OPINION OF ADVOCATE GENERAL TRSTENJAK delivered on 12 April 2011 [1]

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I — Introduction

1. By the present reference for a preliminary ruling under Article 267 TFEU, the Handelsgericht Wien (Commercial Court, Vienna; 'the referring court') first asks a question of interpretation regarding jurisdiction for related actions in accordance with Article 6(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. [2] This gives the Court the opportunity to develop further its case-law in this field. [3]

2. The other questions relate in particular to 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. [4] The question arises, first of all, whether a photo-fit which has been based on a photo may be published in newspapers, magazines and on the internet without the author's consent. The other questions concern the possible constraints under Article 5(3)(d) and (e) of the directive, which permit the Member States to provide for exceptions and limitations to the reproduction right for quotations and for the purposes of public security.

3. The facts of the main proceedings relate to the abduction of an Austrian national, Natascha K., the search measures conducted by the security authorities in that case, and the media reporting after she escaped from her abductor.

II — Applicable law [5]

A — *Regulation No 44/2001*

4. Under its Article 68(1), Regulation No 44/2001 supersedes, as between all the Member States except for Denmark, the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of

2 — OJ 2001 L 12, p. 1.

3 — See, in particular, Case 189/87 *Kalfelis* [1988] ECR 5565; Case C-539/03 *Roche Nederland and Others* [2006] ECR I-6535, which, however, concerned the predecessor provision, Article 6 of the Brussels Convention; and Case C-98/06 *Freeport* [2007] ECR I-8319.

4 — OJ 2001 L 167, p. 10.

5 — In accordance with the terms used in the TEU and in the TFEU, the expression 'Union law' will be used as an umbrella expression for Community law and Union law. Where individual provisions of primary law are relevant hereinafter, the rules which are applicable *ratione temporis* will be cited.

Judgments in Civil and Commercial Matters ('the Brussels Convention').

5. Recitals 11, 12 and 15 in the preamble to the regulation state:

'(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor...

(12) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.

...

(15) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States...'

6. The rules on jurisdiction are laid down in Chapter II of Regulation 44/2001, which covers Articles 2 to 31.

7. Article 2(1) of the regulation provides:

'Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'

8. Article 3(1) of the regulation states:

'Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.'

9. Article 6(1) of the regulation, in Section 2, entitled 'Special jurisdiction', of Chapter II, provides:

'A person domiciled in a Member State may also be sued:

1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them

together to avoid the risk of irreconcilable judgments resulting from separate proceedings; …'

10. Article 28 in Section 9 ('*Lis pendens* – related actions') of the regulation provides:

'1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.'

11. Article 34(3) of the regulation in Chapter III ('Recognition and enforcement') provides:

'A judgment shall not be recognised

…

3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought.'

B — *Directive 93/98 and Directive 2006/116*

12. Recital 17 in the preamble to Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights [6] reads as follows:

'Whereas the protection of photographs in the Member States is the subject of varying regimes; whereas in order to achieve a sufficient harmonisation of the term of protection of photographic works, in particular of those which, due to their artistic or professional

6 — OJ 1993 L 290, p. 9.

character, are of importance within the internal market, it is necessary to define the level of originality required in this Directive; whereas a photographic work within the meaning of the Berne Convention is to be considered original if it is the author's own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account; whereas the protection of other photographs should be left to national law.'

13. Article 6 of that directive provides:

'Photographs which are original in the sense that they are the author's own intellectual creation shall be protected in accordance with Article 1. No other criteria shall be applied to determine their eligibility for protection. Member States may provide for the protection of other photographs.'

14. The provisions of Directive 93/98 were codified in Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights. [7]

15. Recital 16 reads as follows:

'The protection of photographs in the Member States is the subject of varying regimes. A photographic work within the meaning of the Berne Convention is to be considered original if it is the author's own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account. The protection of other photographs should be left to national law.'

16. Article 6 of that directive provides:

'Photographs which are original in the sense that they are the author's own intellectual creation shall be protected in accordance with Article 1. No other criteria shall be applied to determine their eligibility for protection. Member States may provide for the protection of other photographs.'

7 — OJ 2006 L 372, p. 12.

C — *Directive 2001/29*

17. Recitals 9, 21, 32 and 44 in the preamble to Directive 2001/29 are worded as follows:

'(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.

...

(21) This Directive should define the scope of the acts covered by the reproduction right with regard to the different beneficiaries. This should be done in conformity with the acquis communautaire. A broad definition of these acts is needed to ensure legal certainty within 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. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future.

...

(44) When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations. Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject-matter. The provision of such exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter.'

18. Article 1(1) of Directive 2001/29 states:

'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.'

19. Article 2(a) of that directive, which regulates the reproduction right, provides:

'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; …'

20. Article 3(1) of the directive concerns the right of communication to the public of works and right of making available to the public other subject-matter. It provides:

'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.'

21. Article 5 of the directive ('exceptions and limitations') includes the following provisions:

'…

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

…

(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 in accordance with fair practice, and to the extent required by the specific purpose;

(e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;

…

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.'

III — Facts

22. The applicant in the main proceedings is a freelance photographer. Among other things, she photographs children in nurseries and day homes. In the course of her professional work, she produced portrait photos of the Austrian national Natascha K. ('the contested photos') prior to her abduction in 1998. She designed the background, determined the position and facial expression, and produced and developed the photos.

23. For more than 17 years, the applicant has labelled the photos she produces with her name and with the name of her business. The photos have been labelled in different ways over time, by stickers and/or impressions in decorative portfolios or mounts. In any case, the applicant's name and business address can be seen on these producer's labels.

24. The applicant in the main proceedings sold the copies of the works produced by her, but she did not grant third parties any rights to the photos or consent to their publication. The purchase price which she charged for the photos thus concerned only the payment for the copies of works.

25. After Natascha K. had been abducted in 1998, at the age of ten, the competent security authorities launched a search appeal in which the contested photos were used.

26. The defendants in the main proceedings are newspaper publishers. Only the first defendant in the main proceedings is established in Vienna, Austria. The second to five defendants in the main proceedings are established in Germany.

27. The first and third defendants in the main proceedings publish daily newspapers (*Der Standard* and *Süddeutsche Zeitung*) which (also) appear in Austria, whilst the fourth defendant produces a weekly magazine (*Der Spiegel*) which is also published in Austria. The fifth defendant publishes a daily newspaper which appears only in Germany (*Express*). The second defendant publishes a daily newspaper (*Bild*), the national edition of which is not sold in Austria. However, the Munich edition of that newspaper is also published in Austria. In addition, the second

defendant publishes another daily newspaper (*Die Welt*) which is also sold in Austria and runs news websites on the internet.

28. In 2006 Natascha K. managed to escape from her abductor. The main proceedings concern the reporting by the defendants in the main proceedings after this time and prior to the first public television interview by Natascha K. on 5 September 2006. There were no current photos of Natascha K. during that period. In their reports the defendants in the main proceedings published the contested photos in the abovementioned newspapers, magazines and websites without crediting the producer or crediting the incorrect producer, because the name of the applicant in the main proceedings was not indicated as the author, but another name was given. The reports in the daily newspapers, the weekly magazine and the websites differed in their choice of images and accompanying text. The defendants in the main proceedings claim that they had received the contested photos from a news agency without identifying the applicant in the main proceedings or crediting a producer with a different name.

29. In addition, in some reports a photo-fit was also published, which was intended to show the presumed current appearance of Natascha K. ('the contested photo-fit'). It was produced by a graphic artist using a computer programme and based on one of the contested photos.

IV — Procedure before the national courts

30. The applicant in the main proceedings brought an action against the defendants in the main proceedings at the Handelsgericht Wien in Austria. That action seeks, in essence, [8] a prohibitory injunction relating to the reproduction of the contested photos and the contested photo-fit without her consent and without indicating her as author, and payment of remuneration and damages.

31. At the same time, the applicant in the main proceedings applied for an interlocutory injunction, on which a ruling has now been given by the highest court.

8 — The action in the main proceedings is also challenging the distribution of the photos. Because this point is not relevant to the present reference for a preliminary ruling, distribution will not be considered separately below. However, I note here that the possibility of providing for exceptions or limitations under Article 5(3)(d) and (e) of Directive 2001/29 is restricted to Articles 2 and 3 of that directive and thus does not include the distribution right under Article 4.

V — Questions referred for a preliminary ruling

32. By its reference for a preliminary ruling of 8 March 2010, the referring court asks the following questions:

1. Is Article 6(1) of Regulation No 44/2001 to be interpreted as meaning that its application and therefore joint legal proceedings are not precluded where actions brought against several defendants for copyright infringements identical in substance are based on differing national legal grounds the essential elements of which are nevertheless identical in substance – such as applies to all European States in proceedings for a prohibitory injunction, not based on fault, in claims for reasonable remuneration for copyright infringements and in claims in damages for unlawful exploitation?

2.(a) Is Article 5(3)(d) of Directive 2001/29, in the light of Article 5(5) of that directive, to be interpreted as meaning that its application is not precluded where a press report quoting a work or other protected matter is not a literary work protected by copyright?

(b) Is Article 5(3)(d) of the directive, in the light of Article 5(5) thereof, to be interpreted as meaning that its application is not precluded where the name of the author or performer is not attached to the work or other protected matter quoted?

3.(a) Is Article 5(3)(e) of Directive 2001/29, in the light of Article 5(5) thereof, to be interpreted as meaning that in the interests of criminal justice in the context of public security its application requires a specific, current and express appeal for publication of the image on the part of the security authorities, i.e. that publication of the image must be officially ordered for search purposes, or otherwise an offence is committed?

(b) If the answer to question 3a should be in the negative: are the media permitted to rely on Article 5(3)(e) of the directive even if, without such a search request being made by the authorities, they should decide, of their own volition, whether images should be published 'in the interests of public security'?

(c) If the answer to question 3b should be in the affirmative: is it then sufficient for the media to assert after the event that publication of an image served to trace a person or is it always necessary for there to be a specific appeal to readers to assist in a search in the investigation of an offence, which must be directly linked to the publication of the photograph?

4. Are Article 1(1) of Directive 2001/29 in conjunction with Article 5(5) thereof and Article 12 of the Berne Convention, particularly in the light of Article 1 of the First Additional Protocol to the ECHR and Article 17 of the Charter of Fundamental Rights of the European Union, to be interpreted as meaning that photographic works and/or photographs, particularly portrait photos, are afforded 'weaker' copyright protection or no copyright protection at all against adaptations because, in view of their 'realistic image', the degree of formative freedom is too minor?'

VI — Procedure before the Court of Justice

33. The order for reference was lodged at the Registry of the Court of Justice on 22 March 2010.

34. Written observations were submitted by the applicant and the defendants in the main proceedings, the Austrian, Italian and Spanish Governments, and the Commission.

35. As none of the parties applied for the oral procedure to be opened, it was possible to prepare the Opinion in this case after the general meeting of the Court on 14 December 2010.

