

Court of Justice EU, 29 July 2019, Funke Medien v Germany



COPYRIGHT

Military status reports constituting purely informative documents, the content of which is essentially determined by the information which they contain and that those reports are thus entirely characterised by their technical function, are not protected by copyright:

- [creativity has not been expressed in an original manner and there is no own intellectual creation](#)

If military status reports, such as those at issue in the main proceedings, constitute purely informative documents, the content of which is essentially determined by the information which they contain, so that such information and the expression of those reports become indissociable and that those reports are thus entirely characterised by their technical function, precluding all originality, it should be considered, as the Advocate General stated in point 19 of his Opinion, that, in drafting those reports, it was impossible for the author to express his or her creativity in an original manner and to achieve a result which is that author's own intellectual creation (see, to that effect, judgments of 22 December 2010, *Bezpečnostní softwarová asociace*, C-393/09, EU:C:2010:816, paragraphs 48 to 50, and of 2 May 2012, *SAS Institute*, C-406/10, EU:C:2012:259, paragraph 67 and the case-law cited).

Article 5(3)(c) Copyright Directive does not constitute measures of full harmonisation of the scope of the relevant exceptions or limitations. Discretion in the implementation is circumscribed in several regards:

- [discretion must be exercised within the limits imposed by EU law](#)
- [discretion cannot be used so as to compromise the objectives of that directive](#)
- [discretion also circumscribed by Article 5\(5\) of the directive](#)
- [it is for the Member States to ensure a fair balance is struck between the various fundamental rights protected by the European Union legal order](#)

Freedom of information and freedom of the press, enshrined in Article 11 of the Charter of Fundamental Rights of the European Union, are not

capable of justifying exceptions or limitations to the copyright not provided for in the Directive:

- [in striking the balance between the exclusive rights of the author and the rights of the users of protected subject matter, the latter of which derogate from the former, a national court must rely on an interpretation of those provisions which fully adheres to the fundamental rights enshrined in the Charter](#)

Publication of military status reports may amount to 'use of works ... in connection with ... reporting' within Article 5(3)(c), second case, of Directive 2001/29:

- [reports are presented in a structured form in conjunction with an introductory note, further links and a space for comments](#)

Such publication would therefore be capable of falling within Article 5(3)(c), second case, of Directive 2001/29, provided that the other conditions set out in that provision were satisfied, which is for the referring court to ascertain.

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Court of Justice EU, 29 July 2019

(...)

JUDGMENT OF THE COURT (Grand Chamber)

29 July 2019 (*)

(Reference for a preliminary ruling — Copyright and related rights — Directive 2001/29/EC — Information Society — Harmonisation of certain aspects of copyright and related rights — Article 2(a) — Reproduction right — Article 3(1) — Communication to the public — Article 5(2) and (3) — Exceptions and limitations — Scope — Charter of Fundamental Rights of the European Union)

In Case C-469/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 1 June 2017, received at the Court on 4 August 2017, in the proceedings

Funke Medien NRW GmbH

v

Bundesrepublik Deutschland,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Arabadjiev, M. Vilaras, T. von Danwitz, C. Toader, F. Biltgen and C. Lycourgos, Presidents of Chambers, E. Juhász, M. Ilešič (Rapporteur), L. Bay Larsen and S. Rodin, Judges,

Advocate General: M. Szpunar,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 3 July 2018,

after considering the observations submitted on behalf of:

– Funke Medien NRW GmbH, by T. von Plehwe, Rechtsanwalt,

– the German Government, by T. Henze, M. Hellmann, E. Lankenau and J. Techert, acting as Agents,
 – the French Government, by E. Armoët, D. Colas and D. Segoin, acting as Agents,
 – the United Kingdom Government, by Z. Lavery and D. Robertson, acting as Agents, and by N. Saunders, Barrister,
 – the European Commission, by H. Krämer, T. Scharf and J. Samnadda, acting as Agents,
 after hearing the Opinion of the Advocate General at the sitting on 25 October 2018,
 gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(a), Article 3(1) and Article 5(2) and (3) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

2 The request has been made in proceedings between Funke Medien NRW GmbH (*'Funke Medien'*), which operates the website of the German daily newspaper *Westdeutsche Allgemeine Zeitung*, and the Bundesrepublik Deutschland (Federal Republic of Germany) concerning the publication by Funke Medien of certain documents *'classified for restricted access'* drawn up by the German Government.

Legal context

European Union law

3 Recitals 1, 3, 6, 7, 9, 31 and 32 of Directive 2001/29 state:

'(1) The [EC] Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of the laws of the Member States on copyright and related rights contributes to the achievement of these objectives.

...

(3) The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.

...

(6) Without harmonisation at [EU] level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency. The impact of such legislative differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased transborder exploitation of intellectual property. ...

(7) The [EU] legal framework for the protection of copyright and related rights must, therefore, also be

adapted and supplemented as far as is necessary for the smooth functioning of the internal market. ... [D]ifferences not adversely affecting the functioning of the internal market need not be removed or prevented.

...

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

...

(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. ... In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.

(32) This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. ... Member States should arrive at a coherent application of these exceptions and limitations ...'

4 Under the heading *'Reproduction right'*, Article 2 of Directive 2001/29 reads as follows:

'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works;

...

5 Article 3 of the directive, under the heading *'Right of communication to the public of works and right of making available to the public other subject matter'*, provides, in paragraph 1:

'Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.'

6 Article 5 of the directive, under the heading *'Exceptions and limitations'*, provides, in paragraph 3(c) and (d), and in paragraph 5:

'3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

...

(c) reproduction by the press, communication to the public or making available of published articles on

current economic, political or religious topics or of broadcast works or other subject matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

...

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.'

German law

7 Under the heading 'Reporting on current events', Paragraph 50 of the Gesetz über Urheberrecht und verwandte Schutzrechte — Urheberrechtsgesetz (Law on copyright and related rights) of 9 September 1965 (BGBl. 1965 I, p. 1273; 'the UrhG') provides:

'For the purposes of reporting on current events by broadcasting or similar technical means in newspapers, periodicals and other printed matter or other data carriers mainly devoted to current events, as well as on film, the reproduction, distribution and communication to the public of works which become perceivable in the course of these events shall be permitted to the extent justified by the purpose of the report.'

8 Under the heading 'Quotations', Paragraph 51 of the UrhG reads as follows:

'It shall be permissible to reproduce, distribute and communicate to the public a published work for the purpose of quotation so far as such use is justified to that extent by the particular purpose. This shall be permissible in particular where:

1. *subsequent to publication, individual works are included in an independent scientific work for the purpose of explaining the contents;*
2. *subsequent to publication, passages from a work are quoted in an independent work;*
3. *individual passages from a released musical work are quoted in an independent musical work.'*

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 The Federal Republic of Germany prepares a military status report every week on the deployments of the Bundeswehr (Federal armed forces, Germany) abroad and on developments at the deployment locations. The reports are referred to as 'Unterrichtung des

Parlaments' ('Parliament briefings'; 'UdPs'), and are sent to selected members of the Bundestag (Federal Parliament, Germany), to sections of the Bundesministerium der Verteidigung (Federal Ministry of Defence, Germany) and other federal ministries, and to certain bodies subordinate to the Federal Ministry of Defence. UdPs are categorised as 'Classified Documents — Restricted', which is the lowest of the four levels of confidentiality laid down under German law. At the same time, the Federal Republic of Germany publishes summaries of UdPs known as 'Unterrichtung der Öffentlichkeit' ('public briefings'), which are available to the public without any restrictions.

10 Funke Medien operates the website of the German daily newspaper Westdeutsche Allgemeine Zeitung. On 27 September 2012, it applied for access to all UdPs drawn up between 1 September 2001 and 26 September 2012. That application was refused by the competent authorities on the ground that disclosure of the information in those UdPs could have adverse effects on security-sensitive interests of the Federal armed forces. In that context, the competent authorities referred to the regularly published public briefings, which are versions of UdPs that do not affect those interests. Funke Medien nevertheless obtained, by unknown means, a large proportion of the UdPs, which it published in part as the 'Afghanistan Papiere' ('the Afghanistan papers') and could be read online as individually scanned pages accompanied by an introductory note, further links and a space for comments.

11 The Federal Republic of Germany, which takes the view that Funke Medien thereby infringed its copyright over the UdPs, brought an action for an injunction against Funke Medien, which was upheld by the Landgericht Köln (Regional Court, Cologne, Germany). The appeal brought by Funke Medien was dismissed by the Oberlandesgericht Köln (Higher Regional Court, Cologne, Germany). In its appeal on a point of law (Revision), brought before the referring court, Funke Medien maintained its contention that the action for an injunction should be dismissed.

12 The referring court notes that the reasoning of the Oberlandesgericht Köln (Higher Regional Court, Cologne) is based on the premiss that UdPs may be protected under copyright as 'literary works' and that they are not official texts excluded from the protection emanating from that right. It nevertheless states that that court has not made any finding of fact from which it can be concluded that UdPs are original creations.

13 However, the referring court considers that it is not possible to dismiss the judgment of the Oberlandesgericht Köln (Higher Regional Court, Cologne) and to remit the case to that court to allow it to make findings to that effect a posteriori, if copyright infringement of UdPs, which must be presumed for the purposes of an appeal on a point of law (Revision), is, in any event, covered by the derogation relating to reporting current events or quotations, laid down in Paragraphs 50 and 51 of the UrhG, or if such an

infringement is justified by freedom of information or the freedom of the press, laid down respectively in the first and second sentences of Article 5(1) of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany) of 23 May 1949 (BGBl. 1949 I, p. 1; *the GG*) and in Article 11 of the Charter of Fundamental Rights of the European Union (*the Charter*). According to the referring court, if that is the case, then judgment could be given in the case to the effect that the referring court would be required to amend the judgment of the Landgericht Köln (Regional Court, Cologne) and dismiss the action for an injunction which the Federal Republic of Germany brought before it.

14 The referring court considers, in that regard, that the interpretation of Article 2(a), Article 3(1) and Article 5(3)(c) and (d) of Directive 2001/29 read in the light of fundamental rights, in particular of freedom of information and of freedom of the press, is not obvious. It asks inter alia whether those provisions allow any discretion for the purposes of their transposition into national law. It notes in that regard that, according to the case-law of the Bundesverfassungsgericht (Federal Constitutional Court, Germany), national legislation which transposes an EU directive must be measured, as a rule, not against the fundamental rights guaranteed by the GG, but solely against the fundamental rights guaranteed by EU law, where that directive does not allow the Member States any discretion in its transposition.

