Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 10 January 2019[1]

Case C-516/17

Spiegel Online GmbH
v
Volker Beck

(Request for a preliminary ruling from the Bundesgerichtshof (Federal Court of Justice (Germany))

(Reference for a preliminary ruling — Copyright and related rights — Exclusive rights of reproduction and communication to the public — Flexibility in their application in national law — Exception linked to the objective of reporting current events — Reasonable opportunity to request authorisation before publication — References accessible by a hyperlink provided alongside the text — Work published in its particular form with the author's authorisation)

Introduction

1. It is impossible to overestimate the role played in a democratic society by freedom of expression in general and freedom of the media in particular. The free exchange of ideas and the scrutiny of power by society, mechanisms in which the media are essential intermediaries, are the cornerstone of such a society.

2. Freedom of expression was first recognised as a fundamental right in Article 11 of the Declaration of the Rights of Man and of the Citizen. The authors of that declaration were aware, however, that the exercise of a freedom by some may limit the freedom of others. They therefore introduced, in Article 4, the principle that 'the exercise of the natural rights of every man has no bounds other than those that ensure for the other members of society the enjoyment of these same rights'. As to who is to be the arbiter of the rules on the interaction of those freedoms, the second sentence of that article states that 'these bounds may be determined only by law'.

3. Those simple, natural principles still hold good today. The law, as the expression of the general will,[2] is there to strike balance between the various fundamental rights present to the benefit of all. The position is no different in the field of copyright, as this case perfectly illustrates.

1 Original language: French.

2 This also comes from the 1789 Declaration (Article 6).

Legal framework

International law

4. Article 9(1) of 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'), enshrines the right of authors to authorise any reproduction of their works. Article 9(2), Article 10(1) and Article 10bis(2) of the Berne Convention provide respectively:

'It shall be a matter for legislation in the countries of the Union [formed by the Signatory States of the Berne Convention] to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

…

It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

…

It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public.'

Article 1(4) of the WIPO Copyright Treaty[3] provides that the 'Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention'.

5. According to the agreed statement concerning Article 1(4) of the WIPO Copyright Treaty, 'the reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention'.[4]

3 World Intellectual Property Organisation (WIPO) Copyright Treaty, which was adopted in Geneva on 20 December 1996 and which entered into force on 6 March 2002 ('WIPO Copyright Treaty'), to which the European Union is a party by virtue of Council Decision 2000/278/CE 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).

4 Statement of the Diplomatic Conference that adopted the WIPO Copyright Treaty, annexed to that treaty (Article 25 of that treaty).

EU law

6. Article 2(a) 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[5] 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.'

7. According to Article 3(1) of that directive:

'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.'

8. Article 5(3)(c) and (d) of that same directive provides:

'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 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.'

9. Finally, according to Article 5(5) of that directive:

'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.'

5 OJ 2001 L 167, p. 10.

German law

10. Directive 2001/29 was transposed into German law by the Gesetz über Urheberrecht und verwandte Schutzrechte — Urheberrechtsgesetz (Law on copyright and relates rights) of 9 September 1965 ('the UrhG'). Paragraph 50 of the UrhG provides:

'For the purposes of the reporting of current events by broadcasting or similar technical means, in newspapers, periodicals and other printed matter or by other media essentially concerned with current events, as well as in film, the reproduction, distribution and communication to the public of works which can be seen and heard in the course of those events shall be permissible to the extent justified by the purpose of the reporting.'

11. Paragraph 51 of the UrhG provides:

'The reproduction, distribution and communication to the public of a published work for the purpose of quotation shall be permissible in so far as the extent of its use is justified by that particular purpose. The foregoing is permissible in particular where:

1. individual works are, following their publication, included in an independent scientific work for the purposes of explaining its content;

2. passages from a work are, following its publication, quoted in an independent literary work;

3. individual passages from a released musical work are quoted in an independent musical work.'

Facts, procedure and questions referred for a preliminary ruling

12. Volker Beck, the applicant at first instance and respondent in the appeal on a point of law (*Revision*) in the main proceedings ('the respondent') was a member of the Bundestag (lower house of the Federal Parliament, Germany) from 1994 to 2017. He is the author of an article concerning sensitive and controversial matters of criminal law policy. In 1988, that article was published in a collection of essays. Upon publication, the publisher amended the title of the manuscript and one of its sentences was shortened. The respondent complained about this to the publisher and demanded, unsuccessfully, that he record what had happened in a publisher's note at the time of the book's publication. Since at least 1993, the respondent has distanced himself fully from the content of that article.

13. In 2013, the manuscript of the article at issue was discovered in some archives and was put to the respondent, who was at that time a candidate in legislative elections due to take place a few days later. The respondent made the document available to a number of newspaper editors in order to prove that his manuscript had been amended in the article published in the book. He did not, however, give his consent for the media to publish the texts. He nonetheless published the two versions of the article himself on his own website, together with the following statement printed across each page: 'I hereby distance myself from this article. Volker Beck.' The pages of the article published in the book also featured the following statement: '[The publication of] this text was unauthorised and was distorted by the discretionary editing by the publisher of the heading and parts of the body of the text.'

