ECLI:EU:C:2019:625

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

29 July 2019 (*)

(Reference for a preliminary ruling — Copyright and related rights — Directive 2001/29/EC — Information Society — Harmonisation of certain aspects of copyright and related rights — Article 5(3) — Exceptions and limitations — Scope — Article 5(3)(c) and (d) — Reporting of current events — Quotations — Use of hyperlinks — Lawfully making available to the public — Charter of Fundamental Rights of the European Union — Article 11 — Freedom of expression and of information)

In Case C-516/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), by decision of 27 July 2017, received at the Court on 25 August 2017, in the proceedings

Spiegel Online GmbH

v

Volker Beck,

THE COURT (Grand Chamber),

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

Advocate General: M. Szpunar,

Registrar: M. Aleksejev, Head of Unit,

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

after considering the observations submitted on behalf of:

– Spiegel Online GmbH, by T. Feldmann, Rechtsanwalt,

– Mr Beck, by G. Toussaint, Rechtsanwalt,

– the German Government, by M Hellmann and J Techert, acting as Agents,

– the French Government, by E. de Moustier and D. Segoin, acting as Agents,

– the Portuguese Government, by L. Inez Fernandes, M. Figueiredo and T. Rendas, acting as Agents,

– the United Kingdom Government, by Z. Lavery and D. Robertson, acting as Agents, and by N. Saunders, Barrister,

– the European Commission, by H. Krämer, T. Scharf and J. Samnadda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 January 2019,

gives the following

Judgment

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

2 The request has been made in proceedings between Spiegel Online, which operates the internet news portal *Spiegel Online*, and Mr Volker Beck, who was a member of the Bundestag (Federal Parliament, Germany) at the time when the referring court decided to make a reference to the Court, concerning Spiegel Online's publication on its website of a manuscript by Mr Beck and of an article published in a book.

Legal context

European Union law

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

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

…

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

…

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

(7) The [EU] legal framework for the protection of copyright and related rights must, therefore, also be adapted and supplemented as far as is necessary for the smooth functioning of the internal market. … [D]ifferences not adversely affecting the functioning of the internal market need not be removed or prevented.

…

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

…

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

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

4 Under Article 1(1) of Directive 2001/29, 'this Directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society'.

5 Under the heading 'Reproduction right', Article 2 of that directive reads as follows:

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

(a) for authors, of their works;

…'

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

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

7 Article 5 of the directive, under the heading ‘Exceptions and limitations’, provides, in paragraph 3(c) and (d), and in paragraph 5:

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

...

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

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

…

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

German Law

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

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

9 Under the heading ‘Quotations’, Paragraph 51 of the UrhG reads as follows:

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

1. subsequent to publication individual works are included in an independent scientific work for the purpose of explaining the contents;

2. subsequent to publication passages from a work are quoted in an independent work;

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

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

10 Mr Beck had been a member of the Bundestag (Federal Parliament, Germany) since 1994 at the time when the referring court decided to make a reference to the Court. He is the author of a manuscript on criminal policy relating to sexual offences committed against minors. That manuscript was published under a pseudonym in an article to a book published in 1988. At the time of publication, the publisher changed the title of the manuscript and shortened one of its sentences. By letter of 5 May 1988, the author raised an objection with the publisher and called on him, to no avail, to indicate that fact expressly when the book was distributed. Over the following years, Mr Beck, who was criticised for the statements contained in the article, repeatedly contended that the meaning of his manuscript had been altered by the publisher of the book. Mr Beck has distanced himself from the content of that article from at least 1993.

11 In 2013, Mr Beck's manuscript was discovered in certain archives and was put to him on 17 September 2013 when he was a candidate in parliamentary elections in Germany. The following day, Mr Beck provided various newspaper editors with that manuscript in order to show that it had been amended by the publisher for the purposes of the publication of the article in question. He did not, however, give consent for the editors to publish the manuscript and article. Instead, he personally published them on his own website accompanied across each page by the statement 'I dissociate myself from this contribution. Volker Beck'. The pages of the article published in the book in question additionally bore the words: '[The publication of] this text is unauthorised and has been distorted by the publisher's editing at its discretion of the heading and body of the text'.

12 Spiegel Online operates the internet news portal *Spiegel Online*. On 20 September 2013, it published an article in which it contended that, contrary to Mr Beck's claim, the central statement appearing in his manuscript had not been altered by the publisher and therefore that he had misled the public over a number of years. In addition to the article, the original versions of the manuscript and book contribution were available for download by means of hyperlinks.

