicia of a

disproportionate in light of the freedom of speech protections found in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention").[3]

Hertel set out to research the effects of consumption of food prepared in microwave ovens with the assistance of Professor Blanc, a technical advisor to the Federal Institute for Technology of Lausanne.[4] Over the course of two months, eight subjects were fed a microwave irradiated macrobiotic diet while samples of their blood were taken for analysis.[5] According to Hertel and Blanc, these tests revealed changes in the subjects' blood composition similar to those observed in the initial stages of cancer, thereby indicating a causal relationship between the consumption of microwave irradiated food and cancer.[6] Hertel sent their findings, entitled *Vergleichende Untersuchungen über die Beeinflussung des Menschen durch konventionell und im Mikrowellenofen aufbereitete Nahrung* [*Comparative Study of the Effects on Human Beings of Food Prepared by Conventional Means and in Microwave Ovens*][7] to the *Journal Franz Weber*, without consulting Blanc.

The *Journal Franz Weber* printed a special issue on Blanc and Hertel's revolutionary findings.[8] In so doing, the *Journal Franz Weber* was continuing its crusade against microwave ovens that it began in 1989 in Issue No. 8, when it stated that microwave ovens

pathological disorder resembling the beginning of a carcinogenic process, and from using the image of death in association with microwave ovens. *See id.* at 27.

3. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 5, 1950, Europ. T.S. No. 5 [hereinafter Convention].

4. *See Hertel* at 3.

5. *See id.*

6. *See id.* at 3-4.

7. This study concludes:

> [A] significant relation was established between the absorption of microwave energy by the food and its transfer to the volunteers' blood. Thus this energy could be inductively transmitted to human beings by means of the food, a phenomenon governed by the laws of physics and confirmed in the literature . . . The measurable effects on human beings of food treated with microwaves, as opposed to food not so treated, include changes in the blood which appear to indicate the initial stage of a pathological process such as occurs at the start of a cancerous condition.

Id.

8. Hertel's findings were published in Issue No. 19 (January/February/March 1992) of the *Journal Franz Weber*. *See id.* at 4.

were "more harmful than the Dachau gas chambers."[9] On the cover of the issue containing Blanc and Hertel's report, an image of the Reaper holding out one hand towards a microwave oven appeared, with the caption, "The danger of microwaves: scientific proof."[10] In an accompanying editorial, Franz Weber himself wrote:

> To say that our journal is fearless is almost to state the obvious. The *Journal Franz Weber* was the first newspaper in the world to pinpoint the dangers of microwave ovens and has kept up its accusations despite massive attacks by the promoters. Today science proves us right (see pages 3-10). Microwave ovens should be banned. We would not be surprised if the researchers who have had the courage to defend the findings of their research were attacked in their turn, seeing that millions or even thousands of millions are at stake. But truth is in the end more durable than a deal involving thousands of millions at the expense of our health. We shall continue to fight for the truth in this case too.[11]

An article by René d'Ombresson was printed on pages 3-10. d'Ombresson and Hertel were listed in the journal as belonging to the editorial staff, assertions that were later characterized as misprints. In the introduction to his article, d'Ombresson wrote:

> A scientific study demonstrates the health hazards of food prepared by microwave radiation and proves the *Journal Franz Weber* right.
>
> . . . .
>
> Off to the scrap heap and the rubbish dumps with microwave ovens! The treatment to which they subject food is so pernicious that it causes a change in the blood of whoever eats it and this leads to anemia and a pre-cancerous condition. These are the findings of a rigorous study carried out by a professor of the EPLF [Lausanne Federal Institute of Technology] and an independent researcher, who were de-

9. *Id.* at 21.
10. *Hertel* at 4.
11. *Id.*

> termined to answer once and for all the crucial question: are microwave ovens harmful or not? Here is a simplified summary of the study, followed by the study itself for those who are not put off by figures and scientific demonstrations. We were anxious to publish both these, albeit at the risk of repetition, so that the findings should be available to the widest possible public.[12]

The journal then proceeded to present an account of Hertel and Blanc's study in the subsequent pages.[13] Half of page three of the issue depicted a drawing of a microwave oven with the Reaper's head visible behind the glass window of the oven's door.[14] This same picture, reduced in size, appears several times throughout the issue.[15] Eventually, Hertel's article, along with its drawings, came to the attention of the Swiss Association of Manufacturers and Suppliers of Household Electrical Appliances ("MHEA").[16]

The MHEA immediately applied to the President of the Vevey District Court under the Federal Unfair Competition Act ("The UCA")[17] for an interim order prohibiting Mr. Franz Weber:

> '[F]rom using . . . the image of a man's skeleton or any other image suggesting the idea of death . . . associated with the graphic, photographic, oral or written representation of a microwave oven', 'from stating . . . that micro-

12. *Id.* at 4-5.

13. *See id.* at 7-13. (Relevant sections of Hertel's study, *infra* Annex B).

14. *See id.* at 13.