14. Spiegel Online GmbH, defendant at first instance and appellant in the appeal on a point of law (*Revision*) in the main proceedings ('the appellant'), operates the *Spiegel Online* news portal. On 20 September 2013, it published an article in which it stated that the respondent had been misleading the public for years, inasmuch as the essential content of his manuscript had not been distorted in the 1988 publication. In addition to the article which it had published, the appellant also made available for download via hyperlinks the original versions of the manuscript and of the respondent's article as published in the book.

15. The respondent challenged the fact that the full texts of his article had been made available on the appellant's website, which he regards as constituting an infringement of his copyright. The Landgericht (Regional Court, Germany) upheld the respondent's claims. The appellant's appeal was then dismissed. It therefore lodged an appeal on a point of law (*Revision*) before the referring court.

16. It was in those circumstances that the Bundesgerichtshof (Federal Court of Justice, Germany) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do the provisions of EU law on the exceptions or limitations to [copyright] laid down in Article 5(3) of Directive 2001/29 allow any discretion in terms of implementation in national law?

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

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

(4) Is the making available to the public of copyright-protected works on the web portal of a press undertaking to be excluded from consideration as the reporting of current events not requiring permission as provided for in Article 5(3)(c), second case, of Directive 2001/29, because it was possible and reasonable for the press undertaking to obtain the author's consent before making his works available to the public?

(5) Is there no publication for quotation purposes under Article 5(3)(d) of Directive 2001/29 if quoted textual works or parts thereof are not inextricably integrated into the new text — for example, by way of insertions or footnotes — but are made available to the public on the internet by means of a link in the form of PDF files which can be downloaded independently of the new text?

(6) In determining when a work within the meaning of Article 5(3)(d) of Directive 2001/29 has already been made available lawfully to the public, should the focus be on whether that work in its specific form was published previously with the author's consent?'

17. The request for a preliminary ruling arrived at the Court on 25 August 2017. Written observations were lodged by the parties to the main proceedings, the French, Portuguese and United Kingdom Governments and the European Commission. With the exception of the Portuguese Government, the same parties were represented at the hearing held on 3 July 2018.

Analysis

18. The national court has referred six questions for a preliminary ruling relating both to the interpretation of the provisions of Directive 2001/29 and, more generally, to the discretion available to the Member States when transposing and applying those provisions and in their interaction with fundamental rights, in particular freedom of expression and the media. In this Opinion, I shall analyse those various questions, albeit in an order different from that in which they have been raised by the referring court. I shall look first at the interpretation of the provisions of secondary law and then at the more general questions relating to fundamental rights.

The first question

19. By its first question, the referring court seeks to determine the discretion available to the Member States when transposing into their national law the provisions of EU law relating to exceptions and limitations to copyright.

20. This question is similar to the fifth question referred by the same court in *Pelham and Haas*.[6] In my Opinion in that case, I propose that the answer to it should be that the Member States, while remaining free to choose the means, have an obligation to ensure the protection in their domestic law of the exclusive rights set out in Articles 2 to 4 of Directive 2001/29, since those rights may be restricted only for the purposes of applying the exceptions and limitations exhaustively provided for in Article 5 of that directive. In the interests of brevity, I shall therefore confine myself here to referring to the submissions which I devoted to this question in that Opinion.[7]

21. I should, however, like to make the following further comments on the arguments put forward by the appellant in the observations which it submitted in the present case.

22. First, the appellant submits that the discretion enjoyed by the Member States in the application of EU copyright law flows from Article 167(4) TFEU. According to that provision, the European Union 'shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures'. The appellant argues that, since copyright law forms part of cultural legislation, the Member States must enjoy broad discretion in applying that law in such a way as to ensure that account is taken of the diversity of their cultures.

23. However, Article 167 is a general provision intended to serve as guidance in relation to the action of the EU institutions in spheres relating to culture. Indeed, that article is expressly mentioned, in recital 12 of Directive 2001/29,[8] by the EU legislature, which draws from it inferences which are, it seems to me, contrary to those drawn by the appellant, namely that adequate protection must be afforded to copyright works. That said, even if the publication of articles on policy matters does fall within the scope of the concept of 'culture' within the meaning of Article 167 TFEU, that provision cannot be interpreted as allowing the Member States to derogate from the unconditional obligations arising from provisions of EU secondary law. Any other interpretation would effectively refute the EU's competence to harmonise the laws of the Member States in any culture-related sphere such as copyright, audiovisual services, the market in works of art, and so on. The same is true of the appellant's argument that the importance attached in German law to freedom of expression and the media is a cultural particularity of that Member State.

6 C-476/17, currently pending before the Court.

7 See my Opinion in *Pelham and Haas* (C-476/17, EU:C:2018:1002, points 71 to 79).

8 More specifically, the provision that preceded it, that is to say Article 151 EC.

24. While the Member States do, therefore, enjoy some discretion when it comes to applying Directive 2001/29, that discretion is limited by the obligations flowing from the binding provisions of that directive.

25. Secondly, the appellant submits that the purpose of the respondent's action in the main proceedings was to protect not the economic rights deriving from his copyright but his moral, not to say personal, rights. It is sufficient to note in this regard that those proceedings have as their subject matter measures involving the reproduction and communication to the public of a work authored by the respondent which were carried out by the appellant and which indisputably fall within the scope of Directive 2001/29. As regards the similarities between the present case and *Funke Medien NRW*,[9] I shall deal with this point below when I come to look at the relationship between copyright and fundamental rights.[10]

26. Consequently, the appellant's arguments do not detract from my findings with respect to the discretion available to the Member States when it comes to applying Directive 2001/29.