13 Mr Beck brought an action before the Landgericht (Regional Court, Germany) challenging the making available of complete texts of the manuscript and article on Spiegel Online's website, which he considers to be an infringement of copyright. That court upheld Mr Beck's action. After its appeal was dismissed, Spiegel Online brought an appeal on a point of law (*Revision*) before the referring court.

14 That court considers that the interpretation of Article 5(3)(c) and (d) of Directive 2001/29, read in the light of fundamental rights, in particular of freedom of information and of freedom of the press, is not obvious. It asks inter alia whether that provision allows any discretion for the purposes of its transposition into national law. It notes in that regard that, according to the case-law of the Bundesverfassungsgericht (Federal Constitutional Court, Germany), national legislation which transposes an EU directive must be measured, as a rule, not against the fundamental rights guaranteed by the Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany), of 23 May 1949 (BGBl 1949 I, p. 1), but solely against the fundamental

rights guaranteed by EU law, where that directive does not allow the Member States any discretion in its transposition.

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

‘(1) Do the provisions of 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 what manner are the fundamental rights of the Charter of Fundamental Rights of the European Union 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 to 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 of 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 media organisation 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 media organisation 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 [Portable Document Format (PDF)] files which can be downloaded independently of the new text?

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

Consideration of the questions referred

The first question

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

17 In that context, the referring court asks whether that provision of EU law allows the Member States discretion in its transposition, since, according to the case-law of the

Bundesverfassungsgericht (Federal Constitutional Court), national legislation which transposes an EU directive must be measured, as a rule, not against the fundamental rights guaranteed by the Basic Law for the Federal Republic of Germany, but solely against the fundamental rights guaranteed by EU law, where that directive does not allow the Member States any discretion in its transposition.

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

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

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

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

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

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

24 As is clear from recital 32 of Directive 2001/29, Article 5(2) and (3) of that directive sets out a list of exceptions and limitations to the exclusive rights of reproduction and of communication to the public.

25 In that regard, it is clear from the case-law of the Court that the scope of the Member States' discretion in the transposition into national law of a particular exception or limitation referred to in Article 5(2) or (3) of Directive 2001/29 must be determined on a case-by-case basis, in particular, according to the wording of that provision (see, to that effect, judgments of 21 October 2010,

Padawan, C-467/08, EU:C:2010:620, paragraph 36; of 3 September 2014, *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, paragraph 16; and of 22 September 2016, *Microsoft Mobile Sales International and Others*, C-110/15, EU:C:2016:717, paragraph 27; Opinion 3/15 *(Marrakesh Treaty on access to published works)* of 14 February 2017, EU:C:2017:114, paragraph 116), the degree of the harmonisation of the exceptions and limitations intended by the EU legislature being based on their impact on the smooth functioning of the internal market, as stated in recital 31 of Directive 2001/29.

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

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

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

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

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

31 First, the Court has repeatedly held that the Member States' discretion in the implementation of the abovementioned exceptions and limitations provided for in Article 5(2) and (3) of Directive 2001/29 must be exercised within the limits imposed by EU law, which means that the Member States are not in every case free to determine, in an un-harmonised manner, the parameters governing those exceptions or limitations (see, to that effect, judgments of 6 February 2003, *SENA*, C-245/00, EU:C:2003:68, paragraph 34; of 1 December 2011, *Painer*, C-145/10, EU:C:2011:798, paragraph 104; and of 3 September 2014, *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, paragraph 16; Opinion 3/15 *(Marrakesh Treaty on access to published works)* of 14 February 2017, EU:C:2017:114, paragraph 122).

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

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

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

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

36 Nonetheless, it is also for the Member States, in effecting that implementation, to safeguard the effectiveness of the exceptions and limitations thereby established and to permit observance of their purpose (see, to that effect, judgments of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 163, and of 3 September 2014, *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, paragraph 23), in order to safeguard a fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject matter, as stated in recital 31 of that directive.

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

38 Lastly, fourth, as set out in paragraph 20 above, the principles enshrined in the Charter apply to the Member States when implementing EU law. It is therefore for the Member States, in transposing the exceptions and limitations referred to Article 5(2) and (3) of Directive 2001/29, to ensure that they rely on an interpretation of the directive which allows a fair balance to be struck between the various fundamental rights protected by the European Union legal order (judgments of 27 March 2014, *UPC Telekabel Wien*, C-314/12, EU:C:2014:192, paragraph 46, and of 18 October 2018, *Bastei Lübbe*, C-149/17, EU:C:2018:841, paragraph 45 and the case-law cited; see also, by analogy, judgment of 26 September 2013, *IBV & Cie*, C-195/12, EU:C:2013:598, paragraphs 48 and 49 and the case-law cited).