15 In those circumstances, the Bundesgerichtshof (Federal Court of Justice, Germany) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do the provisions of Union law on the exclusive right of authors to reproduce (Article 2(a) of Directive 2001/29) and publicly communicate their works, including the right to make works available to the public (Article 3(1) of Directive 2001/29), and the exceptions or limitations to these rights (Article 5(2) and (3) of Directive 2001/29) allow any latitude in terms of implementation in national law?

(2) In which way are the fundamental rights of the [Charter] to be taken into account when ascertaining the scope of the exceptions or limitations provided for in Article 5(2) and (3) of Directive 2001/29 to the exclusive right of authors to reproduce (Article 2(a) of Directive 2001/29) and publicly communicate their works, including the right to make works available to the public (Article 3(1) of Directive 2001/29)?

(3) Can the fundamental rights of freedom of information (second sentence of Article 11(1) of the Charter) or freedom of the media (Article 11(2) of the Charter) justify exceptions or limitations to the exclusive rights of authors to reproduce (Article 2(a) of Directive 2001/29) and publicly communicate their works, including the right to make works available to the public (Article 3(1) Directive 2001/29), beyond the exceptions or limitations provided for in Article 5(2) and (3) of Directive 2001/29?'

Consideration of the questions referred

Preliminary observations

16 The referring court notes that, in dismissing Funke Medien's appeal, the Oberlandesgericht Köln (Higher Regional Court, Cologne) relied on the premise that UdPs can be protected under copyright as *'literary works'*, but has not made any finding of fact from which it can be concluded that UdPs are original creations.

17 In that regard, the Court considers it appropriate to make the following clarifications.

18 Article 2(a) and Article 3(1) of Directive 2001/29 provide that the Member States are to provide authors with the exclusive right to authorise or prohibit direct or indirect reproduction by any means and in any form of their *'works'* and with the exclusive right to authorise or prohibit any communication to the public of those *'works'*. Thus, subject matter can be protected by copyright under Directive 2001/29 only if such subject matter can be classified as a *'work'* within the meaning of those provisions (see, to that effect, [judgment of 13 November 2018, Levola Hengelo, C-310/17, EU:C:2018:899](#), paragraph 34).

19 As is clear from well-established case-law, in order for subject matter to be regarded as a *'work'*, two conditions must be satisfied cumulatively. First, the subject matter must be original in the sense that it is its author's own intellectual creation. In order for an intellectual creation to be regarded as an author's own it must reflect the author's personality, which is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices (see, to that effect, [judgment of 1 December 2011, Painer, C-145/10, EU:C:2011:798](#), paragraphs 87 to 89).

20 Second, only something which is the expression of the author's own intellectual creation may be classified as a *'work'* within the meaning of Directive 2001/29 ([judgment of 13 November 2018, Levola Hengelo, C-310/17, EU:C:2018:899](#), paragraph 37 and the case-law cited).

21 In the present case, Funke Medien has contended that UdPs cannot be protected under copyright, since they are reports the structure of which consists of a standard form, drawn up by different authors, of a purely factual nature. As far as concerns the German Government, it claims that the very creation of such a standard form may be protected under copyright.

22 It is for the national court to determine whether military status reports, such as those at issue in the main proceedings, or certain elements thereof, may be regarded as *'works'* within the meaning of Article 2(a) and of Article 3(1) of Directive 2001/29 and therefore be protected by copyright (see, to that effect, [judgment of 16 July 2009, Infopaq International, C-5/08, EU:C:2009:465](#), paragraph 48).

23 In order to determine whether that is in fact the case, it is for the national court to ascertain whether, in drawing up those reports, the author was able to make free and creative choices capable of conveying to the reader the originality of the subject matter at issue, the originality of which arises from the choice, sequence

and combination of the words by which the author expressed his or her creativity in an original manner and achieved a result which is an intellectual creation (see, to that effect, [judgment of 16 July 2009, Infopaq International, C-5/08, EU:C:2009:465](#), paragraphs 45 to 47), whereas the mere intellectual effort and skill of creating those reports are not relevant in that regard (see, by analogy, [judgment of 1 March 2012, Football Dataco and Others, C-604/10, EU:C:2012:115](#), paragraph 33).

24 If military status reports, such as those at issue in the main proceedings, constitute purely informative documents, the content of which is essentially determined by the information which they contain, so that such information and the expression of those reports become indissociable and that those reports are thus entirely characterised by their technical function, precluding all originality, it should be considered, as the Advocate General stated in point 19 of his Opinion, that, in drafting those reports, it was impossible for the author to express his or her creativity in an original manner and to achieve a result which is that author's own intellectual creation (see, to that effect, judgments of [22 December 2010, Bezpečnostní softwarová asociace, C-393/09, EU:C:2010:816](#), paragraphs 48 to 50, and of [2 May 2012, SAS Institute, C-406/10, EU:C:2012:259](#), paragraph 67 and the case-law cited). It would then be incumbent on the national court to find that such reports were not 'works' within the meaning of Article 2(a) and of Article 3(1) of Directive 2001/29 and, therefore, that they cannot enjoy the protection conferred by those provisions.

25 It follows that it must be held that military status reports, such as those at issue in the main proceedings, can be protected by copyright only if those reports are an intellectual creation of their author which reflect the author's personality and are expressed by free and creative choices made by that author in drafting those reports, which must be ascertained by the national court in each case.

26 The questions referred for a preliminary ruling must be answered subject to those qualifications.

The first question

27 As a preliminary matter, it should be noted, as is clear from paragraphs 13 and 14 above, that the first question relates to the application by the referring court, for the purposes of disposing of the case in the main proceedings, of the rules on the reporting of current events and quotations, laid down respectively in Paragraphs 50 and 51 of the UrhG, which transpose Article 5(3)(c) and (d) of Directive 2001/29.

28 Although the referring court has not specifically referred a question on the interpretation of those provisions of Directive 2001/29 to the Court, since the referring court has specifically indicated that, according to the Oberlandesgericht Köln (Higher Regional Court, Cologne), Funke Medien's publication of the UDPs on its website did not satisfy the conditions set out in Paragraphs 50 and 51 of the UrhG, it nevertheless harbours doubts as to whether Article 2(a) and Article 3(1) of that directive allow the Member States

discretion in their transposition, since, according to the case-law of the Bundesverfassungsgericht (Federal Constitutional Court), national legislation which transposes an EU directive must be measured, as a rule, not against the fundamental rights guaranteed by the GG, but solely against the fundamental rights guaranteed by EU law, where that directive does not allow the Member States any discretion in its transposition.

29 In that context, by its first question, the referring court asks, in essence, whether Article 2(a) and Article 3(1) of Directive 2001/29 first, and Article 5(3)(c), second case, and (d) of Directive 2001/29 second, must be interpreted as constituting measures of full harmonisation.

30 In that regard, it should be stated that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order, rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law in the territory of that State (judgment of 26 February 2013, Melloni, C-399/11, EU:C:2013:107, paragraph 59).

31 It should be noted in that connection that, since the transposition of a directive by the Member States is covered, in any event, by the situation, referred to in Article 51 of the Charter, in which the Member States are implementing Union law, the level of protection of fundamental rights provided for in the Charter must be achieved in such a transposition, irrespective of the Member States' discretion in transposing the directive.

32 That said, where, in a situation in which action of the Member States is not entirely determined by EU law, a national provision or measure implements EU law for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised (judgments of 26 February 2013, Melloni, C-399/11, EU:C:2013:107, paragraph 60, and of 26 February 2013, Åkerberg Fransson, C-617/10, EU:C:2013:105, paragraph 29).

33 Thus, it is consistent with EU law for national courts and authorities to make that application subject to the condition, emphasised by the referring court, that the provisions of a directive '*allow [some] discretion in terms of implementation in national law*', provided that that condition is understood as referring to the degree of the harmonisation effected in those provisions, since such an application is conceivable only in so far as those provisions do not effect full harmonisation.

34 In the present case, the objective of Directive 2001/29 is to harmonise only certain aspects of the law on copyright and related rights, of which a number of provisions also disclose the intention of the EU legislature to grant a degree of discretion to the Member States in the implementation of the directive (see, to that effect, judgment of 5 March 2015, Copydan Båndkopi, C-463/12, EU:C:2015:144, paragraph 57).

35 As regards, in the first place, the exclusive right of holders referred to in Article 2(a) and in Article 3(1) of Directive 2001/29, it has been stated, in paragraph 18 above, that, according to that provision Member States are to provide authors, respectively, with the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction of their works by any means and in any form, and the exclusive right to authorise or prohibit the communication to the public of their works.

36 Those provisions therefore define a copyright holder's exclusive right in the European Union of reproduction and making available to the public in unequivocal terms. Furthermore, those provisions are not qualified by any condition, or subject, in their implementation or effects, to any measure being taken in any particular form.

37 The Court has moreover previously held in that regard that those provisions form a harmonised legal framework ensuring a high and even level of protection for the rights of reproduction and making available to the public (Opinion 3/15 (Marrakesh Treaty on access to published works) of 14 February 2017, EU:C:2017:114, paragraph 119 and the case-law cited; see also, as regards the right to make available to the public, judgments of 13 February 2014, Svensson and Others, C-466/12, EU:C:2014:76, paragraph 41, and of 1 March 2017, ITV Broadcasting and Others, C-275/15, EU:C:2017:144, paragraph 22 and the case-law cited).

38 It follows that Article 2(a) and Article 3(1) of Directive 2001/29 constitute measures of full harmonisation of the corresponding substantive law (see, by analogy, as regards the exclusive right of an EU trade mark proprietor, judgments of 20 November 2001, Zino Davidoff and Levi Strauss, C-414/99 to C-416/99, EU:C:2001:617, paragraph 39, and of 12 November 2002, Arsenal Football Club, C-206/01, EU:C:2002:651, paragraph 43).

39 In the second place, it should be noted, as is clear from recital 32 of Directive 2001/29, Article 5(2) and (3) of that directive sets out a list of exceptions and limitations to the exclusive rights of reproduction and of communication to the public.