VII — The admissibility of the reference for a preliminary ruling and of the individual questions

36. The defendants in the main proceedings have doubts as to the admissibility of the reference for a preliminary ruling as a whole. They claim that the court has not sufficiently established the facts and has not adequately justified its doubts regarding the correct interpretation of Union law. It has also failed to

establish a sufficient connection between the national legislation applicable to the case and the provisions of Union law, in particular failing to cite the relevant rules of national law.

37. These complaints cannot be upheld.

38. As is clear from the order for reference, a particular feature of the present case is that it was preceded by interlocutory injunction proceedings. In those proceedings, the Austrian Oberster Gerichtshof (Supreme Court, 'OGH') adopted legal opinions whose compatibility with Union law is now in dispute between the parties in the main proceedings. For the purposes of a reference for a preliminary ruling under Article 267 TFEU it is sufficient for the referring court to describe the legal opinion of the OGH and to explain that, because of the different opinions taken by the parties in the main proceedings, it has doubts as to the compatibility of that legal opinion with Union law. Furthermore, in setting out the legal opinion of the OGH, the referring court described the relevant rules of national law with sufficient precision for the purposes of the present proceedings.

VIII — The first question

39. The first question concerns jurisdiction for related actions under Article 6(1) of Regulation No 44/2001. The referring court asks whether it also has jurisdiction under that provision for the claims against the second defendant and the fifth defendant in the main proceedings, in so far as they concern the reports in newspapers which are published only in Germany (i.e. the daily newspaper *Express* and the national edition of *Bild*). [9]

40. Based on the factual and legal circumstances of the present case, the referring court has jurisdiction, under Article 2 of Regulation No 44/2001, for the claim against the first defendant in the main proceedings, which is established in Vienna and publishes the daily newspaper *Der Standard*, which appears in Austria. According to the referring court, Austrian law is applicable to this claim, which is based on an infringement of the applicant's copyright. The claims against the fifth defendant and claim against the second defendant in the main proceedings concerning the reports in the daily newspaper *Express* and the national edition of *Bild* are based on similar infringements of the applicant's copyright. According to the referring court, if it had jurisdiction for these claims, German law would be applicable having regard to

9 — See point 27 of this Opinion. The referring court does not ask this question in relation to the other newspapers, the magazine and the websites.

publication in these daily newspapers, which did not appear in Austria. The referring court also states that although the rules of German and Austrian law are different, they lay down requirements which are essentially comparable.

Such an interpretation would also be supported by reasons of procedural economy. Furthermore, in the internet age, an author must be able to take effective action against copyright infringements committed in different Member States.

A — *Main arguments of the parties*

41. In the view of the *applicant in the main proceedings*, jurisdiction for related actions applies in the present case. It is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings even though the factual situation is the same and the legal situation is almost identical. The claims are identical in respect of all the defendants in the main proceedings, with minor exceptions. The facts are comparable, since in all the cases the contested photos were exploited without the consent of the applicant in the main proceedings. The application of Article 6(1) of the regulation is not precluded if different national law is applicable to the individual claims, but provision is made for essentially identical grounds for the claims.

42. The *defendants in the main proceedings* consider the question to be inadmissible because only courts or tribunals against whose decisions there is no judicial remedy under national law may request from the Court an interpretation of Regulation No 44/2001. They further argue that Article 6(1) of the regulation is not applicable in the present case because the close connection required under that provision is not present. First of all, the publication of the contested pictures in the individual newspapers is to be assessed autonomously in each case. Secondly, the legal situation in the individual Member States may be different, with the result that irreconcilable judgments are not possible. In *Roche Nederland* [10] the Court rejected the existence of a sufficiently close connection in a similar case. In that case, the individual defendants even belonged to the same group and acted in a similar manner in accordance with a common policy. A close connection is all the less conceivable in the present case.

10 — Cited in footnote 3.

43. The *Austrian Government* and the *Commission* argue that the application of Article 6(1) of the regulation is not precluded by reason of the fact that different national law is applicable to the claim against the first defendant established in Austria and other claims.

44. The Commission points out, first of all, that the notion of irreconcilable judgment within the meaning of Article 6(1) of the regulation cannot be interpreted in a comparable way to the corresponding notion in Article 34(3) of the regulation. Rather, Article 6(1) of the regulation is closely connected with Article 28(3) of the regulation, as they both have the aim of avoiding the risk of irreconcilable judgments. However, the objectives of the two provisions are not entirely identical.

45. The Austrian Government also argues that Article 6(1) of the regulation is not aimed at eliminating the risk of irreconcilable judgments stemming from the fact that the applicable national laws are different and those differences between the national laws could lead to different judgments. It does, however, seek to avoid inconsistencies between two judgments which can be attributed to a different appraisal of the facts. Article 6(1) of the regulation therefore also covers actions to which different law is applicable, provided the requirements under both laws are essentially comparable.

46. In the view of the Commission too, it is not a requirement for the application of Article 6(1) of the regulation that the individual claims have the same legal bases. Otherwise that provision would lose a significant part of its practical effectiveness. It is not relevant to the application of that provision whether there is a risk of irreconcilable judgments. Rather, it is necessary to assess all the circumstances of the individual case, taking particular account of the aims of increasing legal protection and avoiding concurrent proceedings, and the interests of the applicant and the defendants. In addition, it must be guaranteed that there are adequate means to enforce intellectual property rights. In the present case, the interest of the applicant in the main proceedings in effective legal protection against copyright infringements prevails, with regard to the second defendant in the main proceedings, with the result that Article 6(1) of the regulation is applicable. For the fifth defendant, which sold its newspaper only in Germany, however, such a claim was not sufficiently predictable, with the result that Article 6(1) of the regulation is not applicable.

B — *Admissibility*

47. In so far as the defendants in the main proceedings complain that the first question is inadmissible because only courts or tribunals against whose decisions there is no judicial remedy under national law may request from the Court an interpretation of Regulation No 44/2001, this complaint must be rejected.

48. This restriction, which was laid down in Article 68(1) EC, no longer appears in the TFEU, which entered into force on 1 December 2009 and is thus applicable *ratione temporis* to the reference for a preliminary ruling lodged with the Court on 22 March 2010.

C — *Legal assessment*

49. With its first question, the referring court is seeking to ascertain whether jurisdiction for related actions under Article 6(1) of Regulation No 44/2001 may apply in respect of the second defendant and the fifth defendant in so far as the publication of the contested photos and the contested photo-fit in the daily newspapers which are sold only in Germany, i.e. the national edition of *Bild* and *Express*, are concerned.

50. Under Article 6(1) of the regulation, an applicant who sues a person in the courts for the place where he is domiciled ('the anchor claim') [11] may also sue another person in that court. However, this is subject to the requirement that the anchor claim and the other claim are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

51. In the present case an anchor claim exists in the form of the claim against the first defendant, which is established in Vienna.

52. The referring court has doubts whether the second requirement under Article 6(1) of the regulation is satisfied, i.e. a close connection between the anchor claim and the abovementioned claims against the second and fifth defendants. This second requirement stems from the Court's case-law on the predecessor provision to Article 6(1) of the regulation in the Brussels Convention. Article 6(1) of the

11 — With regard to this term, see Althammer, C., Die Anforderungen an die 'Ankerklage' am forum connexitatis, *Praxis des Internationalen Privat- und Verfahrensrechts* 2006, p. 558 et seq.

Brussels Convention did not provide for any such requirement. However, the Court considered it necessary to examine this further requirement in order to guarantee the practical effectiveness of Article 2 of the Brussels Convention, which lays down the principle that jurisdiction is vested in the courts of the State of the defendant's domicile. [12] The Union legislator incorporated this requirement developed by the Court into the wording of the provision in Regulation No 44/2001. Continuity is thus maintained between Article 6(1) of the regulation and Article 6(1) of the Brussels Convention.

53. The referring court asks whether a close connection, as required in Article 6(1) of the regulation, can exist in a case where

— copyright infringements which are comparable in substance are alleged and comparable claims are made in all three actions;

— Austrian law is applicable to the anchor claim and German law is applicable to the claims against the second and fifth defendants concerning the newspapers sold in Germany;

— the requirements governing the claims made are identical in substance under Austrian and German law.

54. I will approach the answer to this question gradually. First of all, I will examine the position of jurisdiction for related actions in the overall jurisdiction system under Regulation No 44/2001 (1). I will then consider the connection between Article 6(1) of the regulation, the aims of which include avoiding the risk of irreconcilable judgments, with other provisions which have a similar objective (2). Then I will explain how the Court has interpreted the close connection requirement (3). Because I consider the objections raised against the Court's case-law to be partially justified (4), I will propose that it modify its approach slightly (5).

1. The overall system under Regulation No 44/2001

55. Under Article 2 of Regulation No 44/2001, the courts of the Member State in which the defendant is domiciled have jurisdiction in principle in relation to an action. However, the regulation provides for an exhaustive number of special rules on jurisdiction which

12 — Case 189/87 *Kalfelis*, cited in footnote 3, paragraphs 6 to 12, and Case C-51/97 *Réunion européenne and Others* [1998] ECR I-6511, paragraph 47 et seq.

derogate from that principle. It is settled case-law that such special rules on jurisdiction, which include Article 6(1) of the regulation, must be strictly interpreted. [13]

56. In interpreting Article 6(1) of the regulation, regard must also be had to the 11th recital in the preamble to the regulation. According to that recital, the rules of jurisdiction must be highly predictable. They must be founded on the principle that jurisdiction is generally based on the defendant's domicile. Derogations from that principle are permitted only in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor.

2. Schematic connections

57. Article 6(1) of the regulation seeks, in particular, to avoid the risk of irreconcilable judgments in the case of closely connected claims. [14] Thus, it is natural, in interpreting that provision, to have reference to other provisions of the regulation which have a similar objective. Article 34(3) of the regulation (a) and Article 28 of the regulation (b) also concern inconsistencies between two judgments.

(a) Reference to Article 34(3) of Regulation No 44/2001?

58. The question arises, first of all, whether Article 6(1) of the regulation should be interpreted by reference to Article 34(3) of the regulation and to the case-law on that provision. Article 34(3) provides that a judgment given in a Member State between two parties may not be recognised in the other Member State in which recognition is sought if it is irreconcilable with a judgment given in a dispute between the same parties.

59. The Court has found, with regard to the predecessor provision to Article 34(3) of the regulation, Article 27(3) of the Brussels Convention, that two judgments may be taken to be irreconcilable within the meaning of Article 27(3) only if the two judgments entail legal consequences that are mutually exclusive. [15] This is the case, for example, where the first judgment between two persons orders one person to make maintenance payments by

13 — Case C-98/06 *Freeport*, cited in footnote 3, paragraph 35, and Case C-103/05 *Reisch Montage* [2006] ECR I-6827, paragraph 23.

14 — However, Article 6(1) of the regulation is also intended to pursue objectives of procedural economy.

15 — Case 145/86 *Hoffmann* [1988] ECR 645 paragraph 22.

virtue of his conjugal obligations, whilst the second judgment pronounces the divorce. [16]

60. It is suggested by some that, in interpreting Article 6(1) of the regulation, reference should be made to Article 34(3) of the regulation and that the abovementioned case-law should be applied to Article 6(1) of the regulation. [17] However, this argument is countered by the following reasons.