The fourth question

27. By its fourth question, the referring court asks, in essence, whether the exception for the reporting of current events which is provided for in Article 5(3)(c) of Directive 2001/29 may be limited in domestic law to cases in which the user of a work could not reasonably have been expected to seek the authorisation of the author of that work. According to the information contained in the request for a preliminary ruling, after all, such a limitation of that exception follows, in German law, from the case-law of the referring court.

28. To my mind, that limitation of the exception to copyright is not such as to pose a problem from the point of view of its conformity with the aforementioned provision of Directive 2001/29. The *ratio legis* behind that exception, after all, flows from the fact that it is sometimes extremely difficult, not to say impossible, to report current events without reproducing and communicating to the public a copyright-protected work. This is the case, in particular, in two types of situation. The first situation is where the work in question may itself form the subject of the event, for example where the event in question is the opening of an exhibition of works of art or a concert. The reporting of such an event, and, therefore, the information provided to the public on the event, would be seriously impoverished if it were not possible to communicate at least extracts from the works featured in the event being reported. The second situation is where the work may be seen or heard fortuitously during the event. The example often given is the music accompanying an official ceremony. In such situations, there is justification for granting the reporter the right to reproduce and communicate the work freely given that, since this is a current event, it would be unreasonable, if only on account of lack of time, to require the reporter to seek authorisation from the author of the work in question. What is more, the latter, in exercising his exclusive right, might very well refuse to give his authorisation, which would call into question the public's right to be informed about the event in question.

29. However, as Article 5(3)(c) of Directive 2001/29 explicitly requires, the reporting exception applies 'to the extent justified by the informatory purpose'. To my mind, that limitation attaches not only to the extent of the reproduction and communication authorised but also to the situations in which the exception is applicable, which is to say those in which the reporter could not reasonably have been required to seek authorisation from the author of the work reproduced and communicated in the course of that report. As I see it, therefore, a limitation of the exception in question such as that provided for in German law is not only not contrary to the relevant provision of Directive 2001/29 but is also inherent in the nature and objective of that exception.

9 C-469/17, currently pending before the Court.

10 See in particular points 69 and 70 of this Opinion.

30. However, the reason why that exception is not, in my opinion, applicable in cases such as that in the present case lies elsewhere.

31. Article 5(3)(c) of Directive 2001/29 reproduces the content of Article 10bis of the Berne Convention.[11] The second part of Article 5(3)(c) of Directive 2001/29 reproduces the content of Article 10bis(2) of the Berne Convention.[12] It must therefore be interpreted in accordance with that provision of the Berne Convention, inasmuch as the European Union has an obligation to comply with that convention, as the Court has previously held.[13]

32. Now, Article 10bis(2) of the Berne Convention is much more precise in its wording than the analysed provision of Directive 2001/29.

33. After all, the convention provision is directed only at cases involving the reporting of current events by acoustic and visual transmission (photography, radio, television, cinematography). It is therefore permitted, to the extent justified by the informatory purpose, to reproduce works *seen or heard* in the course of the events being reported in this way.[14]

34. Contrary to the proposition put forward by the referring court, I take the view that the aforementioned exception, interpreted in the light of the Berne Convention, is not applicable in a situation such as that at issue in the main case. According to that court, the event at issue in the main proceedings consists in the respondent being confronted with his manuscript following its discovery in archives and his reaction to that fact. His manuscript is therefore said to have become visible in the course of that event as a result of its publication both by the appellant and by the respondent himself on his website. I do not share that view.

35. The report at issue in this case is presented in the form of a written text, that is to say a system for transcribing language in the form of graphic symbols. While the perception of a text is usually visual, a mental process for decoding those symbols is required to make it possible to perceive the information transmitted in this way. Consequently, unlike information which is purely visual, text cannot simply be seen; it has to be read.

36. The same is true of the work reproduced in the course of that report, in this instance the respondent's article. The purpose of the reproduction and communication of that article by the appellant was not simply to illustrate the comments contained in its report but to demonstrate that the two versions of the article at issue, the manuscript and the version published in the book, were essentially identical and that, consequently, the respondent's comments had not been distorted in the version published in the book. For the purposes of that demonstration, it was not sufficient for readers of the report to see the article; they also had to read it, in both versions, failing which the objective of the reproduction[15] would not have been achieved. It is not therefore sufficient that the work used was seen or heard in the course of the current event forming the subject of the report at

11 It follows implicitly from the statement of grounds for the Proposal for Directive 2001/29 which was presented by the Commission on 21 January 1998 [COM(97) 628 final] that this was the legislature's wish. In that statement, it is observed, in particular, that the Berne Convention guarantees the right of reproduction for authors, that, according to the agreed statement in Article 1(4) of the WIPO Copyright Treaty, that right is fully applicable in the digital environment, and that the exceptions and limitations to that right of reproduction must be compatible with the standard of protection established by that convention (see the statement of grounds for the Commission's proposal, pp. 14-15). See also the first sentence of recital 44 of Directive 2001/29.

