JUDGMENT OF THE COURT (Fourth Chamber)

17 April 2008 *

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. Arestis, R. Silva de Lapuerta, E. Juhász and J. Malenovský (Rapporteur), Judges,

* Language of the case: German.

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. Ośniecką-Tamecką, 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 (BGBl. 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.

[Signatures]