

**European Court of Justice, 17 April 2008, Peek & Cloppenburg v Cassina**

LC 2



LC10-P



LC-3

**COPYRIGHT****Distribution demands transfer ownership of object**

- **That the concept of distribution to the public, otherwise than through sale, of the original of a work or a copy thereof, for the purpose of Article 4(1) of Directive 2001/29, applies only where there is a transfer of the ownership of that object.**

As a result, neither granting to the public the right to use reproductions of a work protected by copyright nor exhibiting to the public those reproductions without actually granting a right to use them can constitute such a form of distribution.

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**European Court of Justice, 17 April 2008**

(K. Lenaerts, G. Arebris, R. Silva de Lapuerta, E. Juhász and J. Malenovský)

**JUDGMENT OF THE COURT (Fourth Chamber)**

17 April 2008 (\*)

*(Copyright – Directive 2001/29/EC – Article 4(1) – Distribution to the public by sale or otherwise of the original of a work or a copy thereof – Use of reproductions of copyright-protected furniture as items of furniture exhibited in a sales area and in display windows – No transfer of ownership or possession)*

In Case C-456/06,

REFERENCE for a preliminary ruling under Article 234 EC, from the Bundesgerichtshof (Germany), made by decision of 5 October 2006, received at the Court on 16 November 2006, in the proceedings

Peek & Cloppenburg KG

v

Cassina SpA,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, G. Arebris, R. Silva de Lapuerta, E. Juhász and J. Malenovský (Rapporteur), Judges, Advocate General: E. Sharpston, Registrar: M.-A. Gaudissart, head of unit, having regard to the written procedure and further to the hearing on 15 November 2007, after considering the observations submitted on behalf of:

- Peek & Cloppenburg KG, by A. Auler, Rechtsanwalt,
- Cassina SpA, by A. Bock, Rechtsanwalt,
- the Polish Government, by E. Ośniecka-Tamecka, acting as Agent,
- the Commission of the European Communities, by H. Krämer and W. Wils, acting as Agents, after hearing the **Opinion of the Advocate General at the sitting on 17 January 2008**, gives the following

**Judgment**

1 This reference for a preliminary ruling concerns the interpretation of Article 4(1) 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 was made in the course of proceedings between Peek & Cloppenburg KG ('Peek & Cloppenburg') and Cassina SpA ('Cassina') concerning the making available to the public and display of furniture which, according to Cassina, infringed its exclusive right of distribution.

**Legal context****International legislation**

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

4 Article 6 of the CT, entitled 'Right of distribution', provides:

1. Authors of literary and artistic works shall enjoy the exclusive right of authorising the making available to the public of the original and copies of their works through sale or other transfer of ownership.

2. Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph 1 applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorisation of the author.'

5 Article 8 of the PPT, entitled 'Right of distribution', confers on performers the exclusive right of authorising the making available to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership.

6 Article 12 of the PPT provides for a similar right in favour of producers of phonograms.

**Community legislation**

7 Recitals 9 to 11, 15 and 28 in the preamble to Directive 2001/29 state:

‘(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. ...’

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. ...

(11) A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.

...

(15) The Diplomatic Conference held under the auspices of the World Intellectual Property Organisation (WIPO) in December 1996 led to the adoption of two new Treaties, the [CT] and the [PPT] .... This Directive also serves to implement a number of the new international obligations.

(28) Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the Community. ...’

8 Article 4 of that directive, entitled ‘Distribution right’, states:

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

2. The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.’

9 Under Article 1(1) and (2) of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61):

‘1. In accordance with the provisions of this Chapter, Member States shall provide, subject to Article 5, a right to authorise or prohibit the rental and lending of originals and copies of copyright works ...’

2. For the purposes of this Directive, “rental” means making available for use, for a limited period of time and for direct or indirect economic or commercial advantage.’

10 Under Article 9(1) of Directive 92/100, ‘Member States shall provide [for performers, phonogram producers, producers of the first fixations of films and for broadcasting organisations] the exclusive right to make

available [protected objects], including copies thereof, to the public by sale or otherwise, hereafter referred to as the “distribution right”.

11 Directive 92/100 was repealed by Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 2006 L 376, p. 28). The latter directive reproduces, in similar terms, the abovementioned provisions of Directive 92/100.

#### National legislation

12 Paragraph 15(1) of the Law on copyright (Urheberrechtsgesetz) of 9 September 1965 (BGBI. 1965 I, p. 1273) provides:

‘The author has the exclusive right to exploit his work in a material form; that right includes in particular:

...,  
the right of distribution (Paragraph 17),  
...’

13 Paragraph 17(1) of that Law provides:

‘The right of distribution is the right to offer to the public or put into circulation the original work or copies thereof.’

#### The main proceedings and the questions referred for a preliminary ruling

14 Cassina manufactures chairs. Its collection includes furniture manufactured according to the designs of Charles-Édouard Jeanneret (Le Corbusier). That furniture includes armchairs and sofas in categories LC 2 and LC 3 and the table system LC 10-P. Cassina has concluded a licensing agreement for the manufacture and sale of that furniture.