12 The first part of Article 5(3)(c) of Directive 2001/29 reproduces Article 10bis(1) of the Berne Convention, which concerns the reproduction of articles on current topics and broadcasts of the same character. That exception is not at issue in the present case.

13 See, most recently, judgment of 13 November 2018, *Levola Hengelo* (C-310/17, EU:C:2018:899, paragraph 38).

14 That clarification, to the effect that the works in question must be seen or heard in the course of the event, is also present in Paragraph 50 of the UrhG, which incorporates the exception for reporting current events into German law.

15 That is to say, the informatory purpose to use the expression contained in Article 5(3)(c) of Directive 2001/29 and Article 10bis(2) of the Berne Convention.

issue. A supplementary analysis by the reader of that report was necessary in the present case. Such a supplementary analysis, however, exceeds the framework of the exception for the reporting of current events provided for in Article 5(3)(c) of Directive 2001/29, as interpreted in the light of Article 10[bis](2) of the Berne Convention.

37. I therefore propose that the answer to the fourth question referred for a preliminary ruling should be that Article 5(3)(c) of Directive 2001/29 must be interpreted as meaning that the use of a literary work in a report on current events does not fall within the scope of the exception provided for in that article where the purpose behind its use makes it necessary to read all or part of that work.

38. I should say here and now that that interpretation does not detract from the right of the public to receive the information contained in the report in question. After all, if such a use is regarded as an unlawful use under the aforementioned provision, it may be regarded as a quotation, for which an exception to the exclusive right of the author is provided in Article 5(3)(d) of Directive 2001/29. This consideration brings me to the fifth and sixth questions.

The fifth question

39. By its fifth question, the referring court asks, in essence, whether Article 5(3)(d) of Directive 2001/29 must be interpreted as meaning that making a copyright-protected work available to the public on the internet as a PDF file in which there is a hyperlink to a press article but which can be consulted independently falls within the scope of the exception for quotations contained in that provision.

40. In this case, after all, the respondent's article was not indissociably inserted into the article published by the appellant on its website but was made available on that site as an independent file, the appellant's article being accessible by hyperlinks. It is this unconventional form of quotation which has prompted the referring court's doubts.

41. The exception for quotations is one of the most traditional exceptions to copyright.[16] It has long been regarded as applying only to literary works.[17] In works of this type, quotations are traditionally signalled by typographical means: inverted commas, italics, a different typeface from that of the main text, footnotes and so on.

42. At the present time, it does not seem inconceivable that [the exception for] quotations may also apply to other categories of work, in particular musical and cinematographic works, as well as works of visual art.[18] In these cases, the methods for incorporating quotations into the work making them and for identifying them obviously have to be adapted.

43. The same applies, in my opinion, to the incorporation of quotations into literary works. Modern technologies, in particular the internet, allow texts to be connected to each other in different ways, for example by hyperlink. There must of course continue to be a close link between the quotation and the work making it. Since webpage architecture can vary significantly, a case-by-case analysis would

16 As early as 1812, Charles Nodier observed in *Questions de littérature légale* that 'de tous les emprunts qu'on peut faire à un auteur, il n'y en a certainement point de plus excusable que la citation […]'. (Quotation taken from: Pollaud-Dulian, F., *Le Droit d'auteur*, Economica, Paris, 2014, p. 852).

17 Article 10 of the Berne Convention, in the version contained in the Brussels Act, 1948, provided: 'It shall be permissible in all the countries of the Union to make short quotations from newspaper articles and periodicals, as well as to include them in press summaries'.

18 The Court appears to have tacitly accepted this in the case of photographic works (see judgment of 1 December 2011, *Painer*, C-145/10, EU:C:2011:798, paragraphs 122 and 123).

probably be necessary. The 'framing' technique, for example, allows content to be inserted in such a way as to give the webpage user the impression that the content in question appears directly on that page, even though, technically, it is a hyperlink. Nonetheless, I do not think there is any need for quotations made by way of hyperlink to be excluded from the outset.[19]

44. To my mind, however, the issue in the present case arises from the particular way in which the appellant went about reproducing and making available the respondent's article. According to the information provided by the referring court, that article was published on the appellant's website, in its entirety, in the form of PDF files which could be consulted and downloaded independently of the main text describing the event in question. The hyperlinks to those files appeared not only on the page containing the main text but also on appellant's homepage. As I see it, the making available of such information (and the reproduction that necessarily preceded it) exceeds the limits of what is permitted in the context of the exception for quotations.

45. As regards whether it is possible to quote an entire work, academic legal opinion appears to be divided.[20] The wording of Article 5(3)(d) of Directive 2001/29 does not specify the extent to which quotations are authorised. The Court appears to have accepted the full quotation of a photographic work,[21] even though it describes the quotation in question as 'reproduction of extracts' from a work.[22] In the Berne Convention, the original restrictive formulation 'short quotations'[23] was abandoned and replaced with the general requirement that quotations should be used 'to the extent justified by the purpose'. A similar wording was adopted in Article 5(3)(d) of Directive 2001/29. It would therefore seem to be permissible to quote a work in its entirety, provided that this is justified by the purpose behind it.

46. The point on which academic legal opinion is unanimous, on the other hand, is that the quotation must not compete with the original work by removing the need for the user to refer to the latter.[24] Such a quotation, after all, by substituting itself for the original work, would provide a means of circumventing the author's exclusive rights over his work by divesting them of all substance. The author of a work quoted in this way would therefore be deprived of most of the rights held by him in his capacity as such, while the author of the work making the quotation, on the other hand, would be able to exercise those rights in his place by virtue of his own work.

