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Court of Justice of the European Union

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Opinion of the Advocate General in Case C-469/17
Funke Medien NRW GmbH v Federal Republic of Germany

According to Advocate General Szpunar, a simple military report cannot enjoy copyright protection

First, such a report does not satisfy the requirements in order to be treated as a work eligible for copyright protection and, second, such protection would constitute an unjustified limitation on freedom of expression

The Federal Republic of Germany has a military status report drawn up every week on the foreign deployments of the Bundeswehr (Federal Armed Forces, Germany) and on developments at the deployment locations. The reports are designated 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 subordinate bodies of the Federal Ministry of Defence. UdPs are categorised as 'classified documents — Restricted', the lowest level of confidentiality. At the same time, the Federal Republic of Germany publishes summary versions of the UdPs known as 'Unterrichtung der Öffentlichkeit' (public briefings).

The German company Funke Medien NRW operates the website of the daily newspaper Westdeutsche Allgemeine Zeitung. In September 2012 it applied for access to all UdPs drawn up over the previous eleven years. That application was refused on the ground that disclosure of certain briefings could have adverse effects on security-sensitive interests of the federal armed forces. Funke Medien nevertheless obtained, by unknown means, a large proportion of the UdPs and published several of them as the 'Afghanistan-Papiere' (Afghanistan Papers).

Taking the view that the threat to the security of the State arising from their disclosure was not of such a degree as to justify interfering with freedom of expression and freedom of the media, the Federal Republic did not bring criminal proceedings for disclosure of confidential information.

However, arguing that Funke Medien had infringed its copyright over those reports, the Federal Republic brought proceedings against it before the German civil courts with a view to bringing that infringement to an end. It is against that background that the the Bundesgerichtshof (Federal Court of Justice, Germany) requests the Court of Justice to interpret the EU law on copyright protection,¹ in particular in the light of the fundamental right of freedom of expression.²

In his Opinion delivered today, Advocate General Maciej Szpunar takes the view that simple military reports such as those at issue cannot enjoy copyright protection, as harmonised in EU law.

The Advocate General doubts that such reports can be classified as works eligible for copyright protection. He notes in particular that these are purely informative documents, drafted in absolutely neutral and standardised terms, providing an accurate report of events or stating that no events of interest have occurred. Such 'raw' information, that is to say, information presented in an unaltered state, is excluded from copyright, which protects only the manner in which ideas have

¹ 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 As guaranteed by the Charter of Fundamental Rights of the European Union.

been articulated in a work. Ideas (including raw information) themselves can therefore be freely reproduced and shared.

Ultimately, it is for the national courts to assess whether the present case concerns 'works' within the meaning of the law on copyright. As that factual assessment has not yet been carried out, the Advocate General takes the view that the questions submitted to the Court are inadmissible on the ground that they are hypothetical in character.

In case the Court does not accept that proposal, **the Advocate General examines further the question whether a Member State can rely on its copyright over documents such as those at issue in order to curtail freedom of expression. In his opinion, the answer to that question should be in the negative.**

He points out that the protection of the confidentiality of certain information for the purpose of safeguarding national security is a legitimate ground for restricting freedom of expression.

However, the main proceedings are not concerned with the protection of the documents at issue as confidential information, but as the subject matter of copyright protection.

Although the State is entitled to benefit from the civil right of ownership, such as the right to intellectual property, it cannot rely on the fundamental right to property as a means of restricting another fundamental right such as freedom of expression. The State is not a beneficiary of fundamental rights, but is rather under an obligation to safeguard fundamental rights.

Furthermore, it does not appear necessary to protect military reports by way of copyright.

The sole objective of the action brought by the Federal Republic of Germany in the main proceedings was to protect the confidential nature of certain information deemed to be sensitive and therefore not published in the public versions of the military reports. However, that falls entirely outside the objectives of copyright. Copyright is therefore being used here to pursue objectives that are entirely unrelated to it.

In addition, the restriction on freedom of expression resulting from the protection by copyright of the documents at issue is not only unnecessary in a democratic society, but would also be highly damaging. One of the most important functions of freedom of expression and its constituent element, freedom of the media, is to enable citizens to keep a check on power, a key aspect of any democratic society. That check can be exercised, inter alia, by the disclosure of certain information or certain documents the content or existence, or even the inexistence, of which the authorities might wish to conceal. Some information must of course remain secret, even in a democratic society, if its disclosure would pose a threat to the essential interests of the State and, in consequence, of society itself. Documents must therefore be classified and protected in accordance with the procedures established for that purpose, which should be applied subject to review by the courts. However, outside the framework of those procedures, or if the State itself declines to apply them, the State cannot be allowed to invoke its copyright over any document whatsoever in order to prevent scrutiny of its actions.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

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 EU law or the validity of an EU 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 Opinion is published on the CURIA website on the day of delivery.

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