15 Peek & Cloppenburg operates menswear and womenswear shops throughout Germany. It has set up in one of its shops a rest area for customers, fitted out with armchairs and sofas from the LC 2 and LC 3 range and a low table from the LC 10-P table system. In a display window of its outlet, Peek & Cloppenburg placed an armchair from the LC 2 range for decorative purposes. Those items of furniture did not come from Cassina but were manufactured without Cassina’s consent by an undertaking in Bologna (Italy). According to the referring court, such furniture was not protected at the time by copyright in the Member State in which it was manufactured.

16 As it considered that Peek & Cloppenburg had infringed its rights by so doing, Cassina brought an action against it before the Landgericht Frankfurt (Frankfurt Regional Court) (Germany) seeking an order that it must desist from that practice and provide Cassina with information, in particular as regards the distribution channels for those items of furniture. In addition, Cassina sought an order that Peek & Cloppenburg pay damages.

17 After the Landgericht Frankfurt had granted Cassina’s application and the appeal court had, essentially, confirmed the judgment given at first instance, Peek & Cloppenburg brought an appeal on a point of law before the Bundesgerichtshof (Federal Court of Justice) (Germany).

18 That court states that, since Cassina has an exclusive right of distribution for the purpose of Paragraph 17 of the Law on copyright of 9 September 1965, its decisions turns on whether the conduct of Peek & Cloppenburg referred to above infringed that right.

19 It takes the view that there is normally a distribution where the original of a work or copies thereof cease to form part of the undertaking and are made publicly available through transfer of ownership or possession. In this connection, a transfer of possession for a merely temporary period may suffice. The issue arises, however, of whether conduct consisting in making publicly available reproductions protected by copyright without a transfer of ownership or possession, and thus without a transfer of the de facto power of disposal, can also be classified as a distribution to the public otherwise than by sale for the purpose of Article 4(1) of Directive 2001/29, those reproductions being, as in the main proceedings, installed in sales areas merely for the purpose of being used by customers.

20 In addition, the Bundesgerichtshof raises the question 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.

21 Furthermore, it submits that the issue also arises of whether the requirements of the protection of the free movement of goods laid down in Articles 28 EC and 30 EC restrict, in the circumstances of the main proceedings, the exercise of that right of distribution.

22 In those circumstances, the Bundesgerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

(1)(a) Can it be assumed that there is a distribution to the public otherwise than by sale, within the meaning of Article 4(1) of Directive 2001/29 ..., in the case where it is made possible for third parties to make use of items of copyright-protected works without the grant of user involving a transfer of de facto power to dispose of those items?

(b) Is there a distribution under Article 4(1) of [Directive 2001/29] also in the case in which items of copyright-protected works are shown publicly without the possibility of using those items being granted to third parties?

(2) If the answers are in the affirmative:

Can the protection accorded to the free movement of goods preclude, in the abovementioned cases, exercise of the distribution right if the items presented are not under copyright protection in the Member State in which they were manufactured and placed on the market?

#### **The application for the reopening of the oral procedure**

23 By letter received at the Court on 7 March 2008, Cassina requested the reopening of the oral procedure pursuant to Article 61 of the Rules of Procedure of the Court following the delivery of the Advocate General's Opinion. Cassina submits, in particular, that the Advocate General founded her Opinion on a number of incorrect arguments, that she misinterpreted the Court's

case-law and that she failed to take into account all the facts relevant to the proceedings. Cassina accordingly wishes to submit further information to the Court.

24 In this connection, it must be pointed out that neither the Statute of the Court of Justice nor its Rules of Procedure make provision for the parties to submit observations in response to the Advocate General's Opinion (see, *inter alia*, Case C-259/04 Emanuel [2006] ECR I-3089, paragraph 15).

25 Admittedly, the Court may, of its own motion, on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure in accordance with Article 61 of the Rules of Procedure if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, *inter alia*, Case C-209/01 Schilling and Fleck-Schilling [2003] ECR I-13389, paragraph 19, and Case C-30/02 Recheio – Cash & Carry [2004] ECR I-6051, paragraph 12).

26 However, the Court, after hearing the Opinion of the Advocate General, considers that in the present case it has all the information necessary to answer the questions referred.

27 Consequently, there is no need to order the reopening of the oral procedure.

#### **The questions referred**

##### **Question 1(a) and (b)**

28 By Question 1(a) and (b), the referring court is essentially asking whether the concept of distribution to the public otherwise than through the sale of the original of a work or a copy thereof, for the purpose of Article 4(1) of Directive 2001/29, must be interpreted as meaning that it includes, first, granting to the public the right to use reproductions of a work protected by copyright without that grant of use entailing a transfer of ownership and, secondly, exhibiting those reproductions to the public without actually granting a right to use them.