47. In my opinion, that is exactly what happens in a situation where a literary work, a genre in which the key element to perception of the work is not its form but its content, is made available to the public on a website in the form of an independently accessible and downloadable file. Such a file may be formally described as a quotation from which there is a hyperlink to the text written by the author of the quotation. Nonetheless, that file is in effect operated independently of the author's text and can be used independently by users of the website hosted by the author of the quotation, inasmuch as it gives them unauthorised access to the original work and, in so doing, removes the need for them to have recourse to the original work.

19 I am speaking here, of course, of links to content made available by the person benefiting from the exception for quotations. Links to others' webpages on which copyright-protected items are lawfully made available do not constitute acts of reproduction or communication to the public and do not therefore require derogation from the exclusive rights (see judgment of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, operative part).

20 See, inter alia, Barta, J. and Markiewicz, R., *Prawo autorskie*, Wolters Kluwer, Warsaw, 2016, pp. 236-237; Pollaud-Dulian, F., *Le droit d'auteur*, Economica, Paris, 2014, p. 855; and Stanisławska-Kloc, S., 'Zasady wykorzystywania cudzych utworów: prawo autorskie i dobre obyczaje (etyka cytatu)', *Diametros*, No 19/2009, pp. 160-184, in particular p. 168.

21 Judgment of 1 December 2011, *Painer* (C-145/10, EU:C:2011:798, paragraphs 122 and 123). See also the Opinion of Advocate General Trstenjak in that case (C-145/10, EU:C:2011:239, point 212).

22 Judgment of 1 December 2011, *Painer* (C-145/10, EU:C:2011:798, paragraph 135).

23 See footnote 17 to this Opinion.

24 See, in particular, Barta, J. and Markiewicz, R., *Prawo autorskie*, Wolters Kluwer, Warsaw, 2016, p. 239; Pollaud-Dulian, F., *Le Droit d'auteur*, Economica, Paris, 2014, p. 851; Preussner-Zamorska, J. and Marcinkowska, J., in Barta, J. (ed.), *Prawo autorskie*, C.H.Beck, Warsaw, 2013, p. 565; and Vivant, M. and Bruguière, J.-M., *Droit d'auteur et droits voisins*, Dalloz, Paris, 2016, p. 572.

48. I therefore take the view that the exception for quotations may justify uses of the works of others to different extents and by different technical means. However, the combination of the extent of use and the technical means employed may mean that the limits of that exception are breached. In particular, the exception for quotations cannot cover situations in which a work, without the author's authorisation, is made available to the public on a website, in its entirety, in the form of an independently accessible and downloadable file.

49. Contrary to what the referring court indicated in the order for reference, I take the view that what is at issue here is not the assessment of the actual risk of independent exploitation of the work quoted, but the definition of the very concept of quotation.[25] In the case of literary works at the very least, any act of making the work available in its entirety on the internet in the form of an independent file removes the need for readers to have recourse to the original work and therefore exceeds the limits of that exception, there being no need to analyse the actual risk of its subsequent exploitation.

50. Allowing a quotation that could be substituted for the original work would also be contrary to the requirements of the 'triple test' contained both in Article 9(2) of the Berne Convention[26] and in Article 5(5) of Directive 2001/29, according to which the exceptions to copyright must not be prejudicial to the normal exploitation of the work or to the legitimate interests of the author, those conditions being cumulative. A quotation which removes the need for the user to have recourse to the original work by substituting itself for the latter is necessarily prejudicial to its normal exploitation.

51. That conclusion is not called into question by the appellant's assertion that the respondent did not intend to exploit the article at issue economically, his opposition to its communication to the public being motivated only by the concern to protect his personal interests. That conclusion, after all, has to do not only with the application of the exception for quotations to the case in the main proceedings but also with the normative limits of that exception in EU law. Those limits are themselves independent of the issue as to whether, in a particular case, the author exploits his work or intends to do so. The fact that the use of a work, in benefiting from the aforementioned exception, is potentially prejudicial to its exploitation is sufficient to render the contested interpretation of the exception contrary to the triple test as provided for in Article 5(5) of Directive 2001/29.

52. Consequently, I propose that the answer to the fifth question referred for a preliminary ruling should be that Article 5(3)(d) of Directive 2001/29 must be interpreted as meaning that the exception for quotations provided for in that provision does not cover situations in which a work, without the authorisation of the author, is made available to the public on a website, in its entirety, in the form of an independently accessible and downloadable file which removes the need for users to have recourse to the original work.

The sixth question

53. By its sixth question, the referring court asks, in essence, what interpretation is to be given, in the circumstances of this case, to the condition contained in Article 5(3)(d) of Directive 2001/29 to the effect that a quotation may relate only to a work which has already been lawfully made available to the public.

25 Since this concept must be interpreted as an independent concept of EU law (see to this effect judgment of 3 September 2014, *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, paragraphs 14 to 17).

26 And reproduced in Article 10 of the WIPO Copyright Treaty.

54. Given that my proposed answer to the fifth question has the effect of ruling out the application of that exception to the present case, the sixth question becomes hypothetical. I shall, however, make a number of comments in this regard in the event that the Court does not share my view on the fifth question.