61. First of all, Article 34(3) of the regulation and Article 6(1) concern different situations and therefore have a different objective.

62. Article 34(3) of the regulation is applicable at the stage of the recognition and enforcement of judgments given by the courts and tribunals of other Member States. It is a rule for resolving a conflict between two judgments between the same parties, which should not occur in principle under the system established by the regulation. [18] Non-recognition under Article 34(3) of the regulation is therefore an exceptional case, where a derogation from the principle of the virtually automatic recognition of judgments given courts and tribunals of the other Member States, and thus from a 'foundation stone' of Regulation No 44/2001, is exceptionally justified. For that reason, that provision must be given a narrow interpretation and be restricted to judgments entailing legal consequences that are mutually exclusive. [19]

63. On the other hand, Article 6(1) of the regulation concerns a different case. First of all, it seeks to avoid the risk of irreconcilable judgments by courts or tribunals before they can actually occur. Secondly, it is not a matter only of inconsistencies between two judgments between the same parties, but of potential inconsistencies between two judgments, one of which is given between the applicant and the defendant in the anchor claim and another is given between the applicant and another defendant. Article 6(1) of the regulation gives the applicant the opportunity, in cases where the claims are closely connected, to have both claims decided by the same court in order to avoid the risk of such inconsistencies between the judgments, which may result from the fact that two different courts rule on the claims. [20]

16 — Ibid., paragraph 25.

17 — For example, in points 107 to 110 of his Opinion in Case C-539/03 *Roche Nederland and Others* (cited in footnote 3), Advocate General Léger favoured such a narrow interpretation of Article 6(1) of the Brussels Convention. In its judgment in that case the Court left open the question whether that view was correct (see paragraph 25 of the judgment). However, it can be seen from the judgment in Case C-98/06 *Freeport* (cited in footnote 3) that the Court give serious consideration to this narrow approach.

18 — See, in particular, the provision on *lis pendens* under Article 27 of Regulation No 44/2001.

19 — See the 17th recital in the preamble to the regulation and Case C-406/92 *Tatry* [1994] ECR I-5439, paragraph 55.

20 — The application of Article 6(1) can also have benefits in terms of procedural economy.

64. Because the two provisions have different regulatory objects, it does not seem reasonable, in my view, to apply the case-law on the predecessor provision to Article 34(3) of the regulation to Article 6(1) of the regulation.

65. Secondly, an argument against applying the case-law on the predecessor provision to Article 34(3) of the regulation is the fact that it would seriously restrict the *effet utile* of Article 6(1) of the regulation. A case where the legal consequences of two judgments are mutually exclusive will, as a rule, exist only where the two judgments are given between the same parties. Because Article 6(1) of the regulation does not apply to this case, however, but a case where the two judgments are given, first, between the applicant and the defendant in the anchor claim and, secondly, between the applicant and another defendant, there will not, as a rule, be legal consequences that are mutually exclusive within the meaning of Article 34(3) of the regulation. Even if the judgments were irreconcilable, they could nevertheless both generally be enforced. [21]

66. Consequently, an interpretation of Article 6(1) of the regulation by reference to Article 34(3) and an application of the case-law on the predecessor provision to Article 34(3) of the regulation to Article 6(1) must be rejected. [22]

(b) Reference to Article 28 of Regulation No 44/2001

67. On the other hand, when interpreting Article 6(1) of the regulation, regard must be had to the connection between it and Article 28 of the regulation. Under Article 28(1) of the regulation, any court other than the court first seised may stay its proceedings where related actions are pending in the courts of different Member States. Under the requirements laid down in Article 28(2), any court other than the court first seised may even decline jurisdiction. The requirements relating to a connection which can justify the staying of proceedings under Article 28(1) and even the declining of jurisdiction under the additional requirements laid down in Article 28(2) are contained in Article 28(3). They are worded in the same way as the second

21 — See point 109 of the Opinion in Case C-539/03 *Roche Nederland and Others*, cited in footnote 3.

22 — See also Gaudemet-Tallon, H., *Compétence et exécution des jugements en Europe*, 4th edition 2010, L.G.D.J., p. 255.

requirement in Article 6(1) of the regulation. As has been explained above, [23] this is because the wording of Article 6(1) of the regulation stems from the Court's case-law on Article 6(1) of the Brussels Convention and the Court took the predecessor provision to Article 28(3) of the regulation, the third paragraph of Article 22 of the Brussels Convention, as its reference point.

68. For this reason, it seems reasonable, in interpreting Article 6(1) of the regulation, to have regard to the schematic connection with Article 28 of the regulation and thus also the case-law on that provision and on its predecessor provision. According the Court's case-law, the notion of 'connection' for the purposes of the third paragraph of Article 22 of the Brussels Convention (now Article 28(3) of Regulation No 44/2001) is to be interpreted to the effect that it is sufficient for the existence of a connection between two questions that separate judgment would involve the risk of conflicting decisions, without necessarily involving the risk of giving rise to mutually exclusive legal consequences. [24] I consider that this case-law can be applied to Article 6(1) of the regulation.

69. However, not all assessments of Article 28 of the regulation can be simply applied to Article 6(1) of the regulation. Even though the wording of both provisions is similar and they have comparable objectives, there are nevertheless differences between the two rules which must be taken into consideration.

70. Article 28(1) of the regulation gives any court other than the court first seised the power to stay its proceedings. However, in contrast with Article 6(1), staying proceedings does not result in a transfer of international jurisdiction. Under Article 28(2) of the regulation, a court may also decline jurisdiction subject to additional requirements. It must nevertheless be assumed that a national court will take the decisions for which it is empowered under Article 28 of the regulation, in particular having regard to the need for the harmonious administration of justice.

71. On the other hand, the decision whether jurisdiction for related actions is applied rests solely with the applicant. He will not, however, be guided by the need for the harmonious administration of justice, but according to the jurisdiction which is more favourable to him. For that reason, in interpreting the notion of 'connection' for the purposes of Article 6(1) of the regulation, sufficient account must be taken of the defendant's interests in order to check the risk of possible abuse. Consequently, higher requirements are to be applied to the notion of connection in Article 6(1) of the

23 — See point 52 of this Opinion.

24 — Case C-406/92 *Tatry*, cited in footnote 19, paragraph 58.

regulation than to the notion of connection under Article 28 of the regulation. [25]

3. The Court's case-law

72. After describing the legislative framework laid down by Regulation No 44/2001, I would now like to consider how the Court has interpreted the notion of close connection for the purposes of Article 6(1) of the regulation. For the abovementioned reasons, regard must also be had to the case-law on Article 6(1) of the Brussels Convention.

73. First of all, the Court has made clear that the notion of connection for the purposes of Article 6(1) of the regulation is a Union-law notion which must be interpreted autonomously and uniformly in all the Member States. [26]

74. The Court also takes the view that the application of Article 6(1) of Regulation No 44/2001 (or of the Brussels Convention) is possible only if there may be diverging judgments for the purposes of that provision. To that end, it is not sufficient in itself that there be a divergence in the outcome of the dispute, but that divergence must also arise in the context of *the same situation of law and fact.* [27]

75. Furthermore, it is clear from the judgment in *Roche Nederland* that in European patent infringement proceedings involving a number of companies established in various Member States in respect of acts committed in one or more of those States, the existence of the same situation of fact cannot be inferred. As grounds the Court stated that the defendants are different and the infringements they are accused of, committed in different Member States, are not the same.

76. Moreover, in that judgment the Court held that the same situation of law does not exist where different law is applicable in both sets of proceedings and that law is not fully harmonised, as in the field of patent law. In such a case, diverging judgments cannot be

25 — See Leible, S., in Rauscher, T., *Europäisches Zivilprozessrecht*, Sellier 2006, Article 6, paragraph 8.

26 — Case C-103/05 *Reisch Montage*, cited in footnote 13, paragraph 29.

27 — Case C-98/06 *Freeport*, cited in footnote 3, paragraph 40, and Case C-539/03 *Roche Nederland and Others*, cited in footnote 3, paragraph 26.

regarded as irreconcilable within the meaning of Article 6(1) of the Brussels Convention. [28]

77. Subsequently, in *Freeport* the Court stated that it is not a requirement for the application of Article 6(1) of the regulation that the actions brought against different defendants should have the same legal bases. [29] It is for the national court to assess whether there is a close connection between the claims brought before it and thus whether there is a risk of irreconcilable judgments between the different claims. In this connection it must take account of all the necessary factors in the case-file. This could lead the national court also to take into consideration the legal bases of the actions brought before that court. [30]

4. Legitimate objections

78. Objections have been raised over individual elements of this case-law. [31] With regard to the requirement developed by the Court in *Roche Nederland* that Article 6(1) of the regulation may be applicable only if both actions arise in the context of the same legal situation, these doubts appear to me to be justified. That requirement appears to be based on the mental assumption that no irreconcilable judgments within the meaning of Article 6(1) of the regulation can exist where different laws are applicable to the actions and those laws are not fully harmonised. That assumption is not correct, however. [32] It would be correct only if, in a case where in two actions before two different courts to which different laws are applicable, *all* inconsistencies between the judgments could be attributed

28 — In that judgment, the Court found that a patent continues to be governed by the national law of each of the Contracting States for which it has been granted ('bundle theory'). An action for infringement of a European patent must therefore be examined in the light of the relevant national law. It follows that, where infringement proceedings are brought before a number of courts in different Contracting States in respect of a European patent granted in each of those States, against defendants domiciled in those Member States in respect of acts allegedly committed in their territory, any divergences between the decisions given by the courts concerned would not arise in the context of the same legal situation. For that reason, there is not a comparable legal situation. Because there is not a comparable legal situation, there is no risk of irreconcilable judgments in such a case.

29 — Case C-98/06 *Freeport*, cited in footnote 3, paragraph 38.

30 — Case C-98/06 *Freeport*, cited in footnote 3, paragraph 41.

31 — Kur, A., A Farewell to Cross-Border Injunctions? The ECJ Decisions GAT v Luk and Roche Nederland v Primus and Goldenberg, *International Review of Intellectual Property and Competition Law* 2006, p. 844 et seq.; 849 et seq.; Wilderspin, M., La competence juridictionnelle en matière de litiges concernant la violation des droits de propriété intellectuelle, *Revue critique de droit international privé* 2006, p. 777 et seq., 791 et seq.; Schlosser, P., Anmerkung zu EuGH, Urteil v. 13.7.2006 – Rs. C-539/03 Roche Nederland BV u.a../. Primus u. Goldenberg, *Juristenzeitung* 2007, p. 303 et seq., 305 et seq.; Muir Watt, H., in: Magnus, U., Mankowski, P., *Brussels I Regulation*, Sellier 2007, Article 6, paragraph 25a. It should not be forgotten in this connection that the European Max Planck Group for Conflict of Laws in Intellectual Property (http://www.ip.mpg.de/shared/data/pdf/clip_brussels_i_dec_06_final.pdf, p. 11 et seq.) proposed, as a response to the judgment in Case C-539/03 *Roche Nederland and Others*, that Article 6(1) of Regulation No 44/2001 be amended so that such cases come under jurisdiction for related actions.