15. Blanc quickly distanced himself from these drawings and the conclusions advanced in the *Journal Franz Weber*. This may explain why he was not named in the action brought by the Swiss Association of Manufacturers and Suppliers of Household Electrical Appliances (MHEA). Professor Blanc, remarks (January 27, 1992):

> Statement concerning false information about foodstuffs treated or prepared in microwave ovens which appeared recently in *Franz Weber Journal* (January-March 1992) [and] *Raum & Zeit* (Munich, January-February 1992). While the published figures and the description of the preliminary experiment are correct, I totally dissociate myself from the presentation and interpretation of the preliminary exploratory experiment carried out in 1989, which was published without my consent by the co-author of the study in the journals cited above.

Id.

16. *See Hertel* at 13.

17. *See Id.* at 24-26. (Relevant provisions of the Federal Unfair Competition Act, *infra* Annex A).

> wave ovens must be abolished and their use banned', 'from stating . . . that scientific research proves what a hazard food that has been exposed to radiation in a microwave oven is to health and backs up the *Journal Franz Weber*' or 'from stating . . . that microwave ovens must all be destroyed without exception because food is harmed by these dangerous appliances to such an extent that it causes, in those who consume it, a change in the blood count and leads to anemia and a pre-cancerous stage.'[18]

The President of the Vevey District Court dismissed the application and expressed doubts as to the applicability of the UCA to unconnected fields of activity when also essentially non-economic activities such as "political, sporting or scientific competition . . . or the expression of philosophical, moral or religious convictions" are involved.[19] The President further held that the expressions were not directed to one individual manufacturer, and that therefore damage could not be established.[20] However, the President nevertheless assessed the possible impact of the publication on the public, and despite little or no perceived effect, ordered the *Journal Franz Weber* not to use images of a skeleton or a cross or tomb in association with the presentation of a microwave oven in future.[21]

The MHEA was more successful in its action against Hertel. The MHEA filed an application under the UCA with the Commercial Court of the Canton of Berne seeking to have Hertel enjoined from (1) stating that food prepared in microwave ovens was a danger to health, and led to changes in the blood which were indicative of a pathological disorder or the beginning of a carcinogenic process and (2) from using in publications and public speeches on microwave ovens, the image of death.[22] The Association's expert witness, Professor M. Teuber, of the Food Research Institute of the Zürich Federal Institute of Technology submitted that Blanc and Hertel's research did not meet any scientific standard, and that its

18. *Id*. at 13-14.
19. *Id*. at 14 (quoting Vevey District Court Order, April 7, 1992).
20. *See id*.
21. *See id.* at 15.
22. *See Hertel* at 16.

conclusions and allegations were unsustainable.[23] Upon hearing this and other testimony, the Commercial Court of the Canton of Berne granted the injunction against Hertel, on pain of the penalties provided in Article 292 of the Criminal Code (imprisonment or a fine) and Article 403 of the Code of Criminal Procedure of the Canton of Berne (a fine of up to 5,000 Swiss francs or imprisonment, in serious cases for up to a year).[24]

This decision was upheld before the Swiss Federal Court (First Civil Division), which held that Hertel's statements fell within the scope of the UCA.[25] The Federal Court held that the UCA was not applied in breach of the Convention, noting that the "UCA provides a remedy only in the respect of unfair statements", and the meaning and purpose of the press cannot be to legitimize unlawful public assertions.[26] The Federal Court went on to state that:

> Anyone claiming scientific freedom is therefore wholly free to expound his knowledge in the academic sphere but, where competition is concerned, he may not claim to have the truth on his side where the opinion he is putting forward is disputed. An opinion which has not been confirmed scientifically must in particular not be misused as a disguised form of positive or negative advertising of one's own work or the work of others. In the present case, that is all the more true as the Commercial Court expressly left the applicant free to base his proposition on new scientific findings.[27]

In reviewing the Swiss Federal Court's decision, the ECHR, however, held that it would be "unreasonable to restrict freedom of expression only to generally accepted ideas" and expressed doubts as to whether Hertel was truly free to pursue his research, especially when presentation of the results outside the economic sphere may well fall within the wide scope of the UCA.[28] One would have expected the Court to decide that the scope of the UCA was

23. See *id.*
24. *See id.*
25. *See id.* at 23.
26. *Id.* at 24.
27. *Id.*
28. *Hertel* at 35.

too wide. However, the Court did not do so, and it emphasized the importance of the wide sphere of appreciation for the Member States in assessing the freedom of expression in unfair competition cases.[29] It furthermore held that, in a case such as this, unfair competition law can place restrictions on expression, even when there are no economic agents involved.[30] It therefore is of no consequence whether the speech in question is commercial or non-commercial speech.[31] The restrictions on the freedom of expression are simply held against the formalities of Article 10 of the Convention, requiring the prohibition to be (1) prescribed by law (i.e. foreseeable), (2) conforming to a legitimate aim, and (3) necessary in a democratic society (i.e. a pressing social need).[32] In considering these three conditions, the Court held that Hertel could have foreseen that sending his report to the *Journal Franz Weber* would result in its subsequent use.[33] The statements made by Hertel were liable to amount to an "act of competition", making it clear that the statements would fall within the scope of the UCA.[34] In observing that the UCA serves to guarantee fair and undistorted competition, the Court held that causing damage to the goodwill, credit, professional reputation, business or economic interests in general is actionable, thus establishing that the aim of the restric-

29. In his dissenting opinion in *Hertel*, Judge Matscher follows the reasoning of the EHCR in *markt intern Verlag GmbH and Klaus Beermann v. Germany*, 3 Eur. Ct. H.R. (ser. A) (1989) and advocates that the ECHR should refrain from intervening:

> As in the markt intern case, I consider that in unfair competition cases States should be afforded a wider margin of appreciation than in other spheres of freedom of expression. Otherwise, the system for preventing unfair competition, one that is beneficial to the business world, will be destroyed. While there is debate between specialists in the field, it is not over whether interference in the freedom of expression is lawful, but only as to whether particular conduct does or does not amount to unfair competition. That is not an issue for the Court to decide.