55. The requirement that a quotation must relate only to works already lawfully made available to the public is traditionally recognised in copyright law and can be found in particular in Article 10(1) of the Berne Convention. The purpose of that requirement is to protect the author's moral rights, in particular the right of disclosure, whereby it is for the author to decide when his work is first communicated or made available to the public. The work may be made available for the first time either with the author's consent or under a statutory licence. The Court also appears to have tacitly accepted disclosure in the context of an exception, namely that provided for in Article 5(3)(e) of Directive 2001/29.[27] This approach does not seem self-evident to me, since the exceptions provided for in Article 5(1) to (3) of Directive 2001/29 derogate only from the economic rights of authors and should not in principle adversely affect their moral rights. In any event, the work obviously cannot be made available to the public for the first time as a result of the quotation itself.

56. As regards the respondent's article that is at issue in the main proceedings, it follows from the information contained in the request for a preliminary ruling that it was published in one version in the book which appeared in 1988 and then in both versions on the respondent's website following the discovery of the manuscript in the archives. It would therefore seem that, at the time when it was published on the appellant's website, that article had already been lawfully made available to the public. It would be for the referring court to verify that this is the case.

57. The only issue might be the fact that the publication in the book is alleged to have distorted the respondent's thinking, whereas the publication on his own website came with a statement by which he distanced himself from his article but which was not reproduced by the appellant. It may therefore be that this constitutes an infringement of the respondent's moral rights, in particular his right to respect for his work. However, since moral rights are not covered by the provisions of Directive 2001/29, the assessment of this issue falls squarely within the remit of the national courts and the national laws of the Member States.

58. In the event that the Court does not endorse my proposed answer to the fifth question, I propose that the answer to the sixth question referred for a preliminary ruling should be that Article 5(3)(d) of Directive 2001/29 must be interpreted as meaning that the work forming the subject of the quotation must have already been made available to the public either with the author's consent or under a statutory licence, this being a matter for the national courts to verify.

The second and third questions

59. It follows from the answers I have proposed should be given to the fourth and fifth questions that the use of a work in a way such as that in which the appellant used the respondent's article at issue in the main proceedings is not covered by the exceptions which the referring court regards as applying to the exclusive rights enjoyed by the author, which is to say those provided for in Article 5(3)(c) and (d) of Directive 2001/29. The referring court also wishes to ascertain, however, whether the use of the article in this way might be justified on grounds relating to respect for the appellant's fundamental rights, in particular its freedom of expression, guaranteed under Article 11(1) of the Charter, and the freedom of the media, referred to in paragraph 2 of that article. This forms the subject of the second and third questions, which I propose should be analysed together.

27 Use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings. See judgment of 1 December 2011, *Painer* (C-145/10, EU:C:2011:798, paragraphs 143 and 144).

60. By its second and third questions, the referring court asks, in essence, whether freedom of expression and the freedom of the media constitute a limitation of, or warrant an exception to or an infringement of, the author's exclusive right to authorise or prohibit the reproduction and communication to the public of his work in the event that the latter is published by a press organisation in the course of a debate relating to matters of public interest.

61. These questions are identical to the second and third questions referred for a preliminary ruling by the same court in *Funke Medien NRW*[28] and are also similar, in essence, to the sixth question referred for a preliminary ruling by that same court in *Pelham and Haas*.[29]

62. In my Opinion in *Pelham and Haas*, I proposed that the answer should, in essence, be that, since copyright law already contains limits and exceptions intended to reconcile authors' exclusive rights with fundamental rights, in particular freedom of expression, it is usually appropriate to respect the choices made by the legislature in this regard. After all, those choices are based on a process of weighing up the fundamental rights of the users of works against the rights of the authors and other rightholders, which are also protected as a fundamental right, namely the right to property, enshrined in Article 17 of the Charter, paragraph 2 of which expressly mentions intellectual property. That process of weighing up the respective rights concerned is the prerogative of the legislature, the judiciary being required to intervene only exceptionally, in the event of an infringement of the essential content of a fundamental right.[30]

63. I would add that the idea, mooted in the third question, of supplementing EU copyright law, by recourse to the courts, with exceptions not provided for in Article 5 of Directive 2001/29 but justified on grounds relating to freedom of expression would, in my view, carry with it the risk of calling into question the effectiveness of that law and the harmonisation which it is intended to secure. After all, such an option would be tantamount to introducing into EU law a kind of 'fair use clause', inasmuch as any use of works which is in breach of copyright can be said to be based in one way or another on freedom of expression.[31] This would make the protection actually afforded to authors' rights dependent on how sensitive the courts in each Member State are to freedom of expression, and would in the process turn any attempt at harmonisation into wishful thinking.[32]

64. In my view, that reasoning is fully applicable to this case.

65. I have already made mention, in the introduction to this Opinion, of the importance of freedom of expression and the freedom of the media in a democratic society, so I shall not reiterate the point here. Those freedoms, however, like all fundamental rights, are not absolute or unlimited, as is clear from Article 52(1) of the Charter and Article 10(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), which attach limitations to fundamental rights and lay down the conditions governing the application of those limitations. Copyright may be one of those legitimate limitations on freedom of expression[33] and that freedom does not, in principle, have primacy over copyright beyond the limitations and exceptions for which copyright law itself provides.