40 In that regard, it is clear from the case-law of the Court that the scope of the Member States' discretion in the transposition into national law of a particular exception or limitation referred to in Article 5(2) or (3) of Directive 2001/29 must be determined on a case-by-case basis, in particular, according to the wording of the provision in question (see, to that effect, judgments of 21 October 2010, Padawan, C-467/08, EU:C:2010:620, paragraph 36; of 3 September 2014, Deckmyn and Vrijheidsfonds, C-201/13, EU:C:2014:2132, paragraph 16; and of 22 September 2016, Microsoft Mobile Sales International and Others, C-110/15, EU:C:2016:717, paragraph 27; Opinion 3/15 (Marrakesh Treaty on access to published works) of 14 February 2017, EU:C:2017:114, paragraph 116), the degree of the

harmonisation of the exceptions and limitations intended by the EU legislature being based on their impact on the smooth functioning of the internal market, as stated in recital 31 of Directive 2001/29.

41 Under Article 5(3)(c), second case, and (d) of Directive 2001/29, the exceptions or limitations referred to are comprised respectively of *'use of works or other subject matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible'* and *'quotations for purposes such as criticism or review, provided that they relate to a work or other subject matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose'*.

42 As is clear from its content, that provision does not constitute full harmonisation of the scope of the exceptions or limitations which it contains.

43 It is clear, first, from the use, in Article 5(3)(c), second case, and (d) of Directive 2001/29 of the wording *'to the extent justified by the informatory purpose'* and *'in accordance with fair practice, and to the extent required by the specific purpose'* respectively, that, in the transposition of that provision and its application under national law, the Member States enjoy significant discretion allowing them to strike a balance between the relevant interests. Second, Article 5(3)(d) of that directive sets out, in respect of cases of permissible quotation, merely an illustrative list of such cases, as is clear from the use of the words *'for purposes such as criticism or review'*.

44 The existence of that discretion is supported by the legislative drafts which preceded the adoption of Directive 2001/29. Thus, it is stated in the Explanatory Memorandum to the Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society of 10 December 1997 (COM(97) 628 final), relating to the limitations which are now provided for, in essence, in Article 5(3)(c) and (d) of Directive 2001/29, that, in view of their more limited economic importance, those limitations are deliberately not dealt with in detail in the framework of the proposal, which only sets out minimum conditions for their application, and it is for the Member States to define the detailed conditions for their use, albeit within the limits set out by that provision.

45 Notwithstanding the foregoing considerations, the Member States' discretion in the implementation of Article 5(3)(c), second case, and (d) of Directive 2001/29 is circumscribed in several regards.

46 First, the Court has repeatedly held that the Member States' discretion in the implementation of the exceptions and limitations provided for in Article 5(2) and (3) of Directive 2001/29 must be exercised within the limits imposed by EU law, which means that the Member States are not in every case free to determine,

in an unharmonised manner, the parameters governing those exceptions or limitations (see, to that effect, judgments of [6 February 2003, SENA, C-245/00, EU:C:2003:68](#), paragraph 34; of [1 December 2011, Painer, C-145/10, EU:C:2011:798](#), paragraph 104; and of [3 September 2014, Deckmyn and Vrijheidsfonds, C-201/13, EU:C:2014:2132](#), paragraph 16; [Opinion 3/15 \(Marrakesh Treaty on access to published works\) of 14 February 2017, EU:C:2017:114](#), paragraph 122).

47 The Court thus made clear that the option open to the Member States of implementing an exception or limitation to the harmonised rules laid down in Articles 2 and 3 of Directive 2001/29 is highly circumscribed by the requirements of EU law (see, to that effect, [Opinion 3/15 \(Marrakesh Treaty on access to published works\) of 14 February 2017, EU:C:2017:114](#), paragraph 126).

48 In particular, Member States may provide, in their law, for an exception or limitation referred to in Article 5(2) and (3) of Directive 2001/29 only if they comply with all the conditions laid down in that provision (see, by analogy, [Opinion 3/15 \(Marrakesh Treaty on access to published works\) of 14 February 2017, EU:C:2017:114](#), paragraph 123 and the case-law cited).

49 The Member States are also required, in that context, to comply with the general principles of EU law, which include the principle of proportionality, from which it follows that measures which the Member States may adopt must be appropriate for attaining their objective and must not go beyond what is necessary to achieve it ([judgment of 1 December 2011, Painer, C-145/10, EU:C:2011:798](#), paragraphs 105 and 106).

50 Second, the Court has reaffirmed that the discretion enjoyed by the Member States in implementing the exceptions and limitations provided for in Article 5(2) and (3) of Directive 2001/29 cannot be used so as to compromise the objectives of that directive that consist, as is clear from recitals 1 and 9 thereof, in establishing a high level of protection for authors and in ensuring the proper functioning of the internal market (see, to that effect, judgments of [1 December 2011, Painer, C-145/10, EU:C:2011:798](#), paragraph 107, and of [10 April 2014, ACI Adam and Others, C-435/12, EU:C:2014:254](#), paragraph 34; [Opinion 3/15 \(Marrakesh Treaty on access to published works\) of 14 February 2017, EU:C:2017:114](#), paragraph 124 and the case-law cited).

51 Nonetheless, it is also for the Member States, in effecting that implementation, to safeguard the effectiveness of the exceptions and limitations thereby established and to permit observance of their purpose (see, to that effect, judgments of [4 October 2011, Football Association Premier League and Others, C-403/08 and C-429/08, EU:C:2011:631](#), paragraph 163, and of [3 September 2014, Deckmyn and Vrijheidsfonds, C-201/13, EU:C:2014:2132](#), paragraph 23), in order to safeguard a fair balance of rights and interests between the different categories of

rightholders, as well as between the different categories of rightholders and users of protected subject matter, as stated in recital 31 of that directive.

52 Third, the Member States' discretion in the implementation of the exceptions and limitations relevant to Article 5(2) and (3) of Directive 2001/29 is also circumscribed by Article 5(5) of the directive, which makes those exceptions or limitations subject to three conditions, namely that those exceptions or limitations may be applied only in certain special cases, that they do not conflict with a normal exploitation of the work and that they do not unreasonably prejudice the legitimate interests of the copyright holder ([Opinion 3/15 \(Marrakesh Treaty on access to published works\) of 14 February 2017, EU:C:2017:114](#), paragraph 125 and the case-law cited).

53 Lastly, fourth, as set out in paragraph 31 above, the principles enshrined in the Charter apply to the Member States when implementing EU law. It is therefore for the Member States, in transposing the exceptions and limitations referred to Article 5(2) and (3) of Directive 2001/29, to ensure that they rely on an interpretation of the directive which allows a fair balance to be struck between the various fundamental rights protected by the European Union legal order (judgments of [27 March 2014, UPC Telekabel Wien, C-314/12, EU:C:2014:192](#), paragraph 46, and of [18 October 2018, Bastei Lübbe, C-149/17, EU:C:2018:841](#), paragraph 45 and the case-law cited; see also, by analogy, judgment of 26 September 2013, [IBV & Cie, C-195/12, EU:C:2013:598](#), paragraphs 48 and 49 and the case-law cited).

54 In the light of the foregoing considerations, the answer to the first question is that Article 2(a) and Article 3(1) of Directive 2001/29 must be interpreted as constituting measures of full harmonisation of the scope of the exceptions or limitations which they contain. Article 5(3)(c), second case, and (d) of Directive 2001/29 must be interpreted as not constituting measures of full harmonisation of the scope of the relevant exceptions or limitations.

The third question

55 By its third question, which it is appropriate to consider in the second place, the referring court asks, in essence, whether freedom of information and freedom of the press, enshrined in Article 11 of the Charter, are capable of justifying, beyond the exceptions or limitations provided for in Article 5(2) and (3) of Directive 2001/29, a derogation from the author's exclusive rights of reproduction and of communication to the public, referred to, respectively, in Article 2(a) and Article 3(1) of that directive.

56 First of all, it should be noted that it is clear both from the Explanatory Memorandum to Proposal COM(97) 628 final and from recital 32 of Directive 2001/29 that the list of exceptions and limitations contained in Article 5 of that directive is exhaustive, as the Court has also pointed out on several occasions (judgments of [16 November 2016, Soulier and Doke, C-301/15, EU:C:2016:878](#), paragraph 34, and of [7](#)

[August 2018, Renckhoff, C-161/17, EU:C:2018:634](#), paragraph 16).

57 As follows from recitals 3 and 31 of Directive 2001/29, the harmonisation effected by that directive aims to safeguard, in particular in the electronic environment, a fair balance between, on the one hand, the interest of the holders of copyright and related rights in the protection of their intellectual property rights guaranteed by Article 17(2) of the Charter and, on the other hand, the protection of the interests and fundamental rights of users of protected subject matter, in particular their freedom of expression and information guaranteed by Article 11 of the Charter, as well as of the public interest (see, to that effect, [judgment of 7 August 2018, Renckhoff, C-161/17, EU:C:2018:634](#), paragraph 41).

58 The mechanisms allowing those different rights and interests to be balanced are contained in Directive 2001/29 itself, in that it provides inter alia, first, in Articles 2 to 4 thereof, rightholders with exclusive rights and, second, in Article 5 thereof, for exceptions and limitations to those rights which may, or even must, be transposed by the Member States, since those mechanisms must nevertheless find concrete expression in the national measures transposing that directive and in their application by national authorities (see, to that effect, [judgment of 29 January 2008, Promusicae, C-275/06, EU:C:2008:54](#), paragraph 66 and the case-law cited).

59 The Court has repeatedly held that the fundamental rights now enshrined in the Charter, the observance of which the Court ensures, draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories (see, to that effect, judgment of 27 June 2006, *Parliament v Council*, C-540/03, EU:C:2006:429, paragraph 35 and the case-law cited).

60 As regards the exceptions and limitations provided for in Article 5(3)(c), second case, and (d) of Directive 2001/29 in respect of which the referring court has doubts, it is to be noted that they are specifically aimed at favouring the exercise of the right to freedom of expression by the users of protected subject matter and to freedom of the press, which is of particular importance when protected as a fundamental right, over the interest of the author in being able to prevent the use of his or her work, whilst ensuring that the author has the right, in principle, to have his or her name indicated (see, to that effect, [judgment of 1 December 2011, Painer, C-145/10, EU:C:2011:798](#), paragraph 135).

61 Article 5(5) of that directive also contributes to the fair balance mentioned in paragraphs 51 and 57 above, in that, as has been stated in paragraph 52 above, it requires that the exceptions and limitations provided for in Article 5(1) to (4) of the directive be applied only in certain special cases which do not conflict with a normal exploitation of the work or other subject matter

and do not unreasonably prejudice the legitimate interests of the rightholder.

