JUDGMENT OF THE COURT (Third Chamber)

1 December 2011 *

In Case C-145/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Handelsgericht Wien (Austria), made by decision of 8 March 2010, received at the Court on 22 March 2010, in the proceedings

Eva-Maria Painer

v

Standard VerlagsGmbH,

Axel Springer AG,

Süddeutsche Zeitung GmbH,

Spiegel-Verlag Rudolf Augstein GmbH & Co KG,

Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co KG,

* Language of the case: German.

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský (Rapporteur), E. Juhász, G. Arestis and T. von Danwitz, Judges,

Advocate General: V. Trstenjak,
Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Ms Painer, by G. Zanger, Rechtsanwalt,

— Standard VerlagsGmbH, by M. Windhager, Rechtsanwältin,

— the Austrian Government, by E. Riedl, acting as Agent,

— the Spanish Government, by N. Díaz Abad, acting as Agent,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by M. Russo, avvocato dello Stato,

— the European Commission, by S. Grünheid, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 12 April 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of 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 (OJ 2001 L 12, p. 1) and Article 5(3)(d) and (e) and (5) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

2 The reference has been made in proceedings between Ms Painer, the applicant in the main proceedings, a freelance photographer, and five newspaper publishers, namely Standard VerlagsGmbH ('Standard'), Axel Springer AG ('Axel Springer'), Süddeutsche Zeitung GmbH, Spiegel-Verlag Rudolf Augstein GmbH & Co KG and

Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co KG, concerning their use of photographs of Natascha K.

Legal context

International law

3 The Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the Agreement establishing the World Trade Organisation ('WTO'), signed at Marrakesh on 15 April 1994, was approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

4 Article 9(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights provides:

'Members shall comply with Articles 1 through 21 of the Berne Convention [for the Protection of Literary and Artistic Works (revised at Paris on 24 July 1971), in its version resulting from the amendment of 28 September 1979 ("the Berne Convention")] and the Appendix thereto. However, Members shall not have rights or obligations

under this Agreement in respect of the rights conferred under Article 6*bis* of that Convention or of the rights derived therefrom.'

5 Article 2(1) of the Berne Convention is in the following terms:

'The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art, illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.'

6 Article 10(1) of the Berne Convention stipulates:

'It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.'

7 Article 12 of the Berne Convention states:

'Authors of literary or artistic works shall enjoy the exclusive right of authorising adaptations, arrangements and other alterations of their works.'

8 Article 37(1)(c) of the Berne Convention provides:

'In case of differences of opinion on the interpretation of the various texts, the French text shall prevail.'

9 The World Intellectual Property Organisation ('WIPO') adopted in Geneva, on 20 December 1996, the WIPO Performances and Phonograms Treaty and the WIPO Copyright Treaty. Those two treaties were approved on behalf of the European Community by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6).

10 Article 1(4) of the WIPO Copyright Treaty provides that Contracting Parties are to comply with Articles 1 to 21 of and the Appendix to the Berne Convention.

European Union ('EU') law

Regulation No 44/2001

11 Recitals 11, 12 and 15 in the preamble to Regulation No 44/2001 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. ...'

12 Article 2(1) of Regulation No 44/2001 is in the following terms:

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

13 Article 3(1) of that regulation provides:

'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.'

14 Article 6(1) of that regulation, which forms part of Section 2 in Chapter II thereof, entitled 'Special jurisdiction', provides:

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

Directive 93/98/EEC

15 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 (OJ 1993 L 290, p. 9) states:

'… the protection of photographs in the Member States is the subject of varying regimes; … 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 character, are of importance within the internal market, it is necessary to define the level of originality required in this Directive; … 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 1(1) of that directive provides that protection of the rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention is to run for the life of the author and for 70 years after his death.

17 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.'

18 Directive 93/98 was repealed by 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 (OJ 2006 L 372, p. 12), which codified it and contains, in essence, the same provisions. Directive 2006/116 entered into force on 16 January 2007.

19 Nonetheless, given the material time in the main proceedings, the legislation applicable to them remains Directive 93/98.

Directive 2001/29

20 Recitals 6, 9, 21, 31, 32 and 44 in the preamble to Directive 2001/29 read as follows:

'(6) Without harmonisation at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency. The impact of such legislative differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased transborder exploitation of intellectual property. This development will and should further increase. Significant legal differences and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights.

...

(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.

...

(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded....

(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 [protected] subject-matter.'

21 Article 1(1) of that directive 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.'

22 Article 2 of that directive, relating to 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;

…'

23 Article 3(1) of that directive is in the following terms:

'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.'

24 Article 5 of Directive 2001/29, entitled 'Exceptions and limitations', states in paragraph 3(d) and (e) thereof:

'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, 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;

...'

25 Article 5(5) of that directive provides:

'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.'

