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ECJ interprets Article 4(1) of Copyright Directive

In *Peek & Cloppenburg KG v Cassina SpA* (Case C-456/06, April 17 2008), the European Court of Justice (ECJ) has issued its decision in a reference for a preliminary ruling on the interpretation of Article 4(1) of the [Copyright Directive](#) (29/2001/EC).

The reference was made in the course of proceedings between [Peek & Cloppenburg KG](#) (P&C) and [Cassina SpA](#). Cassina, an Italian company, manufactures chairs and other items, including furniture manufactured according to the designs of Charles-Édouard Jeanneret (Le Corbusier). Such furniture includes armchairs and sofas called 'LC2' and 'LC3' and a table system called 'LC10-P'.

P&C runs stores selling men's and women's clothing throughout Germany. In one of its stores, P&C set up a rest area for customers with armchairs and sofas from the LC2 and LC3 range, and a low table from the LC10-P table system. In a display window of its outlet, P&C placed an armchair from the LC2 system for decorative purposes. All items of furniture owned by P&C did not originate from Cassina itself, but were manufactured without Cassina's consent by a different Italian company. Such furniture was not protected by copyright in Italy at that time.

Cassina brought an action against P&C before the Frankfurt District Court. The court considered that P&C, by its actions, had infringed Cassina's copyrights. This decision was later confirmed by the appellate court. P&C brought an appeal on a point of law relating to Article 4(1) of the Copyright Directive before the German Federal Court of Justice.

Article 4(1) reads as follows:

"Member states shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorize or prohibit any form of distribution to the public by sale or otherwise."

Assuming that Cassina had an exclusive right of distribution for the purposes of Article 17 of the German Copyright Act, the Federal Court of Justice stated that the decision depended on whether P&C's conduct came under the definition of 'otherwise' within the meaning of Article 4(1). The court took the view that there is normally a distribution where the original of a work or copies thereof are made publicly available through transfer of ownership or possession. According to this definition, a transfer of possession for a temporary period may suffice. The issue also arose of whether conduct which consists in making publicly available reproductions protected by copyright without a transfer of ownership or possession - and thus without a transfer of *de facto* power and disposal - can also be classified as a distribution to the public otherwise than by sale for the purpose of Article 4(1), as the reproductions in question were installed in sales areas merely for the use of customers.

The court also considered whether merely exhibiting a reproduction of a work in a shop display window, without making it available for use, also constitutes a form of distribution to the public within the meaning of that provision. The court decided to stay the proceedings and refer questions to the ECJ for a preliminary ruling.

The ECJ had thus to decide whether the concept of distribution to the public, otherwise than through selling the original of a work or a copy thereof, must be interpreted as including:

- authorizing the public to use reproductions of a work protected by copyright without such authorization entailing a transfer of ownership; and
- exhibiting those reproductions to the public without actually granting a right to use them.

The ECJ stated that neither Article 4(1) nor any other provision of the directive gives a sufficient explanation of the concept of distribution to the public of a work protected by copyright. Such a concept is defined more clearly by the [World Intellectual Property Organization's \(WIPO\) Copyright Treaty](#) and its [Performances and Phonograms Treaty](#), adopted in Geneva on December 20 1996 and approved on behalf of the European Union by Council Decision 2000/278/EC.

The ECJ further stated that the Copyright Directive must be interpreted in a manner that is consistent with the concept defined by the aforementioned WIPO treaties as international agreements concluded by the European Union. Under these circumstances, the concept of distribution in Article 4(1) of the directive must be interpreted, as far as possible, in light of the definitions given in the treaties.

Accordingly, the ECJ emphasized that Article 6(1) of the Copyright Treaty and Articles 8 and 12 of the Performances and Phonograms Treaty link the concept of distribution exclusively to that of transfer of ownership. Thus, the term 'otherwise' in Article 4(1) of the directive must be interpreted in accordance with the meaning given to it in Article 4(2), which entails a transfer of ownership.

Therefore, the ECJ concluded that for the purpose of Article 4(1), the concept of distribution to the public, otherwise than through sale, of the original of a work or a copy thereof, covers acts which entail, and entail only, a transfer of ownership of that work. Given that a transfer of ownership of the original work or a copy thereof did not take place in the present case, the ECJ denied that P&C's conduct constituted an infringement. Granting to the public the right to use reproductions of a work protected by copyright or exhibiting those reproductions to the public without actually granting a right to use them does not constitute a form of distribution for the purpose of Article 4(1).

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