

Case C-145/10

Eva-Maria Painer

v

Standard VerlagsGmbH and Others

(Reference for a preliminary ruling
from the Handelsgericht Wien)

(Jurisdiction in civil matters — Regulation (EC) No 44/2001 — Article 6(1) — More than one defendant — Directive 93/98/EEC — Article 6 — Protection of photographs — Directive 2001/29/EC — Article 2 — Reproduction — Use of a portrait photograph as a template to establish a photo-fit — Article 5(3)(d) — Exceptions and limitations as regards quotations — Article 5(3)(e) — Exceptions and limitations for the purposes of public security — Article 5(5))

Opinion of Advocate General Trstenjak delivered on 12 April 2011 I - 12537

Judgment of the Court (Third Chamber), 1 December 2011 I - 12594

Summary of the Judgment

1. *Judicial cooperation in civil matters — Jurisdiction and the enforcement of judgments in civil and commercial matters — Regulation No 44/2001 — Special jurisdiction — More than one defendant — Jurisdiction of the court seised in relation to one of the co-defendants — Condition — Connection*
(Council Regulation No 44/2001, Art. 6(1))

2. *Approximation of laws — Copyright and related rights — Directive 93/98 — Field of application — Portrait photograph — Included — Conditions*
(Council Directive 93/98, Art. 6)
3. *Approximation of laws — Copyright and related rights — Directive 2001/29 — Harmonisation of certain aspects of copyright and related rights in the information society — Reproduction right — Exceptions and limitations*
(European Parliament and Council Directive 2001/29, Art. 5(3)(e) and (5))
4. *Approximation of laws — Copyright and related rights — Directive 2001/29 — Harmonisation of certain aspects of copyright and related rights in the information society — Making a work available to the public — Field of application*
(European Parliament and Council Directive 2001/29, Art. 5(3)(d))
5. *Approximation of laws — Copyright and related rights — Directive 2001/29 — Harmonisation of certain aspects of copyright and related rights in the information society — Reproduction right — Exceptions and limitations*
(European Parliament and Council Directive 2001/29, Art. 5(3)(d) and (5))
6. *Approximation of laws — Copyright and related rights — Directive 2001/29 — Harmonisation of certain aspects of copyright and related rights in the information society — Reproduction right — Exceptions and limitations*
(European Parliament and Council Directive 2001/29, Art. 5(3)(d) and (e), and (5))

1. On a proper construction of Article 6(1) of Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the application of that provision is not precluded simply because actions brought against several defendants for substantially identical copyright infringements rest on national legal bases which vary according to the Member

States concerned. It is for the referring court to ascertain, having regard to all the elements of the case, whether there would be a risk of irreconcilable judgments if those actions were to be determined separately.

(see para. 84, operative part 1)

2. On a proper construction of Article 6 of Directive 93/98 harmonising the term of protection of copyright and certain related rights, a portrait photograph can, in accordance with that provision, be protected by copyright if, which it is for the national court to determine in each case, that photograph is an intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that photograph. Once it has been determined that the portrait photograph in question is a work, its protection is no less than that enjoyed by any other work, including other photographic works.

(see para. 99, operative part 2)

3. Article 5(3)(e) of Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society, read in the light of Article 5(5) of that directive, must be interpreted as meaning that media, such as newspaper publishers, may not, on their own initiative, use a work protected by copyright by invoking an objective of public security. However, it is conceivable that a newspaper publisher might, in specific cases, contribute to the fulfilment of such an objective by publishing a photograph of a person for whom a search has been launched. It must be a requirement that that initiative be taken, first, within the framework of a decision or action taken by the competent national authorities to ensure public security and, second, by agreement and in coordination with those authorities, in order to avoid the risk of running counter to the measures taken by them, but it is not, however, necessary for a specific, current and express appeal to be made by the security authorities for a photograph to be published for the purposes of an investigation.

(see para. 116, operative part 3)

4. In order to ensure that Article 5(3)(d) of Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society is interpreted, in so far as possible, in the light of the applicable rules of international law, and in particular those set

forth in Article 10(1) of the Berne Convention for the Protection of Literary and Artistic Works, the expression ‘mis[e] à la disposition du public [dune oeuvre]’ (making a work available to the public), in the sense of Article 5(3)(d) of that directive must be understood as meaning the act of making that work available to the public.

reproduction of extracts from his work which has already been lawfully made available to the public, whilst ensuring that the author has the right, in principle, to have his name indicated.

(see paras 134-135, 137, operative part 4)

(see paras 126-128)

5. On a proper construction of Article 5(3)(d) of Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society, read in the light of Article 5(5) of that directive, its application is not precluded by the circumstance that a press report quoting a work or other protected subject-matter is not a literary work protected by copyright.

That provision is intended to strike a fair balance between the right to freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors. That fair balance is struck, in particular, by favouring the exercise of the users’ right to freedom of expression over the interest of the author in being able to prevent the

6. Article 5(3)(d) of Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society, read in the light of Article 5(5) of that directive, must be interpreted as meaning that its application is subject to the obligation to indicate the source, including the name of the author or performer, of the work or other protected subject-matter quoted. If, however, pursuant to Article 5(3)(e) of Directive 2001/29, that name has not been indicated, that obligation must be regarded as having been fulfilled if the source alone is indicated. That is so when photographs have been made available to the public by the competent national security authorities in the context of a criminal investigation but, at the time of that original lawful use, the author’s name was not indicated.

(see paras 143, 147, 149, operative part 5)