Id. at 40 (Matscher, J. dissenting).

30. *See id.* at 29, 35.

31. *See* David Feldman, *Content Neutrality*, *in* IMPORTING THE FIRST AMENDMENT: FREEDOM OF EXPRESSION IN AMERICAN, ENGLISH AND EUROPEAN LAW, 139 (Ian Loveland, ed., 1998) (arguing that there may be good reasons to set controls on speech which are not neutral as to content)[hereinafter IMPORTING THE FIRST AMENDMENT].

32. *See Hertel* at 27.

33. *See id.* at 28.

34. *Id.* at 30.

tive measure was the protection of the rights of others.[35] In essence, the Court saw it as its task to determine whether the State of Switzerland had exercised its discretionary powers to limit free speech reasonably, carefully, and in good faith.

The issue was therefore whether there was a pressing social need for the restriction of the freedom of expression.[36] Hertel submitted that the measure imposed on him was disproportionate. He argued that the economic interests of the MHEA were being protected at the expense of his research being censored and himself being prevented from entering into a scientific debate on an issue affecting the general public.[37]

The Court took the view that not only ideas or information that are received favorably are worthy of protection, but also those that "offend, shock, or disturb."[38] Restrictions to the freedom of speech must therefore be construed narrowly.[39] In commercial matters, "especially in an area as complex and fluctuating as that of unfair competition"[40] it is accepted case law that authorities have a wider margin of appreciation in assessing whether a pressing social need exists, and can impose more stringent restrictions on the freedom of expression.[41] The Court held that the statements involved were not purely commercial, but formed part of a larger debate taking place in society, reducing the margin of appreciation of the Member State.[42]

The Court, therefore, felt free to examine whether the "measures in issue were proportionate to the aim pursued."[43] The Court held that Hertel only sent a copy of his research paper to the *Jour-*

35. *See id.* at 30-31.

36. *See id.* at 31.

37. *See id.*

38. *Hertel* at 32. *See also* Grigoriades v. Greece, 121 Eur. Ct. H.R. (ser. A) at 13(1997); Zana v. Turkey, 69 Eur. Ct. H.R. (ser. A) at 12 (1997); Vogt v. Germany, 7 Eur. Ct. H.R. (ser. A) at 20 (1995).

39. *See Hertel* at 32.

40. *Id.* at 32-33. *See also* markt intern Verlag GmbH and Klaus Beerman v. Germany, 3 Eur. Ct. H.R.(ser.A)(1989); Jacubowski v. Germany, 7 Eur. Ct. H.R.(ser.A)(1994).

41. *See Hertel* at 32-33.

42. *See id.* at 33.

43. *Id.*

nal Franz Weber; he was not involved with the editing process or with the choice of illustrations (although he refused to distance himself from the publication).[44] The dissemination of Hertel's statements did, however, have the potential to adversely affect the sale of microwave ovens in Switzerland. The *Journal Franz Weber* has a wide circulation, although it is almost exclusively available only through subscription. The fact remained, however, that there was no measurable effect or actual damage caused to the members of the MHEA.[45] Both the Commercial Court of the Canton of Berne and the Federal Court based their decision on the conceivable effect on sales.[46] The absence of quantifiable damage proved to be decisive in the ECHR's assessment of the necessity of the Swiss restrictions imposed on Hertel – restrictions that included the risk of imprisonment. Furthermore, according to the Court, it was not clear whether the measures preventing Hertel from taking part in a public debate did not extend beyond the economic sphere, thereby resulting in *de facto* censorship of his work. As a result, the measures were held to be disproportionate to Hertel's behavior, resulting in a violation of Article 10 of the Convention.[47]

II. THE IMPLICATIONS OF THE HERTEL DECISION FOR UNFAIR COMPETITION LAW

Although the ECHR has been reluctant to interfere in commercial matters, it was prepared to do so in *Hertel.* This was particularly remarkable since the Court had previously expressed great reluctance to do so, especially in unfair competition cases. For this reason, the Court was keen to emphasize its assessment of the restrictions on Hertel's freedom of speech based upon proportionality. If Hertel's statements had caused a "measurable effect on sales", the restrictions would have been justified.[48] The Court never questioned the breadth of the UCA itself. On the one hand, this is a tribute to the freedom of the Member States to regulate market behavior. On the other hand, by not questioning the breadth

44. *See id.* at 33.
45. *See id.* at 34.
46. *See id.*
47. *See Hertel* at 35.
48. *Id*. at 34.

of the UCA, the Court avoided the question of whether unfair competition law should be applied solely on the basis of economic considerations, in other words, whether commercial and non-commercial speech should be afforded different standards of protection.