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

The third question

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

41 First of all, it should be noted that it is clear both from the Explanatory Memorandum to Proposal COM(97) 628 final and from recital 32 of Directive 2001/29 that the list of exceptions and limitations contained in Article 5 of that directive is exhaustive, as the Court has also pointed out on several occasions (judgments of 16 November 2016, *Soulier and Doke*, C-301/15, EU:C:2016:878, paragraph 34, and of 7 August 2018, *Renckhoff*, C-161/17, EU:C:2018:634, paragraph 16).

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

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

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

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

46 Article 5(5) of that directive also contributes to the fair balance mentioned in paragraphs 36 and 42 above, in that, as has been stated in paragraph 37 above, it requires that the exceptions and limitations provided for in Article 5(1) to (4) of the directive be applied only in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.

47 In that context, to allow, notwithstanding the express intention of the EU legislature, set out in paragraph 41 above, each Member State to derogate from an author's exclusive rights, referred to in Articles 2 to 4 of Directive 2001/29, beyond the exceptions and limitations exhaustively set out in Article 5 of that directive, would endanger the effectiveness of the harmonisation of copyright and related rights effected by that directive, as well as the objective of legal certainty pursued by it (judgment of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraphs 34 and 35). It is expressly clear from recital 31 of the directive that the differences that existed in the exceptions and limitations to certain restricted acts had direct negative effects on the functioning of the internal market of copyright and related rights, since the list of the exceptions and limitations set out in Article 5 of Directive 2001/29 is aimed at ensuring such proper functioning of the internal market.

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

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

The second question

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

51 As set out in paragraph 38 above, it is for the Member States, in transposing the exceptions and limitations referred to in Article 5(2) and (3) of Directive 2001/29, to ensure that they rely on an interpretation of those exceptions and limitations which allows for a fair balance to be struck between the various fundamental rights protected by the EU legal order.

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

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

54 However, although Article 5 of Directive 2001/29 is expressly entitled 'Exceptions and limitations', it should be noted that those exceptions or limitations do themselves confer rights on the users of works or of other subject matter (see, to that effect, judgment of 11 September 2014, *Eugen Ulmer*, C-117/13, EU:C:2014:2196, paragraph 43). In addition, that article is specifically intended, as has been stated in paragraph 36 above, to ensure a fair balance between, on the one hand, the rights and interests of rightholders, which must themselves be given a broad interpretation (see, to that effect, judgment of 16 November 2016, *Soulier and Doke*, C-301/15, EU:C:2016:878, paragraphs 30 and 31 and the case-law cited) and, on the other, the rights and interests of users of works or other subject matter.

55 It follows that the interpretation of the exceptions and limitations provided for in Article 5 of Directive 2001/29 must allow, as is clear from paragraph 36 above, their effectiveness to be to safeguarded and their purpose to be observed, since such a requirement is of particular importance where those exceptions and limitations aim, as do those provided for in Article 5(3)(c) and (d) of Directive 2001/29, to ensure observance of fundamental freedoms.

56 In that context, first, it should be added that the protection of intellectual property rights is indeed enshrined in Article 17(2) of the Charter. There is, however, nothing whatsoever in the wording of that provision or in the Court's case-law to suggest that that right is inviolable and must for that reason be protected as an absolute right (judgments of 24 November 2011, *Scarlet Extended*, C-70/10, EU:C:2011:771, paragraph 43; of 16 February 2012, *SABAM*, C-360/10, EU:C:2012:85, paragraph 41; and of 27 March 2014, *UPC Telekabel Wien*, C-314/12, EU:C:2014:192, paragraph 61).

57 Second, it has been stated in paragraph 45 above that Article 5(3)(c) and (d) of Directive 2001/29 is aimed at favouring the exercise of the right to freedom of expression by the users of protected subject matter and to freedom of the press, enshrined in Article 11 of the Charter. In that regard, it should be noted that, in so far as the Charter contains rights which correspond to those guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), Article 52(3) of the Charter seeks to ensure the necessary consistency between the rights contained in it and the corresponding rights guaranteed by the ECHR, without thereby adversely affecting the autonomy of EU law and that of the Court of Justice of the European Union (see, by analogy, judgments of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraph 47, and of 26 September 2018, *Staatssecretaris van Veiligheid en justitie (Suspensory effect of the appeal)*, C-180/17, EU:C:2018:775, paragraph 31 and the case-law cited). Article 11 of the Charter contains rights which correspond to those guaranteed by Article 10(1) of the ECHR (see, to that effect, judgment of 14 February 2019, *Buivids*, C-345/17, EU:C:2019:122, paragraph 65 and the case-law cited).