29 Neither Article 4(1) of Directive 2001/29 nor any other provision of that directive gives a sufficient explanation of the concept of distribution to the public of a work protected by copyright. That concept is, on the other hand, defined more clearly by the CT and the PPT.

30 In this connection, it is settled case-law that Community legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the Community (see, *inter alia*, Case C-341/95 Bettati [1998] ECR I-4355, paragraph 20, and [Case C-306/05 SGAE \[2006\] ECR I-11519](#), paragraph 35).

31 It is common ground that, as recital 15 in the preamble to Directive 2001/29 makes clear, that directive is intended to implement at Community level the Community's obligations under the CT and the PPT. In those circumstances, the concept of distribution in Article 4(1) of that directive must be interpreted, as far as is

possible, in the light of the definitions given in those Treaties.

32 Article 6(1) of the CT defines the concept of the right of distribution enjoyed by the authors of literary and artistic works as the exclusive right of authorising the making available to the public of the original and copies of their works through sale or ‘other transfer of ownership’. Moreover, Articles 8 and 12 of the PPT contain the same definitions of the right of distribution enjoyed by performers and producers of phonograms. Thus, the relevant international Treaties link the concept of distribution exclusively to that of transfer of ownership.

33 Since Article 4(1) of Directive 2001/29 provides, in such a context, for ‘distribution by sale or otherwise’, that concept should be interpreted in accordance with those Treaties as a form of distribution which entails a transfer of ownership.

34 The wording of the provisions relating to the exhaustion of the right of distribution in the CT and Directive 2001/29 also points to that conclusion. Exhaustion is dealt with in Article 6(2) of the CT, which links it to the acts referred to in Article 6(1). Thus, paragraphs 1 and 2 of Article 6 of the CT form a whole and should be interpreted together. Those two provisions refer expressly to acts entailing a transfer of ownership.

35 Article 4(1) and (2) of Directive 2001/29 follow the same scheme as Article 6 of the CT and are intended to implement it. Like Article 6(2) of the CT, Article 4(2) of the directive provides for the exhaustion of the distribution right within the Community in respect of the original or copies of the work on the first sale or other transfer of ownership of that object. Since Article 4 implements Article 6 of the CT and should be interpreted, like Article 6 of the CT, as a whole, it follows that the term ‘otherwise’ in Article 4(1) of Directive 2001/29 must be interpreted in accordance with the meaning given to it in Article 4(2), that is to say, as entailing a transfer of ownership.

36 It follows that the concept of distribution to the public, otherwise than through sale, of the original of a work or a copy thereof, for the purpose of Article 4(1) of Directive 2001/29, covers acts which entail, and only acts which entail, a transfer of the ownership of that object. The information provided by the referring court shows that that clearly does not apply to the acts at issue in the main proceedings.

37 Contrary to what Cassina asserts, those findings are not affected by recitals 9 to 11 in the preamble to Directive 2001/29, which state that harmonisation of copyright must take as a basis a high level of protection, that authors have to receive an appropriate reward for the use of their work and that the system for the protection of copyright must be rigorous and effective.

38 That protection can be achieved only within the framework put in place by the Community legislature. Therefore, it is not for the Court to create, for authors’ benefit, new rights which have not been provided for by Directive 2001/29 and by so doing to widen the scope of the concept of distribution of the original of a

work or a copy thereof beyond that envisaged by the Community legislature.

39 It would be for the Community legislature to amend, if necessary, the Community rules on protection of intellectual property if it considered that protection of authors is not assured to an adequate level by the legislation in force and that uses such as those at issue in the main proceedings should be subject to authors’ consent.

40 For the same reasons, Cassina’s arguments according to which the concept of distribution of the original of a work or a copy thereof should be interpreted widely, on the ground that the actions at issue in the main proceedings are objectionable because the copyright owner obtained no remuneration for the use of copies of his work, which is protected under the legislation of the Member State where those copies are used, cannot be accepted.

41 Therefore, the answer to Question 1 is that the concept of distribution to the public, otherwise than through sale, of the original of a work or a copy thereof, for the purpose of Article 4(1) of Directive 2001/29, applies only where there is a transfer of the ownership of that object. As a result, neither granting to the public the right to use reproductions of a work protected by copyright nor exhibiting to the public those reproductions without actually granting a right to use them can constitute such a form of distribution.

## Question 2

42 Since the answer to Question 1 was in the negative, there is no need to answer Question 2.

### Costs

43 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 (Fourth Chamber) hereby rules:

The concept of distribution to the public, otherwise than through sale, of the original of a work or a copy thereof, for the purpose of Article 4(1) 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, applies only where there is a transfer of the ownership of that object. As a result, neither granting to the public the right to use reproductions of a work protected by copyright nor exhibiting to the public those reproductions without actually granting a right to use them can constitute such a form of distribution.