The approach taken in the United States is somewhat different.[49] In *Gordon & Breach Science Publishers* v. *American Institute of Physics*,[50] an action for false advertising under the Lanham Act[51] was brought against defendant, who published a comparative study on the cost-quality ratio of publications in a number of scientific journals. A member of the American Physical Society conducted the study for its journal. In the study, the journals of the plaintiff scored lowest, while those of the defendant scored highest. Similar to *Hertel*, the methodology of the study was disputed.[52] Despite the fact that a competitive nexus was present between plaintiff and defendant, the American Institute of Physics and the American Physical Society were not held to be economic agents. Both were non-profit organizations with objectives beyond the economic sphere.[53] The court in *Gordon* held that the pursuit of academic research and the related academic freedom were among the interests most protected by freedom of speech.[54] Therefore, statements that mix non-commercial and commercial speech are protected as a whole, when inseverably linked.[55] However, this does not mean that one can claim protection by cloaking statements made in the economic sphere in a non-economic or even academic guise. In *Bolger* v. *Youngs Drug Prods. Corp.*,[56] a case in which a petitioner challenged a federal statute that prohibited unsolicited advertising of contraceptives, the Supreme Court held that "advertising which 'links a product to a current public debate'

49. *See generally* HERBERT N. FOERSTEL, FREE EXPRESSION AND CENSORSHIP IN AMERICA: AN ENCYCLOPEDIA (1997); IMPORTING THE FIRST AMENDMENT, *supra* note 31.

50. 859 F. Supp. 1521 (S.D.N.Y. 1994).

51. *See* LANHAM ACT § 43(a), 15 U.S.C. §1125(a)(West 1998).

52. *See Gordon*, 859 F. Supp. at 1525-26.

53. *See id.* at 1540.

54. *See id. See also* Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

55. See *Gordon*, 859 F. Supp. at 1539-40. *See generally* Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988); Village of Schaumberg v. Citizens for a Better Env't, 444 U.S. 620 (1980).

56. 463 U.S. 60 (1983).

is not thereby entitled to constitutional protection afforded non-commercial speech."[57]

United States law, however, approaches issues involving unfair competition law and freedom of speech by assessing the scope of the relevant provision of the Lanham Act itself. Before the relevant provisions of the Lanham Act apply, one first has to determine whether the speech is of a commercial or non-commercial nature.[58] The definition of commercial speech is limited and not consistent; however, the core notion of commercial speech is encapsulated in *Bolger* as "speech which does no more than propose a commercial transaction."[59]

The Swiss UCA, with its wide scope makes no such distinction, but only appraises the economic market effect of the statements, not the economic nature of the statements themselves. The ECHR agreed with this approach, but merely thought that the measures taken in reference to Hertel were disproportionate.[60] The question of whether the ambit of the UCA itself was too wide was never addressed. This is an issue that still falls within the exclusive competence of the Member State. In view of the complexity of market dynamics, one can understand that the ECHR may have felt itself unable, or not competent to interfere in unfair competition legislation of a Member State. In deciding the *Hertel* case on the basis of "necessity in a democratic society", however, the Court in fact substituted its own factual evaluation for that of the national courts.[61] Furthermore, the Court did not address the fundamental

57. *Id.* at 68 (quoting Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 at 563, n.5 (1980)).

58. Commercial speech may, however, be entitled to some First Amendment protection. *See* Bad Frog Brewery Inc. v. New York State Liquor Auth., 134 F.3d 87 (2d Cir. 1998).

59. *Bolger*, 463 U.S. at 66 (quoting Viriginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976)).

60. *See Hertel* at 35.

61. Compare this to the sentiment reflected in the dissenting opinion of Judge Bernhard in *Hertel*:

> The Court tries itself to strike a fair balance between the interests of the economic producers concerned and Mr. Hertel's freedom of expression. In giving a detailed description and evaluation of the publication as well as of the surrounding factors, the Court comes to a different conclusion from that of the national courts. In the present case, it is beyond doubt that the applicant's central

question as to the scope of unfair competition law, and made no principled statement on the special place academic freedom ought to take in society. It is submitted that when broad and sweeping unfair competition provisions encroach on non-economic agents, they be subject to restrictions as to their applicability and scope. Human rights concerns should be part of the normative framework that shapes commercial matters, and even an area as complex and fluctuating as that of unfair competition.

A. *The Wider Implications of the* Hertel *Decision for Unfair Competition and Intellectual Property Law*

Viewed in a positive light, the fact that the ECHR saw itself fit to decide upon "commercial matters, especially in an area as complex and fluctuating as that of unfair competition" is encouraging for the development of unfair competition law and intellectual property law.[62] The *Hertel* decision is a positive statement that fundamental rights and freedoms affect commerce. One can envisage freedom of speech playing a more prominent role in the balancing of interest in, for example, disparagement of trademarks and imagery, trade libel, and defamation cases.[63]

A recent Panel Discussion on Intellectual Property and Human Rights[64] suggests that World Intellectual Property Organization (WIPO) is also developing an interest in the relationship between intellectual property and human rights. The joint panel discussion

> assertion and the alleged scientific results do not stand up to close scrutiny, and this was obviously decisive for the national courts. There might be good reasons to allow such statements irrespective of their correctness, but the European Court of Human Rights should not substitute its own evaluation for that of the national courts, where those courts considered, on reasonable grounds, the restrictions to be necessary.

Id. at 39(Bernhardt, J., dissenting).

