Reports of Cases

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.

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.

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;

…'

3 OJ 2001 L 167, p. 10.

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]

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:

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]

'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).

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.

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).

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.

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).

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.

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

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

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.

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.

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).

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

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.

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.

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).

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.

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.

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

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).

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.