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## OPINION OF ADVOCATE GENERAL Sharpston

delivered on 17 January 2008 (1)

Case C-456/06

Peek & Cloppenburg KG

v

**Cassina SpA**

(*Copyright and related rights – Furniture lawfully acquired in one Member State – Made available for temporary use or displayed to the public in another Member State – ‘Distribution to the public’*)

1. In this reference from the Bundesgerichtshof (Federal Court of Justice) Germany, the Court has been asked for guidance on the interpretation of Article 4(1) 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 ('the Copyright Directive' or 'the Directive'). (2)

2. The case concerns items of furniture which, at the relevant time, were not protected by copyright in the Member State where they were manufactured and where they were acquired by Peek & Cloppenburg KG ('Peek & Cloppenburg') but were so protected in the Member State where that party made them available for temporary use in the public rest areas of one of its shops and displayed them in the window of another. The Court is asked whether such use of the furniture constitutes a 'distribution to the public by sale or otherwise' within the meaning of Article 4(1) of the Copyright Directive. If so, the Court is asked whether the exercise of that distribution right in the circumstances of the present case is compatible with Article 28 EC.

**Legal framework****The Copyright Directive**

3. The Copyright Directive, as its title indicates, aims to harmonise certain aspects of copyright and related rights, (3) including the right to authorise the distribution of works protected by such rights, or copies of such works, to the public.

4. The preamble to the Directive includes the following recitals:

'(3) The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.'

(4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation ...

...

(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.

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The

investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

(11) A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.

...

(15) The Diplomatic Conference held under the auspices of the World Intellectual Property Organisation (WIPO) in December 1996 led to the adoption of two new Treaties, the "WIPO Copyright Treaty" and the "WIPO Performances and Phonograms Treaty", dealing respectively with the protection of authors and the protection of performers and phonogram producers. Those Treaties update the international protection for copyright and related rights significantly, not least with regard to the so-called "digital agenda", and improve the means to fight piracy worldwide. The Community and a majority of Member States have already signed the Treaties and the process of making arrangements for the ratification of the Treaties by the Community and the Member States is under way. This Directive also serves to implement a number of the new international obligations.

...

(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.

...

(23) This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.

...

(28) Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the Community. This right should not be exhausted in respect of the original or of copies thereof sold by the rightholder or with his consent outside the Community. Rental and lending rights for authors have been established in Directive 92/100/EEC. The distribution right provided for in this Directive is without prejudice to the provisions

relating to the rental and lending rights contained in Chapter I of that Directive.

...

(60) The protection provided under this Directive should be without prejudice to national or Community legal provisions in other areas, such as industrial property, data protection, conditional access, access to public documents, and the rule of media exploitation chronology, which may affect the protection of copyright or related rights.'

5. Article 4 provides as follows:

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

2. The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.'

6. Article 9 provides that the Directive is to be without prejudice to provisions concerning, *inter alia*, design rights. Historically, in some Member States such rights were included within the scope of copyright, in others they were protected by specific national legislation and in others they had no protection at all. (4)

#### **International conventions**

7. Article 4(1) of the Copyright Directive is similar to Article 6(1) of the WIPO (5) Copyright Treaty ('the WCT'). (6) It is settled case-law that provisions of secondary Community legislation must, so far as is possible, be interpreted in a manner that is consistent with international agreements concluded by the Community. (7)

8. The WCT entered into force on 6 December 2001. The Community, although a signatory, has not yet ratified the WCT. (8) That treaty is none the less of relevance in interpreting the Copyright Directive since recital 15 in the preamble to the Directive states that the Directive 'serves to implement a number of the new international obligations' deriving from the WCT.

9. Article 6 of the WCT, headed 'Right of Distribution', reads as follows:

'(1) Authors of literary and artistic works shall enjoy the exclusive right of authorising the making available to the public of the original and copies of their works through sale or other transfer of ownership.

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorisation of the author.'

#### **National legislation**

10. Article 4 of the Copyright Directive has been implemented in Germany by Paragraphs 15 and 17 of the German Urheberrechtsgesetz (law on author's rights, 'UrhG'). (9)

11. Paragraph 15(1) provides that the author's exclusive right includes the distribution right as defined in Paragraph 17.

12. Paragraph 17(1) defines the distribution right as 'the right to offer to the public or to put into circulation the original work or copies thereof'.

#### **Background to the main proceedings**

13. The following account of the facts is taken from the order for reference except where otherwise indicated.

14. Cassina SpA ('Cassina'), a company established in Italy, manufactures furniture, including items designed by Charles Edouard Jeanneret (Le Corbusier). The order for reference is based on the assumption (10) that, as a matter of German copyright law, (11) Cassina has the exclusive right to manufacture and sell Le Corbusier-design furniture by virtue of a licensing agreement between it and the holder of the copyright in such furniture and that that right corresponds to the right of distribution conferred by Paragraph 17 of the UrhG.

15. Peek & Cloppenburg, a limited partnership established in Germany, sells clothes in outlets throughout Germany. In its store in Frankfurt-am-Main it has set up rest areas for customers that are fitted out with Le Corbusier-design armchairs and sofas and with a table system. It has also placed an armchair in a display window of its outlet in Düsseldorf for decorative purposes.