62. *Id.* at 33.

63. *See* Leonard Leigh, *Of Free Speech and Individual Reputation: New York Times v. Sullivan in Canada and Australia*, in IMPORTING THE FIRST AMENDMENT, 51, *supra* note 31.

64. A Panel Discussion in commemoration of the 50th Anniversary of the Universal Declaration of Human Rights on Intellectual Property and Human Rights organized by the World Intellectual Property Organization (WIPO) in collaboration with the Office of the United Nations High Commissioner for Human Rights, Geneva, November 9, 1998, *Intellectual Property and Human Rights*, WIPO Pub. No. 762(E) (1999).

organized by WIPO and the Office of the United Nations High Commissioner for Human Rights was tribute to the commemoration of the 50th anniversary of the Universal Declaration of Human Rights, and addressed issues such as biodiversity, the protection of traditional knowledge and innovation, the right to culture, health, non-discrimination, and scientific freedom.

During the panel discussions, it was emphasized that the Universal Declaration of Human Rights ("Declaration")[65] and the International Covenant on Economic, Social and Cultural Rights ("ICESCR")[66] augment intellectual property law. Articles 27(1) of the Declaration[67], and 15(1)(b) of the ICESCR[68] guarantee the right to participation in cultural and scientific life. It not only protects the creator to enjoy the fruits of his labor, but also requires the Member States to "facilitate and promote scientific progress and its applications and to do so in a manner that will broadly benefit members of society on an individual as well as a collective level."[69] The considerations of the ICESCR go well beyond a simple economic calculus. The approach taken with regard to cultural and scientific life is therefore a multifaceted one, describing the right both in terms as access to and engagement in scientific discourse, and the protection of the spiritual and earthly benefits of the creator. Intellectual property law in its narrow sense primarily addresses the rights of the individual creator.

Similarly one can see the right to the freedom of speech as a multifaceted right. Article 10 of the Convention not only protects the positive right to expression, but also the right to receive information.[70] The freedom to receive information enshrined in Article

65. *See* Universal Declaration of Human Rights, G.A. Res.217A, U.N. GAOR, 3d Sess., at 135, U.N.Doc A/810 (1948) [hereinafter Universal Declaration].

66. *See* International Covenant on Economic, Social and Cultural Rights, G.A.Res.2200A (XXI), U.N. GAOR, 21st Sess., Supp.No.16, at 165, U.N.Doc A/6316 (1966) [hereinafter ICESCR].

67. "Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits". Universal Declaration, *supra* note 65, art. 27(1).

68. "The States Parties to the present Covenant recognize the right of everyone: . . . to enjoy the benefits of scientific progress and its applications;" ICESCR, *supra* note 66, art. 15(1)(b).

69. *See* supra, note 64.

70. See Convention, supra note 3, art. 10.

10 of the Convention represents the other side of the same coin of freedom of expression protection. The *Hertel* decision may therefore signal the involvement of the norms of the Convention and the European Court of Human Rights in unfair competition and intellectual property issues by ensuring academic freedom, freedom of speech, and freedom of access in the information society.[71]

B. *Beyond the* Hertel *decision*

In the face of expanding protection of intellectual property rights, freedom of access for academics and civilians alike is currently of grave concern. Several developments epitomize these concerns: the expansion of the scope of copyright protection through the WIPO treaties,[72] the envisaged implementation thereof in the EU as set out in the Amended Proposal for a Directive on Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society,[73] as well as the implementation of the Database Directive.[74] The approach the Commission has taken is to extend protection on the basis of an absolute property rights regime, with a limited number of statutory exceptions. By contrast, United States law applies the wider *fair use* principle to copyright. Moreover, the proposed Collections of Information Antipiracy Act[75] is structured around the misappropriation doctrine, which has enjoyed limited application since its inception in *International News Service* v. *Associated Press.*[76] Therefore, the free flow of in-

71. For the purpose of this paper I will not discuss further issues which have closer links to the Universal Declaration of Human Rights, the draft UN Declaration on the Rights of Indigenous Peoples, the UNESCO Declaration on the Human Genome and Human Rights, the International Covenant on Economic, Social and Cultural Rights, or the UN Convention of Biological Diversity. For these issues I refer to WIPO-UNHCHR Pub. No. 762(E), *supra* note 64.

72. *See* World Intellectual Property Organization Performers and Phonograms Treaty, *adopted by* Diplomatic Conference at Geneva, Dec. 20, 1996, 36 I.L.M. 76 (1997); World Intellectual Property Organization Copyright Treaty, *adopted by* Diplomatic Conference at Geneva, Dec. 20, 1996, 36 I.L.M. 65 (1997) [hereinafter WIPO Copyright Treaty].

73. *See* Amended Proposal for a European Parliament and Council Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, COM(99)250 final [hereinafter Copyright Harmonization Directive].

74. *See* Council Directive 96/9, 1996 O.J.(L 77) 20.

75. *See* H.R. 354, 106th Cong. (1999).

76. 248 U.S. 215 (1918).

formation may be better guaranteed in the United States than in the EU.