62 In that context, to allow, notwithstanding the express intention of the EU legislature, set out in paragraph 56 above, each Member State to derogate from an author's exclusive rights, referred to in Articles 2 to 4 of Directive 2001/29, beyond the exceptions and limitations exhaustively set out in Article 5 of that directive, would endanger the effectiveness of the harmonisation of copyright and related rights effected by that directive, as well as the objective of legal certainty pursued by it (judgment of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraphs 34 and 35). It is expressly clear from recital 31 of the directive that the differences that existed in the exceptions and limitations to certain restricted acts had direct negative effects on the functioning of the internal market of copyright and related rights, since the list of the exceptions and limitations set out in Article 5 of Directive 2001/29 is aimed at ensuring such proper functioning of the internal market.

63 In addition, as is clear from recital 32 of the directive, the Member States are required to apply those exceptions and limitations consistently. The requirement of consistency in the implementation of those exceptions and limitations could not be ensured if the Member States were free to provide for such exceptions and limitations beyond those expressly set out in Directive 2001/29 (see, to that effect, [judgment of 12 November 2015, Hewlett-Packard Belgium, C-572/13, EU:C:2015:750](#), paragraphs 38 and 39), since the Court has moreover previously held that no provision of Directive 2001/29 envisages the possibility for the scope of such exceptions or limitations to be extended by the Member States (see, to that effect, [judgment of 10 April 2014, ACI Adam and Others, C-435/12, EU:C:2014:254](#), paragraph 27).

64 In the light of the foregoing considerations, the answer to the third question is that freedom of information and freedom of the press, enshrined in Article 11 of the Charter, are not capable of justifying, beyond the exceptions or limitations provided for in Article 5(2) and (3) of Directive 2001/29, a derogation from the author's exclusive rights of reproduction and of communication to the public, referred to in Article 2(a) and Article 3(1) of that directive respectively.

The second question

65 By its second question, the referring court asks, in essence, whether, in striking the balance which it is incumbent on a national court to undertake between the exclusive rights of the author referred to in Article 2(a) and Article 3(1) of Directive 2001/29 on the one hand, and, on the other, the rights of the users of protected subject matter referred to in Article 5(3)(c), second case, and (d) of that directive, the latter derogating from the former, a national court may depart from a restrictive interpretation of the latter provisions in favour of an interpretation which takes full account of the need to respect freedom of expression and freedom of information, enshrined in Article 11 of the Charter.

66 The referring court harbours doubts in that regard as to the possibility of applying, in the present case, Article 5(3)(c), second case, of Directive 2001/29 to Funke Medien's use of UdPs on the ground that Funke Medien did not add any distinct act of summary to the publication of the UdPs.

67 As set out in paragraph 53 above, it is for the Member States, in transposing the exceptions and limitations referred to in Article 5(2) and (3) of Directive 2001/29, to ensure that they rely on an interpretation of those exceptions and limitations which allows for a fair balance to be struck between the various fundamental rights protected by the EU legal order.

68 Subsequently, when applying the measures transposing that directive, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with that directive but also make sure that they do not rely on an interpretation of it which would be in conflict with those fundamental rights or with the other general principles of EU law, as the Court has repeatedly held (see, to that effect, judgments of [29 January 2008, Promusicae, C-275/06, EU:C:2008:54](#), paragraph 70; of [27 March 2014, UPC Telekabel Wien, C-314/12, EU:C:2014:192](#), paragraph 46; and of [16 July 2015, Coty Germany, C-580/13, EU:C:2015:485](#), paragraph 34).

69 It is certainly the case, as the referring court notes, that any derogation from a general rule must, in principle, be interpreted strictly.

70 However, although Article 5 of Directive 2001/29 is expressly entitled '*Exceptions and limitations*', it should be noted that those exceptions or limitations do themselves confer rights on the users of works or of other subject matter (see, to that effect, [judgment of 11 September 2014, Eugen Ulmer, C-117/13, EU:C:2014:2196](#), paragraph 43). In addition, that article is specifically intended, as has been stated in paragraph 51 above, to ensure a fair balance between, on the one hand, the rights and interests of rightholders, which must themselves be given a broad interpretation (see, to that effect, [judgment of 16 November 2016, Soulier and Doke, C-301/15, EU:C:2016:878](#), paragraphs 30 and 31 and the case-law cited) and, on the other hand, the rights and interests of users of works or other subject matter.

71 It follows that the interpretation of the exceptions and limitations provided for in Article 5 of Directive 2001/29 must allow, as is clear from paragraph 51 above, their effectiveness to be safeguarded and their purpose to be observed, since such a requirement is of particular importance where those exceptions and limitations aim, as do those provided for in Article 5(3)(c) and (d) of Directive 2001/29, to ensure observance of fundamental freedoms.

72 In that context, first, it should be added that the protection of intellectual property rights is indeed enshrined in Article 17(2) of the Charter. There is, however, nothing whatsoever in the wording of that

provision or in the Court's case-law to suggest that that right is inviolable and must for that reason be protected as an absolute right (judgments of [24 November 2011, Scarlet Extended, C-70/10, EU:C:2011:771](#), paragraph 43; of [16 February 2012, SABAM, C-360/10, EU:C:2012:85](#), paragraph 41; and of [27 March 2014, UPC Telekabel Wien, C-314/12, EU:C:2014:192](#), paragraph 61).

73 Second, it has been stated in paragraph 60 above that Article 5(3)(c) and (d) of Directive 2001/29 is aimed at favouring the exercise of the right to freedom of expression by the users of protected subject matter and to freedom of the press, enshrined in Article 11 of the Charter. In that regard, it should be noted that, in so far as the Charter contains rights which correspond to those guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('*the ECHR*'), Article 52(3) of the Charter seeks to ensure the necessary consistency between the rights contained in it and the corresponding rights guaranteed by the ECHR, without thereby adversely affecting the autonomy of EU law and that of the Court of Justice of the European Union (see, by analogy, judgments of 15 February 2016, N., C-601/15 PPU, EU:C:2016:84, paragraph 47, and of 26 September 2018, Staatssecretaris van Veiligheid en justitie (Suspensory effect of the appeal), C-180/17, EU:C:2018:775, paragraph 31 and the case-law cited). Article 11 of the Charter contains rights which correspond to those guaranteed by Article 10(1) of the ECHR (see, to that effect, judgment of 14 February 2019, Buivids, C-345/17, EU:C:2019:122, paragraph 65 and the case-law cited).

74 As is clear from the case-law of the European Court of Human Rights, for the purpose of striking a balance between copyright and the right to freedom of expression, that court has, in particular, referred to the need to take into account the fact that the nature of the '*speech*' or information at issue is of particular importance, inter alia in political discourse and discourse concerning matters of the public interest (see, to that effect, ECtHR, 10 January 2013, *Ashby Donald and Others v. France*, CE:ECHR:2013:0110JUD003676908, § 39).

75 In the present case, according to the case file, Funke Medien not only published the UdPs on its website, but also presented them in a structured form in conjunction with an introductory note, further links and a space for comments. Accordingly, supposing that UdPs were regarded as '*works*' within the meaning of Article 2(a) and of Article 3(1) of Directive 2001/29, it would need to be held that the publication of those documents may amount to '*use of works ... in connection with ... reporting*'. Such publication would therefore be capable of falling within Article 5(3)(c), second case, of Directive 2001/29, provided that the other conditions set out in that provision were satisfied, which is for the referring court to ascertain.

76 In the light of the foregoing considerations, the answer to the second question is that, in striking the

balance which is incumbent on a national court between the exclusive rights of the author referred to in Article 2(a) and in Article 3(1) of Directive 2001/29 on the one hand, and, on the other, the rights of the users of protected subject matter referred to in Article 5(3)(c), second case, and (d) of that directive, the latter of which derogate from the former, a national court must, having regard to all the circumstances of the case before it, rely on an interpretation of those provisions which, whilst consistent with their wording and safeguarding their effectiveness, fully adheres to the fundamental rights enshrined in the Charter.

Costs

77 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. Article 2(a) and Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as constituting measures of full harmonisation of the scope of the exceptions or limitations which they contain. Article 5(3)(c), second case, and (d) of Directive 2001/29 must be interpreted as not constituting measures of full harmonisation of the scope of the relevant exceptions or limitations.

2. Freedom of information and freedom of the press, enshrined in Article 11 of the Charter of Fundamental Rights of the European Union, are not capable of justifying, beyond the exceptions or limitations provided for in Article 5(2) and (3) of Directive 2001/29, a derogation from the author's exclusive rights of reproduction and of communication to the public, referred to in Article 2(a) and Article 3(1) of that directive respectively.

3. In striking the balance which is incumbent on a national court between the exclusive rights of the author referred to in Article 2(a) and in Article 3(1) of Directive 2001/29 on the one hand, and, on the other, the rights of the users of protected subject matter referred to in Article 5(3)(c), second case, and (d) of that directive, the latter of which derogate from the former, a national court must, having regard to all the circumstances of the case before it, rely on an interpretation of those provisions which, whilst consistent with their wording and safeguarding their effectiveness, fully adheres to the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union.

[Signatures]

**OPINION OF ADVOCATE GENERAL
SZPUNAR**

delivered on 25 October 2018 (1)

Case C-469/17

Funke Medien NRW GmbH

v

Bundesrepublik Deutschland

(Request for a preliminary ruling

from the Bundesgerichtshof (Federal Court of Justice, Germany))

(Reference for a preliminary ruling — Copyright and related rights — Reproduction right — Right of communication to the public of works and right of making available to the public other subject matter — Exceptions and limitations — Procedure for transposition by Member States — Assessment in the light of fundamental rights — Exhaustive nature)

Introduction

1. *'All quiet on the Western Front'*, declared what is probably the most well-known military report in the history of literature. Featured in the novel by Erich Maria Remarque bearing the same name, (2) this phrase naturally enjoyed, together with the work as a whole, copyright protection. The case in point presents the Court with a more complex question: can a military report that is not fictional but entirely real enjoy copyright protection, as harmonised in EU law, in the same way as other literary works?

2. This question raises two problems: first, does such a report satisfy the requirements in order to be treated as a work eligible for copyright protection, requirements that flow from the very nature of copyright and the case-law of the Court? Secondly, must other factors such as freedom of expression, protected by the Charter of Fundamental Rights of the European Union (*'the Charter'*), be taken into account in order to minimise, or even rule out, such protection? It seems to me to be necessary to answer those two questions in order to provide the national court with a useful answer.

Legal framework

European Union law

3. Article 2 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (3) provides:

'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works;

...'