16. Peek & Cloppenburg acquired those items from an Italian undertaking, 'Dimensione', which had manufactured them. According to Cassina, in order for a work to be protected by Italian copyright law its artistic value had, until recently, to be distinguishable from its commercial character. As a result, industrial designs, such as Le Corbusier-design furniture, were not protected by copyright. The law was changed in 2001 in order to implement Directive 98/71 on the legal protection of designs, (12) so as to encompass works of industrial design which have an artistic and creative character. A transitional provision excluded for 10 years the possibility of asserting the new right against a person who, before the amendment, had lawfully manufactured or distributed a work covered by the right. (13)

17. Cassina brought proceedings against Peek & Cloppenburg before the Landgericht (Regional Court) seeking damages, an injunction and information concerning the source of the items of furniture. The Landgericht ruled in favour of Cassina. Peek & Cloppenburg's appeal on a point of law is now before the Bundesgerichtshof.

18. That court notes that (on the basis that the facts are as it assumes) the decision in the dispute will depend on whether, by installing the furniture in its publicly accessible sales areas and in display windows of its sales areas in Germany, Peek & Cloppenburg has interfered with Cassina's distribution right. Paragraph 17(1) of the UrhG is to be construed in a manner consistent with the Copyright Directive. Thus the question is whether such acts amount to 'distribution to the public by sale or otherwise' within the meaning of Article 4(1) of that directive. If that question is answered in the affirmative, the further question will arise whether Ar-

ticles 28 and 30 EC limit the exercise of the distribution right if this could otherwise lead to a partitioning of national markets. A partitioning of the national markets of Member States might arise out of a situation in which artistic or craft products with a functional purpose could be afforded copyright protection in Germany even though they could be lawfully manufactured in Italy.

### **Proceedings before the Court of Justice**

19. Against that background, the Bundesgerichtshof has referred the following questions to the Court for a preliminary ruling:

'1.(a) Can it be assumed that there is a distribution to the public otherwise than by sale, within the meaning of Article 4(1) of [the Copyright Directive], in the case where it is made possible for third parties to make use of items of copyright-protected works without the grant of user involving a transfer of de facto power to dispose of those items?

(b) Is there a distribution under Article 4(1) of the [Copyright] Directive also in the case in which items of copyright-protected works are shown publicly without the possibility of using those items being granted to third parties?

2. If the answers are in the affirmative:

Can the protection accorded to the free movement of goods preclude, in the abovementioned cases, exercise of the distribution right if the items presented are not under copyright protection in the Member State in which they were manufactured and placed on the market?

20. Written observations have been lodged by Cassina, Peek & Cloppenburg, the Polish Government and the Commission, all of whom, with the exception of the Polish Government, were represented at the hearing.

### **Assessment**

#### **Question 1(a)**

21. By the first part of its first question the referring court asks essentially whether there is a distribution to the public within the meaning of Article 4(1) of the Copyright Directive where pieces of copyright-protected furniture (14) are made available for temporary use by third parties without those third parties having the right to dispose of them.

22. That question refers to furniture which is made available to the public in the rest areas of a department store but which is not available for purchase.

23. Cassina and the Polish Government consider that the referring court's first question should be answered in the affirmative. Peek & Cloppenburg and the Commission take the contrary view.

24. Cassina and the Polish Government make, variously, the following points.

25. First, Article 4(1) ('any form of distribution, by sale or otherwise' (15)) is broadly formulated. A broad reading is moreover dictated by the objectives of the Directive. The recitals in its preamble show that it aims to give a wide protection to rightholders, (16) to ensure that they are adequately remunerated (17) and to promote legal certainty. (18)

26. Second, such an interpretation would be consistent with the broad concept of distribution right used in other copyright instruments before the Copyright Directive, such as the directives on rental and lending rights, (19) on the legal protection of computer programs (20) and on the legal protection of databases. (21)

27. Third, the Court has in a number of cases given a wide reading to 'distribution'. (22)

28. Finally, a narrow definition would conflict with Council Regulation No 1383/2003, (23) which concerns the duties of customs authorities with regard to counterfeit goods. Although that regulation applies to products coming from countries outside the EU, it would be undermined if, through a narrow reading of 'distribution', pirated goods (defined as copies made without the consent of the rightholder) from third countries could not be put into free circulation or re-exported whereas pirated goods from other Member States could be imported without sanction.

29. I am not persuaded by these arguments.

30. As the Court noted in SGAE, Community legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the Community. (24) As is clear from recital 15 in its preamble, the Copyright Directive is intended to implement a number of the international obligations flowing from the WCT. Article 6(1) of that Treaty refers to the distribution right it enjoins as the right to authorise the making available to the public of the original and copies of a protected work 'through sale or other transfer of ownership'. I agree with Peek & Cloppenburg and the Commission that that wording is unequivocal and would clearly not encompass making available for temporary use.