The right to the free flow of information and academic freedom has had limited application in carving out exceptions from the absolute intellectual property rights so far. The application of limitations to intellectual property rights are traditionally found in tailor-made exceptions honoring the economic interest of the author,[77] and in restrictions to the exercise of the right on grounds of anti-competitive behavior.[78] It is worrisome to see that the ever-strengthened position of the rightholder is not balanced by exceptions that go beyond an economic calculus. It becomes important to realize that there is a market for ideas, but that the sole application of market theory to safeguard access has its shortcomings. Of special concern is the access to public sector information. Whereas the Collection of Information Antipiracy Act contains a paragraph on government collections of information,[79] the EC Database Directive does not. At the implementation stage, the Member States are now seeking to introduce exceptions to the database right analogous to the statutory exception contained in many copyright systems guaranteeing the citizen the right to free access to government information. An exception from the database right for public sector information is, for example, envisaged in The Netherlands.[80]

Furthermore, certain Member States have begun to examine the effects of new technologies on the public service, especially where dealing with access to and exploitation of public sector information.[81] The EC Commission has followed suit by publishing its

77. *See* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on Nov. 13, 1908, completed at Berne on Mar. 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971, 1161 U.N.T.S. 3., art. 9;WIPO Copyright Treaty, *supra* note 72, art. 10.; Copyright Harmonization directive, *supra* note 73, art. 5.

78. *See* TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C224) 1 (1992), [1992] 1 C.M.L.R. 573 (1992), arts. 85-6.

79. *See* H.R. 354, § 1404 (a).

80. Art. 8 (1) wetsvoorstel 26 108 *Bescherming producent van databanken* KST30645, July 20, 1998.

81. In the UK, *Freedom of Information White Paper*; in The Netherlands, *Towards the Accessability of Government Information*; and France, *Preparing France's entry into*

Green Paper on Public Sector Information in the Information Society, outlining its vision on affordable public access, potential exploitation of new technologies, and fair competition.[82]

The guarantee for a free flow of information is therefore no longer an issue that is limited by the discussion on the scope of intellectual property rights and the traditional exceptions thereto. Guarantees for the public through regulatory action,[83] as well as fundamental human rights issues, become increasingly relevant for the establishment of the information society.

CONCLUSION

With the *Hertel* decision, the ECHR has claimed a role for itself in commercial matters involving unfair competition, which may leave scope for the development of a coherent doctrine protecting expression in non-commercial and hybrid speech. It may, however, also mean that the Court has a more fundamental role to play in the balancing of interests of individuals and society as a whole in the area of intellectual property. The European Convention itself leaves room to develop case law and doctrine not only in the area of freedom of expression, but also in the areas of free flow of information and the participation in academic life in all its aspects.

the Information Society.

82. *See* Green Paper on Public Sector Information in the Information Society, COM(98)585 final.

83. *See id. See also* Eric Barendt *in* IMPORTING THE FIRST AMENDMENT, 49, *supra* note 31 (arguing that the Madisonian perspective "asserts that the legislature and regulatory agencies must be invloved in resolving . . . conflicts between participators in the free speech market").

ANNEX A

Relevant Provisions of The Swiss Federal Unfair Competition Act of December 19, 1986 (cited in *Hertel* at 25-26):

Section 1

"This Act is intended to guarantee, in the interests of all the parties concerned, fair, undistorted competition."

Section 2

"Any conduct [*Verhalten*] or commercial practice [*Geschäftsgebaren*] shall be unfair and illegal if it is deceptive or in any other way offends the principle of good faith and if it affects relations between competitors or between suppliers and customers."

Section 3

"A person acts unfairly if, in particular,

(a) he denigrates others or the goods, work, services, prices or business of others by making inaccurate, misleading or unnecessarily wounding statements;

. . ."

Section 9

"1. Anyone who through an act of unfair competition sustains or is threatened with damage to his goodwill, credit, professional reputation, business or economic interests in general, may apply to a court:

(a) to prohibit the act if it is imminent;

(b) to order that it cease, if it is still continuing;

(c) to declare it unlawful, if the interference it has caused persists.

2. He may, in particular, seek an order that a rectification or the judgment be communicated to third parties or published.

3. He may also, in accordance with the Code of Obligations, bring an action in damages and for reparation of non-pecuniary damage and require that any gain be handed over in accordance with the provisions on intermeddling."

Section 10

"...

2. The actions provided for by section 9, sub-paragraphs 1 and 2, may also be brought by:

(a) professional associations and economic associations whose memoranda and articles of association authorize them to defend the economic interests of their members;

..."

ANNEX B

Account of Blanc and Hertel's study published in Issue No. 19 of the Journal Franz Weber on pages 5-10. Cited in *HERTEL* AT 7-13.

"THE COMPLETE RESEARCH PAPER

COMPARATIVE STUDY OF THE EFFECTS ON HUMAN BEINGS OF FOOD PREPARED BY CONVENTIONAL MEANS AND FOOD PREPARED WITH MICROWAVES

BERNARD H. BLANC . . . HANS U. HERTEL. . .

1. INTRODUCTION

. . .

TOLERANCE THRESHOLDS

. . . The harmfulness of microwaves, and above all their thermic effect on biological systems, was discovered very early on (1944). Tolerance thresholds were accordingly established, for microwave ovens as for other applications, in order to avoid the undesirable effects of any leaking radiation.

HARMFUL OR NOT HARMFUL?