28 C-469/17, currently pending before the Court.

29 C-476/17, currently pending before the Court. It is true that this case concerns the freedom of the arts, enshrined in Article 13 of the Charter. However, that freedom is simply an incarnation of freedom of expression.

30 See my Opinion in *Pelham and Haas* (C-476/17, EU:C:2018:1002, points 90 to 99).

31 According to the European Court of Human Rights, freedom of expression encompasses, for example, the sharing of files in the context of peer-to-peer networks (see ECtHR, 19 February 2013, *Neij and Sunde Kolmisoppi v. Sweden*, CE:ECHR:2013:0219DEC004039712).

32 This is the expression used by A. Lucas in Lucas, A. and 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. 4-153, at p. 25.

33 See ECtHR, 10 January 2013, *Ashby Donald and Others v. France* (CE:ECHR:2013:0110JUD003676908, § 36).

66. The answer to the appellant's argument that, for the purposes of freedom of expression and the media, it is crucial to know who controls the information should therefore be that, where the information at issue comprises a work protected by copyright, it is the author who controls its disclosure and dissemination, subject to the abovementioned limitations and exceptions.

67. It is true that the situation in the dispute in the main proceedings is a special case inasmuch as the author of the work in question is a politician, the work itself expresses his views on a subject of public interest and the appellant's contested communication of that work to the public took place in the course of the debate preceding legislative elections. It is therefore legitimate to ask whether the situation at issue in the present case is similar to that in *Funke Medien NRW*,[34] in which I proposed the view that the German State's copyright did not justify the infringement of freedom of expression to which it gave rise.

68. It is my opinion, however, that the circumstances of the present case do not warrant a similar finding.

69. First, the special feature of *Funke Medien NRW*[35] lies in the fact that the work in question comprises confidential periodic military reports which are of a purely factual nature[36] and that the German State, which has the copyright in those reports, decided to replace the protection enjoyed by those documents as confidential information with protection under copyright. As a State, Germany cannot rely on a fundamental right in support of its copyright, fundamental rights being the exclusive preserve of individuals.

70. In the present case, the nature of the article in question as a work within the meaning of copyright law is not called into question and the copyright owner is a natural person. Unlike a State, a natural person does not have at his disposal instruments such as the ability to classify a document as confidential and thus restrict legal access to it. For a natural person, the principal, if not the only, means of protecting his intellectual creation is copyright. As a natural person, moreover, the author benefits from the fundamental right to property, as well as from other fundamental rights protected in the same way as the freedom of expression enjoyed by the potential users of his work. The limitation of that freedom of expression, which arises from the exclusive rights held by the author in question, is therefore legitimate in the sense that it flows from the protection of another fundamental right. Consequently, those various fundamental rights must be weighed up against each other, a process which, in principle, was carried out by the legislature in the context of the provisions governing copyright.

71. Secondly, it is true that the respondent, as an elected official, is subject to particularly strict requirements in connection with the scrutiny of his public activities, particularly by the media. In certain circumstances, that scrutiny might justify the communication of the respondent's article to the public without his authorisation, if, for example, he were trying to conceal its contents.[37]

34 C-469/17, currently pending before the Court.

35 C-469/17, currently pending before the Court.

36 Which have not been shown to have benefited from copyright protection (see my Opinion in *Funke Medien NRW*, C-469/17, EU:C:2018:870, point 20).

37 Often cited as an example of a situation where the needs of public debate take precedence over copyright is the decision of the Gerechtshof Den Haag (Court of Appeal, The Hague, Netherlands) of 4 September 2003 in the case concerning the publication of documents from the Church of Scientology (NL:GHSGR:2003:AI5638) (see the observations on that judgment formulated by Vivant, M., *Propriétés intellectuelles*, No 12, p. 834).

72. In this instance, however, the respondent acted with full transparency by publishing the two versions of his article himself on his website and thus enabling every individual to form his own opinion of the significance of the discrepancies between those two versions. What is more, that publication on the respondent's website made the appellant's task easier, inasmuch as it could have achieved its objective of providing information by means less invasive of copyright, in particular by citing the relevant passages from the two versions of the respondent's article or by creating a hyperlink to his website.

73. As regards the appellant's argument that the fact that the author distanced himself from his article by affixing a statement to the two texts published on his website prevented readers from forming an objective perception, it need only be observed that the author is at liberty to distance himself from his work. I do not think that that distancing measure, which amounts to no more than additional information, prevented readers from objectively analysing the two versions of the article in question. If readers are sufficiently informed to compare the two versions of the text, they are also capable of judging the sincerity of such a distancing measure.

74. Neither am I convinced by the appellant's argument that a hyperlink to the respondent's website is not sufficient because such a link is necessarily dependent on the target page content. Furthermore, since the appellant is in possession of the respondent's article, it would have been perfectly able to respond if the respondent had removed the article in question from his website. The situation from the point of view of freedom of expression would then have been different. This was not the case, however.

75. Thirdly and finally, my conclusion is not called into question by the appellant's argument that, in relying on his right to reproduce his article and communicate it to the public, the respondent's objective was in fact not to defend the economic rights flowing from his copyright ownership but to protect his personal rights, including those not deriving from his status as author of that article. Those rights would not fall within the scope either of Directive 2001/29 or of EU law in general.