32 — Kur, A., cited in footnote 31, p. 850, is very critical, describing this argument as 'manifestly deficient.'

to the differences between the two applicable laws. However, that is not the case.

79. First of all, it is always conceivable that in the case of two judgments by two courts inconsistencies between those judgments can be attributed to a different appraisal of the facts of the case by those courts. If, as in the present case, two actions are brought for copyright infringements, one of which is subject to Austrian law and the other to German law, there may be differences between the judgments which can be attributed to differences between German and Austrian copyright law. However, there may also be differences which can be attributed to the fact that two courts, which are applying an essentially comparable legal criterion, reach different conclusions because they appraise the facts differently.

80. Secondly, even in a field which is not fully harmonised, certain minimum requirements may nevertheless have been harmonised. Even with actions to which different national laws are applicable, such a case may ultimately be governed by the same law in substance, the common requirements of Union law.

81. In my view, the Court's view that irreconcilable judgments within the meaning of Article 6(1) of the regulation cannot exist if different laws are applicable to the actions and those laws are not fully harmonised cannot therefore be accepted.

82. Nor can it be based on the fact that the Member States' courts would not be capable of deciding on the infringement of intellectual property rights in another Member State under the law of that Member State. Such a fundamental power of the courts forms the basis for the system under Regulation No 44/2001.

83. Thirdly, the following example too raises the question whether it may be a mandatory requirement of Article 6(1) of the regulation that the same law is applicable to the anchor claim and the other claim. In a case of contingent liability (alternative liability) in which one of the defendants is liable only where the other defendant is not liable, there is, in my view, a clear interest that the case is decided by the same court in order to avoid the risk of irreconcilable judgments. [33] In such a case,

33 — An irreconcilable outcome would exist, for example, if one court decides that the defendant who is the primary liable party is not liable, whilst the other court decides that the other defendant, who is the secondary liable party, is not liable because, in its view, the primary liable party should have been liable.

the legal connection between both claims is not dependent on whether the same law is applicable to both claims.

84. The above considerations raise doubts as to whether the application of Article 6(1) of the regulation is really justified only where the same law is applicable to both claims.

85. In *Freeport* the Court does appear to have departed substantively from its approach in *Roche Nederland*. However, because it continued to require, with reference to *Roche Nederland*, that the same situation of law and fact exist, [34] the Court's overall approach remains unclear. [35]

5. The connection for the purposes of Article 6(1) of Regulation No 44/2001

86. In the light of the criticism of the Court's previous case-law, which I consider to be justified, I suggest that a slightly modified criterion be applied in examining whether there is a sufficiently close connection for the purposes of Article 6(1) of Regulation No 44/2001. It should first be pointed out that in the context of Article 6(1) of the regulation only a connection between the anchor claim and the other claim(s) is relevant. This stipulation must be taken seriously (a). The first requirement for the existence of a close connection is that the anchor claim and the other claim arise in the context of a single factual situation (b). Secondly, there must also be a sufficiently close legal connection between the anchor claim and the other claim (c). On the other hand, there is no need for a separate examination of whether there is a risk of irreconcilable judgments in the specific case (d).

(a) Connection between the anchor claim and the other claim(s)

87. Article 6(1) of Regulation No 44/2001 grants jurisdiction over connected claims only for claims that are closely connected with the earlier claim. However, these claims cannot serve as anchor claims for further claims that are closely connected with them.

88. This follows, firstly, from the wording of Article 6(1) of the regulation, which requires that there be a close connection between the anchor claim and the further claim. Second,

34 — Case C-98/06 *Freeport*, cited in footnote 3, paragraph 40.

35 — Roth, H., Das Konnexitätserfordernis im Mehrparteieingerichtsstand des Artikel 6(1) EuGVO, *Die Richtige Ordnung – Festschrift für Jan Kropholler*, Mohr Siebeck 2008, p. 884 et seq., 887, points out inconsistencies between these two judgments. See also Gaudemet-Tallon, H., cited in footnote 22, p.p. 256 to 259.

this reflects the idea that the rules on jurisdiction must be highly predictable for the defendant.

89. In the present case, this means that jurisdiction over the claims against the fifth defendant and against the second defendant concerning the newspapers published in Germany is given only if each of these claims has a sufficiently close connection with the anchor claim against the first defendant. It is irrelevant, however, in the context of Article 6(1) of the regulation whether the individual claims against the second to fifth defendants are connected because those defendants are not established in Austria and the actions are not therefore anchor claims.

90. The jurisdiction of the referring court for the claim against the second defendant concerning the national edition of Bild, which is published in Germany, cannot therefore be based, under Article 6(1) of the regulation, on the fact that other claims have already been brought before it against the second defendant concerning newspapers published in Austria (the Munich edition of *Bild* and *Die Welt*), for which it has jurisdiction. These other claims against the second defendant are not anchor claims for the purposes of Article 6(1) of the regulation because the second defendant is not established in Austria.

(b) Single factual situation

91. The first requirement for the existence of a connection between the anchor claim and another claim is that the claims arise in the context of a single factual situation. It should be borne in mind in this connection that Article 6(1) of the regulation must be highly predictable for the defendant. [36] A minimum requirement for a single factual situation must therefore be that it is at least clear to a defendant that he may be sued, as the co-defendant of an anchor defendant, under Article 6(1) of the regulation, at a court in the place where that anchor defendant is domiciled.

36 — See point 56 of this Opinion.

92. That minimum requirement is not satisfied where the facts on which the applicant bases its anchor claim and the other claim are such that the conduct of the anchor defendant and of the other defendant concerns the same or similar legal interests of the applicant and is similar in nature, but occurs independently and without knowledge of one another. In such a case of unconcerted parallel conduct, it is not sufficiently predictable for the other defendant that he can also be sued, under Article 6(1) of the regulation, at a court in the place where the anchor defendant is domiciled.

93. It is for the referring court to examine whether there is unconcerted parallel conduct on the part of the anchor defendant, on the one hand, and the second to fifth defendants, on the other, in the main proceedings. However, the description of the facts in the order for reference suggests that unconcerted parallel conduct does not exist in the present case. In that case, the application of Article 6(1) of the regulation is frustrated because there is not a single factual situation for the purposes of that provision.

94. It should be mentioned here that in *Roche* the Court also rejected the application of Article 6(1) of the Brussels Convention, in the absence of the 'same factual situation', in a case where it was claimed that a European patent had been infringed by companies belonging to the same group which were established in different Member States. As grounds it stated inter alia that the defendants were different and the infringements they were accused of, committed in different Member States, were not the same. [37] I do not wish to consider here this disputed case-law [38] in the present case, as there does not appear be concerted parallel conduct. [39]

37 — Case C-539/03 *Roche Nederland and Others*, cited in footnote 3, paragraph 26 et seq.

38 — See, in particular, Wilderspin, M., cited in footnote 31, p. 791 et seq.

39 — Merely for the sake of completeness, I would point out that, in my view, the fears expressed by the Court in paragraph 37 et seq. of the judgment in Case C-539/03 *Roche Nederland and Others* (cited in footnote 3) that the application of Article 6(1) of the regulation in such a case could undermine the predictability of the rules of jurisdiction and encourage the practice of forum shopping can be countered by having strict regard to the requirement for a connection to the anchor claim, as is suggested in points 87 to 90 of this Opinion. As a rule, this would mean that solely the place in which the parent company is established could be the common place of jurisdiction for all the claims against companies in the group if the parent company is sued together with the group subsidiaries.

(c) Sufficiently close legal connection

95. The second requirement for a close connection for the purposes of Article 6(1) of the regulation is that a sufficient legal connection exists. Because a single factual situation does not appear to exist in the present case, I would like to comment briefly on the second requirement.

96. The theoretical starting point must be whether the two claims have such a close legal connection that the applicant could not be reasonably expected to seek to have the claims decided by two courts. It is clear from the wording of Article 6(1) of the regulation that this may be the case in particular where the legal connection between two claims is so close that inconsistencies between them would not be acceptable. Some account can also be taken in this connection of considerations of procedural economy, although strict regard must be had to the defendant's interest in the predictability of jurisdiction.

97. Cases where the legal connection between two claims is so close that inconsistencies between the decisions would not be acceptable are, first and foremost, cases where the outcome of one claim is dependent on the outcome of the other claim. I refer in this respect to the example of contingent liability (alternative liability) given in point 83 of this Opinion. Furthermore, a sufficiently close legal connection exists in particular where the defendants are jointly and severally liable, co-owners or a community of rights.

98. In cases in which comparable claims are made and the requirements under the applicable law are essentially comparable, application of Article 6(1) of Regulation No 44/2001 is suggested, first of all, by the fact it is possible to avoid inconsistencies which could result from a different appraisal of the facts by two courts. In so far as common stipulations under Union law are concerned, this is also supported by the avoidance of legal inconsistencies. Considerations of procedural economy also indicate the existence of such a connection. However, in such cases the requirement that the anchor claim and the other claim arise in the context of a single factual situation is of crucial importance. The risk of a different appraisal of the facts and a different legal assessment can justify a transfer of jurisdiction under Article 6(1) of the regulation only where this is predictable for the defendant.

99. In the light of the fact that no such single factual situation appears to exist in the present case, this point need not be examined in any greater detail for the purposes of the

present proceedings. It should be pointed out, finally, that the abovementioned examples of a sufficiently close connection should not be understood as an exhaustive list of cases in which there is a sufficient legal connection.

(d) No separate examination or forecast whether there is a risk of an inconsistency in the specific case

100. Contrary to the apparent suggestion made in *Roche Nederland*[40] in particular, it is not necessary, in addition to the existence of a single factual situation and a sufficiently close legal connection, to examine or make a forecast as to whether there is a risk of a contradiction between the two judgments.

101. Article 6(1) of the regulation proceeds for the assumption of the *abstract risk* that the transfer of two judgments to two courts may result in inconsistencies between those judgments.[41] As explained earlier, in any case where two courts rule on two claims there is at least the risk that differences between the judgments given by the courts can be attributed to a different appraisal of the facts. On this reading, it is indeed the *aim* of Article 6(1) of the regulation to avoid inconsistencies. However, because this is an abstract risk, the *requirement* is merely the existence of a sufficiently close connection with the anchor claim.[42]

102. Such a reading is also not precluded by the wording of Article 6(1) of the regulation. The words 'to avoid the risk of irreconcilable judgments resulting from separate proceedings' can be understood as a simple description of the objective of the provision, but do not have the character of an autonomous requirement.

D — *Conclusion*

103. The notion of close connection under Article 6(1) of Regulation No 44/2001 must therefore be interpreted as requiring a single factual situation and a sufficient legal connection between the anchor claim and the other claim. In the present case it simply depends

40 — See paragraph 32 of the judgment in Case C-539/03 *Roche Nederland and Others*, cited in footnote 3.