National law

26 The abovementioned provisions of Directive 2001/29 were transposed into the Austrian legal order by the Federal law on copyright in literary and artistic works and related rights (Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte, Urheberrechtsgesetz).

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

27 Ms Painer has for many years worked as a freelance photographer, photographing, in particular, children in nurseries and day homes. In the course of that work, she took several photographs of Natascha K. designing the background, deciding the position and facial expression, and producing and developing them ('the contested photographs').

28 Ms Painer has, for more than 17 years, labelled the photographs she produces with her name. That labelling has been done in different ways which have varied over the years, by stickers and/or impressions in decorative portfolios or mounts. Those indications have always stated her name and business address.

29 Ms Painer sold the photographs which she produced, but without conferring on third parties any rights over them and without consenting to their publication. The price she charged for photographs corresponded solely to the price of the prints.

30 After Natascha K., then aged 10, was abducted in 1998, the competent security authorities launched a search appeal in which the contested photographs were used.

31 The defendants in the main proceedings are newspaper and magazine publishers. Only Standard is established in Vienna (Austria). The other defendants in the main proceedings are established in Germany.

32 Standard publishes the daily newspaper, *Der Standard*, which is distributed in Austria. Süddeutsche Zeitung GmbH publishes the daily, *Süddeutsche Zeitung*, which is distributed in Austria and Germany. Spiegel-Verlag Rudolf Augstein GmbH & Co KG publishes a weekly magazine in Germany, *Der Spiegel*, which also appears in Austria. Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co KG produces the daily, *Express*, which is published only in Germany. Axel Springer publishes the daily, *Bild*, the German edition of which is not distributed in Austria. The Munich edition of that newspaper, on the other hand, appears also in Austria. Axel Springer publishes, in addition, another daily newspaper, *Die Welt*, which is also distributed in Austria, and runs news websites on the internet.

33 In 2006 Natascha K. managed to escape from her abductor.

34 Following Natascha K.'s escape and prior to her first public appearance, the defendants in the main proceedings published the contested photographs in the abovementioned newspapers, magazines and websites without, however, indicating the name of the photographer, or indicating a name other than Ms Painer's as the photographer.

35 The coverage in the various media and websites differed in its choice of the contested photographs and accompanying text. The defendants in the main proceedings claim that they received the contested photographs from a news agency without Ms Painer's name being mentioned or with a name other than Ms Painer's name being indicated as the photographer's.

36 Several of those publications also published a portrait, created by computer from the contested photographs, which, since there was no recent photograph of Natascha K. until her first public appearance, represented the supposed image of Natascha K. ('the contested photo-fit').

37 By summons before the Handelsgericht Wien, on 10 April 2007, Ms Painer sought an order that the defendants in the main proceedings immediately cease the reproduction and/or distribution, without her consent and without indicating her as author, of the contested photographs and the contested photo-fit.

38 Ms Painer also applied for an order against the defendants for accounts, payment of appropriate remuneration and damages for her loss.

39 At the same time, Ms Painer applied for an interlocutory injunction, on which a ruling has already been given by the highest court, the Oberster Gerichtshof (Supreme Court) by a judgment of 26 August 2009.

40 As is clear from the order for reference, the Oberster Gerichtshof held, applying the relevant national rules, that the defendants in the main proceedings did not need Ms Painer's consent to publish the contested photo-fit.

41 In that court's view, the contested photograph which had been used as a template for the contested photo-fit was, admittedly, a photographic work protected by copyright. However, the production and publication of the contested photo-fit was not an adaptation for which the consent of Ms Painer, as author of the photographic work, was needed, but a free use, which did not require her consent.

42 Indeed, the referring court considered that 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 portrait photographs like the contested photographs, the creator enjoys only a small degree of individual formative freedom. For that reason, the copyright protection of that photograph is accordingly narrow. Furthermore, the contested photo-fit based on the template is a new and autonomous work which is protected by copyright.

43 In those circumstances, the Handelsgericht Wien decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(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 [Directive 2001/29], 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 [Directive 2001/29] 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 European Convention for the Protection of Human Rights and Fundamental Freedoms [signed at Rome on 4 November 1950] 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?'

Admissibility of the request for a preliminary ruling

44 In their observations, the defendants in the main proceedings challenge, on various grounds, the admissibility both of the request for a preliminary ruling and of some of the questions referred.

45 First of all, the defendants in the main proceedings submit that the request for a preliminary ruling should be rejected as inadmissible because, first, the referring court has given no sufficient explanation of the reasons which led to its doubts concerning the interpretation of EU law and, second, that court has not established a sufficient link between the national legal provisions applicable to the dispute in the main proceedings and those of EU law. In particular, that court has not cited the relevant rules of national law.

46 In that regard, it is settled case-law that the need to provide an interpretation of EU law which will be of use to the national court requires that the national court define the factual and legal context of its questions or, at the very least, that it explain the factual circumstances on which those questions are based (see, in particular, Case C-134/03 *Viacom Outdoor* [2005] ECR I-1167, paragraph 22; Case C-145/03 *Keller* [2005] ECR I-2529, paragraph 29; and Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-10423, paragraph 45).

