



A portrait photograph enjoys the same protection as that conferred by copyright on any other work

However, the media may publish such a photograph, without the consent of its author, if the object of its publication is to assist the police, in a criminal investigation, to find a missing person

Ms Painer is a freelance photographer, photographing, in particular, children in nurseries and day care centres. In the course of her work, she took several photographs of Natascha K. (choosing the background, deciding on the pose and facial expression, and producing and developing those photographs).

After Natascha K., then aged 10, was abducted in 1998, the Austrian police launched a search appeal for which Ms Painer's photographs were used.

Following the young girl's escape and prior to her first public appearance, five newspaper publishers, four German and one Austrian, published those photographs in certain newspapers¹ and known websites without, however, indicating the name of the photographer, or indicating a name other than Ms Painer's as the photographer.

Several of those publications also published a photo-fit, created by computer from those photographs, which, in the absence of a more recent photograph of the young girl until her first public appearance, represented her supposed image.

Since Ms Painer considered that those photographs infringed her copyright, she applied to the Austrian courts for an order that the publishers immediately cease the reproduction and/or distribution, without her consent and without indicating her as author, of the photographs and photo-fit. She also sought the payment of appropriate remuneration and damages.

The Handelsgericht Wien (Vienna Commercial Court (Austria)), before which the proceedings were brought, asks the Court of Justice whether European Union law confers inferior copyright protection on portrait photographs because they are 'realistic images' and the degree of artistic freedom is limited. In addition, the Austrian court seeks to ascertain the conditions under which such photographs can be used by the media, without the photographer's consent, for the purposes of a criminal investigation. It also asks the Court to clarify the conditions in which a protected work can be quoted.

In its judgment of today, the Court notes, first of all, that copyright protects only original subject-matter, that is to say its author's own intellectual creation. In that regard, the Court recalls that an intellectual creation is an author's own if it reflects the author's personality. That is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices.

The Court holds that the author of a portrait photograph can make free and creative choices in several ways and at various points in its production. Thus, in the preparation phase, the photographer can choose the background, the subject's pose and the lighting. When taking a

¹ Der Standard, Süddeutsche Zeitung, Express, Bild and Die Welt, and the weekly magazine, Der Spiegel.

portrait photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when printing the photo, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software.

By those various choices, the author of a portrait photograph can stamp the work created with his 'personal touch'. Therefore, **a portrait photograph is protected by copyright** if it expresses the author's creative abilities. In addition, the Court holds that **such protection is identical to that conferred on other works, including other photographic works**.

Next, the Court recalls that, under EU law², the extent of copyright protection can be limited, by way of exception, where a protected work is used for the purposes of public security, particularly in a criminal investigation involving a search for a missing person. In that regard, the Court points out that, **only States - not newspaper publishers - can be regarded as appropriate and responsible for ensuring public security** by appropriate measures including, for example, assistance with a search appeal.

However, it is conceivable that a newspaper publisher might, in specific cases, contribute to the fulfilment of an objective of public security **by publishing, for example, a photograph of a person for whom a search has been launched**. Any such initiative should, however, be taken in the context of action taken by the national authorities and by agreement and in coordination with those authorities, in order to avoid the risk of interfering with the measures taken by them. The Court also makes clear that a prior specific, current and express appeal, on the part of the security authorities, for publication of a photograph by the media for the purposes of an investigation is not necessary.

Finally, as regards the quotation of protected works, the Court notes that works which have already been lawfully made available to the public may be quoted, provided that the source, including the author's name, unless that turns out to be impossible, is indicated.

In that regard, the Court responds to the publishers' arguments that they received Ms Painer's photographs from a news agency but had difficulties in identifying the author and could not indicate her name on the photographs. Save for an assumption that the news agency came into possession of those photographs unlawfully – without their author's consent – the Court finds, on the contrary, that the agency should have communicated the author's name to the publishers. Therefore, the publishers were also bound to indicate it in their publications.

However, the Court states that it is also possible that the national security authorities were the cause of the publication of Ms Painer's photographs. In such a situation, the author's name need not be indicated. Consequently, in such a situation, and if the author's name was not indicated, their source must be indicated but not necessarily the name of their author.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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² 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).