4. Article 3(1) of that directive provides:

'Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.'

5. Under Article 5(3)(c) and (d) of the directive:

'Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

...

(c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

...'

German law

6. Directive 2001/29 was transposed into German law by the Gesetz über Urheberrecht und verwandte Schutzrechte — Urheberrechtsgesetz (Law on copyright and related rights) of 9 September 1965 ('the UrhG'). Paragraph 2 of that law lists the categories of protected works. Paragraph 2(2) provides:

'Only personal intellectual creations shall be regarded as works within the meaning of this law.'

7. With regard to the protection of official texts, Paragraph 5 of the law makes the following provision:

'1. Laws, decrees, official orders or notices, decisions and the statements of reasons for those decisions shall not be protected by copyright.'

2. Copyright protection shall also not extend to other official texts which, in the interests of the administration, were disseminated to the public for information purposes. However, the provisions of Paragraphs 62(1) to (3) and 63(1) and (2) concerning the prohibition on altering the work and the indication of the source shall apply mutatis mutandis.'

...'

8. Authors' reproduction rights and the right of communication to the public are protected under Paragraph 15(1) and (2) of the UrhG, while the exceptions concerning the reporting of current events and quotations are laid down in Paragraphs 50 and 51 of that law.

Facts, procedure and questions referred

9. The defendant, the Bundesrepublik Deutschland (Federal Republic of Germany), has a military status report drawn up every week on the deployments of the Bundeswehr (Federal Armed Forces, Germany) abroad and on the developments at the deployment locations. The reports are referred to as 'Unterrichtung des Parlaments' (Parliament briefings, 'UdPs') and are sent to selected members of the Bundestag (Federal Parliament, Germany), to sections of the Bundesministerium der Verteidigung (Federal Ministry of Defence, Germany) and other federal ministries, and

to subordinate bodies of the Federal Ministry of Defence. UdPs are categorised as 'classified documents — Restricted', the lowest level of confidentiality. At the same time, the defendant publishes summaries of the UdPs known as 'Unterrichtung der Öffentlichkeit' (public briefings, 'UdÖs').

10. The applicant, Funke Medien NRW GmbH ('Funke Medien'), a company incorporated under German law, operates the website of the daily newspaper Westdeutsche Allgemeine Zeitung. On 27 September 2012, it applied for access to all UdPs drawn up between 1 September 2001 and 26 September 2012. The application was refused on the ground that disclosure of the briefings could have adverse effects on security-sensitive interests of the federal armed forces. The applicant nevertheless obtained, by unknown means, a large proportion of the UdPs and published several of them as the 'Afghanistan-Papiere' (Afghanistan Papers).

11. The Federal Republic of Germany took the view that Funke Medien had infringed its copyright over those reports and thus brought an action against it seeking an injunction, which was upheld by the Landgericht (Regional Court, Germany). Funke Medien's appeal was dismissed by the appellate court. By its further appeal on a point of law, Funke Medien maintains its form of order seeking dismissal of the injunction action.

12. In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Do the provisions of Union law on the exclusive right of authors to reproduce (Article 2(a) of Directive 2001/29) and publicly communicate their works, including the right to make works available to the public (Article 3(1) of Directive 2001/29), and the exceptions or limitations to these rights (Article 5(2) and (3) of Directive 2001/29) allow any latitude in terms of implementation in national law?

(2) In which way are the fundamental rights of the Charter ... to be taken into account when ascertaining the scope of the exceptions or limitations provided for in Article 5(2) and (3) of Directive 2001/29 to the exclusive right of authors to reproduce (Article 2(a) of Directive 2001/29) and publicly communicate their works, including the right to make works available to the public (Article 3(1) of Directive 2001/29)?

(3) Can the fundamental rights of freedom of information (second sentence of Article 11(1) of the Charter) or freedom of the media (Article 11(2) of the Charter) justify exceptions or limitations to the exclusive rights of authors to reproduce (Article 2(a) of Directive 2001/29) and publicly communicate their works, including the right to make works available to the public (Article 3(1) of Directive 2001/29), beyond the exceptions or limitations provided for in Article 5(2) and (3) of Directive 2001/29?'

13. The request for a preliminary ruling was received at the Court on 4 August 2017. Written observations were lodged by Funke Medien, the German, French and UK

Governments and the European Commission. The same parties were represented at the hearing on 3 July 2018.

Assessment

Admissibility of the questions referred for a preliminary ruling

14. The dispute in the main proceedings concerns the communication to the public, by Funke Medien, of UdPs, namely periodic briefing reports on the operations of the federal armed forces abroad, over which the Federal Republic of Germany claims to hold copyright. The exact content of those documents is not known to the Court, as Funke Medien was required to withdraw them from its website. Nonetheless, it is possible to consult UdÖs, that is to say the public version of UdPs. At the hearing, the parties disagreed on the differences between those two versions: according to the German Government, UdPs are much more voluminous than UdÖs, while, according to Funke Medien, UdPs contain only a few more items of information than UdÖs. In any event, the fact that Funke Medien decided to publish the UdPs it had managed to obtain suggests that the two versions differ as regards the information provided. However, in my opinion, it can be assumed that even if the information contained in UdPs is more detailed, the form in which it is presented (its expression, in copyright language) is the same in both cases. That form, as is apparent from the UdÖs, makes me seriously doubt that such documents should be classified as works protected by copyright. These are purely informative documents, drafted in absolutely neutral and standardised terms, providing an accurate report of events or stating that no events of interest have occurred. (4)

15. It is commonly accepted as a principle that copyright does not protect ideas but expressions. According to one classic formulation, ideas roam free, (5) in that they cannot be monopolised by copyright, unlike the case of, for instance, patents protecting ideas, inventions and suchlike. Copyright protects only the way in which ideas have been articulated in a work. Ideas themselves, severed from any work, can therefore be freely reproduced and shared.

16. That exclusion of ideas from the scope of copyright protection extends to 'raw' information, namely information in its unaltered state. Although such information may appear in the form of a text, it is nonetheless a basic text confined to answering three key questions: who? what? when? Without any embellishment, the expression of the information merges with the information itself. Monopolisation of the expression by copyright thus results in monopolisation of the information. That exclusion of raw information from the scope of protection was already present in the Berne Convention for the Protection of Literary and Artistic Works, signed in Berne on 9 September 1886 (Paris Act of 24 July 1971), as amended on 28 September 1979 ('the Berne Convention'), which is the main international instrument on copyright protection. Article 2(8) thereof provides that '*the protection of this Convention shall not apply to news of the day or to miscellaneous facts*

having the character of mere items of press information'. (6)

17. Furthermore, if an expression is to be regarded as a 'work' for the purpose of copyright, it must also be '*original in the sense that it is its author's own intellectual creation*'. (7) That condition governing the applicability of copyright, as harmonised in EU law, particularly by Directive 2001/29, was inferred by the Court from the scheme of that directive and of the Berne Convention. It was not, however, invented by EU law: it appears in most domestic copyright laws, at least in continental law systems. (8) It therefore forms part, in a sense, of the legal traditions of the Member States.

18. Under EU copyright law, the concept of a work being '*its author's own intellectual creation*' is the main component of the definition of work, itself an autonomous concept of EU law. That definition was subsequently developed in the case-law of the Court following the judgment in Infopaq International. (9) The Court thus explained that an intellectual creation is an author's own if it reflects the author's personality. That is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices. (10) However, where the expression of the components of the subject matter at issue is dictated by their technical function, the criterion of originality is not met, since the different methods of implementing an idea are so limited that the idea and the expression become indissociable. Such a situation does not permit the author to express his creativity in an original manner and achieve a result which is an intellectual creation of his own. (11) Only the author's own intellectual creation, as defined above, has the status of work eligible for copyright protection. Elements such as intellectual work and the skill of the author cannot as such justify the protection of the subject matter at issue by copyright if such work and skill do not express any originality. (12)

19. The application of those criteria to the instant case raises serious doubts as to the classification of the documents at issue as works for the purpose of EU copyright law, as interpreted by the Court. It seems to me to be rather unlikely that the author or authors of those documents, whose identity is unknown but who are probably civil servants or officers of the federal armed forces, were able to make free and creative choices in order to express their creative abilities when drafting those documents. The content of purely informative documents that are inevitably drafted in simple and neutral terms is entirely determined by the information they contain, so that such information and its expression become indissociable, thus precluding all originality. A degree of effort and skill is required to draw them up, but those elements on their own cannot justify copyright protection. During the discussions in that regard at the hearing, the parties also argued that the structure of the documents at issue could itself be protected by copyright. However, that structure consists in setting out evenly spaced information concerning each foreign mission in which the federal armed forces

are participating. Therefore, I do not think that the structure of those reports is more creative than their content.

20. Doubts as to the classification of the documents at issue as works eligible for copyright protection were raised in the main proceedings and in the present case, in particular by Funke Medien. The national court informed the Court that that matter had not been resolved by the lower courts in the main proceedings. (13) It nevertheless considers that it is not appropriate to refer the case back to the appellate court for clarification, since it might be apparent from the Court's answers to the questions referred that copyright protection should not be conferred on those documents.

21. I understand the concern for procedural economy. However, the questions referred in this case raise key legal issues concerning the relationship between copyright and fundamental rights, which may lead to the legitimacy or validity of copyright being challenged in the light of such rights. To a large extent, those issues stem from the unusual nature of the documents at issue as a subject matter of copyright, to the extent that their content is purely informative, they emanate from and remain the property of the State, and are confidential. I therefore take the view that it would be at least desirable to ensure, before addressing those key issues, that the documents at issue actually fall within the scope of copyright and, more generally, EU law.

22. Obviously, the classification of the documents at issue as 'works' for the purpose of copyright, as harmonised in EU law, is a factual assessment, responsibility for which lies with the national courts alone. However, my opinion is that in view of the doubts raised above concerning the applicability of EU copyright law to those documents, doubts which indeed seem to be shared by the national court, the Court could consider finding that, in accordance with settled case-law, the questions referred for a preliminary ruling in this case are inadmissible because they are, at this stage of the main proceedings, hypothetical, because they are based on a premiss that the national court has not confirmed. (14)

23. In case the Court does not endorse that proposal, I will now turn to the analysis of the substance of the case.

Preliminary observations on the substance of the questions referred

24. In the instant case, the questions referred for a preliminary ruling are all linked in one way or another to the issue of the relationship between copyright, as harmonised by Directive 2001/29, and fundamental rights, particularly freedom of expression, as protected by Article 11 of the Charter.