47 The Court has also stressed that it is important for the referring court to set out the precise reasons why it was unsure as to the interpretation of EU law and why it considered it necessary to refer questions to the Court for a preliminary ruling. The Court has thus ruled that it is essential that the referring court provide at the very least some explanation of the reasons for the choice of the provisions of EU law which it requires to be interpreted and of the link it establishes between those provisions and the national legislation applicable to the dispute (see, in particular, Case C-318/00 *Bacardi-Martini and Cellier des Dauphins* [2003] ECR I-905, paragraph 43, and *ABNA and Others*, paragraph 46).

48 In this case, the order for reference sets out the national factual and legal context in which the questions referred arise. In addition, the referring court has set out the reasons which led it to consider it necessary to refer the questions to the Court for a preliminary ruling, since it has noted the opposing arguments of the parties to the main proceedings as regards the compatibility with the provisions of EU law referred

to in the questions of the relevant national provisions, as interpreted by the Oberster Gerichtshof in the interlocutory proceedings.

49 It follows that this Court has sufficient information to enable it to give an answer that will be of use to the referring court.

50 In those circumstances, the objection raised by the defendants in the main proceedings on that point must be rejected, with the result that the request for a preliminary ruling is admissible.

51 Secondly, the defendants in the main proceedings submit, more particularly, that the first question is inadmissible because the referring court is not entitled to refer questions to the Court of Justice for a preliminary ruling on the interpretation of Regulation No 44/2001. They submit that, only courts or tribunals against whose decisions there is no judicial remedy under national law could, under Article 68(1) EC, request from the Court a preliminary ruling on the interpretation of that regulation. However, here, judgments given by the referring court, which is a court of first instance, are subject to appeal under national law.

52 In that regard, Regulation No 44/2001, to which the request for a preliminary ruling relates, was adopted on the basis of Article 65 EC, which forms part of Title IV in Part Three of the EC Treaty.

53 Admittedly, under Article 68(1) EC, courts or tribunals of first instance did not have the right to refer questions for a preliminary ruling where acts adopted in the field of Title IV of the EC Treaty were concerned.

54 However, this reference for a preliminary ruling was submitted on 22 March 2010 that is after the Treaty of Lisbon entered into force. On 1 December 2009 when that Treaty entered into force, Article 68 EC was repealed. Since then, it is the general rules governing references for a preliminary ruling under Article 267 TFEU which apply to references for preliminary rulings on the interpretation of acts adopted in the area of judicial cooperation in civil matters. Consequently, Article 267 TFEU also applies to references relating to Regulation No 44/2001.

55 Accordingly, courts or tribunals, such as the referring court, are entitled to refer questions to the Court of Justice for a preliminary ruling on the interpretation of Regulation No 44/2001.

56 In those circumstances, the first question must be held to be admissible.

57 Thirdly, the defendants in the main proceedings argue that question 2(a) is irrelevant and, therefore, inadmissible because the referring court has not found that the press articles in question in the main proceedings are not protected by copyright.

58 However, it is settled case-law that, within the framework of the cooperation established by Article 267 TFEU, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling (see Case C-380/01 *Schneider* [2004] ECR I-1389, paragraph 21; Case C-165/03 *Längst* [2005] ECR I-5637, paragraph 31; and Case C-313/07 *Kirtruna and Vigano* [2008] ECR I-7907, paragraph 26).

59 It follows that questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for this Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, in particular, Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 25; Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 22; and *Kirtruna and Vigano*, paragraph 27).

60 The mere fact that the order for reference does not contain a formal finding that the press articles in question in the main proceedings are not protected by copyright cannot lead to an obvious conclusion that question 2(a) is hypothetical or unrelated to the actual facts of the main action or its purpose.

61 Accordingly, the fact that the referring court has not found that the articles in question in the main proceedings are not protected by copyright cannot render question 2(a) inadmissible.

62 In those circumstances question 2(a) must be held to be admissible.

63 Fourthly, question 2(b) is, so the defendants in the main proceedings submit, inadmissible because the answer to that question follows from the very wording of Article 5(3)(d) of Directive 2001/29 and leaves no scope for any reasonable doubt.

64 However, those circumstances in no way prevent a national court from referring to this Court for a preliminary ruling a question the answer to which, in the submission of the defendants in the main proceedings, leaves no scope for reasonable doubt (see, to that effect, Joined Cases C-428/06 to C-434/06 *UGT-Rioja and Others* [2008] ECR I-6747, paragraphs 42 and 43).

65 Thus, even if the answer to the question referred leaves no scope for any reasonable doubt, that question does not thereby become inadmissible.

66 In those circumstances question 2(b) must be held to be admissible.

67 Fifthly, the defendants in the main proceedings submit that the fourth question is inadmissible because it is too general and has no relevance to the outcome of the dispute in the main proceedings.