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

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

The fourth question

60 By its fourth question, the referring court asks, in essence, whether Article 5(3)(c), second case, of Directive 2001/29 must be interpreted as precluding a national rule restricting the application of the exception or limitation provided for in that provision in cases where it is not reasonably possible to make a prior request for authorisation with a view to the use of a protected work for the purposes of reporting current events.

61 As has been stated in paragraph 26 above, Article 5(3)(c), second case, of Directive 2001/29 provides that the Member States may provide for exceptions or limitations to the exclusive rights of reproduction and of communication to the public provided for in Articles 2 and 3 of that directive in the case of use of works or other subject matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible.

62 As is clear from settled case-law, the need to ensure a uniform application of EU law and the principle of equality require that the terms of a provision of EU law which, as is the case of Article 5(3) of Directive 2001/29, makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union (judgment of 21 October 2010, *Padawan*, C-467/08, EU:C:2010:620, paragraph 32 and the case-law cited).

63 First of all, it should be noted that the wording of Article 5(3)(c), second case, of Directive 2001/29 does not require the rightholder's consent prior to the reproduction or communication to the public of a protected work.

64 Subject to indication of the source and use of the work to the extent justified by the informatory purpose, the exception or limitation provided for requires only that such use be 'in connection with the reporting of current events'.

65 Since Directive 2001/29 gives no definition of those words, they must be interpreted in accordance with their usual meaning in everyday language, while also taking into account the legislative context in which they occur and the purposes of the rules of which they are part (see, to that effect, judgment of 3 September 2014, *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, paragraph 19 and the case-law cited).

66 As regards, first, the wording of Article 5(3)(c), second case, of Directive 2001/29, it should be noted, first of all, that the action of 'reporting', referred to in that provision, must be understood as that of providing information on a current event. Although merely announcing that such an event has occurred does not amount to reporting it, the word 'reporting', according to its usual meaning, does not, however, require the user to analyse such an event in detail.

67 Next, reporting must relate to a 'current event'. In that regard, as noted by the referring court, it must be held that a current event is an event that, at the time at which it is reported, is of informatory interest to the public.

68 Lastly, Article 5(3)(c), second case, of Directive 2001/29 requires that the source, including the name of the author of the protected work, be indicated, unless this turns out to be impossible, and that the use in question be made 'to the extent justified by the informatory purpose' and, therefore, consistently with the principle of proportionality. It follows that the use of the protected work must not be extended beyond the confines of what is necessary to achieve the informatory purpose.

69 In the present case, it is for the referring court to ascertain whether the publication of the original versions of the manuscript and of the article published in the book at issue, in full and without indicating that Mr Beck dissociated himself from the content of those documents, was necessary to achieve the informatory purpose.

70 Second, as regards the legislative context of which Article 5(3)(c) of Directive 2001/29 forms a part, the Court observes that that provision concerns the dissemination of information by news agencies for the purposes of satisfying the informatory interest of the public in respect of current events, which is clear, inter alia, first, from the wording used in that provision, in which the first case set out specifically refers to reproductions by the press and to the publication of articles on current topics and, second, from the limits laid down by the EU legislature on the use of the work or protected subject matter in question, which must be made only to the 'extent justified by the informatory purpose'.

71 When a current event occurs, it is necessary, as a general rule, particularly in the information society, for the information relating to that event to be diffused rapidly, which is difficult to reconcile with a requirement for the author's prior consent, which would be likely to make it excessively difficult for relevant information to be provided to the public in a timely fashion, and might even prevent it altogether.

72 Third, as regards safeguarding the effectiveness of the exception or limitation provided for in Article 5(3)(c), second case, of Directive 2001/29, it should be noted that its purpose is to contribute to the exercise of the freedom of information and the freedom of the media, enshrined in Article 11 of the Charter, since the Court has already indicated that the purpose of the press, in a democratic society governed by the rule of law, justifies it in informing the public, without restrictions other than those that are strictly necessary (see, to that effect, judgment of 1 December 2011, *Painer*, C-145/10, EU:C:2011:798, paragraph 113).