31. That interpretation is, as the Commission submits, borne out by the scheme of the Copyright Directive, and in particular by Article 4 read as a whole. Article 4(2) essentially defines exhaustion of the distribution right, and it does so in terms of the 'first sale or other transfer of ownership'. It is to be expected that the scope of exhaustion should be defined in terms of acts which are generically similar to those constituting distribution. That approach is suggested even more strongly by the wording of recital 28 in the preamble to the Directive.

32. I am not convinced that any assistance is to be derived from the other directives mentioned by Cassina. It is true that the directives on the legal protection of computer programs and on the legal protection of databases both refer to 'any form of distribution to the public' (25) in defining the rightholder's exclusive right. However, since 'distribution to the public' is not itself defined, this argument seems to me to be circular. Similarly, the directive on rental and lending rights simply refers to 'the exclusive right to make available [defined] objects, including copies thereof, to the public by sale or otherwise'. (26) This too does not seem to advance matters.

33. It is of course the case that the Copyright Directive seeks to provide for a high level of protection of intellectual property. (27) It would, however, in my view be an oversimplification to assume that any ambiguity in the scope of ‘distribution to the public’ should automatically be decided in favour of the rightholder. That is all the more so when, as in the present case, such a construction would be contrary both to the express terms of the WCT, which (as I have indicated) is relevant when construing the Copyright Directive, and to the free movement of goods. It must be borne in mind that the Directive also seeks to implement the four freedoms of the internal market. (28)

34. Although the national court has referred a specific question concerning the rules on the free movement of goods, that question is put only on the assumption that the first questions are answered in the affirmative. I consider, however, that those rules may be relevant at an earlier stage in the analysis, namely in determining whether the first questions should be so answered. As the Commission points out, Articles 28 and 30 EC will be relevant to arriving at the correct interpretation of Article 4(1) of the Copyright Directive in cases – such as the present – which concern a reproduction of a work protected by copyright in one Member State and not another, where the ability of the author to prevent a use of that reproduction is liable to affect intracommunity trade. In that context I note that, prior to Directive 98/71, (29) the legal protection of designs was not harmonised, (30) and that the reference in the present case is based on the premiss that the items of furniture were not protected either by copyright or as designs at the time of their purchase by Peek & Cloppenburg.

35. Interpreting Article 4(1) of the Directive in such a way that ‘distribution to the public’ includes the making available of protected items for temporary use, so that the rightholder could prevent such use, would be liable to restrict the free movement of goods. Article 30 EC provides that such a restriction may be justified on grounds of, *inter alia*, the protection of industrial and commercial property. It is settled case-law, however, that a derogation on that ground is allowed only to the extent to which it is justified by the fact that it safeguards the rights which constitute the specific subject-matter of that property. (31)

36. A broad interpretation of Article 4(1) of the Directive, such as that advocated by Cassina and the Polish Government, would therefore be in accordance with Article 30 EC only if the exercise of the distribution right conferred by Article 4(1) as so interpreted safeguarded the specific subject-matter of the copyright. As the Commission submits, the Court has, in assessing the lawfulness of derogations from the free movement of goods based on the protection of copyright, focused on whether an allegedly infringing act is commercial in nature, generating revenue of which the rightholder is deprived. The allegedly infringing act in cases such as the present is, in contrast, clearly very different in nature. It is not at all obvious to me that to permit a rightholder in such circumstances to prevent a

person who has lawfully bought the protected goods in another Member State from making them available for temporary use by the public safeguards the rights which constitute the specific subject-matter of the copyright.

37. Nor do I accept Cassina’s more general argument that, since the Court has interpreted the concept of the right of distribution broadly in a number of cases concerning copyright, it should be so interpreted in the context of Article 4(1) of the Directive. Of the three cases cited by Cassina in support of this argument, (32) Warner Brothers and Metronome Musik concerned the compatibility with Article 30 EC of national and Community legislation (33) respectively which conferred on (*inter alios*) the author or producer of a musical or cinematographic work the exclusive right to authorise the rental of recordings of such work. The question in particular was, essentially, whether such a right conflicted with the general principle that a rightholder’s distribution right is exhausted on first sale. The Court concluded that, given the particular nature of the relevant markets, it did not. I do not see how the Court’s analysis in that case assists with the definition of ‘distribution to the public’ in a wholly different context. Foreningen af danske Videogramdistributører concerned the question whether that exclusive rental right was exhausted throughout the Community when the holder authorised rental within one Member State. The Court ruled that, given the particular nature of the exclusive rental right, it was not. Again, I do not see how that ruling assists the Court in the present case.

38. Cassina submits that if the Court were to interpret the distribution right conferred by Article 4(1) of the Copyright Directive more narrowly than it interpreted the distribution right at issue in those cases, which concerned intellectual property in intangibles such as music, the result would be that intangible works would have an unjustifiably greater protection than tangible works. Even, however, if that were the case, I do not consider that it is a good argument for a broad reading of Article 4(1). Intangible works are, by their nature, susceptible to being distributed in different ways from tangible works. It is precisely for that reason that first the Court in its case-law and then the Community legislature in the directive on rental and lending rights provided for more extensive copyright protection for intangibles.