25. Thus, by the first question referred for a preliminary ruling, submitted in conjunction with the case-law of the Bundesverfassungsgericht (Federal Constitutional Court, Germany), the national court seeks to ascertain whether the provisions of German law transposing Directive 2001/29 are to be interpreted only in the light of fundamental rights under EU law or

also in the light of the applicable fundamental rights at domestic constitutional level.

26. The second question referred concerns the way in which fundamental rights should be taken into account in the interpretation of the exceptions and limitations to the copyrights laid down in Directive 2001/29. Although not raised expressly, the wording of that question nonetheless suggests that the national court wishes to know whether the taking into account of fundamental rights, specifically the right to information, may result in an interpretation of those exceptions which covers the use of the documents at issue in the main proceedings.

27. Lastly, the third question referred raises the issue of the possible existence of other exceptions or limitations to copyright which are not laid down in Directive 2001/29 (or in any other EU legal act), but which are necessary in order to ensure that fundamental rights are observed.

28. Those three questions, couched in very general terms, have also been submitted in two other cases currently pending before the Court in the form of requests for a preliminary ruling from the same national court. (15) However, the three cases concern completely different factual situations and involve different fundamental rights. There are probably an infinite number of other possible factual and legal configurations in which the same general questions could be submitted concerning the relationship between copyright and fundamental rights.

29. I do not think it is useful to examine the issues raised in the main proceedings in such a general way. Any answer formulated in general terms which disregards the specific situation of possible conflict between copyright and a fundamental right would, to my mind, be either too inflexible, as it would prevent any adjustment being made to the copyright system if necessary, or too permissive, as it would open the door to that system being questioned in any situation whatsoever, thereby depriving it of all legal certainty.

30. That is so all the more since, as I will explain below, copyright itself already incorporates mechanisms designed to reconcile it with respect for fundamental rights, first and foremost with freedom of expression. As a general rule, those mechanisms should be sufficient, short of calling in question the actual validity of the provisions of copyright law in the light of those fundamental rights. The issue of the validity of the provisions of Directive 2001/29 was not, however, raised in this case and I see no need to do so.

31. Any balancing of copyright against fundamental rights which goes beyond merely interpreting the provisions of copyright law, an exercise on the borderline between the interpretation and application of the law, must therefore, in my view, be carried out having regard to the circumstances of each individual case. That case-by-case approach enables the principle of proportionality to be applied as accurately as possible, thereby avoiding unjustified interferences with both copyright and fundamental rights.

32. The main proceedings are concerned with the application of copyright in a case that is special in a number of respects. First, the subject matter comprises documents of the State which, as I have already observed, are purely informative in nature. It is therefore difficult to distinguish those documents, as a subject matter of copyright, from the information they contain. Secondly, the holder of that copyright is the State, namely the player in the situation not of beneficiary of fundamental rights, but of party under fundamental rights obligations. Thirdly and lastly, although use is made here of the mechanisms to protect copyright, the undisguised aim is not to exploit the work, but to protect the confidentiality of the information contained therein. For those reasons, if the Court were to confine itself to answering the questions referred as formulated by the national court, it would not, in my view, be able to provide an appropriate solution to the problem faced by that court.

33. I therefore propose that the Court — in order to give the national court a useful answer for the resolution of the specific dispute pending before it in the main proceedings — reformulate the questions referred, considering them together and taking as the starting point not the copyright law of the Federal Republic of Germany, but the freedom of expression of *Funke Medien*. In my opinion, the national court essentially enquires whether Article 11 of the Charter should be interpreted as precluding a Member State from relying on its copyright over documents such as those at issue in the main proceedings in order to curtail the freedom of expression laid down in that article.

Copyright and freedom of expression

34. Article 11 of the Charter provides that the freedom of expression and information enshrined in that article includes the *'freedom to ... receive and impart information and ideas'*. Paragraph 2 thereof adds freedom of the media. That right finds its counterpart in the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (*'the ECHR'*), Article 10 of which defines freedom of expression in terms identical to those used in Article 11(1) of the Charter.

35. By contrast, copyright, as harmonised in EU law, gives authors the exclusive right to authorise or prohibit the reproduction and communication to the public of their works. Even though, as explained in more detail above, copyright does not protect information or ideas contained in works but their expressions, it is, as might be expected, bound to clash with freedom of expression. First, the communication of a work covered by copyright, whether by the author himself, with his authorisation or without such authorisation, naturally falls within the scope of that freedom. Secondly, even where the work is not the sole or principal subject matter of the communication, it is sometimes very difficult, if not impossible, to communicate certain ideas without simultaneously communicating, at least partially, a work by another person. Take art criticism, for example. By requiring prior authorisation from the author (and entitling the author to withhold such

authorisation), copyright necessarily restricts freedom of expression.

36. It is commonly accepted that copyright itself incorporates mechanisms allowing possible conflict between fundamental rights, including freedom of expression, and copyright to be resolved. (16)

37. They include, in the first place, the principle that copyright does not protect ideas but expressions. In that way, freedom of expression, so far as concerns the transmission and receipt of information, is protected. As I have already examined that principle in the section relating to the admissibility of the questions referred for a preliminary ruling, (17) I will not repeat myself here.

38. In the second place, copyright is compatible with fundamental rights through the application of various exceptions. Those exceptions enable works to be used in different situations which may fall within the scope of different fundamental rights and freedoms, without at the same time depriving authors of the substance of their rights, namely respect for the relationship linking them to their works and the possibility of exploiting those works economically.

39. Under EU law, the exceptions to copyright have been harmonised, particularly by Article 5 of Directive 2001/29. It is true that those exceptions are optional; strictly speaking, Member States are not required to include them in their domestic law. However, in my view, rather than an actual choice as to whether or not to include those exceptions, this is a means by which the EU legislature gives Member States greater flexibility in their implementation. Copyright existed in Member States' legal systems long before its harmonisation at EU level by Directive 2001/29. That was indeed the reason for such harmonisation. (18) Nonetheless, the EU legislature clearly did not want to overhaul the different traditions and the ways of wording the exceptions which have developed in national legal systems. That in no way alters the fact that most of the exceptions laid down in Article 5 of Directive 2001/29 exist, in one form or another, in all the domestic copyright laws of the Member States. (19)

40. In the normal scheme of things, those internal limits on copyright make it possible to reconcile, in a satisfactory way overall, fundamental rights and freedoms with the exclusive rights of authors as regards the use of their works. The fact remains that, notwithstanding the existence of such limits, the application of copyright law, like any other body of law, remains subject to the requirement of respect for fundamental rights, respect which may be reviewed by the courts. If it became apparent that there were systemic shortcomings in the protection of a fundamental right vis-à-vis copyright, the validity of copyright would be affected and the question of legislative amendment would then arise. However, there may be exceptional cases where copyright, which, in other circumstances, could quite legitimately enjoy legal and judicial protection, must yield to an overriding interest relating to the implementation of a fundamental right or freedom.

41. The European Court of Human Rights (*'the ECtHR'*) recently drew attention to the existence of such an external limitation on copyright. In two rulings, (20) the ECtHR considered that the actions of a State party to the ECHR in connection with copyright protection could be reviewed from the standpoint of its compatibility with freedom of expression, enshrined in Article 10 of the ECHR. In neither case did the ECtHR find that freedom of expression had been infringed. In the light of the nature of the communications at issue (which pursued a commercial aim) and the rights of others at stake (the copyright holders), the ECtHR held that the defendants (namely the States signatories to the ECHR) enjoyed a wide margin of appreciation as regards the necessity, in a democratic society, of the restrictions on that freedom entailed by copyright.

42. However, in circumstances that differ from those at issue in the two abovementioned cases, the outcome of the analysis might be different, particularly where, as in this case, the communication of the allegedly protected work contributed to a public interest debate and the work consists of official documents of a State of an informative nature. I therefore propose that the Court follow a similar line of reasoning to that of the ECtHR.

43. That proposal is all the more justified by the fact that under Article 52(3) of the Charter, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights are to be the same as those laid down by the ECHR. Article 11 of the Charter corresponds to Article 10 of the ECHR. (21) It is true, as the national court points out in its request, that the Court has held that since the ECHR has not been formally incorporated into EU law, the validity of the provisions of EU law and of national law must be assessed solely in the light of the Charter. (22) But that does not mean that the ECHR, as interpreted by the ECtHR, is not to be taken into account in the interpretation of the Charter for the purpose of that assessment. (23) If that were the case, Article 52(3) of the Charter would be completely meaningless.

Protection of copyright over military reports in the light of Article 11 of the Charter

44. Article 51(1) of the Charter states that its provisions are addressed, among others, to the Member States when they are implementing EU law. It is clear that the application by the German courts in the main proceedings of the provisions transposing Directive 2001/29 contributes to the implementation of EU law. That application is therefore subject to the provisions of the Charter, including the obligation to respect, in the context of such implementation, Funke Medien's freedom of expression within the meaning of Article 11. Several aspects of this case lead to the conclusion that the protection of the documents at issue by copyright would be contrary to that article of the Charter.

Possible limitations of freedom of expression

45. To my mind, there is no doubt that the publication of confidential documents such as those at issue in the main proceedings falls within the scope of freedom of

expression. (24) It is also clear in my view that the copyright relied on by the Federal Republic of Germany restricts freedom of expression. (25) Those points require no further explanation. Such limitations of that freedom are not prohibited in absolute terms. Both the ECHR, in Article 10(2), and the Charter, in Article 52(1), list the grounds on which limitations of freedom of expression may be justified and the requirements that such limitations must meet.

46. I do not intend to enter into the debate concerning whether the grounds for restriction of the ECHR take precedence over those of the Charter in cases involving freedoms enjoying similar protection under both instruments. (26) I suggest instead that they be treated on a par, which I think best reflects the premiss set out in Article 52(3) of the Charter, according to which the corresponding rights in those two instruments must have the same meaning and scope.

47. So far as concerns the restriction of freedom of expression in a situation such as that in the main proceedings, the most obvious ground appears to me to be to prevent the disclosure of confidential information in connection with national security requirements. Those two grounds for limiting freedom of expression are expressly set out in Article 10(2) of the ECHR.

48. The Charter is not as explicit: Article 52(1) mentions only in general terms *'objectives of general interest recognised by the Union'*. However, according to the explanatory note on Article 52 of the Charter, those interests cover, in addition to the objectives of the European Union listed in Article 3 TEU, the interests of Member States which the European Union is bound to respect. In particular, that note specifically refers to Article 346 TFEU, under which *'no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security'*. Safeguarding national security also appears as one of the *'essential State functions'* that the European Union is required to respect under Article 4(2) TEU.