68 However, that question does not come within any of the possible situations referred to in paragraph 59 of the present judgment.

69 In fact, the referring court wishes to know whether the distinction drawn by the Oberster Gerichtshof, as stated in paragraphs 41 and 42 of the present judgment, between the free use and the reproduction of a portrait photograph is compatible with EU law. That distinction depends on the existence and/or scope of the protection conferred according to the criteria laid down by EU law on such a subject-matter.

70 The fourth question referred by the national court, which seeks clarification precisely as to the existence and/or scope of that protection, cannot therefore be regarded as being unrelated to the actual facts or purpose of the main action or as being hypothetical.

71 Under those circumstances the fourth question must be declared to be admissible.

Consideration of the questions referred

The first question

72 By its first question, the referring court asks, in essence, whether Article 6(1) of Regulation No 44/2001 must be interpreted as precluding its application if actions against several defendants for substantially identical copyright infringements are brought on national legal grounds which vary according to the Member States concerned.

73 The rule of jurisdiction laid down in Article 6(1) of Regulation No 44/2001 provides that a person may, where he is one of a number of defendants, be sued 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.

74 That special rule, because it derogates from the principle stated in Article 2 of Regulation No 44/2001 that jurisdiction be based on the defendant's domicile, must be strictly interpreted and cannot be given an interpretation going beyond the cases expressly envisaged by that regulation (see Case C-98/06 *Freeport* [2007] ECR I-8319, paragraph 35 and the case-law cited).

75 Indeed, as recital 11 in the preamble to Regulation No 44/2001 states, 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.

76 It is not apparent from the wording of Article 6(1) of Regulation No 44/2001 that the conditions laid down for application of that provision include a requirement that the actions brought against different defendants should have identical legal bases (*Freeport*, paragraph 38).

77 As regards its purpose, the rule of jurisdiction in Article 6(1) of Regulation No 44/2001, first, meets, in accordance with recitals 12 and 15 in the preamble to that regulation, the wish to facilitate the sound administration of justice, to minimise the possibility of concurrent proceedings and thus to avoid irreconcilable outcomes if cases are decided separately.

78 Secondly, that rule cannot however be applied so as to allow an applicant to make a claim against a number of defendants with the sole object of ousting the jurisdiction of the courts of the State where one of those defendants is domiciled (see, to that effect, Case 189/87 *Kalfelis* [1988] ECR 5565, paragraphs 8 and 9, and Case C-51/97 *Réunion européenne and Others* [1998] ECR I-6511, paragraph 47).

79 In that regard, the Court has stated that, in order for judgments to be regarded as irreconcilable within the meaning of Article 6(1) of Regulation No 44/2001, it is not sufficient that there be a divergence in the outcome of the dispute, but that divergence must also arise in the same situation of fact and law (see *Freeport*, paragraph 40).

80 However, in assessing whether there is a connection between different claims, that is to say a risk of irreconcilable judgments if those claims were determined separately, the identical legal bases of the actions brought is only one relevant factor among others. It is not an indispensable requirement for the application of Article 6(1) of Regulation No 44/2001 (see, to that effect, *Freeport*, paragraph 41).

81 Thus, a difference in legal basis between the actions brought against the various defendants, does not, in itself, preclude the application of Article 6(1) of Regulation No 44/2001, provided however that it was foreseeable by the defendants that they might be sued in the Member State where at least one of them is domiciled (see, to that effect, *Freeport*, paragraph 47).

82 That reasoning is stronger if, as in the main proceedings, the national laws on which the actions against the various defendants are based are, in the referring court's view, substantially identical.

83 It is, in addition, for the referring court to assess, in the light of all the elements of the case, whether there is a connection between the different claims brought before it, that is to say a risk of irreconcilable judgments if those claims were determined separately. For that purpose, the fact that defendants against whom a copyright holder alleges substantially identical infringements of his copyright did or did not act independently may be relevant.

84 In the light of the foregoing considerations, the answer to the first question is that Article 6(1) of Regulation No 44/2001 must be interpreted as not precluding its application solely because actions against several defendants for substantially identical copyright infringements are brought on national legal grounds which vary according

to the Member States concerned. It is for the referring court to assess, in the light of all the elements of the case, whether there is a risk of irreconcilable judgments if those actions were determined separately.

The fourth question

85 The fourth question, which it is appropriate to consider second, has been raised by the referring court in order to determine the correctness of the position according to which the defendants in the main proceedings did not need Ms Painer's consent to publish the contested photo-fit worked up from a portrait photograph, because the scope of the protection conferred on such a photograph was restricted, or even non-existent, because of the minor degree of formative freedom allowed by such photographs.