73 However, requiring the user of a protected work to seek the authorisation of the rightholder where reasonably possible would mean disregarding the need for the exception or limitation referred to in Article 5(3)(c), second case, of Directive 2001/29 to permit, if the conditions for its application are satisfied, the use of a protected work without any authorisation from the rightholder.

74 In the light of the foregoing considerations, the answer to the fourth question is that Article 5(3)(c), second case, of Directive 2001/29 must be interpreted as precluding a national rule restricting the application of the exception or limitation provided for in that provision in cases where it is not reasonably possible to make a prior request for authorisation with a view to the use of a protected work for the purposes of reporting current events.

The fifth question

75 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 the concept of 'quotations', referred to in that provision, covers a reference made by means of a hyperlink to a file which can be downloaded independently.

76 Under Article 5(3)(d) of Directive 2001/29, Member States may provide for exceptions or limitations to the exclusive rights of reproduction and of communication to the public referred to in Articles 2 and 3 of that directive in the case of 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.

77 Since Directive 2001/29 gives no definition of the term 'quotation', the meaning and scope of that term must, according to the Court's settled case-law set out in paragraph 65 above, be determined by considering its usual meaning in everyday language, while also taking into account the legislative context in which it occurs and the purposes of the rules of which it is part.

78 As regards the usual meaning of the word 'quotation' in everyday language, it should be noted that the essential characteristics of a quotation are the use, by a user other than the copyright holder, of a work or, more generally, of an extract from a work for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user. In that regard, the Court has previously held that the issue of whether the quotation is made as part of a work protected by copyright or, on the other hand, as part of subject matter not protected by copyright, is irrelevant (judgment of 1 December 2011, *Painer*, C-145/10, EU:C:2011:798, paragraph 136).

79 As stated, in essence, by the Advocate General in point 43 of his Opinion, the user of a protected work wishing to rely on the exception for quotations must therefore necessarily establish a direct and close link between the quoted work and his own reflections, thereby allowing for an intellectual comparison to be made with the work of another, since Article 5(3)(d) of Directive 2001/29 states in that regard that a quotation must inter alia be intended to enable criticism or review. It also follows that the use of the quoted work must be secondary in relation to the assertions of that user, since the quotation of a protected work cannot, moreover, under Article 5(5) of Directive 2001/29, be so extensive as to conflict with a normal exploitation of the work or another subject matter or prejudices unreasonably the legitimate interests of the rightholder.

80 However, neither the wording of Article 5(3)(d) of Directive 2001/29 nor the concept of 'quotation', as described in paragraphs 78 and 79 above, require that the quoted work be inextricably integrated, by way of insertions or reproductions in footnotes for example, into the subject matter citing it, so that a quotation may thus be made by including a hyperlink to the quoted work.

81 Such a possibility is consistent with the legislative context of which that provision forms a part, since Directive 2001/29 concerns the legal protection of copyright in the framework of the internal market with particular emphasis on the information society, as set out in Article 1(1) thereof. As the Court has stated on several occasions, hyperlinks contribute to the sound operation of the internet, which is of particular importance to freedom of expression and of information, enshrined in Article 11 of the Charter, as well as to the exchange of opinions and information in that network characterised by the availability of incalculable amounts of information (judgments of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraph 45, and of 7 August 2018, *Renckhoff*, C-161/17, EU:C:2018:634, paragraph 40).

82 Furthermore, such an interpretation is not undermined by the objective to which the exception for quotations provided for in Article 5(3)(d) of Directive 2001/29 aspires, which, as the Court has previously held, is intended to strike a fair balance between the right to freedom of expression of users of a work or other subject matter and the reproduction right conferred on authors and to preclude the exclusive right of reproduction conferred on authors from preventing the publication, by means of quotation accompanied by comments or criticism, of extracts from a work that is already available to the public (judgment of 1 December 2011, *Painer*, C-145/10, EU:C:2011:798, paragraphs 120 and 134).

83 Despite those considerations and since, in the present case, the referring court notes that Mr Beck's manuscript and article were made available to the public on the internet, by means of hyperlinks, as files which can be downloaded independently, it is to be noted that for Article 5(3)(d) of Directive 2001/29 to apply, as has been stated in paragraph 76 above, the use in question must be made 'in accordance with fair practice, and to the extent required by the specific purpose', so that the use of that manuscript and article for the purposes of quotation must not be extended beyond the confines of what it necessary to achieve the informatory purpose of that particular quotation.

84 In the light of the foregoing considerations, the answer to the fifth question is that Article 5(3)(d) of Directive 2001/29 must be interpreted as meaning that the concept of 'quotations', referred to in that provision, covers a reference made by means of a hyperlink to a file which can be downloaded independently.