39. Finally, I have difficulty understanding Cassina’s argument based on Regulation No 1383/2003. (34) As Cassina concedes, it applies only to goods introduced into the Community customs territory from third countries. Moreover, the present case is based on the premiss that the items of furniture in question were not pirated but lawfully manufactured and acquired in Italy.

40. I accordingly conclude in answer to Question 1(a) that there is not a distribution to the public within the meaning of Article 4(1) of the Copyright Directive where pieces of copyright-protected furniture are made available for temporary use by third parties without those third parties having the right to dispose of them.

#### Question 1(b)

41. By the second part of its first question the referring court asks whether there is a distribution to the public within the meaning of Article 4(1) of the Copyright Directive where pieces of copyright-protected furniture (35) are displayed in the window of a shop without the public being able to use or acquire them.

42. In my view, the answer to that question follows a fortiori from the answer I have proposed to the first part of the first question, for the reasons given above.

43. I am accordingly of the view that there is not a distribution to the public within the meaning of Article 4(1) of the Copyright Directive where pieces of copyright-protected furniture are displayed in the window of a shop without the public being able to use or acquire them.

## Question 2

44. The national court's second principal question is put only in the event that the first questions are answered in the affirmative, namely to the effect that there is a distribution to the public within the meaning of Article 4(1) of the Copyright Directive where pieces of copyright-protected furniture are made available for temporary use by third parties without those third parties being able to dispose of the items or are displayed in the window of a shop without the public being able to use or acquire them. In that case, the referring court asks whether the protection accorded to the free movement of goods precludes exercise of the right to prohibit distribution if the items presented are not under copyright protection in the Member State in which they were manufactured and placed on the market.

45. I do not consider that either limb of the national court's first question calls for an affirmative answer; I do not, therefore, intend to propose an answer to the second question. I will, however, say a few words about it.

46. It appears from the order for reference that the national court is concerned that, in a case such as the present, which concerns works which are subject to copyright protection in Germany even though they were lawfully manufactured in Italy without the rightholder's consent, the exercise in Germany of the right to prohibit distribution to the public within the meaning of Article 4(1) of the Directive might lead to a partitioning of national markets. If that were the case, the exercise of that right, *prima facie* contrary to Article 28 EC, could not be justified on the basis of Article 30 EC.

47. Cassina and the Polish Government submit that the second question should be answered in the negative. Peek & Cloppenburg and the Commission take the contrary view.

48. Cassina submits that the right to prohibit in Germany the use of furniture lawfully acquired in Italy is not such as to hinder trade between Member States. Even if it were, it would be justified by Article 30 EC. Admittedly, that provision cannot justify measures which amount to artificial partitioning of national markets. The holder of an intellectual or industrial property right cannot therefore rely on it to oppose the import of goods put lawfully on the market in another Member

State by or with the consent of that rightholder. Cassina states that that is not the case here, since it did not consent to the furniture being placed on the market in Italy.

49. The Polish Government submits that the scope of copyright protection is not harmonised at Community level. In the absence of harmonisation the scope of protection is a matter of national law.

50. Neither of those submissions seems to me to be particularly helpful. The reference in general and the second question in particular are based on the premiss that the items of furniture were lawfully manufactured in Italy. Cassina's submissions are therefore not to the point. The Polish Government's submission seems to me to be misconceived: even if the scope of protection were a matter of national law, that law would naturally have to comply with Articles 28 and 30 EC.

51. The Commission submits that it is not conceivable that the right of distribution defined in Article 4(1) should be interpreted in such a way that the principle of the free movement of goods prohibits exercise of that right. It accordingly proceeds on the basis that the second question asks whether Articles 28 and 30 EC preclude an interpretation of a provision of national law such that acts such as those at issue in the present case constitute a distribution protected by copyright.

52. Again, however, this argument seems misconceived to me. The second question is explicitly put on the basis that the acts in question do constitute distribution within the meaning of Article 4(1). If that is the case, then of necessity (given that Article 4 is mandatory) national law implementing that provision will be to the same effect. I therefore do not understand what distinction the Commission seeks to draw.

53. Given that analysis, I consider that both Article 4(1) of the Directive and national law implementing it must stand or fall together: if one falls foul of the Treaty rules on the free movement of goods, so must the other. I have already explained in the context of the first limb of the first question referred why, to my mind, Articles 28 and 30 EC dictate a narrow reading of 'distribution to the public' in Article 4(1). (36)

54. The analysis of the second question referred thus confirms in my view that the answer I propose to the first question must be correct. As is implicit in my earlier analysis of the first question, I broadly accept the submissions of Peek & Cloppenburg (37) that too wide an interpretation of 'distribution to the public' in Article 4(1) would not be compatible with the free movement of goods enshrined in Article 28 EC and would not be justified in accordance with Article 30 EC. A derogation will be permitted under Article 30 EC only if the exercise of the distribution right in question safeguards the specific subject-matter of the copyright. In the present case, that condition is not satisfied: the acts in question are not concerned with sale or resale or any analogous transaction but simply involve (at most) temporary use for the purpose for which the furniture is designed.