86 Therefore, the referring court's question must be understood as asking, in essence, whether Article 6 of Directive 93/98 must be interpreted as meaning that a portrait photograph can, under that provision, be protected by copyright and, if so, whether, because of the allegedly too minor degree of creative freedom such photographs can offer, that protection, particularly as regards the regime governing reproduction of works provided for in Article 2(a) of Directive 2001/29, is inferior to that enjoyed by other works, particularly photographic works.

87 As regards, first, the question whether realistic photographs, particularly portrait photographs, enjoy copyright protection under Article 6 of Directive 93/98, it is important to point out that the Court has already decided, in Case C-5/08 *Infopaq International* [2009] ECR I-6569, paragraph 35, that copyright is liable to apply only

in relation to a subject-matter, such as a photograph, which is original in the sense that it is its author's own intellectual creation.

88 As stated in recital 17 in the preamble to Directive 93/98, an intellectual creation is an author's own if it reflects the author's personality.

89 That is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices (see, *a contrario*, Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR I-9083, paragraph 98).

90 As regards a portrait photograph, the photographer can make free and creative choices in several ways and at various points in its production.

91 In the preparation phase, the photographer can choose the background, the subject's pose and the lighting. When taking a portrait photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software.

92 By making those various choices, the author of a portrait photograph can stamp the work created with his 'personal touch'.

93 Consequently, as regards a portrait photograph, the freedom available to the author to exercise his creative abilities will not necessarily be minor or even non-existent.

94 In view of the foregoing, a portrait photograph can, under Article 6 of Directive 93/98, be protected by copyright if, which it is for the national court to determine in each case, such photograph is an intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that photograph.

95 As regards, secondly, the question whether such protection is inferior to that enjoyed by other works, particularly photographic works, it is appropriate to point out straightaway that the author of a protected work is, under Article 2(a) of Directive 2001/29, entitled to, among other things, the exclusive right to authorise or prohibit its direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part.

96 In that regard, the Court has held that the protection conferred by that provision must be given a broad interpretation (see *Infopaq International*, paragraph 43).

97 Moreover, nothing in Directive 2001/29 or in any other directive applicable in this field supports the view that the extent of such protection should depend on possible differences in the degree of creative freedom in the production of various categories of works.

98 Therefore, as regards a portrait photograph, the protection conferred by Article 2(a) of Directive 2001/29 cannot be inferior to that enjoyed by other works, including other photographic works.

99 In the light of the foregoing, the answer to the fourth question is that Article 6 of Directive 93/98 must be interpreted as meaning that a portrait photograph can, under that provision, be protected by copyright if, which it is for the national court to determine in each case, such photograph is an intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that photograph. Since it has been determined that the portrait photograph in question is a work, its protection is not inferior to that enjoyed by any other work, including other photographic works.

Question 3(a) and (b)

100 By question 3(a) and (b), the national court asks, in essence, whether Article 5(3)(e) of Directive 2001/29, read in the light of Article 5(5) of that directive, must be interpreted as meaning that, in a case such as that in the main proceedings, its application requires a specific, current and express appeal for publication of the image on the part of the security authorities for search purposes and, if that is not required, whether the media can rely on that provision should they decide, of their own volition, without a search request being issued, to publish a photograph in the interests of public security.

101 In that regard, the provisions of Directive 2001/29 do not expressly address the circumstances in which the interests of public security can be invoked with a view to the use of a protected work, meaning that the Member States which decide to enact such an exception enjoy a broad discretion in that respect (see, by analogy, Case C-462/09 *Stichting de Thuiskopie* [2011] ECR I-5331, paragraph 23).

102 In fact, such a discretion is, first, in accordance with the idea that each Member State is best placed to determine, in accordance with its national needs, the requirements of public security, in the light of historical, legal, economic or social considerations specific to it (see, by analogy, Case C-213/07 *Michaniki* [2008] ECR I-9999, paragraph 56).

103 Secondly, that discretion is consistent with the Court's case-law to the effect that, in the absence of sufficiently precise criteria in a directive to delimit the obligations thereunder, it is for the Member States to determine, in their own territory, what are the most relevant criteria for ensuring compliance with that directive (see, to that effect, Case C-245/00 *SENA* [2003] ECR I-1251, paragraph 34, and Case C-433/02 *Commission* v *Belgium* [2003] ECR I-12191, paragraph 19).

104 That being so, the discretion which the Member States enjoy when they make use of the exception under Article 5(3)(e) of Directive 2001/29 must be exercised within the limits imposed by EU law.

105 In that regard, it is important to note, first, that it is settled case-law that, when adopting measures to implement EU legislation, national authorities must exercise their discretion in compliance with the general principles of EU law, which include the principle of proportionality (see, inter alia, Case C-313/99 *Mulligan and*

Others [2002] ECR I-5719, paragraphs 35 and 36; Joined Cases C-231/00, C-303/00 and C-451/00 *Cooperativa Lattepiú and Others* [2004] ECR I-2869, paragraph 57; and Case C-496/04 *Slob* [2006] ECR I-8257, paragraph 41).

