



Freedom of information and the freedom of the press cannot justify a derogation from the rights of copyright holders beyond the exceptions and limitations set out in the Copyright Directive

However, as far as concerns military status reports, a national court must, first of all, ascertain whether the conditions are satisfied so that those reports can be regarded as protected by copyright, before considering whether the use of the reports is capable of falling within the scope of such exceptions or limitations

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 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’ (the Afghanistan Papers).

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

In today’s judgment, the Court makes clear that **it is for the national court, first of all, to ascertain whether the conditions are satisfied so that military status reports are protected by copyright**. Those reports can be protected by copyright only if they are an intellectual creation of their author that reflects the author’s personality and are expressed by free and creative choices made by that author in drafting those reports.

The Court adds that, if those conditions were satisfied and military status reports could therefore be regarded as ‘works’, **freedom of information and freedom of the press are not capable of justifying, beyond the exceptions or limitations provided for in the Copyright Directive, a derogation from copyright, in particular, from the author’s exclusive rights of reproduction and of communication to the public**.

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).

The Court states, in that regard, that the EU harmonisation of copyright 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 of Fundamental Rights of the European Union 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. The mechanisms allowing for such a balance to be struck in an individual case are contained in that directive itself, in that it provides not only rightholders with exclusive rights but also provides for exceptions and limitations to those rights.

The Court also adds 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 ('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. 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**. In those circumstances, having also underlined the way in which Funke Medien published the military status reports on the internet, the Court of Justice states that it is not inconceivable that such use may be covered by the exception concerning current events reporting provided for in the Copyright Directive.

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.

Press contact: Jacques René Zammit ☎ (+352) 4303 3355

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