The sixth question

85 By its sixth question, the referring court asks, in essence, whether Article 5(3)(d) of Directive 2001/29 must be interpreted as meaning that a work has already been lawfully made available to the public where that work, in its specific form, was published previously with the author's consent.

86 As is clear from Article 5(3)(d) of Directive 2001/29, the exception for quotations applies only if the quotation in question relates to a work which has already been lawfully made available to the public.

87 In that regard, the Court has previously held that the expression '*mise à la disposition du public d'une œuvre*' (making a work available to the public) in the French language version must be understood, within the meaning of Article 5(3)(d) of Directive 2001/29, as meaning the act of making a work available to the public, that interpretation being supported both by the expressions 'made available to the public' and '*der Öffentlichkeit zugänglich gemacht*', which are used indiscriminately in the English and German language versions of that article (see, to that effect, judgment of 1 December 2011, *Painer*, C-145/10, EU:C:2011:798, paragraph 128).

88 As to whether a work has already been ‘lawfully’ made available to the public, the Court has pointed out that the only quotations permissible, provided that the other conditions provided for in Article 5(3)(d) of Directive 2001/29 are satisfied, are quotations from a work which has already been lawfully made available to the public (see, to that effect, judgment of 1 December 2011, *Painer*, C-145/10, EU:C:2011:798, paragraph 127).

89 Thus, it must be held that a work, or a part of a work, has already been lawfully made available to the public if it has been made available to the public with the authorisation of the copyright holder or in accordance with a non-contractual licence or a statutory authorisation.

90 In the present case, the referring court asks whether Mr Beck’s work may be regarded as having already been lawfully made available to the public at the time of the publication of his manuscript in 1988 as an article in a book, in the light of the fact that that manuscript was allegedly the subject of minor changes prior to publication by the publisher of that book. It asks whether Mr Beck’s publication on his own website of those documents accompanied by statements of dissociation constitutes making it lawfully available to the public.

91 It must be borne in mind, in that regard, that it is for the national court to decide whether a work has been lawfully made available to the public, in the light of the particular case before it and by taking into account all the circumstances of the case (see, to that effect, judgment of 3 September 2014, *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, paragraph 28).

92 In particular, it is for the referring court, in the case in the main proceedings, to ascertain whether, at the time of Mr Beck’s initial publication of the manuscript as an article in a book, the publisher had the right, whether contractually or otherwise, to undertake the editorial amendments in question. If not, it would need to be held that, in the absence of the rightholder’s consent, the work, in the form in which it was published in that book, was not made lawfully available to the public.

93 However, it is clear that Mr Beck’s manuscript and article were subsequently published by the copyright holder himself on his own website. The referring court states, however, that the publication of those documents on Mr Beck’s website was accompanied by a statement of dissociation by him from the content of those documents across every page thereof. Thus, at the time of that publication, the same documents were lawfully made available to the public only in so far as they were accompanied by those statements of dissociation.

94 In any event, in the light of the considerations already set out in paragraph 83 above, for the purpose of the application of Article 5(3)(d) of Directive 2001/29, it is for the referring court to ascertain whether the original versions of the manuscript and of the article published in the book in question, without Mr Beck’s statements of dissociation from the content of those documents, were published in accordance with fair practice and to the extent required by the specific purpose of the quotation in question.

95 In the light of the foregoing considerations, the answer to the sixth question is that Article 5(3)(d) of Directive 2001/29 must be interpreted as meaning that a work has already been lawfully made available to the public where that work, in its specific form, was previously made available to the public with the rightholder’s authorisation or in accordance with a non-contractual licence or statutory authorisation.

Costs

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

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

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

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

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

4. **Article 5(3)(c), second case, of Directive 2001/29 must be interpreted as precluding a national rule restricting the application of the exception or limitation provided for in that provision in cases where it is not reasonably possible to make a prior request for authorisation with a view to the use of a protected work for the purposes of reporting current events.**

5. **Article 5(3)(d) of Directive 2001/29 must be interpreted as meaning that the concept of 'quotations', referred to in that provision, covers a reference made by means of a hyperlink to a file which can be downloaded independently.**

6. **Article 5(3)(d) of Directive 2001/29 must be interpreted as meaning that a work has already been lawfully made available to the public where that work, in its specific form, was previously made available to the public with the rightholder's authorisation or in accordance with a non-contractual licence or statutory authorisation.**

[Signatures]

---

* Language of the case: German.