The quality of food prepared with microwaves has not been officially questioned. It is simply accepted that food prepared in this way is neither better nor worse than food cooked by conventional means. So far as is known, there has not yet been any scientific research which has clarified the possible effects on health of food defrosted or cooked in microwave ovens. Given the widespread use of this method of cooking, is it not appropriate that the question 'harmful/not harmful' should at last be answered scientifically?

In this study various foodstuffs were accordingly examined firstly in their raw state and secondly in technologically prepared form, defrosted or cooked by conventional means and with microwaves.

2. DESCRIPTION AND MODE OF ACTION OF MICROWAVES ON LIVING BEINGS THROUGH DIRECT RADIATION AND THROUGH FOOD PREPARED IN MICROWAVE OVENS

. . .

WELL-KNOWN PERNICIOUS EFFECTS

The scientific literature on the damage to living organisms by direct microwave radiation is particularly extensive. It is so revealing that it is surprising that the use of microwaves has not long since been replaced by another technique better attuned to nature. The pernicious effects of microwaves range from the destruction of cell membranes and cell respiration and cell-division disorders to haemolysis, leukaemia and genetic changes including the blocking of natural cycles.

INFERNAL RADIATION

The artificial production of microwaves is based on the principle of alternating current. Matter (atoms, molecules, cells) which is irradiated by this electromagnetic radiation thus undergoes, according to the radiation frequency, between one and a hundred thousand million polarity reversals or oscillations per second. Not a single atom, molecule or cell of a living organism would be able to resist destructive forces of such power, even if it was only of the order of one milliwatt.

MIND THE WATER!

Of all the matter and substances in nature which are polar, the hydrogen in water reacts with the greatest sensitivity. . . .

MR 80% WATER, BEWARE!

. . . the biological effects of artificially created microwaves will be correlated above all with the generation of heat by friction. And since plants, animals and human beings are 80% water, it is not difficult to imagine the biological dangers of such microwaves. . .

EASY PREY FOR VIRUSES

In addition to the thermic effects of microwaves there is also an athermic effect . . ., of which little official notice has been taken until now. It is not measurable like the thermic effect. But under the influence of these two effects, molecules are shattered, their structure deformed and their natural functions perverted. Such effects are probably qualitative. This pernicious effect at the qualitative level and the weakening of organic systems, such as cell membranes, are used in genetic engineering to gain access to genes. In this way the genes can be artificially altered by radiation.

The cells are thus broken into and the energy tension between the outside and the inside of the cell is removed. A cell weakened in this way becomes an easy prey for viruses and fungi.

DANGER! CELL POISON

If the stress were to be maintained, *inter alia* by microwaves, the repair mechanism would break down and the cell, for want of energy, would be obliged to switch to anaerobic respiration. In place of H_20 and CO_2 (aerobic respiration) there appears, among other things, the cell poison H_2O_2 and CO as in a cancer cell. This is why leaked radiation from microwave ovens is so dangerous. Yet safety standards vary from country to country. This shows only too well that the problem is far from being resolved, especially as microwave ovens, as we know very well, are not always reliably sealed and become less leak proof with use, as experience has shown.

DANGER TO THE EYES, LUNGS AND ENDOCRINE SYSTEM

The microwaves, which in the light of our scientific knowledge can be identified as the main cause, together with artificial radioactivity, of 'electrosmog', impair the functions of all living organisms, functions which depend on natural fields. . . . It can be expected that these effects will be detectable in the blood count.

AS POWERFUL AS A TELEVISION TRANSMITTER

Basically, microwaves can produce the same changes in form and structure in food prepared in microwave ovens as they can in living organisms. . . .

MICROWAVE TRANSMITTERS ON THE LOOSE IN THE ORGANISM

Through this irradiation of food the structure of the molecules is likewise broken down and deformed and new substances with lasting effects are created about which science knows very little. Furthermore, this powerful, artificially produced radiation will be induced in the food, which in its turn, by a well known electromagnetic process, will become a source and carrier of the radiation. The actual process of induction in organic matter is not entirely understood.

A PHENOMENON UNKNOWN IN NATURE

. . .

A PROPER CLINICAL STUDY

Whether and to what extent microwaves are harmful or harmless can at present be determined only by an indirect method – by assessing the effects on living organisms. The present research, based on a method of that kind, is designed to measure the effects of different foodstuffs, cooked by conventional means and with microwaves, as interpreted through changes in the parameters of the blood count of volunteers.

3. RESEARCH PLAN

. . .

4. ANALYSIS AND OBSERVATION OF THE FOOD VARIANTS

. . .

5. DISCUSSION OF THE RESULTS

5.1. GENERAL FINDINGS

All the measures (original values and control values) of erythrocytes, haemoglobin, haematocrits and leucocytes are at the bottom of the normal range of variation. A haematological interpretation shows up indications of a tendency to anaemia among the volunteers.

That situation becomes more marked during the second month, when, together with a further deterioration of the blood parameters, an increased level of cholesterol becomes apparent.

. . .

5.2. TABLE 5 SUMMARISES THE RESULTS

(See Table 5)

The differences in effects on the human organism of food prepared by conventional means or with microwaves are negligible for a single serving. Certain tendencies, however, are visible, in some circumstances significant ones, statistically confirmed by the Rank method.