55. Finally, I repeat that the fact that the furniture was first put on the market in the Community without the consent of the right-holder is irrelevant in the con-

text of the present case. It is settled case-law that, as Community law now stands, and in the absence of Community provisions harmonising national laws, it is for the Member States to establish the conditions and detailed rules for the protection of literary and artistic property, subject to observance of the applicable international conventions. (38) As I have indicated, before implementation of Directive 98/71 (39) the legal protection of designs was not harmonised; nor did the Berne Convention require such protection. (40) The fact that, at the relevant time, the legal protection of designs was different in Germany and Italy is simply a consequence of that situation.

### Conclusion

56. For the reasons given above, I consider that the questions referred by the Bundesgerichtshof should be answered as follows:

There is not a ‘distribution to the public by sale or otherwise’ within the meaning of Article 4(1) 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 where pieces of copyright-protected furniture are either made available for temporary use by third parties without those third parties having the right to dispose of them or displayed in the window of a shop without the public being able to use or acquire them.

1 – Original language: English.

2 – (OJ 2001 L 167, p. 10).

3 – In the context of EC law, copyright (‘droit d’auteur’) comprises the exclusive rights granted to authors, composers, artists etc while related rights (‘droits voisins’) cover the analogous rights granted to performers (musicians, actors etc.) and entrepreneurs (publishers, film producers etc.).

4 – At the international level, the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886 permitted contracting parties ‘to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected’: Article 2(7). At the Community level, Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs (OJ 1998 L 289, p. 28) introduced partial harmonisation of design rights.

5 – World Intellectual Property Organisation.

6 – Adopted in Geneva on 20 December 1996.

7 – Case C-61/94 Commission v Germany [1996] ECR I-3989, paragraph 52.

8 – It appears that ratification by the Community is to take place only when, after implementing the Copyright Directive, all the Member States have ratified the WCT. The Community and the then Member States indicated their intention at the end of the Diplomatic Conference on certain copyright and neighbouring rights questions, Geneva, 2 to 20 December 1996, to deposit their instruments of ratification simultaneously.

See M. Ficsor, *The Law of Copyright and the Internet* (2002), p. 68, point 2.41.

9 – Law of 9 September 1965 (BGBI. I, p. 1273), as last amended by the law of 10 November 2006 (BGBI. I, p. 2587).

10 – Ultimately to be verified by the national court.

11 – According to Cassina, which has not been contradicted by Peek & Cloppenburg on this point, it is settled case-law in Germany that Le Corbusier-design furniture is protected by copyright.

12 – Cited in footnote 4.

13 – It should be noted that Cassina disputes the compatibility of the Italian legislation with Community law (and indeed with the Italian constitution). However, the referring court has put its questions on the basis that the items of furniture at issue in the present case were lawfully manufactured and acquired in Italy, and Cassina’s summary of the Italian law appears to explain how this came about.

14 – In my view it would be preferable for the answers to the questions referred in the present case to be framed in terms of their specific context. If more general answers are given, there is a risk that they might determine the outcome of disputes arising in different circumstances where other factors, not debated before the Court in the present case, are relevant. I have accordingly rephrased the questions in narrower terms than those put by the referring court.

15 – Emphasis added.

16 – See recitals 9 and 11.

17 – See recitals 10 and 11.

18 – Recitals 21 and 23.

19 – Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61).

20 – Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42).

21 – Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ 1996 L 77, p. 20).

22 – Case 158/86 Warner Brothers [1988] ECR 2605, Case C-200/96 Metronome Musik [1998] ECR I-1953 and Case C-61/97 Foreningen af danske Videogramdistributører [1998] ECR I-5171.

23 – Regulation of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights (OJ 2003 L 196, p. 7).

24 – Case C-306/05 [2006] ECR I-11519, paragraph 35, and the case-law there cited. See also Commission v Germany, cited in footnote 7, at paragraph 52.

25 – Articles 4(c) and 5(c) respectively.

26 – Article 9(1).

27 – See recitals 4, 9 and 11.

28 – See recital 3.

29 – Cited in footnote 4.

30 – See point 6 and footnote 4 above.

31 – See, for example, Foreningen af danske Videogramdistributører, cited in footnote 22, paragraph 13.

32 – See footnote 22.

33 – The directive on rental and lending rights, cited in footnote 19.

34 – Cited in footnote 23.

35 – See footnote 14.

36 – See points 35 and 36 above.

37 – In the alternative, given its proposed response to the first questions.

38 – Joined Cases C-92/92 and C-326/92 Phil Collins [1993] ECR I-5145, paragraph 19.

39 – Cited in footnote 12.

40 – See footnote 4.

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