Court of Justice of the European Union: Freedom of information and freedom of the press in relation to the Copyright Directive

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Christina Etteldorf

In a judgment of 29 July 2019 (Case no. C-469/17, Funke Medien NRW GmbH v Bundesrepublik Deutschland), the European Court of Justice (ECJ) explained that freedom of information and the freedom of the press cannot justify derogations from the rights of authors beyond the exceptions or limitations provided for in the Copyright Directive (Directive 2001/29/EC). The court's decision was surprisingly clear, given that, both at national level and in the Opinion of the Advocate General, the right to protection of the disputed 'Afghanistan papers' had been seriously questioned.

The decision follows a legal dispute in Germany over the publication of military status reports on the foreign deployments of the Bundeswehr (federal armed forces) by the Westdeutsche Allgemeine Zeitung (WAZ) in 2012. These reports, prepared every week by the Bundesregierung (Federal Government), referred to as 'Unterrichtung des Parlaments' (parliament briefings – UdPs) and labelled 'Classified documents – for official use only', are sent to selected members of the German Bundestag (Federal Parliament), sections of the Bundesministerium der Verteidigung (Federal Ministry of Defence) and other federal ministries, and to certain bodies subordinate to the Federal Ministry of Defence. It remains unclear how the WAZ obtained a large proportion of the UdPs – its previous application for access to them had been rejected on the grounds that disclosure of the information could have adverse effects on the security-sensitive interests of the federal armed forces. The Federal Republic of Germany (FRG) brought an action for an injunction against the WAZ, which it accused of infringing its copyright by publishing the status reports without its consent. The WAZ appealed on the grounds of freedom of the press. Although the lower-instance courts upheld the FRG's action on the grounds that copyright over a literary work had been infringed, the Bundesgerichtshof (Federal Court of Justice – BGH) referred the matter to the ECJ, asking, *inter alia*, whether, on the basis of a general weighing-up of interests, the fundamental rights of freedom of information and freedom of the press justified limitations to copyright beyond the limitations provided for by law.

In its judgment, the ECJ began by addressing the national courts in detailed preliminary observations concerning the protection of works: it stated that it was for the national court to determine whether military status reports were protected

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under copyright, and, in particular, whether they constituted an ‘intellectual creation’ that reflected the author’s personality and were expressed by free and creative choices. If the documents were protected, the ECJ continued, freedom of information and the freedom of the press could not justify a copyright exemption beyond the exceptions and limitations provided for in the Copyright Directive. The harmonisation effected by the Copyright Directive should, in particular in the context of electronic media, safeguard a fair balance between intellectual property rights and the interests of the users of protected subject matter (in particular their freedom of expression and information). Therefore, the list of exceptions provided for, which already took users’ interests into account in terms of freedom of information and freedom of the press, was exhaustive. Only when interpreting national provisions to implement exceptions and limitations was it necessary to ensure that the interpretation, whilst consistent with their wording and safeguarding their effectiveness, fully adhered to fundamental rights.

However, the ECJ did not expressly exclude the possibility that the publication of the reports by the WAZ might be covered by the derogation relating to the reporting of current events contained in the Copyright Directive.

Judgment of the CJEU (Grand Chamber), Case C-469/17, 29 July 2019

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