APPEARANCE OF ANAEMIA

In the vegetables prepared with microwaves (variant 7) the erythrocytes tend to increase. Among other blood factors, the erythrocytes have the property of being mobilized (probably from

the spleen) and rapidly increasing in number in the blood under the influence of short-term stress. If the stress continues, the number falls. Anaemic tendencies thus appear.

DIFFERENCES IN FOOD TRANSIT

In unpasteurised milk (variant 1) haemoglobin levels tend to fall, in vegetables cooked with microwaves (variant 8) they drop significantly. Haemoglobin deficits are to be regarded as stress indicators. The three foodstuffs in question cause stress in the human organism. The digestion of unpasteurised milk is radically different from that of heated milk. The transit of unpasteurised milk through the stomach, because of its coagulation and breakdown, is lengthy and is associated with some stress for the organism. This process, however, is natural, normal and not toxic.

AGGRESSIVENESS OF MILK HEATED WITH MICROWAVES

The transit of heat-treated milk through the stomach and intestines is generally more rapid than that of unpasteurised milk. The proteins are transformed to such an extent that they coagulate into magma more quickly. But in this accelerated transit they are not fully broken down. The heated milk thus has a less stressful effect on the organism but its nutritional value is also less. Milk heated with microwaves, on the other hand, unlike conventionally heated milk, clearly creates a situation of stress which is in no way comparable to that caused by unpasteurised milk.

RHEUMATISM, FEVER AND PITUITARY INSUFFICIENCY

Haemoglobin concentration and corpuscular content react like haemoglobin. There is a significant drop in the levels above all in foodstuffs prepared with microwaves (variants 4, 7 and 8). These losses also indicate anaemia. In the reference literature they are associated with microcytosis (haemoglobin content), poisoning (chemical, radiation) and their consequences: rheumatism, fever, pituitary insufficiency, etc.

The haematocrit increases partly significantly in vegetables prepared with microwaves (variants 7 and 8). While the low haematocrit values may indicate anaemia – as a result of repeated pernicious influences – increasing values are more a sign of acute poisoning.

BEWARE, LEUCOCYTES ON THE INCREASE!

The increase in leucocytes, which exceed the normal daily variations – after consuming food, for example – is taken very seriously by haematologists. Leucocytes are particularly sensitive to external challenges. They are often a sign of pathogenic action on the organic system by poisoning and non-infectious damage to the (cell) tissues. The increase in leucocytes in food prepared with microwaves (variants 4, 7 and 8) is greater than with the other variants. The consequences of such a challenge can easily be imagined.

DECREASING LYMPHOCYTES

Lymphocytes in principle react to external challenges (poisons, for example) in the opposite way to leucocytes. They tend to decrease. They react similarly to haemoglobin. The effect of a challenge is above all observable in unpasteurised milk (variant 1) and in vegetables prepared with microwaves (variants 7 and 8). In these cases – initially in every instance – the lymphocytes decrease more significantly than with the other variants.

CHOLESTEROL, THE RESULT OF STRESS

Although, according to accepted opinion, cholesterol levels rise only slowly and over a long period, cholesterol and, more particularly, its HDL and LDL constituents increase after consumption of vegetables cooked with microwaves (variants 7 and 8). On the other hand, with milk (variants 1 to 4) the cholesterol level tends to remain unchanged, and in the case of unpasteurised milk (variant 1) it even drops significantly. This most interesting finding bears out the most recent scientific knowledge, according to which cholesterol, in a situation of acute challenge, can also increase rapidly owing not so much to the cholesterol content of food as to an external challenge.

CHOLESTEROL OUT OF NOTHING

Such challenges, as the present research shows, are also possible through foodstuffs which contain practically no cholesterol. Artificial radiation and poisons (antigens) have a cholesterol-forming effect. In an electromagnetic field, cholesterol undergoes changes in its crystal structure and is eliminated from the blood in the form of a deposit. In cancer patients the blood cholesterol level is always very high. This is why a raised blood cholesterol level

may be regarded as an obvious sign of a precancerous condition or a developing cancerous condition.

LOSS OF IRON

Iron levels tend to increase in vegetables prepared with microwaves (variants 7 and 8), contrary to all the other variants. Haemolysis might be thought to be the cause of this phenomenon, being itself a consequence of damage to the membranes of blood cells. Research undertaken up to now does not enable any significant conclusions to be drawn.

ESTABLISHED PATHOGENIC DISORDERS

In sum, the results obtained from analysing the blood count of the volunteers fed on food prepared with microwaves to the exclusion of the other variants show changes which bear witness to pathogenic disorders. They present a pattern which might correspond to the beginning of a cancerous development and deserves attention. These results match the effects of chemico-physiological deformations observed in living cells subjected to microwave irradiation.

MICROWAVES ON THE LOOSE IN THE BLOOD

The luminescence of bacteria in contact with the serum of volunteers who had consumed food irradiated by microwaves is significantly higher than that produced by the blood of other volunteers fed on the other food variants. The possibility of a transfer of the radiation energy by induction, through the consumption of foodstuffs prepared with microwaves, and their effect on a living organism, in this instance the blood, must be considered.

Such physical phenomena are scientifically proved. The destructive power of microwaves through direct irradiation, as attested in the scientific literature (see the previous paragraph), could also have harmful effects on human beings through indirect radiation, through irradiated food."