76. In so far as the appellant seeks to rely on an exception to copyright, it is to be noted, on the one hand, that the enjoyment of that right is not conditional upon the actual exploitation of the work by its author. Copyrights, and in particular economic rights, guarantee for the author not only the unimpeded exploitation of his work but also protection against its exploitation by third parties if such exploitation is not authorised by the author. In making the respondent's article available to the public on its website, the appellant performed an act of exploitation of that article within the meaning of copyright law.

77. Furthermore, the moral rights flowing from copyright, although they remain outside the scope of the harmonisation carried out by Directive 2001/29,[38] must be taken into account in the interpretation of the provisions of that directive where the application of those provisions may adversely affect those rights. Directive 2001/29 carries out only a partial harmonisation of copyright. This means that it applies neither out of context nor, by virtue of its very nature as a directive, directly. Its provisions must be transposed into the domestic law of each Member State, where they interact with other provisions of that law, in particular those governing the moral rights deriving from copyright. Thus, the interpretation of an exception to an economic right enjoyed by the author cannot disregard his moral rights by allowing the work to be used freely on the sole ground that the author does not have in mind to exploit that work economically but is looking only to protect his moral rights.

38 See recital 19 of Directive 2001/29.

78. Next, if the appellant's argument is to be understood as meaning that, in the absence of any economic exploitation of the work, the respondent's copyright, which emanates from his right to property as protected under Article 17 of the Charter, does not justify the limitation of freedom of expression that arises from it, I would observe that the situation in this case is not similar to that in *Funke Medien NRW*, in which I proposed a similar line of reasoning,[39] for the reasons set out in points 69 and 70 of this Opinion.

79. Furthermore, in striking a balance between the fundamental rights of the parties to the dispute in the main proceedings, it is important to take into account not only the respondent's right to property but also any of his other fundamental rights that may be relevant. The event giving rise to the dispute in the main proceedings is the respondent being confronted with beliefs he had expressed in the past in the work at issue. By his action, the respondent sought to preserve his monopoly over the communication of that work to the public in order to be able to affix to that communication the statement that he distanced himself from the beliefs expressed in that work. Article 10 of the Charter establishes freedom of thought, which, according to the express wording of that provision, 'includes freedom to change … belief'.[40] I see no reason not to grant that right to politicians. How, then, would the respondent actually be able to exercise his freedom to change his beliefs if a third party were free to publish the article containing his earlier beliefs under his name and without the statement distancing himself from them, thereby suggesting to the public that they are his current beliefs?

80. The respondent is therefore justified in protecting his rights under the Charter[41] by recourse to the legal instruments available to him, in this instance copyright. If he does so within the limits of the law, there is no abuse and the limitation of the appellant's freedom of expression that arises from it cannot be regarded as unjustified.

81. I therefore propose that the answer to the second and third questions referred for a preliminary ruling should be that freedom of expression and of the media does not constitute a limitation to, and does not warrant an exception to or an infringement of, the author's exclusive right to authorise or prohibit the reproduction and communication to the public of his work beyond the limitations and exceptions provided for in Article 5(2) and (3) of Directive 2001/29. This is also the case in the situation where the author of the work in question holds public office and that work discloses his beliefs on matters of public interest, in so far as that work is already available to the public.

Conclusion

82. In the light of all the foregoing considerations, I propose that the Court's answers to the questions referred for a preliminary ruling by the Bundesgerichtshof (Federal Court Of Justice, Germany) should be as follows:

(1) The Member States have an obligation to ensure the protection in their domestic law of the exclusive rights set out in Articles 2 to 4 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, since those rights may be restricted only for the purposes of applying the exceptions and limitations exhaustively provided for in Article 5 of that directive. The Member States nonetheless remain free to choose the means they consider appropriate to put in place in order to comply with that obligation.

39 See my Opinion in *Funke Medien NRW* (C-469/17, EU:C:2018:870, points 58 to 61).

40 The same right is found in Article 9(1) of the ECHR, the wording of which is essentially identical to that of Article 10(1) of the Charter.

41 I shall dispense here with any discussion of the question as to whether the public notice of the change of beliefs remains within the scope of Article 10 of the Charter or falls within that of Article 11 thereof.

(2) Article 5(3)(c) of Directive 2001/29 must be interpreted as meaning that the use of a literary work in the context of a current events report does not fall within the scope of the exception provided for in that article where the purpose behind its use makes it necessary to read all or part of that work.

(3) Article 5(3)(d) of Directive 2001/29 must be interpreted as meaning that the exception for quotations provided for in that provision does not cover situations in which a work, without the authorisation of the author, is made available to the public on a website, in its entirety, in the form of an independently accessible and downloadable file, thus removing the need for the reader to have recourse to the original work.

(4) The freedom of expression and the media, established in Article 11 of the Charter of Fundamental Rights of the European Union, does not constitute a limitation to, and does not warrant an exception to or an infringement of, the author's exclusive right to authorise or prohibit the reproduction and communication to the public of his work beyond the limitations and exceptions provided for in Article 5(2) and (3) of Directive 2001/29. That is also the case in the situation where the author of the work in question holds public office and that work discloses his beliefs on matters of public interest, in so far as that work is already available to the public.