106 In accordance with that principle, measures which the Member States may adopt must be appropriate for attaining their objective and must not go beyond what is necessary to achieve it (Case C-434/02 *Arnold André* [2004] ECR I-11825, paragraph 45; Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 47; and *ABNA and Others*, paragraph 68).

107 Secondly, the discretion enjoyed by the Member States cannot be used so as to compromise the principal purpose of Directive 2001/29 which, as is apparent from recital 9 in its preamble, is to establish a high level of protection for, in particular, authors, which is crucial to intellectual creation.

108 Thirdly, the exercise of that discretion must comply with the need for legal certainty for authors with regard to the protection of their works as referred to in recitals 4, 6 and 21 in the preamble to Directive 2001/29. That requirement means that the use of a protected work, for the purposes of public security, must not be dependent on discretionary human intervention by a user of the protected work (see, to that effect, *Infopaq International*, paragraph 62).

109 Fourthly, Article 5(3)(e) of Directive 2001/29, being a derogation from the general principle established by that directive, namely the requirement of authorisation from the copyright holder for any reproduction of a protected work, must, according to settled

case-law, be interpreted strictly (Case C-476/01 *Kapper* [2004] ECR I-5205, paragraph 72, and Case C-36/05 *Commission* v *Spain* [2006] ECR I-10313, paragraph 31).

110 Fifthly, the Member States' discretion is limited by Article 5(5) of Directive 2001/29, which makes the introduction of the exception under Article 5(3)(e) of that directive subject to three conditions, which are, first, that the exception may be applied only in certain special cases, second, that it does not conflict with a normal exploitation of the work and, finally, that it does not unreasonably prejudice the legitimate interests of the copyright holder.

111 In view of all those requirements and clarifications, the media, such as, in this case, newspaper publishers, cannot be allowed to confer on themselves the protection of public security. Only States, whose competent authorities are provided with appropriate means and coordinated structures, can be regarded as appropriate and responsible for the fulfillment of that objective of general interest by appropriate measures including, for example, assistance with a search appeal.

112 Such a publisher cannot, therefore, of its own volition, use a work protected by copyright by invoking an objective of public security.

113 However, having regard to the purpose of the press, in a democratic society governed by the rule of law, to inform the public, without restrictions other than those that are strictly necessary, it is conceivable that a newspaper publisher might, in specific cases, contribute to the fulfilment of an objective of public security by publishing a photograph of a person for whom a search has been launched. However, it should be required that such initiative is taken, first, within the framework of a decision or action taken by the competent national authorities to ensure public security and,

second, by agreement and in coordination with those authorities, in order to avoid the risk of interfering with the measures taken by them. A specific, current and express appeal, on the part of the security authorities, for publication of a photograph for the purposes of an investigation is not, however, necessary.

114 The defendants' argument that, in the name of freedom of the press, the media should be entitled to avail themselves of Article 5(3)(e) of Directive 2001/29, without a search notice from the security authorities, cannot lead to a different conclusion. Indeed, as the Advocate General pointed out, in point 163 of her opinion, the sole purpose of that provision is to ensure the protection of public security and not to strike a balance between the protection of intellectual property and the freedom of the press.

115 In addition, as is clear from Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, and Article 11 of the Charter of Fundamental Rights of the European Union, freedom of the press is not intended to protect public security but it is the requirements of the protection of public security which can justify a restriction on that freedom.

116 In the light of the foregoing, the answer to question 3(a) and (b) is that Article 5(3)(e) of Directive 2001/29, read in the light of Article 5(5) of that directive, must be interpreted as meaning that the media, such as newspaper publishers, may not use, of their own volition, a work protected by copyright by invoking an objective of public security. However, it is conceivable that a newspaper publisher might, in specific cases, contribute to the fulfilment of such an objective by publishing a photograph of a person for whom a search has been launched. It should be required that such initiative is taken, first, within the framework of a decision or action taken by the

competent national authorities to ensure public security and, second, by agreement and in coordination with those authorities, in order to avoid the risk of interfering with the measures taken by them, without, however, a specific, current and express appeal, on the part of the security authorities, for publication of a photograph for the purposes of an investigation being necessary.

Question 3(c)

117 In view of the answer to question 3(a) and (b), there is no need to answer question 3(c).

The second question

Preliminary observations

118 As a preliminary point, it should be noted that in order to answer question 2(a) and (b) the Court must interpret the same provision of EU law, namely Article 5(3)(d) of Directive 2001/29.

119 Under that provision, Member States may provide for an exception to the author's exclusive right of reproduction of his work in respect of quotations for purposes such as criticism or review, provided that (i) they relate to a work or other subject-matter

which has already been lawfully made available to the public; (ii) unless this turns out to be impossible, the source, including the author's name, is indicated; and (iii) their use is in accordance with fair practice, and to the extent required by the specific purpose.