41 — A similar idea can be found in Roth, H., cited in footnote 35, p. 892 et seq.

42 — See also Roth, H., cited in footnote 35, p. 893.

on a close connection with the claim against the first defendant.

104. A single factual situation cannot be taken to exist where the contested conduct of the anchor defendant and of the other defendant appears to be unconcerted parallel conduct.

105. A sufficient legal connection may exist even where different national law which is not fully harmonised is applicable to the anchor claim and the other claim.

IX — The other questions

106. I will examine the second, third and fourth questions below, first considering the fourth question, by which the referring court is seeking to ascertain whether the publication of a photo-fit can constitute reproduction of the photographic template used for its production in accordance with Article 2(a) of Directive 2001/29 (A). According to the scheme of the directive, this question must be answered before the second and third questions, which are directed at the interpretation of Article 5(3)(d) and (e) of Directive 2001/29. Under those provisions, the Member States may provide for exceptions or limitations ('constraints') to the reproduction right for public security measures (B) or for quotations (C).

A — *The fourth question*

107. By its fourth question, the referring court is seeking to ascertain whether Article 1(1) of Directive 2001/29 in conjunction with Article 5(5) thereof and Article 12 of the Revised Berne Convention, [43] particularly in the light of Article 1 of the Additional Protocol to the ECHR [44] and Article 17 of the Charter of Fundamental Rights, are to be interpreted as meaning that portrait photos are afforded 'weaker' copyright protection or no copyright protection at all against adaptations because, in view of their 'realistic image', the degree of formative freedom is too minor.

108. As is clear from the order for reference, the fourth question must be seen in the

43 — Revised Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), as revised on 28 September 1979.

44 — European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950; First Additional Protocol of 20 March 1952.

light of the legal opinion taken by the OGH in the proceedings for an interlocutory injunction.[45] The OGH ruled that under the relevant national rules the publication of the contested photo-fit by the defendants in the main proceedings did not require the consent of the applicant in the main proceedings. The contested photo which had been used as a template for the contested photo-fit was a copyright photographic work. However, the production and publication of the photo-fit was not an adaptation for which the consent of the applicant in the main proceedings, as author of the photographic work, was needed, but a free use, which did not require her consent. The question whether it was an adaptation or a free use depends on the creative effort in the template. The greater the creative effort in the template, the less conceivable is a free use. In the case of a portrait photo like the contested photo, the creator enjoys only a small degree of individual formative freedom. For that reason, the copyright protection of the contested photo is accordingly narrow. Furthermore, the contested photo-fit based on the template is a new and autonomous and work which is protected by copyright.

1. Main arguments of the parties

109. In the view of the *applicant in the main proceedings*, an approach whereby portrait photos are afforded weaker copyright protection or no copyright protection at all is incompatible with the rules cited by the referring court in its question. Under Article 1 of Directive 2001/29, simple photographs and photographic works enjoy the same protection against adaptation. The fact that there is a lesser degree of formative freedom in the production of portrait photos does not mean that they are afforded weaker protection. Copyright protection of such photos cannot be subdivided into a protected and an unprotected part. It must in any case be borne in mind that photo-fits can be produced at any time without difficulty. The approach taken by the OGH is not compatible with the three-stage test under Article 5(5) of Directive 2001/29, Article 12 of the Berne Convention, or the right to ownership under Article 1 of the First Additional Protocol to the ECHR and Article 17 of the Charter of Fundamental Rights. First of all, these are not strictly limited special cases. Secondly, on the basis of this approach, the normal exploitation of the contested photo on the basis of which the photo-fit was produced is also seriously jeopardised and, thirdly, the economic value of copyright is undermined, without

45 — See point 38 of this Opinion.

this being justified having regard to a legitimate general interest.

110. The *defendants in the main proceedings* consider the fourth question to be inadmissible because it manifestly bears no relation to the main proceedings. The decision on the question of the scope of the protection enjoyed by the contested photo must be answered in the main proceedings by the referring court, having regard to all the circumstances of the individual case. The question of interpretation asked by the referring court is not important in this connection.

111. In addition, the approach taken by the OGH is correct. In the case of a portrait photo the creative scope is limited, which means that such a photo is less original. Consequently, such photos are afforded weaker copyright protection or no copyright protection at all. Furthermore, the creative effort expended in the production of a photo-fit must be taken into consideration. In any case, Article 5(3)(i) of Directive 2001/29 provides for a possible constraint in relation to the incidental inclusion of a work in other material.

112. In the view of the *Italian Government*, it does not follow from the rules cited by the referring court that portrait photos are afforded weaker copyright protection or no copyright protection at all in relation to a photo-fit based on it. Portrait photos are not subject to any lesser degree of copyright protection. In addition, producing a photo-fit is a fairly simple activity which can be easily performed with the aid of a computer programme. Such an approach is also not compatible with the three-stage test under Article 5(5) of Directive 2001/29.

113. The *Austrian Government* and the *Commission* point out that the rules cited by the referring court are not relevant, but Article 6 of Directive 93/98 and of Directive 2006/116. Together with the *Spanish Government*, they argue that photos are protected by copyright where they are original intellectual creations. The eligibility for protection of a portrait photo therefore depends on its degree of originality and creativity. It is for the national court to assess, on the basis of the criteria in the main proceedings, whether the photo on which the photo-fit was based satisfies these requirements. The fact that it is a portrait photo does not mean that it is afforded a lesser degree of copyright protection against adaptation under Directive 2001/29. The question whether the production of a photo-fit is to be regarded as a reproduction of the template for the purposes of Article 2 of Directive 2001/29 depends on whether the characteristics on the basis of which the template is to be

regarded as an original intellectual creation are reflected in the photo-fit.

2. Admissibility

114. The fourth question is to be construed to the effect that the referring court is seeking to ascertain whether the legal opinion taken by the OGH as described in point 108 of this Opinion is compatible with the relevant provisions of Union law and, if appropriate, international law.

115. The question, thus construed, is admissible.

116. Contrary to the view taken by the defendants in the main proceedings, the question is not hypothetical. Rather, the referring court wishes to know whether the distinction drawn by the OGH on the basis of national law between free use and consent-dependent reproduction of the contested photo is compatible with Union law. This question is relevant to the dispute before it.

117. It is also not detrimental that the answer to the question thus construed does not follow from the rules cited in the question, but from Article 6 of Directive 93/98, which was codified in Article 6 of Directive 2006/116, and from Article 2 of Directive 2001/29. Because the preliminary ruling procedure under Article 267 TFEU is intended to bring about effective cooperation between the national courts and the Court of Justice, and the Court can thus provide the referring court with all the guidance that it deems useful for the settlement of the main proceedings, it may answer the question referred with reference to the relevant provisions. [46]

3. Legal assessment

118. Because the reproduction right under Article 2(a) of Directive 2001/29 requires the existence of copyright work, [47] the question arises in the present case, first of all, under what conditions a portrait photo can be afforded copyright protection (a). The further

46 — Case 294/82 *Einberger* [1984] ECR 1177, paragraph 6, and Case C-187/91 *Belovo* [1992] ECR I-4937, paragraph 13.

47 — See Case C-5/08 *Infopaq International* [2009] ECR I-6569, paragraph 33 et seq. Schulze, G., 'Schleichende Harmonisierung des urheberrechtlichen Werkbegriffs?', *Gewerblicher Rechtschutz und Urheberrecht* 2009, p. 1019 et seq., is critical of the Court's approach, according to which the existence of an intellectual creation is also required for types of work for which the conditions for protection are not harmonised. This is not relevant in the present case because the requirements governing the eligibility for protection of photographs are harmonised in Article 6 of Directive 93/98 and of Directive 2006/116.

question arises whether the publication of a photo-fit based on a copyright portrait photo is to be regarded as a reproduction within the meaning of Article 2(a) of Directive 2001/29 (b).

(a) The eligibility for protection of portrait photos

119. Article 6 of Directive 93/98, which was codified in Article 6 of Directive 2006/116, governs the conditions under which photos are afforded copyright protection under Union law. [48] The relevant factor under the first sentence of Article 6 is whether the photos are original in the sense that they are the author's own intellectual creation. The second sentence of Article 6 of that directive provides that no other criteria may be applied to determine their eligibility for protection.

120. The referring court will thus have to examine whether the photo which was used as a template for the photo-fit is to be regarded as an original work resulting from the applicant in the main proceedings' intellectual creation. This notion, which is not defined in Directive 93/98 or Directive 2006/116, is a Union-law notion which must be given an autonomous interpretation. [49] According to the 17th recital in the preamble to Directive 93/98 and the 16th recital in the preamble to Directive 2006/116, which refers to the Revised Berne Convention, an original photographic work exists if it is the author's own intellectual creation reflecting his personality.

121. According to the first sentence of Article 6 of Directive 93/98 and of Directive 2006/116, only human creations are therefore protected, which can also include those for which the person employs a technical aid, such as a camera.

122. Furthermore, the photo must be an original creation. [50] In the case of a photo, this means that the photographer utilises available formative freedom and thus gives it originality.

48 — Under Article 6(3) of Directive 93/98 and Directive 2006/116, Member States may protect photographs to a greater extent than the requirements of Union law.

49 — This is clear from 17th recital in the preamble to Directive 93/98.

50 — See Case C-5/08 *Infopaq International*, cited in footnote 47, paragraph 35, where the Court made reference to the requirements under Article 6 of Directive 2006/116.

123. Other criteria are expressly irrelevant, as the second sentence of Article 6 of Directive 93/98 and of Directive 2006/116 makes clear. A certain degree of artistic quality or novelty are not therefore required. The purpose of the creation, expenditure and costs are also immaterial.

124. Accordingly, the requirements governing copyright protection of a photo under Article 6 of Directive 93/98 and of Directive 2006/116 are not excessively high. [51] If this criterion is applied, a portrait photo may be protected by copyright under Article 6 of Directive 93/98 and of Directive 2006/116 where the work was produced by the photographer as a result of a commission. Even though the essential object of such a photo is already established in the person of the figure portrayed, a photographer still enjoys sufficient formative freedom. The photographer can determine, among other things, the angle, the position and the facial expression of the person portrayed, the background, the sharpness, and the light/lighting. To put it vividly, the crucial factor is that a photographer 'leaves his mark' on a photo.

125. It is for the referring court, applying this criterion in the main proceedings, to determine whether the photo which was used as a template for the photo-fit is protected by copyright under Article 6(1) of Directive 93/98 and of Directive 2006/116.

