ECLI:EU:C:2019:623

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 2(a) — Reproduction right — Article 3(1) — Communication to the public — Article 5(2) and (3) — Exceptions and limitations — Scope — Charter of Fundamental Rights of the European Union)

In Case C-469/17,

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

Funke Medien NRW GmbH

v

Bundesrepublik Deutschland,

THE COURT (Grand Chamber),

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

Advocate General: M. Szpunar,

Registrar: M. Aleksejev, Head of Unit,

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

after considering the observations submitted on behalf of:

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

– the German Government, by T. Henze, M. Hellmann, E. Lankenau and J. Techert, acting as Agents,

– the French Government, by E. Armoët, D. Colas and D. Segoin, acting as Agents,

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

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

after hearing the Opinion of the Advocate General at the sitting on 25 October 2018,

gives the following

Judgment

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

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

Legal context

European Union law

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

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

…

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

…

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

differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased transborder exploitation of intellectual property. …

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

…

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

…

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

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

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

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

(a) for authors, of their works;

…'

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

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

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

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

…

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

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

…

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

German law

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

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

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

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

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

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

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

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

9 The Federal Republic of Germany prepares a military status report every week on the deployments of the Bundeswehr (Federal armed forces, Germany) abroad and on developments at the deployment locations. The reports are referred to as '*Unterrichtung des Parlaments*' ('Parliament briefings'; 'UdPs'), and are sent to selected members of the Bundestag (Federal Parliament, Germany), to sections of the Bundesministerium der Verteidigung (Federal Ministry of Defence, Germany) and other federal ministries, and to certain bodies subordinate to the Federal Ministry of Defence. UdPs are categorised as 'Classified Documents — Restricted', which is the lowest of the four levels of confidentiality laid down under German law. At the same time, the Federal Republic of Germany publishes summaries of UdPs known as '*Unterrichtung der Öffentlichkeit*' ('public briefings'), which are available to the public without any restrictions.

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

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

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

13 However, the referring court considers that it is not possible to dismiss the judgment of the Oberlandesgericht Köln (Higher Regional Court, Cologne) and to remit the case to that court to allow it to make findings to that effect a posteriori, if copyright infringement of UdPs, which must be presumed for the purposes of an appeal on a point of law (*Revision*), is, in any event, covered by the derogation relating to reporting current events or quotations, laid down in Paragraphs 50 and 51 of the UrhG, or if such an infringement is justified by freedom of information or the freedom of the press, laid down respectively in the first and second sentences of Article 5(1) of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany) of 23 May 1949 (BGBl. 1949 I, p. 1; 'the GG') and in Article 11 of the Charter of Fundamental Rights of the European Union ('the Charter'). According to the referring court, if that is the case, then judgment could be given in the case to the effect that the referring court would be required to amend the judgment of the Landgericht Köln (Regional Court, Cologne) and dismiss the action for an injunction which the Federal Republic of Germany brought before it.

14 The referring court considers, in that regard, that the interpretation of Article 2(a), Article 3(1) and Article 5(3)(c) and (d) of Directive 2001/29 read in the light of fundamental rights,

in particular of freedom of information and of freedom of the press, is not obvious. It asks inter alia whether those provisions allow any discretion for the purposes of their transposition into national law. It notes in that regard that, according to the case-law of the Bundesverfassungsgericht (Federal Constitutional Court, Germany), national legislation which transposes an EU directive must be measured, as a rule, not against the fundamental rights guaranteed by the GG, but solely against the fundamental rights guaranteed by EU law, where that directive does not allow the Member States any discretion in its transposition.

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

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

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

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

Consideration of the questions referred

Preliminary observations

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

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

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

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

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

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

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

23 In order to determine whether that is in fact the case, it is for the national court to ascertain whether, in drawing up those reports, the author was able to make free and creative choices capable of conveying to the reader the originality of the subject matter at issue, the originality of which arises from the choice, sequence and combination of the words by which the author expressed his or her creativity in an original manner and achieved a result which is an intellectual creation (see, to that effect, judgment of 16 July 2009, *Infopaq International*, C-5/08, EU:C:2009:465, paragraphs 45 to 47), whereas the mere intellectual effort and skill of creating those reports are not relevant in that regard (see, by analogy, judgment of 1 March 2012, *Football Dataco and Others*, C-604/10, EU:C:2012:115, paragraph 33).

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

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

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

The first question

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

28 Although the referring court has not specifically referred a question on the interpretation of those provisions of Directive 2001/29 to the Court, since the referring court has specifically indicated that, according to the Oberlandesgericht Köln (Higher Regional Court, Cologne), Funke Medien's publication of the UdPs on its website did not satisfy the conditions set out in Paragraphs 50 and 51 of the UrhG, it nevertheless harbours doubts as to whether Article 2(a) and Article 3(1) of that directive allow the Member States discretion in their transposition, since, according to the case-law of the Bundesverfassungsgericht (Federal Constitutional Court), national legislation which transposes an EU directive must be measured, as a rule, not against the fundamental rights guaranteed by the GG, but solely against the fundamental rights guaranteed by EU law, where that directive does not allow the Member States any discretion in its transposition.

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

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

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

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

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

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

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

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

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

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

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

40 In that regard, it is clear from the case-law of the Court that the scope of the Member States' discretion in the transposition into national law of a particular exception or limitation referred to in Article 5(2) or (3) of Directive 2001/29 must be determined on a case-by-case basis, in particular, according to the wording of the provision in question (see, to that effect, judgments of 21 October 2010, *Padawan*, C-467/08, EU:C:2010:620, paragraph 36; of 3 September 2014, *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, paragraph 16; and of 22 September 2016, *Microsoft Mobile Sales International and Others*, C-110/15, EU:C:2016:717, paragraph 27; Opinion 3/15 *(Marrakesh Treaty on access to published works)* of 14 February 2017, EU:C:2017:114, paragraph 116), the degree of the harmonisation of the exceptions and limitations intended by the EU legislature being based on their impact on the smooth functioning of the internal market, as stated in recital 31 of Directive 2001/29.

41 Under Article 5(3)(c), second case, and (d) of Directive 2001/29, the exceptions or limitations referred to are comprised respectively of 'use of works or other subject matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The third question

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

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

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

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

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

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

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

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

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

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

The second question

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

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

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

68 Subsequently, when applying the measures transposing that directive, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with

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

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

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

71 It follows that the interpretation of the exceptions and limitations provided for in Article 5 of Directive 2001/29 must allow, as is clear from paragraph 51 above, their effectiveness to be 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.

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

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

74 As is clear from the case-law of the European Court of Human Rights, for the purpose of striking a balance between copyright and the right to freedom of expression, that court has, in particular, referred to the need to take into account the fact that the nature of the 'speech' or

information at issue is of particular importance, inter alia in political discourse and discourse concerning matters of the public interest (see, to that effect, ECtHR, 10 January 2013, *Ashby Donald and Others v. France*, CE:ECHR:2013:0110JUD003676908, § 39).

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

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

Costs

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

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

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

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

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

[Signatures]

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* Language of the case: German.