120 That provision is intended thus to preclude the exclusive right of reproduction conferred on authors from preventing the publication, by means of quotation accompanied by comments or criticism, of extracts from a work already available to the public.

121 It is common ground that the work relied upon in the main proceedings is a portrait photograph of Natascha K.

122 It is appropriate to observe that the referring court starts from the assumption that a photographic work comes within the scope of Article 5(3)(d) of Directive 2001/29. Moreover, that assumption is not disputed by any of the parties to the main proceedings, by any of the Member States which have lodged observations or by the European Commission.

123 It is from that point of view that question 2(a) and (b) must be answered, without ruling on the correctness of the assumption or on the question of whether the contested photographs were in fact used for the purpose of quotation.

124 In that preliminary respect, it is also appropriate to define the meaning of the expression '*mis[e] à la disposition du public*' (made available to the public) in the French version of Article 5(3)(d) of Directive 2001/29.

125 In that regard, it is important to point out that neither Article 5(3)(d) of Directive 2001/29 nor any general provision of that directive defines what is meant by the French expression '*mis[e] à la disposition du public*'. Moreover, that expression is used in several contexts with different wording, as is illustrated, in particular, by Article 3(2) of that directive.

126 In those circumstances, according to settled case-law, Article 5(3)(d) of Directive 2001/29 must be interpreted, in so far as possible, in the light of the applicable rules of international law, and in particular those set forth in the Berne Convention (see Case C-306/05 *SGAE* [2006] ECR I-11519, paragraphs 35, 40 and 41, and *Football Association Premier League and Others*, paragraph 189), it being understood that, under Article 37 thereof, its French version is to prevail if there are differences of opinion on the interpretation of the various language versions.

127 It is clear from the French text of Article 10(1) of the Berne Convention, the material scope of which is comparable to that of Article 5(3)(d) of Directive 2001/29, that the only quotations permissible, under certain conditions, are quotations from a work which has already been lawfully made available to the public.

128 In those circumstances, the French expression 'mis[e] à la disposition du public [d'une oeuvre]' (making a work available to the public), in the sense of Article 5(3)(d) of Directive 2001/29, must be understood as meaning the act of making that work available to the public. That interpretation is also confirmed not only by the expression 'made available to the public' but also by the expression 'der Öffentlichkeit zugänglich gemacht' used unvaryingly in the English and German versions of both Article 5(3)(d) of Directive 2001/29 and Article 10(1) of the Berne Convention.

Question 2(a)

129 By question 2(a), the referring court asks, in essence, whether Article 5(3)(d) of Directive 2001/29, read in the light of Article 5(5) of that directive, must be interpreted as not precluding its application where a press report quoting a work or other protected subject-matter is not a literary work protected by copyright.

130 In that regard, it is appropriate to note at the outset that Article 5(3)(d) of Directive 2001/29 sets out a series of conditions for its application which do not include a requirement that a work or other protected subject-matter must be quoted as part of a literary work protected by copyright.

131 Contrary to the Italian Government's submission in its written observations, the part of the sentence 'provided that they relate to a work or other subject-matter which has already been lawfully made available to the public' in Article 5(3)(d) refers, unambiguously, to the work or other protected subject-matter quoted and not to the subject-matter in which the quotation is made.

132 As regards the context surrounding Article 5(3)(d) of Directive 2001/29, it is important to note that, as stated in recital 31 in the preamble to that directive, a 'fair balance' must be safeguarded between, on the one hand, the rights and interests of authors, and, on the other, the rights of users of protected subject-matter.

133 It is also important to note that while the conditions set out in Article 5(3)(d) of Directive 2001/29 must, according to the Court's case-law referred to in paragraph 109 of the present judgment, be interpreted strictly, since that provision is a derogation from the general rule established by that directive, the fact remains that the interpretation of those conditions must also enable the effectiveness of the exception thereby established to be safeguarded and its purpose to be observed (see, to that effect, *Football Association Premier League and Others*, paragraphs 162 and 163).

134 Article 5(3)(d) of Directive 2001/29 is intended to strike a fair balance between the right to freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors.

135 That fair balance is struck, in this case, by favouring the exercise of the users' right to freedom of expression over the interest of the author in being able to prevent the reproduction of extracts from his work which has already been lawfully made available to the public, whilst ensuring that the author has the right, in principle, to have his name indicated.

136 From those two opposing points of view, the issue of whether the quotation is made as part of a work protected by copyright or, on the other hand, as part of a subject-matter not protected by copyright, is irrelevant.

137 In the light of all the foregoing considerations, the answer to question 2(a) is that Article 5(3)(d) of Directive 2001/29, read in the light of Article 5(5) of that directive, must be interpreted as not precluding its application where a press report quoting a work or other protected subject-matter is not a literary work protected by copyright.

Question 2(b)

138 By question 2(b), the referring court is asking, in essence, whether Article 5(3)(d) of Directive 2001/29, read in the light of Article 5(5) of that directive, must be interpreted as precluding its application where the name of the author or performer of the work or other protected subject-matter quoted is not indicated.