49. It follows that the protection of the confidentiality of certain information for the purpose of safeguarding national security is a legitimate ground for restricting freedom of expression under both the ECHR and the Charter. However, the main proceedings are not concerned with the protection of the documents at issue as confidential information, but as the subject matter of copyright. According to the clear statement made by the German Government's representative at the hearing, while the sole objective of the action against Funke Medien is to protect the confidential information contained in those documents, the Federal Republic of Germany considered that the threat to the security of the State arising from their disclosure was not such as to justify interfering with freedom of expression and freedom of the media. Thus, instead of bringing criminal proceedings for disclosure of confidential information, that Member State had recourse to an *'unusual'* legal remedy, namely the protection of its copyright over those documents.

50. It is therefore necessary to examine whether the protection of that copyright may justify a restriction on freedom of expression in the light of Article 10 of the ECHR and Article 11 of the Charter.

Copyright of the State over military reports as a ground justifying a restriction of freedom of expression 51. The exercise of copyright, as an individual right, does not as a matter of course fall within the scope of any public interest. A holder who invokes copyright is acting not in the public interest, but in his own private interest. Therefore, although copyright may justify limiting fundamental rights such as freedom of expression, it does so with a view to protecting the rights of others, a ground for limitation laid down in both Article 10(2) of the ECHR and Article 52(1) of the Charter. (27)

52. Those rights of others include, in the first place, the rights and freedoms guaranteed by the ECHR and the Charter. Where different fundamental rights clash, a balance must be struck between them. (28) Copyright, as an intellectual property right, is comparable for the purpose of that protection to the right to property guaranteed under Article 1 of the Additional Protocol to the ECHR and Article 17 of the Charter. (29) The Court has consistently recognised the need to ensure that a fair balance is struck between intellectual property rights, including copyright, and other fundamental rights guaranteed by the Charter. (30)

53. However, I do not think that that reasoning can be applied in the specific situation where, as in this case, the copyright holder is a Member State. The Member States and the States signatories to the ECHR are not beneficiaries of fundamental rights, but parties under fundamental rights obligations. They are required to respect and protect those rights not for themselves, but for individuals. Indeed, against whom would Member States be protecting their fundamental rights? Obviously not against themselves, which leaves only individuals. That would be at odds with the very rationale behind fundamental rights, as conceived since the Declaration of the Rights of Man and of the Citizen of 1789, which is to protect individuals against the State, not the State against individuals.

54. Of course, I am not suggesting that the State is not entitled to the civil right of ownership, including the right to intellectual property. However, the State cannot rely on the fundamental right to property as a means of restricting another fundamental right guaranteed by the ECHR or the Charter.

55. Furthermore, even if it were to be considered that the rights of others, mentioned in Article 10(2) of the ECHR and Article 52(1) of the Charter as a possible justification for limiting freedom of expression, include not only the rights protected by those instruments but also other rights, then for the same reasons as those set out above, I think that that justification cannot be based on the rights of the State itself. If the State were able to invoke its individual rights, other than the public interest, in order to limit fundamental rights, the result would be the destruction of those fundamental rights.

56. Accordingly, the only ground on which a Member State may rely to justify the limitation of a fundamental right guaranteed by the ECHR or the Charter is the public interest. As mentioned above, in the present case, the Federal Republic of Germany considered that the restriction of freedom of expression and freedom of the media which would flow from a prosecution against Funke Medien for disclosure of the documents at issue in the main proceedings would be disproportionate in relation to the public interest in protecting the confidentiality of those documents. In such a situation, the Member State cannot invoke its copyright instead of the public interest.

57. Even if that barrier were to be overcome, for example by considering that the protection of the State's copyright is in the public interest, which in my opinion is doubtful, both Article 10(2) of the ECHR and Article 52(1) of the Charter require limitations on freedom of expression to be necessary. (31) That requirement is not met here.

Necessity of protecting copyright over military reports 58. Copyright has two main objectives. The first is to protect the personal relationship between the author and his work as his intellectual creation and therefore, in a sense, an emanation of his personality. This primarily involves the area of moral rights. The second objective is to enable authors to exploit their works economically and thus earn an income from their creative endeavours. This involves the area of property rights, subject to harmonisation at EU level. In order for a restriction on freedom of expression flowing from copyright to be characterised as necessary, it must meet at least one of those two objectives. However, it seems to me that the protection by copyright of military reports such as those at issue in the main proceedings meets neither.

59. First, as regards the protection of the relationship between the author and his work, it must be observed that although the Federal Republic of Germany may be, through a sort of legal fiction, the holder of the copyright over the documents at issue, it is certainly not, for obvious reasons, the author. The real drafter or, more likely, drafters, are entirely anonymous, since the documents at issue were drawn up continuously and, like any official document, had to be checked by higher authorities. Those drafters prepare documents, or parts of them, within the framework not of a personal creative activity, but of their professional obligations, as civil servants or officers. (32) Strictly speaking, therefore, those documents have no real author within the meaning of that term under copyright law, with the result that there can be no question of protecting the author's link with the work.

60. It is true that, as confirmed by recital 19 of Directive 2001/29, moral rights remain outside the scope of that directive, as indeed outside the scope of EU law generally. However, the origin of and justification for copyright, in the form of both moral and property rights, lies in the special relationship between the author and his work. Thus, where there is

no author, there is no copyright, in the form of either moral or property rights.

61. Secondly, so far as concerns economic exploitation, it has been established that the sole objective of the action taken by the Federal Republic of Germany in the main proceedings was to protect the confidential nature not of the documents at issue as a whole, since a version of them had been published as UdÖs, but only of certain information deemed to be sensitive. That falls completely outside the scope of copyright. Copyright is therefore used here to pursue objectives that are entirely unrelated to it.

62. Thus, having considered that the interest in protecting the documents at issue as confidential information did not justify the resulting restriction on freedom of expression, the Federal Republic of Germany decided to achieve the same result by invoking its copyright over those documents, despite the fact that copyright pursues completely different aims and it is not even established that those documents are works for the purpose of copyright.

63. In my view, such a practice cannot be accepted.

64. The restriction on freedom of expression flowing from the protection by copyright of the documents at issue is not only not necessary in a democratic society, but would also be highly damaging. One of the most important functions of freedom of expression and its constituent element, freedom of the media, specifically mentioned in Article 11(2) of the Charter, is to enable citizens to keep a check on power, a key aspect of any democratic society. That check can be exercised, for instance, by the disclosure of certain information or certain documents the content or even the existence (or inexistence) of which the authorities would like to conceal. Some information must of course remain secret, even in a democratic society, if its disclosure poses a threat to the essential interests of the State and, in consequence, society itself. Documents must therefore be classified and protected in accordance with the procedures established for that purpose, which should be applied subject to judicial oversight. However, outside the framework of those procedures or if the State itself declines to apply them, the State cannot be allowed to invoke its copyright over any document whatsoever in order to prevent scrutiny of its actions.

Conclusions of this section

65. To summarise, the possible protection by copyright of the documents at issue in the main proceedings does not fall within the scope of the fundamental right to intellectual property and must therefore be examined only as a limitation on freedom of expression as set out in Article 11 of the Charter. That limitation is not necessary, is not genuinely in any public interest and does not meet the need to protect the rights of others as provided for in Article 52(1) of the Charter.

66. I therefore propose that if the Court decides to examine the substance of the questions referred for a preliminary ruling in this case, the answer should be that Article 11 of the Charter, read in conjunction with Article 52(1) thereof, must be interpreted as precluding

a Member State from invoking copyright under Article 2(a) and Article 3(1) of Directive 2001/29 in order to prevent the communication to the public, in the context of a debate concerning matters of public interest, of confidential documents emanating from that Member State. That interpretation does not prevent the Member State from applying, in compliance with EU law, other provisions of its domestic law, including those relating to the protection of confidential information.

Questions referred for a preliminary ruling

67. As stated in my preliminary observations, I propose that the Court reformulate the questions referred in order to conduct an assessment of the applicability of copyright, as harmonised in EU law, to the documents at issue in the main proceedings, in the light of freedom of expression. That assessment and, in consequence, the suggested approach precedes the questions referred as set out in the order for reference.

68. The first question referred concerns the leeway enjoyed by Member States in the transposition of Directive 2001/29. As the national court points out in its request, that question was submitted against the backdrop of the case-law of the Bundesverfassungsgericht (Federal Constitutional Court). According to that case-law, where Member States enjoy a degree of leeway in the application of EU law, that application must be assessed in the light of fundamental rights as set out in the German constitution, while, where no such leeway exists, the only relevant reference point is the Charter. The Bundesverfassungsgericht (Federal Constitutional Court) is said to have developed that case-law as a result of the Court's case-law. (33) However, the answer I suggest giving flows entirely from the relationship between provisions of EU law, namely Directive 2001/29 and the Charter, without it being necessary to analyse Member States' leeway.

69. By the second question referred, the national court enquires about the possibility (or the necessity) of taking account of freedom of expression for the purpose of interpreting the exceptions to copyright set out in Article 5 of Directive 2001/29. It is true that the Court recommended such taking into account in the *Deckmyn and Vrijheidsfonds* judgment (34) The situation in that case was nonetheless different from the situation here. The course of action taken in the case giving rise to the *Deckmyn and Vrijheidsfonds* judgment was based on the presumption of the applicability of the exception in question (for parody). (35) At issue was whether it was possible for that exception not to be applied, because the legitimate interests of the relevant copyright holders opposed that application. (36)

70. In the present case, the national court appears to suggest a broad interpretation, influenced by freedom of expression, of the scope and conditions for application of the exceptions that may come into play. However, my view is that in specific circumstances such as those of the main proceedings, the protection conferred by copyright must be refused,

notwithstanding the possible applicability of an exception.

71. By its third question, the national court asks the Court to consider the possibility of applying to copyright, on the ground of protecting freedom of expression, exceptions or limitations other than those laid down in Directive 2001/29. My suggested answer might appear to favour the proposition put forward in that question. There is, however, a significant difference between the approach of the national court and the approach I propose to take in this Opinion. It is one thing to give precedence to freedom of expression over copyright in a specific and very particular situation. It is quite another to introduce into the harmonised copyright system, outside the provisions of substantive EU law governing that area, exceptions and limitations which, by their nature, are intended to apply generally.

