

Copyright owners beware! Supreme Court judgment defines author's distribution rights anew



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Introduction

In light of the European Court of Justice (ECJ) ruling in *Peek & Cloppenburg KG v Cassina SpA*,⁽¹⁾ the Supreme Court recently overturned its earlier interpretation of an author's exclusive distribution right in relation to his or her work of art. The Supreme Court took the view that any kind of distribution – regardless of whether it is a transfer of ownership in a work of art – falls under the author's exclusive distribution right. Further, the court held that this distribution right is violated only if ownership in the work of art is actually transferred.⁽²⁾

Facts

The defendant was the lessee of a Viennese hotel. The lessor of the hotel furnished the hotel lobby with fauteuils that resembled the famous fauteuil 'LC2' by Le Corbusier. The furniture was leased by the defendant together with the hotel. The plaintiff held the exclusive right to manufacture and distribute Le Corbusier furniture. Le Corbusier furniture models are protected under Austrian copyright law as works of applied art.

On learning about the fauteuils in the Viennese hotel lobby, the plaintiff sued the defendant, among other things, to cease and desist from:

- distributing copies of Le Corbusier fauteuils or the development thereof; and
- providing photographs showing the Le Corbusier furniture to the public.

The plaintiff argued that:

- providing copies of the fauteuils in the lobby for use by hotel guests constituted 'distribution' within the meaning of Section 16(1) of the Copyright Act; and
- publishing photographs of the lobby showing the copied fauteuils infringed its exclusive right to make Le Corbusier fauteuils available to the public, pursuant to Section 18a(1) of the Copyright Act (Article 3 of the EU Copyright Directive (2001/29/EC)).

The defendant pleaded that putting the fauteuils in the lobby for the hotel guests did not represent a distribution within the meaning of Section 16(1), since this action did not lead to a transfer in ownership of the fauteuils. It referred to the ECJ's ruling in *Le Corbusier*, wherein it was held that pursuant to Article 4 (1) of the EU Copyright Directive, the concept of distribution to the public (apart from through sale) of an original work or a copy thereof applies only where there is a transfer of ownership of that object. As a result, neither granting the public the right to use reproductions of a work of art protected by copyright nor exhibiting to the public those reproductions without actually granting a right to use them constitute a form of distribution.⁽³⁾ The defendant pointed out that Section 16(1) of the Copyright Act transposed Article 4 (1) of the EU Copyright Directive into national law, and thus Section 16(1) must be interpreted in line with the ECJ's construction of Article 4.

Decision

The first-instance court ruled in favour of the plaintiff without considering the ECJ's judgment in *Le Corbusier*. The appeal court overturned the first-instance court's ruling in favour of the defendant by referring to the ECJ's decision. It stated that the plaintiff's distribution right had not been infringed because providing copies of Le Corbusier fauteuils in a lobby for use by hotel guests did not realise the distribution concept laid down in Section 16(1) of the Copyright Act, as there was no transfer of ownership. In relation to the photographs of the hotel lobby uploaded to the Internet, the appeal court took the rather surprising view that Section 18a(1) of the Copyright Act also had not been infringed, reasoning that the right to make protected works available to the public covers literary, photographic and cinematographic works only. It went on to state that the Le Corbusier fauteuils were works of applied art and therefore did not fall under these three categories. Consequently, the appeal court also rejected the plaintiff's claim in respect of the publication of the photographs on the Internet.

The Supreme Court shared the appeal court's view regarding the necessity to interpret the exclusive distribution right pursuant to Section 16 of the Copyright Act in compliance with the ECJ's judgment in *Le Corbusier* and therefore did not uphold its decision rendered in the provisional proceedings.⁽⁴⁾ It clarified that even though the Supreme Court had previously supported a much broader definition of the concept of 'distribution', according to Section 16(1) of the Copyright Act, this definition had to be abandoned in favour of a harmonised interpretation of the EU Copyright Directive.

In respect of Section 18a of the Copyright Act, the Supreme Court overturned the appeal court's ruling by stressing that this section is – like the underlying Article 3 of the EU Copyright Directive – by no means limited to literary, photographic and cinematographic works, but instead covers all kinds of work falling under the Copyright Act, including works of applied art, such as the Le Corbusier fauteuils. The Supreme Court rejected the appeal court's opinion that – due to the three-dimensional features of the Le Corbusier fauteuils – it was *per se* impossible to make them available on the Internet by pointing to the artistic value as the relevant factor without which the Copyright Act would not apply in the first place. Consequently, even a one-dimensional photograph of a three-dimensional work of art or a copy thereof that has been published on the Internet violates the copyright owner's right under Section 18a of the Copyright Act, since the photograph makes the artistic value of said art available to the public.

Comment

The Supreme Court's clarification as to scope of protection granted by Section 18a of the Copyright Act is highly welcome – in particular, that:

- all kinds of work, including works of applied art are addressed; and
- photographs published on the Internet that depict three-dimensional objects infringe a right holder's exclusive rights under this provision.

The ruling concerning the construction of the concept of distribution laid down in Section 16(1) of the Copyright Act is, in view of the ECJ's judgment in *Le Corbusier*, unsurprising but questionable. Austrian legal scholars have correctly pointed out that neither the World Intellectual Property Organisation (WIPO) Copyright Treaty nor the WIPO Performances and Phonograms Treaty (both approved on behalf of the European Union by EU Council Decision 2000/278/EC) – both of which contain the input requirements for the EU Copyright Directive – necessitate such a narrow interpretation of the exclusive right to distribution bestowed on the author of a work, as both treaties stipulate a minimum standard of protection only, not a harmonised maximum standard.

However, considering the Supreme Court's judgment, the matter seems to be settled for the time being. It is highly unlikely that another plaintiff will have the chance to challenge the narrow interpretation of the concept of distribution in relation to a transfer of ownership. Lower courts usually follow the Supreme Court's rulings and the Supreme Court will not accept an appeal where the facts are comparable and no new material questions of law arise.

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Endnotes

(1) ECJ 17.04.2008, C-456/06 – *Le Corbusier*.

(2) OGH 20.04.2016, 4 Ob 61/16y.

(3) In the more recent judgment of *Dimensione v Knoll* (C-516/13), the ECJ put the notion of transfer of ownership into perspective by stating that Article 4(1) of the EU Copyright Directive must be interpreted as meaning that it allows a holder of an exclusive right to distribute a protected work in order to prevent an offer for sale or a targeted advertisement of the original or a copy of that work, even if it is not established that that advertisement gave rise to the purchase of the protected work by an EU buyer, insofar as that advertisement invites consumers of the member states in which the work is protected by copyright to purchase it.

(4) OGH 4 Ob 83/08x.

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