(b) The notion of reproduction

126. If a photo is protected by copyright under Article 6 of Directive 93/98 and of Directive 2006/116, its author enjoys a reproduction right under Article 2(a) of Directive 2001/29. Under that provision, he may authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part. In accordance with this extremely broad

51 — See Nordemann, A., in Loewenheim, U., *Handbuch der Urheberrechts*, 2nd edition 2010, Beck, § 9, paragraph 149. Leistner, M., Copyright Law in the EC: Status quo, recent case law and policy perspectives, *Common Market Law Review* 2009, p. 847 et seq., 849 et seq., points out that in Member States in which a higher test applied, Article 6 of Directive 93/98 and of Directive 2006/116 has led to a lowering of that test in order to comply with the requirements of the directive. For the purposes of the present case, a more comprehensive comparison with, on the one hand, the criterion of '*sweat of the brow*', which is familiar from common law and from the legal orders of the United Kingdom and Ireland, and, on the other, the criterion of '*originalité*' and '*Schöpfungshöhe*', which is familiar from continental legal orders, is therefore irrelevant.

wording,[52] a reproduction exists if the defendants in the main proceedings published the contested photos without modification. However, the question arises in the present case whether the publication of the contested photo-fit can also be a reproduction of the photo which was used as the template for its production.

127. If the computer-assisted production of the photo-fit was carried out in such a way that the contested photo was first scanned in[53] and then that scan was modified with the aid of a programme, a reproduction within the meaning of Article 2(a) of the directive is suggested. That provision expressly also covers publications in a modified form. This is also confirmed by the 21st recital in the preamble to Directive 2001/29, according to which a broad definition of acts of reproduction is needed.

128. This conclusion is not inevitable, however. In interpreting the notion of reproduction, not only can regard be had to the wording of Article 2(a) of Directive 2001/29, but consideration must also be given to the purpose pursued by that provision. That purpose consists in protecting copyright works. In this connection, a distinction should be drawn between the work and the copy of the work. The *work* is the personal intellectual creation which is protected by copyright. The *work as a produced item* is the material object in which the work protected by copyright is manifested. The reproduction right under Article 2(a) of the directive protects the copyright work. The work as a produced item is protected only in so far as there may be an infringement of the work.

129. The publication of a photo-fit thus constitutes a reproduction of the portrait photo used as a template only if the personal intellectual creation which justifies the copyright protection of the photographic template is still embodied in the photo-fit. In a case where the photo-fit was based on a scan of the photographic template, this as a rule can be assumed. However, it is possible that in the case of a photo-fit which, based on the picture of a ten-year-old child, is intended to show the presumed appearance of an eighteen-year-old adult, the elements which comprise the personal intellectual creation in respect of the template are largely removed when the photo-fit is produced. If, for example, the portrait photo is only used to record a person's biometric characteristics, and if a photo-fit is then produced on the basis of

52 — The notion of reproduction in Article 2 of Directive 2001/29 is a combination of the notions of reproduction in the preceding directives. See Reinbothe, J., Die EG-Richtlinie zum Urheberrecht in der Informationsgesellschaft, *Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil* 2001, p. 733 et seq., 736 and Lewinsky, S., Der EG-Richtlinienvorschlag zum Urheberrecht und zu verwandten Schutzrechten in der Informationsgesellschaft, *Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil* 1998, p. 637 and 638.

53 — In this case, the production of the scans themselves would be a reproduction, the lawfulness of which would have to be assessed on the basis of Article 5(1) of Directive 2001/29.

those characteristics, the publication of that photo-fit does not constitute a reproduction within the meaning of Article 2(a) of the directive.

130. Under the directive, on the other hand, it does not appear to be an autonomously relevant criterion what creative content the photo-fit has or whether it is itself a work protected by copyright. Nevertheless, the further removed from the template the photo-fit is, the more readily it can be accepted that the elements comprising the personal intellectual creation of the template are repressed in the photo-fit to an extent that they are no longer significant and are thus no longer worthy of consideration.

131. It is for the referring court, having regard to those requirements, to examine in the main proceedings whether the publication of the photo-fit constitutes a reproduction within the meaning of Article 2(a) of the directive.

(c) Conclusion

132. In conclusion, it must be stated, first of all, that a portrait photo is afforded copyright protection under Article 6 of Directive 93/98 and of Directive 2006/116 if it is an original work resulting from the intellectual creation of the photographer, which is the case where the photographer leaves his mark by using the available formative freedom of portrait photography.

133. Secondly, it must be stated that the publication of a photo-fit based on a copyright portrait photo constitutes a reproduction within the meaning of Article 2(a) of Directive 2001/29 where the elements comprising the original intellectual creation of the template are also embodied in the photo-fit.

B — *The third question*

134. The third question concerns the interpretation of the possible constraints under Article 5(3)(e) of Directive 2001/29. Under that provision, Member States may provide for exceptions or limitations to the reproduction right and the right of communication to

the public in the case of use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings.

135. The referring court first asks the question whether the application of that provision requires a specific, current and express appeal for publication of the contested images on the part of the security authorities, i.e. whether publication of the images must be officially ordered for search purposes. In the event that this is not required, it asks the question, secondly, whether the media are permitted to rely on Article 5(3)(e) of Directive 2001/29 even if, without such a search request being made by the authorities, they should decide, themselves, whether images should be published 'in the interests of public security'. If this is not possible, the question arises, thirdly, whether it is sufficient for the application of Article 5(3)(e) of Directive 2001/29 for the media to assert after the event that publication of the images served to trace a person or whether it is always necessary for there to be a specific appeal to readers to assist in a search in the investigation of an offence, which must be directly linked to the publication of the photograph.

1. Main arguments of the parties

136. The *applicant in the main proceedings* and the *Spanish Government* take the view that Article 5(3)(e) of Directive 2001/29 applies only where there has been a specific, current and express appeal for publication of the image on the part of the security authorities. They point out that the decision whether and how this possible constraint is to be applied depends on the relevant national administrative and judicial authorities. The protection of public security comes under the exclusive competence of the public authorities, with the result that they must decide in what media and in what form photos may be published for search purposes. In the view of the applicant in the main proceedings, this view is also supported by the fact that Directive 2001/29 is intended to achieve a high level of protection of rights to intellectual creations. If the media could decide, themselves, whether images should be published in the interests of public security, they would be free to exploit author's works without their consent. According to the applicant in the main proceedings, Article 5(3)(e) of the directive also requires an appeal to assist in a search to be linked to the publication of the images. It is not sufficient for the media to assert after the event that publication of the images served to trace a person.

137. The *defendants in the main proceedings,* the *Austrian Government* and the *Commission* take the view, on the other hand, that the media are permitted to rely on Article 5(3)(e) of the directive even if no current and express search appeal has been made. That provision does not contain any indication that a specific and express appeal for publication of the images on the part of the security authorities is necessary.

138. The submissions made by these parties differ in other respects.

139. The defendants in the main proceedings point out that Article 5(3)(e) of the directive also accords the Member States the possibility to permit the free use of works to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings. On the other hand, the Commission considers that Article 5(3)(e) of the directive covers two separate scenarios and the present case concerns only the scenario of use for the purposes of public security.

140. The defendants in the main proceedings also claim that the media can rely directly on Article 5(3)(e) of Directive 2001/29 if the publication of images is in the interest of public security. In this connection, they refer in particular to the importance of freedom of the press. The media must be able to decide autonomously, i.e. without an appeal on the part of the authorities, when to investigate and report. Furthermore, readers would notify the authorities of important information for the investigation of the offence as a result of the facts reported in the media.

141. In contrast, the Austrian Government and the Commission claim that the competent national authorities are reserved the right to provide for exceptions and limitations for the purposes of public security. They must, however, have regard to the requirements of Article 5(3)(e) of the directive and of the three-stage test. Consequently, the media cannot decide at their own discretion when public security is affected.

142. The Commission further claims that the reproduction of the images must be necessary for the purposes of public security and proportionate to the purpose of public security pursued. If police authorities asked the media to publish a photo, there is a strong presumption that the use was necessary for the purposes of public security. If, on the other hand, the publication of the photo and of the accompanying text bore no obvious relation to public security and the publisher claimed this only after the event, there is a strong suspicion that the use was not in fact for the purposes of public security.

143. The Austrian Government considers it sufficient if the publication of the images is objectively capable of detecting criminal offences.

2. Legal assessment

144. As is evident from the order for reference, the third question is also to be seen in the light of the legal opinions taken by the OGH in the proceedings for an interlocutory injunction. [54] The OGH ruled that, under the provisions of national law, a free use of the contested photos for the purposes of public security did not require any specific, express appeal to publish the images on the part of the security authorities. It was sufficient that the security authorities were offered photos for publication and, in connection with their publication, made reference to actually ongoing criminal investigations of criminal offences.

145. With its three sub-questions, the referring court would like to know whether this approach is compatible with the requirements laid down in Article 5(3)(e) of Directive 2001/29.

54 — See point 38 of this Opinion.

146. Before answering the three sub-questions, I would first like to examine the legislative technique underlying Article 5(3)(e) of the directive, as well as Article 5(3)(d).

(a) The legislative technique underlying Article 5(3) of Directive 2001/29

147. Article 5 of Directive 2001/29 provides for a number of constraints to copyright. As is clear from the 32nd recital in the preamble to the directive, this list is exhaustive, since a minimum degree of harmonisation is to be achieved as regards the permissible constraints. Accordingly, the notions contained in Article 5(3) of the directive are autonomous Union-law notions.

148. Article 5(3) of the directive provides for a number of optional constraints. The Member States may provide for the constraints set out therein, but are not required to do so. If the Member States are able to decide whether to provide for one of the constraints set out in Article 5(3), they are also able, according to the principle of *qui potest majus, potest et minus*, to decide in principle how to organise such a constraint. Nevertheless, they must have regard to certain requirements. First, certain powers in relation to constraints leave the Member States free to decide whether they wish to provide for a constraint, but lay

down certain minimum requirements in the event that the Member States exercise those powers. Furthermore, the Member States must in any case have regard to the requirements of the three-stage test under Article 5(5) of the directive. They may apply the constraints only in certain special cases (*first stage*), which are not contrary to a normal exploitation of the work (*second stage*) and which do not unreasonably prejudice the legitimate interests of the rightholders (*third stage*).[55] There may also be other requirements under other rules of Union law. Lastly, according to the 32nd recital in the preamble to the directive, the Member States must exercise their discretion coherently.

149. Article 5(3) of the directive thus provides for a legal framework with which a Member State must comply. However, the way in which a Member State gives shape to the constraints provided for in that provision is a matter for its discretion within that framework.

150. As regards the application of Article 5(3)(e) of Directive 2001/29, this means that a Member State is bound by Article 5(3)(e) of the directive in so far as it lays down the limits of what can be regarded as a case of public security which can justify an exception or a limitation to copyright. Within those limits, however, the Member State is free in principle to determine, at its own discretion, the cases in which it considers an exception or limitation to copyright to be justified.

(b) The first sub-question

151. Having regard to the abovementioned legislative technique in Article 5(3)(e) of Directive 2001/29, the first sub-question is to be construed as meaning that the referring court is seeking to ascertain whether a national court exceeds the limits laid down by Article 5(3)(e) of the directive, in interpreting the relevant national rules, if it finds that, in a case like the present one, a current and express appeal on the part of the security authorities is not required for the consent-free publication of copyright photos.

152. A feature of the present case is that search measures were conducted in the past in connection with the abduction of Natascha K. in 1998 and for that reason the contested

55 — With regard to the three-stage test, point 134 of my Opinion in Case C-5/08 *Infopaq International*, cited in footnote 47.

photos were offered to the security authorities for publication. After Natascha K. escaped from her abductor in 2006, however, there was no current and express search appeal.