72. For those reasons, I propose that the Court should not examine the questions referred for a preliminary ruling in detail. Furthermore, since those questions have been submitted in two other cases which I have already mentioned, the Court will have the opportunity to answer them. Those other two cases concern typical situations involving the application of copyright, in which the analysis of those questions will be especially useful.

Conclusion

73. In the light of the foregoing, I propose that the Court either declare the questions referred for a preliminary ruling by the Bundesgerichtshof (Federal Court of Justice, Germany) in this case inadmissible, or give the following answer to those questions:

Article 11 of the Charter of Fundamental Rights of the European Union, read in conjunction with Article 52(1) thereof, must be interpreted as precluding a Member State from invoking copyright under Article 2(a) and Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society in order to prevent the communication to the public, in the context of a debate concerning matters of public interest, of confidential documents emanating from that Member State. That interpretation does not prevent the Member State from applying, in compliance with EU law, other provisions of its domestic law, including those relating to the protection of confidential information.

[1] Original language: French.

[2] Remarque, E.M., *Im Westen nichts Neues*, Propyläen Verlag, Berlin, 1929; English translation: Wheen, A.W., *Ballantine Books*, New York, 1987.

[3] OJ 2001 L 167, p. 10.

[4] By way of illustration, I refer to a fragment of the last UdÖ available when this Opinion was drafted, namely UdÖ No 36/18 of 5 September 2018. The first page of the document contains a schematic map of part of the world showing the countries where the Federal Armed Forces are deployed on mission. The map is

followed by a list of those missions. Thereafter, information is presented in the same order as the different missions, for example:

'Resolute Support (RS)/NATO-Einsatz in Afghanistan Train-Advise-Assist-Command (TAAC) North / Deutsches Einsatzkontingent

Die Operationsführung der afghanischen Sicherheitskräfte (Afghan National Defence and Security Forces /ANDSF) in der Nordregion konzentrierte sich im Berichtszeitraum auf die Provinz Faryab mit Schwerpunkt im Raum nördlich von Maimanah. Darüber hinaus wurden Operationen in den Provinzen Baghlan, Badakhshan, Kunduz und Takhar durchgeführt. Für den Bereich Kunduz gilt unverändert, dass das seit November 2016 gültige Sicherheitskonzept der ANDSF für das Stadtgebiet Kunduz für weitgehende Sicherheit und Stabilität sorgt.

Im Verantwortungsbereich des TAAC North kam es im Berichtszeitraum zu verschiedenen Angriffen auf Kontroll- und Sicherungsposten der ANDSF.

Deutsche Beteiligung: 1.124 Soldatinnen und Soldaten (Stand: 03.09.18).

[Resolute Support (RS)/NATO mission in Afghanistan Train-Advise-Assist-Command (TAAC) North/German contingent

The operations of the Afghan security forces in the northern region during the period under consideration were focused on the province of Faryab with emphasis on the region north of Maimanah. In addition, operations were carried out in the provinces of Baghlan, Badakhshan, Kunduz and Takhar. As regards the region of Kunduz, the concept of authenticated security of the ANDSF for the urban area of Kunduz continues to ensure security and stability since November 2016.

In the area under the responsibility of TAAC Nord, several attacks on security checkpoints of the ANDSF took place during the reference period.

German involvement: 1 124 soldiers (as of 03.09.18)].

Kosovo Force (KFOR)/NATO-Einsatz im Kosovo Keine berichtenswerten Ereignisse.

Deutsche Beteiligung: 315 Soldatinnen und Soldaten (Stand: 03.09.18).

[Kosovo Force (KFOR)/NATO mission in Kosovo

No events of interest.

German involvement: 315 soldiers (as of 03.09.18)].

... '.

[5] Vivant, M., Buguière, J.-M., *Droit d'auteur et droits voisins*, Dalloz, Paris, 2016, p. 151.

[6] The European Union is not a party to the Berne Convention but it is a party to the World Intellectual Property Organisation (WIPO) Copyright Treaty, which was adopted in Geneva on 20 December 1996 and came into force on 6 March 2002. That treaty requires its signatories to comply with Articles 1 to 12 of the Berne Convention (see Council Decision 2000/278/EC of 16 March 2000 on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, OJ 2000 L 89, p. 6). Accordingly, EU legal acts relating to copyright must be interpreted

in the light of that convention (see judgment of 7 December 2006, SGAE, C-306/05, EU:C:2006:764, paragraphs 34 and 35).

[7] Judgment of 16 July 2009, Infopaq International (C-5/08, EU:C:2009:465, paragraph 37).

[8] That is particularly true in the case of German law: Paragraph 2(2) of the UrhG provides that *'only personal intellectual creations shall be regarded as works within the meaning of this law'*. That concept is also found in the notion of originality under French copyright law (judgment of the Cour de cassation (Court of Cassation, France), full court, of 7 March 1986, Babolat v Pachot, No 83-10477, published in the Official Gazette), under Polish law (Article 1(1) of the ustawa o prawie autorskim i prawach pokrewnych (Law on copyright and related rights) of 4 February 1994) and under Spanish law (Article 10 of the Ley de Propiedad Intelectual (Law on intellectual property) of 24 April 1996). The situation is different in the copyright systems of English-speaking countries.

[9] Judgment of 16 July 2009 (C-5/08, EU:C:2009:465).

[10] Judgment of 1 December 2011, Painer (C-145/10, EU:C:2011:798, paragraphs 88 and 89).

[11] Judgment of 22 December 2010, Bezpečnostní softwarová asociace (C-393/09, EU:C:2010:816, paragraphs 49 and 50).

[12] Judgment of 1 March 2012, Football Dataco and Others (C-604/10, EU:C:2012:115, paragraph 33).

[13] The national court states only that those documents are not excluded a priori from copyright protection as official publications, under Paragraph 5(2) of the UrhG. This is self-evident, as they are confidential documents that are not therefore intended for the public. However, in order for an official document to be eligible for copyright protection, it is not sufficient for it not to be excluded from such protection under that provision. It must also satisfy the criteria governing work for the purpose of copyright. That aspect was not clarified in the main proceedings.

[14] See, in particular, judgment of 18 December 2014, Schoenimport *'Italmoda'* Mariano Previti and Others (C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraphs 31 and 39).

[15] Cases C-476/17, Pelham, and C-516/17, Spiegel Online.

[16] See, in particular, Barta, J., Markiewicz, R., Prawo autorskie, Wolters Kluwer, Warsaw, 2016, p. 635 et seq., and Vivant, M., Buguière, J.-M., Droit d'auteur et droits voisins, Dalloz, Paris, 2016, p. 519 et seq. Also see, for example, Geiger, C., Izyumenko, E., *'Copyright on the human rights' trial: redefining the boundaries of exclusivity through freedom of expression*, International Review of Intellectual Property and Competition Law, vol. 45 (2014), pp. 316 to 342, and Lucas, A., Ginsburg, J.C., *'Droit d'auteur, liberté d'expression et libre accès à l'information (étude comparée de droit américain et européen)'*, Revue internationale du droit d'auteur, vol. 249 (2016), pp. 4 to 153.

[17] See points 15 and 16 of this Opinion.

[18] See recitals 6 and 7 of Directive 2001/29.

[19] With the exception perhaps, once again, of the United Kingdom of Great Britain and Northern Ireland, where, in line with the copyright tradition of English-speaking countries, the concept of *'fair use'* has developed, which is a general limitation on copyright applied on a case-by-case basis.

[20] Judgment of the ECtHR of 10 January 2013, Ashby Donald and Others v. France (CE:ECHR:2013:0110JUD003676908), and decision of the ECtHR of 19 February 2013, Fredrik Neij and Peter Sunde Kolmisoppi v. Sweden (CE:ECHR:2013:0219DEC004039712).

[21] See the explanatory note on Article 52 of the Charter.

[22] See, respectively, judgments of 15 February 2016, N. (C-601/15 PPU, EU:C:2016:84, paragraphs 45 and 46 and the case-law cited), and of 5 April 2017, Orsi and Baldetti (C-217/15 and C-350/15, EU:C:2017:264, paragraph 15).

[23] As the Court has already found, see judgments of 5 October 2010, McB. (C-400/10 PPU, EU:C:2010:582, paragraph 53), and of 22 December 2010, DEB (C-279/09, EU:C:2010:811, paragraph 35).

[24] See, in particular, among others, judgment of the ECtHR of 19 January 2016, Görmüş and Others v. Turkey (CE:ECHR:2016:0119JUD004908507, § 32).

[25] See judgment of the ECtHR of 10 January 2013, Ashby Donald and Others v. France (CE:ECHR:2013:0110JUD003676908, § 34).

[26] A detailed analysis of that issue was conducted by Peers, S., in Peers, S., and others (ed.), The EU Charter of Fundamental Rights. A Commentary, Hart Publishing, Oxford, 2014, pp. 1515 to 1521.

[27] Specifically, the Charter speaks about *'the rights and freedoms of others'*, while the ECHR refers only to *'rights of others'*. Nonetheless, I consider these to be equivalent terms.

[28] See, to that effect, judgment of the ECtHR of 10 January 2013, Ashby Donald and Others v. France (CE:ECHR:2013:0110JUD003676908, § 40). Also see Peers, S., op.cit., p. 1475.

[29] Article 17 of the Charter even expressly mentions intellectual property in paragraph 2.

[30] For a recent example, see judgment of 15 September 2016, Mc Fadden (C-484/14, EU:C:2016:689, paragraphs 82 to 84).

[31] The ECHR adds *'in a democratic society'*, which is probably assumed in the Charter. I am not questioning here the requirement for limitations to be lawful, since copyright protection clearly flows from the law.

[32] Also see my comments on the status of those documents as a work in the section of this Opinion concerning the admissibility of the questions referred.

[33] In particular, judgment of 26 February 2013, Åkerberg Fransson (C-617/10, EU:C:2013:105, paragraph 29).

[34] Judgment of 3 September 2014 (C-201/13, EU:C:2014:2132, second subparagraph of paragraph 2 of the operative part of the judgment).

[35] '*On the assumption that the drawing at issue fulfils the essential requirements of parody ...*' (judgment of 3 September 2014, Deckmyn and Vrijheidsfonds, C-201/13, EU:C:2014:2132, third subparagraph of paragraph 2 of the operative part of the judgment).

[36] Judgment of 3 September 2014, Deckmyn and Vrijheidsfonds (C-201/13, EU:C:2014:2132, paragraphs 30 to 32).