139 The provisions of Article 5(3)(d) of Directive 2001/29 establish the obligation of principle that, for quotations, the source, including the author's name, unless that turns out to be impossible, be indicated, it being understood that the work or other protected subject-matter quoted has already been lawfully made available to the public.

140 In that regard, the order for reference states, without giving any details, that the defendants in the main proceedings received the contested photographs from a news agency.

141 Since the contested photographs had been, prior to their use by the defendants in the main proceedings, in the possession of a news agency, which then, according to the defendants, sent them to the defendants, it is legitimate to assume that it was as the result of a lawful disposal that the news agency came into possession of those photographs. It should therefore be considered that the name of the author of the contested photographs was indicated on that occasion. Indeed, in the absence of such indication, the relevant making available to the public would be unlawful and, consequently, Article 5(3)(d) of Directive 2001/29 would not be applicable.

142 Thus, since the name of the author of the contested photographs had already been indicated, it was not in the least impossible for a subsequent user of those photographs to indicate it, in compliance with the obligation under Article 5(3)(d) of Directive 2001/29.

143 However, it should also be noted that the main proceedings are unusual, in that they are taking place in the context of a criminal investigation, as part of which, following the kidnapping of Natascha K., in 1998, a search notice, with a reproduction of the contested photographs, was launched by the competent national security authorities.

144 Consequently, it is conceivable that the national security authorities were the cause of the making available to the public of the contested photographs which were the subject of subsequent use by the defendants in the main proceedings.

145 Such making available does not require, under Article 5(3)(e) of Directive 2001/29, in contrast to Article 5(3)(d) of that directive, the author's name to be indicated.

146 Consequently, the failure by an original user entitled to rely on Article 5(3)(e) to indicate, in making a protected work available to the public, its author's name does not affect the lawfulness of that act.

147 In this case, if the contested photographs were, in accordance with Article 5(3)(e) of Directive 2001/29, made available, originally, to the public by the competent national security authorities and if, at the time of that original lawful use, the author's name was not indicated, the subsequent use of those photographs by the press certainly

required, in accordance with Article 5(3)(d) of that directive, the indication of their source but not necessarily the name of their author.

148 Indeed, since it is not for the press to establish the reasons for that failure, it is impossible for the press, in such a situation, to identify and/or indicate the author's name and, therefore, it must be regarded as exempt from the obligation of principle to indicate the author's name.

149 In the light of all the foregoing considerations, the answer to question 2(b) is that Article 5(3)(d) of Directive 2001/29, read in the light of Article 5(5) of that directive, must be interpreted as meaning that its application is subject to the obligation to indicate the source, including the name of the author or performer, of the work or other protected subject-matter quoted. However, if, in applying Article 5(3)(e) of Directive 2001/29, that name was not indicated, that obligation must be regarded as having been fulfilled if the source alone is indicated.

Costs

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

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

1. **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 must be interpreted as not precluding its application solely because actions against several defendants for substantially identical copyright infringements are brought on national legal grounds which vary according to the Member States concerned. It is for the referring court to assess, in the light of all the elements of the case, whether there is a risk of irreconcilable judgments if those actions were determined separately.**

2. **Article 6 of Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights must be interpreted as meaning that a portrait photograph can, under that provision, be protected by copyright if, which it is for the national court to determine in each case, such photograph is an intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that photograph. Since it has been determined that the portrait photograph in question is a work, its protection is not inferior to that enjoyed by any other work, including other photographic works.**

3. **Article 5(3)(e) 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, read in the light of Article 5(5) of that directive, must be interpreted as meaning that the media, such as newspaper publishers, may not use, of their own volition, a**

work protected by copyright by invoking an objective of public security. However, it is conceivable that a newspaper publisher might, in specific cases, contribute to the fulfilment of such an objective by publishing a photograph of a person for whom a search has been launched. It should be required that such initiative is taken, first, within the framework of a decision or action taken by the competent national authorities to ensure public security and, second, by agreement and in coordination with those authorities, in order to avoid the risk of interfering with the measures taken by them, without, however, a specific, current and express appeal, on the part of the security authorities, for publication of a photograph for the purposes of an investigation being necessary.

4. **Article 5(3)(d) of Directive 2001/29, read in the light of Article 5(5) of that directive, must be interpreted as not precluding its application where a press report quoting a work or other protected subject-matter is not a literary work protected by copyright.**

5. **Article 5(3)(d) of Directive 2001/29, read in the light of Article 5(5) of that directive, must be interpreted as meaning that its application is subject to the obligation to indicate the source, including the name of the author or performer, of the work or other protected subject-matter quoted. However, if, in applying Article 5(3)(e) of Directive 2001/29, that name was not indicated, that obligation must be regarded as having been fulfilled if the source alone is indicated.**

[Signatures]