153. It must first be pointed out that, according to the wording of Article 5(3)(e) of the directive, the crucial factor is that the exception or limitation to the reproduction right is for the purposes of public security. The relevant criterion is therefore whether the reproduction is objectively capable of pursuing purposes of public security. [56]

154. It must also be stated that a search appeal with the intention of finding an abducted person or their abductor(s) pursues a purpose of public security within the meaning of Article 5(3)(e) of Directive 2001/29.

155. Furthermore, a Member State does not exceed the limits laid down by Article 5(3)(e) of Directive 2001/29 if it continues to consider public security to be affected even in the case of a search appeal from a long time ago. It is possible that a person who is the subject of a search will only be found years after the search appeal.

156. Nevertheless, even though a national security authority made a search appeal in the past and in this connection requested images for publication, it can no longer be assumed that this is objectively capable of pursuing a purpose of public security if the search appeal has already been completed. The referring court will therefore have to examine what purposes were pursued by the original search appeal and whether those purposes were fulfilled with the escape of Natascha K. and the suicide of her abductor immediately thereafter.

157. If the referring court concluded that the search pursued further purposes which had not been fulfilled, such as the search for a potential accomplice, [57] it will also have to examine whether the publication of the contested photos in the newspapers and the magazine was objectively capable of helping to achieve that further purpose of the search. It cannot be ruled out that newspaper reports in which no search appeal is made are also objectively

56 — Going beyond the present case, it can thus be stated that the notion of public security under Article 5(3)(e) of Directive 2001/29 does not just cover the category of search appeals.

57 — This is claimed by the defendants in the main proceedings.

capable of contributing to a search on the part of the public security authorities. However, at least a reference to an ongoing search must be made in the report. Furthermore, the publication of the images must be objectively capable of promoting this further purpose of the search. In this case, the national court would therefore have to examine in particular whether the publication of eight-year-old photos and of a photo-fit of the abductee may be objectively capable of finding a potential accomplice who was not found eight years previously when the same photos were used.

158. If the referring court concluded, on the basis of the abovementioned criterion, that the requirements laid down in Article 5(3)(e) of the directive are satisfied, it would also have to examine whether the requirements of the three-stage test are respected. In the present case, it will have to examine in particular whether the third stage of that test has been observed, i.e. whether the legitimate interests of the rightholders are not unreasonably prejudiced. This will be a possibility in particular if the reproduction of the contested photos serves primarily to illustrate a report about Natascha K. and assistance with a search appeal on the part of the public security authorities takes on secondary importance to that purpose.

(c) The second sub-question

159. With its second sub-question, the referring court is seeking to ascertain whether the media are permitted to decide, of their own volition, whether images should be published for the purposes of public security, i.e. whether the media may rely directly on Article 5(3)(e) of Directive 2001/29, going 'over the heads of the competent security authorities'.

160. This question must be answered in the negative.

161. As was explained above,[58] under Article 5(3)(e) of the directive, the Member States *may* provide for exceptions or limitations to copyright for the purposes of public security. That provision does not therefore require a Member State actually to introduce such a constraint. If it introduces one, it is able to organise it within the limits laid down by Union law. The decision in which cases covered by Article 5(3)(e) of the directive a limitation of copyright is justified thus falls within the discretion of the Member State in principle.

58 — See points 148 to 150 of this Opinion.

162. The media cannot therefore rely directly on Article 5(3)(e) of the directive in order to justify the reproduction of copyright photos because that provision is not sufficiently precise and unconditional in this regard.

163. In so far as the defendants in the main proceedings rely on freedom of the press in this connection, on the ground that their reporting opportunities were restricted, this is mistaken. Article 5(3)(e) of the directive grants the Member States powers for the protection of public security. It does not therefore seek to strike a balance between protection of intellectual property and freedom of the press. That balance is expressed in particular in Article 5(3)(c) (freedom of the press) and (d) (freedom of quotation) of Directive 2001/29 and must therefore be taken into consideration in interpreting those provisions.

164. It must therefore be concluded that the media may not rely directly on Article 5(3)(e) of Directive 2001/29 in order to justify the reproduction of copyright photos.

(d) The third sub-question

165. There is no need to answer the third sub-question because it is asked only if the answer to the second sub-question is in the affirmative.

C — *The second question*

166. The second question asked by the referring court concerns Article 5(3)(d) of Directive 2001/29. Under that provision, the Member States may provide for exceptions or limitations to the reproduction right in the case of quotations for purposes such as criticism or review, provided that they relate to a work which has already been lawfully made available to the public. Further requirements are that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that the use is in accordance with fair practice, and to the extent required by the specific purpose.

167. The referring court wishes to know, first of all, whether that provision is applicable even where the press report quoting a work is itself not a literary work protected by

copyright. Secondly, it asks whether the provision can be applied even where the name of the author or performer is not attached to the work quoted.

1. Arguments of the parties

168. The defendants in the main proceedings consider the *first sub-question* to be inadmissible, as it is not relevant to the outcome of the dispute, because the referring court has not stated whether or not the reports are protected by copyright.

169. The applicant in the main proceedings and the Italian Government essentially argue that the application of Article 5(3)(d) of Directive 2001/29 is precluded where the press report quoting a work is not itself a literary work protected by copyright. In the view of the Italian Government, this view is supported by the wording of the provision. The Italian Government and the applicant also invoke the aims of a high level of protection for copyright and an appropriate reward for authors.

170. On the other hand, in the opinion of the defendants in the main proceedings, the Austrian Government and the Commission, it is not a requirement of Article 5(3)(d) of the directive that the press report quoting a work is itself a literary work protected by copyright, as a right of quotation can also be justified in that case. In this connection, the Commission refers to the wording of the provision and the fact that the exceptions set out in Article 5 of Directive 2001/29 are exhaustive. In addition, an appropriate balance must be created between the protection of intellectual property and the public interest in the free exploitation of the work in the form of a quotation.

171. The defendants in the main proceedings and the Spanish Government claim, in the alternative, that even a short press report can be protected by copyright.

172. With regard to the *second sub-question*, the applicant in the main proceedings, the Austrian, Italian and Spanish Governments, and the Commission argue that Article 5(3)(d) of the directive is not applicable where the correct name of the author is not attached to the work or other protected matter quoted, unless this turns out to be impossible. The Austrian Government draws attention to the clear wording of the provision.

173. In the view of the defendants in the main proceedings, this question is inadmissible because the answer is already clear from the wording of the provision. They essentially argue that Article 5(3)(d) of the directive is applicable even where the name of the author or performer is not attached to the work or other protected matter quoted. Furthermore, it had not been possible for them, in the normal course of events, to ascertain the name of the applicant in the main proceedings. The agency from which they had obtained the contested photos had previously been given the photos by the police, without any documentation, for search purposes or at press conferences.

174. The applicant in the main proceedings and the Italian Government contend that the communication of the contested images by a news agency did not release the defendants in the main proceedings from the obligation to identify the correct author.

175. *Moreover*, the parties also comment on the other requirements under Article 5(3)(d) of the directive. The applicant in the main proceedings, the Austrian and Spanish Governments and the Commission point out that that provision is applicable only if the photos were used as a quotation, that is to say they served a documentation function. It is not sufficient that they were merely used to direct the reader's attention to the report.

176. In the view of the Austrian Government and the Commission, it is permissible under Article 5(3)(d) of the directive also to quote whole images where this is required for quotation purposes. In that case, however, particular importance is attached to the three-stage test under Article 5(5) of the directive. The Italian Government and the Commission have doubts whether the requirements of three-stage test, in particular the second and third stages, are satisfied in the main proceedings.

177. On the other hand, the defendants in the main proceedings claim that the other requirements laid down in Article 5(3)(d) are also satisfied. In particular, publication was in accordance with fair practice, as the published photos had been obtained from bona fide third parties. In addition, account must be taken of the right to freedom of opinion.

2. Legal assessment

178. As is clear from the order for reference, the second question must also be seen in the light of the legal opinions taken by the OGH in its decision in the proceedings for an

interlocutory injunction.[59] The OGH found that free use for quotations in newspapers and magazines is possible under the rules of national law, but the quotation of whole images is permissible only where this is required for quotation purposes and the economic value of the photograph is not significantly undermined.

(a) The first sub-question

179. With its first sub-question, the referring court is seeking to ascertain whether Article 5(3)(d) of Directive 2001/29 is applicable where the medium in which the quotation can be found is not itself afforded copyright protection.

180. This question is relevant to the decision. Contrary to the view taken by the defendants in the main proceedings, it is not necessary for the referring court first to examine whether the reports are protected by copyright. A reference for a preliminary ruling under Article 267 TFEU is not a subsidiary procedure in the sense that a national court must clarify all additional disputed issues before it refers a question to the Court of Justice on the interpretation of EU law.

181. It must also be pointed out in this connection that the possible constraints under Article 5(3)(d) of Directive 2001/29 are optional for the Member States, which thus enjoy a margin of discretion in principle as regards the question whether they provide for such constraints in national law and how they organise those constraints within the framework stipulated by Union law, but having regard to the reservations already set out in point 148 of this Opinion.

182. Against this background, the question asked by the referring court is to be construed as seeking to ascertain whether a Member State exceeds the framework stipulated by Union law under that provision where it does not make the right of quotation under national law subject to the requirement that the report quoting a work is not itself a literary work is protected by copyright.

183. This question must be answered in the negative.

184. Firstly, the wording of Article 5(3)(d) of the directive does not provide such a restrictive requirement.

59 — See point 38 of this Opinion.

185. Secondly, the directive does not contain any further indications to suggest such a requirement. In fact, it is evident from the schematic link with the other possible constraints provided for in Article 5(3) of the directive that none of those possible constraints are based on the fundamental idea that the limitation of copyright in a work can be granted only for the benefit of another work.

186. Thirdly, I do not think that the purpose of that provision supports such an interpretation. The possible constraint under Article 5(3)(d) of the directive must be seen against the background of the interest in a free intellectual analysis. It thus serves in particular to realise freedom of opinion and freedom of the press. Statements which are themselves protected by copyright may certainly come under the protection afforded by these fundamental rights.

187. Fourthly, the Revised Berne Convention, which forms the conceptual basis for the possible constraint under Article 5(3)(d) of the directive, [60] and in the light of which it should therefore be interpreted, does not give any indication of such a restrictive interpretation.

60 — See Article 10(1) of the Revised Berne Convention.

188. Fifthly, the three-stage test under Article 5(5) of Directive 2001/29 also does not require only quotations in copyright works to be protected. Reference can be made, first of all, to the abovementioned arguments. Furthermore, it is not clear that the normal use of a copyright photo is more seriously undermined by quotations in works not protected by copyright than by quotations in literary works protected by copyright.

189. It must therefore be concluded that it is not a mandatory requirement of Article 5(3)(d) of Directive 2001/29 that the report in which the quotation within the meaning of that provision can be found is protected by copyright.

190. Since Article 5(3)(d) of the directive is optional for the Member States, however, they are free, in principle, to organise the quotation right under national law more narrowly than the limits stipulated in the Union-law framework. However, they must have regard to other requirements of Union-law, including freedom of opinion and freedom of the press.

(b) The second sub-question

191. With its second sub-question, the referring court would like to know whether the exception under Article 5(3)(d) of the directive can be applied where the author of the published photo is not named in the reports. This question is also to be construed to the effect that the referring court is seeking to ascertain whether a Member State exceeds the framework stipulated by Article 5(3)(d) of the directive where a quotation can be made under national law even without indicating the name of the author of the work quoted.

192. Contrary to the view taken by the defendants in the main proceedings, the question is admissible. According to the second subparagraph of Article 104(3) of the Rules of Procedure, questions referred for a preliminary ruling are not inadmissible even where the answer admits of no reasonable doubt, but they may be decided by order.

193. This question essentially has two elements. Because the author's name must be credited under Article 5(3)(d) of the directive only where this does not turn out to be impossible, the question arises, first of all, when impossibility can be taken to exist for the purposes of that provision (i). The further question arises what legal consequences a Member State must provide for if it was not impossible to indicate the author and the author's name was still not indicated (ii).

(i) Impossibility of indicating the author

194. Article 5(3)(d) of Directive 2001/29 does not define when it turns out to be impossible to indicate the source and author.

195. First of all, according to the wording of the provision, impossibility is the relevant factor. A lack of reasonableness is not therefore sufficient. This suggests a fairly strict criterion. This conclusion is also supported by the aims of a high level of protection and an appropriate reward which underlie Directive 2001/29. [61] Furthermore, the wording 'turns out to be' [62] shows that certain efforts are expected to be made by the person quoting the work to ascertain the source and the author's name.

61 — See the 4th, 9th and 10th recitals in the preamble to Directive 2001/29.

62 — In German 'erweisen', in French 's'avère', in Dutch 'blijkt', in Portuguese 'se revele', in Slovenian 'se … izkaže', in Spanish 'resulte'. The Italian language version 'in caso di' is less clear.

196. Secondly, it should be borne in mind that the quotation right serves to realise freedom of opinion and freedom of the press. Consequently, the criterion of impossibility should not be subject to such high requirements that the quotation right no longer applies in practice if the author cannot be identified.

197. The assessment whether it was impossible to indicate the author for the purposes of Article 5(3)(d) of the directive must also be made in the context of an appraisal of all the circumstances of the individual case.

198. The referring court will therefore have to take into consideration, in the present case, in particular the fact that the contested photos were used in the context of a search appeal. In such a case the person quoting the work cannot automatically rely on the fact that the person who is in actual possession of a photo also holds the rights thereto. Furthermore, in such a case the person quoting the work must be expected to make enquiries in the event that the author's name does not appear on the photo. The author's name is not, as a rule, displayed on a photo used for a police search.

199. In addition, the application of high requirements to the responsibility on the part of the defendants in the main proceedings is also suggested by the three-stage test under Article 5(5) of the directive. The second and third stages of that test require that the constraints do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder. In the present case, the copyright held by the applicant in the main proceedings has already been breached by search measures, that is to say measures for the purposes of public security, and, as a result of those measures, the contested photos were reproduced without her consent and without her being indicated as the author of the images. In this instance, for the copyright not to be completely invalidated, it can be assumed only in exceptional cases, in my view, that the person quoting the work may claim, without further investigations, that it was impossible to indicate the author.

200. Without wishing to anticipate the assessment to be conducted by the referring court in the individual case, it appears reasonable to assume, on the basis of the description of the facts in the order for reference, that it did not turn out to be impossible for the defendants in the main proceedings to indicate the author.

(ii) The legal consequences where impossibility does not apply

201. If the referring court concluded that it did not turn out to be impossible to indicate the author's name, the further question arises what legal consequences a Member

State must provide for in that case. A possible approach is that publication without the author's consent is unlawful in this case. A further approach to be considered is that publication is still lawful in this case, but the author has a right to have his name credited.

202. In my view, only the approach whereby quotation without indicating the author's name and without the author's consent constitutes unlawful publication is compatible with Article 5(3)(d) of Directive 2001/29.

203. This view is supported, first of all, by the wording of Article 5(3)(d) of Directive 2001/29. Under that provision, a Member State may provide for a quotation right provided the source, including the author's name, is indicated. This makes clear that a Member State which exercises the power under Article 5(3)(d) of the directive must comply with that requirement.

204. Secondly, this interpretation is confirmed by the fact that this requirement is named in connection with other requirements under that provision, which must also be complied with. Those requirements are that use must be in accordance with fair practice and to the extent required by the specific purpose.

205. Thirdly, this conclusion is also supported by the spirit and purpose of that requirement. An author is generally able to make decisions on the use of his work. Article 5(3)(d) of the directive enables a Member State to limit the rights of authors in the interest of freedom of opinion and freedom of the press. However, the author is intended to retain a minimum amount of control as a result of the obligation to indicate the source and the author's name. Thus, he is intended to be able to control, among other things, whether or not the use of his work goes beyond the use of a permissible quotation. An approach whereby reproduction were permissible even without crediting the author's name and there was only a right for his name to be credited would run the risk that the author would not be able to exercise such control effectively. If he is not credited, in many cases he is in danger of not knowing about the use of his work.

206. The above arguments suggest that indicating the author's name must be regarded as a mandatory requirement for the possible constraint under Article 5(3)(d) of the directive. Failure to comply with that require-

ment thus means that reproduction cannot be justified on the basis of that provision. [63]

(iii) Conclusion

207. It must be concluded that the framework for consent-free quotations under Article 5(3)(d) of the directive is exceeded where the name of the author of a photo is not indicated, even though this did not turn out to be impossible. Indicating the author's name does not turn out to be impossible where the person making the quotation has not taken all the measures to identify the author which appear reasonable having regard to the circumstances of the individual case.

(c) Supplementary remarks

208. The second question concerns only two points which are relevant in the context of Article 5(3)(d) of the directive. However, because in preliminary ruling proceedings the Court can provide the referring court with all the guidance that it deems useful for the settlement of the main proceedings, [64] I would like to examine, going beyond the sub-questions asked by the court, three further points concerning the limits of the Union-law framework under Article 5(3)(d) and Article 5(5) of the directive. The question arises, first of all, under what circumstances a quotation can be taken to exist within the meaning of Article 5(3)(d) of the directive (i). The question also arises whether a full quotation can also constitute a quotation within the meaning of Article 5(3)(d) of that provision (ii). Lastly, I would like to consider the limitation on that possible constraint as a result of the requirement that the use must be in accordance with fair practice, and the three-stage test under Article 5(5) of the directive (iii).

(i) Quotations for purposes such as criticism or review

209. Under Article 5(3)(d) of Directive 2001/29, Member States may provide for exceptions or limitations for quotations for purposes such as criticism or review. The crucial

63 — See also Götting, H.-P., in Löwenheim, U., *Handbuch des Urheberrechts*, Beck 2010, § 32 paragraph 12.

64 — See point 117 of this Opinion.

factor is thus that reproduction is for quotation purposes.

210. The notion of quotation is not defined in the directive. In natural language usage, it is extremely important for a quotation that third-party intellectual property is reproduced without modification in identifiable form. As is made clear by the general examples cited in Article 5(3)(d) of the directive, according to which the quotation must be for purposes such as criticism or review, this is not sufficient in itself. There must also be a material reference back to the quoted work in the form of a description, commentary or analysis. The quotation must therefore be a basis for discussion.

211. It is for the referring court to establish whether the defendants in the main proceedings pursued such an aim with the publication of the contested pictures. A quotation within the meaning of Article 5(3)(d) of the directive cannot be taken to exist, however, where the reports do not contain the necessary material reference back to the work. In particular where the contested photos were merely intended to be used as a 'teaser' to arouse the interest of readers without discussing those photos in the accompanying text, it cannot be assumed that there were quotation purposes within the meaning of Article 5(3)(d) of the directive.

(ii) Full quotation

212. The question also arises to what extent Article 5(3)(d) of the directive also covers full quotations. According to its traditional meaning, a quotation is generally only a partial extract of a text. In the case of photos, however, it would seem possible that a full quotation can also be a quotation within the meaning of that provision. In the case of this type of work, a complete reproduction may be necessary in order to create the necessary material reference back to the work. If only parts of photos could be published under Article 5(3)(d) of the directive, this would significantly restrict the application of that provision to photos.

213. Because there is a material breach of copyright in the case of a full quotation, however, particular importance is attached to the other requirements, such as the requirement that the quotation must be in accordance with fair practice, and the examination of the three-stage test under Article 5(5) of the directive.

(iii) Other requirements

214. The referring court will also have to examine in the main proceedings whether the publication of the contested photos is consistent with normal use and satisfies the requirements of the three-stage test under Article 5(5) of Directive 2001/29. In this connection, it will have to take into consideration in particular whether the full quotation of the contested photos in the newspapers, magazines and websites operated by the defendants in the main proceedings seriously restricts their sales opportunities and thus unreasonably prejudices the interests of the applicant in the main proceedings.

X — Conclusion

215. In the light of the above considerations, I propose that the Court answer the questions referred for a preliminary ruling as follows:

1. The notion of 'close connection' under Article 6(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is to be interpreted as requiring a single factual situation and a sufficient legal connection between the claim against the defendant who is domiciled in the place where the court is based (anchor claim) and the other claim. In a case such as the present, a single factual situation cannot be taken to exist where the contested conduct of the anchor defendant and of the other defendant appears to be unconcerted parallel conduct. A sufficient legal connection may exist even where different national law which is not fully harmonised is applicable to the two claims.

2.(a) Article 5(3)(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 is to be interpreted to the effect that a Member State has the power to permit the quotation of a work without the author's consent even where the press report quoting the work is not itself protected by copyright.

(b) That provision also requires the person making the quotation to indicate the name of the author of a photo protected by copyright unless this turns out to be impossible. Indicating the author's name does not turn out to be impossible where the person making the quotation has not taken all the measures to identify the author which appear reasonable having regard to the circumstances of the individual case.

3(a) Article 5(3)(e) of Directive 2001/29 is to be interpreted to the effect that in the case of a search appeal which pursues a purpose of public security within the meaning of that provision a Member State may permit the reproduction of copyright photos by the media even without the author's consent if the purposes pursued by the search have not been fulfilled and the reproduction is objectively capable of pursuing those purposes.

(b) The media may not rely directly on that provision in order to justify a reproduction without the author's consent.

4. Under Article 6 of Council Directive 93/98/EEC harmonising the terms of protection of copyright and certain related rights and of Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, a portrait photo is afforded copyright protection if it is an original intellectual creation of the photographer,

which requires the photographer to have left his mark by using the available formative freedom.

The publication of a photo-fit based on a copyright portrait photo constitutes a reproduction within the meaning of Article 2(a) of Directive 2001/29 where the elements comprising the original intellectual creation of the template are also embodied in the photo-fit.