

Fake Le Corbusier LC2 chairs in a hotel lobby - Austrian Supreme Court changes its jurisprudence.

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Placing a copyright-infringing armchair in a hotel lobby does not qualify as "distribution", but displaying a photo of it on the hotel's website does qualify as "making available" under copyright law. This is the outcome of a recent Austrian Supreme Court judgment, notable for its reversal of the decision of that same court in the corresponding preliminary injunction proceedings.



In 1928, Le Corbusier designed a series of Corbusier furniture, which soon became iconic around the globe as a prime example of modern design. The copyright holder sued, *inter alia*, the tenant of a hotel, where the lobby was furnished with counterfeit Le Corbusier LC2 chairs.

The defendant was ordered to cease and desist using the counterfeit chairs altogether by the Austrian Supreme Court in the preliminary injunction proceedings in 2008. However, in 2016, the Supreme Court decided differently in the subsequent full scale proceedings.

The reason for this - under normal circumstances quite unusual! - change in the Supreme Court's legal evaluation of the very same facts lies in the ECJ's judgment in case C-456/06, *Peek & Cloppenburg KG/Cassina SpA*, which was also handed down in 2008. According to the ECJ, 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 (the InfoSoc Directive), applies only when there is a transfer of the ownership in the object as such. Consequently, neither granting the public the possibility of using reproductions of a copyright work, nor exhibiting those reproductions to the public without actually granting them a right of use could qualify as such a form of distribution.

On this basis, the Austrian Supreme Court was therefore forced to reconsider its preliminary ruling and to conclude that the display of the armchairs already in the possession of the hotel was not a dissemination (in the sense of § 16a of the Austrian Copyright Act), as no transfer of ownership was intended.

However, there is still a catch.

The Supreme Court went on to consider whether making available photos of the counterfeit armchairs, e.g. on the hotel's website, would infringe the copyright-holder's right to exclusively "make available" according to § 18a of the Austrian Copyright Act.

This statutory provision grants the author/copyright-holder the exclusive right to make his copyright work available to the public by wire or wireless means in a way such that the work is accessible to members of the public at their chosen times and places.

The Supreme Court therefore held that the publication of a photo showing counterfeit copyright armchairs, makes the works and their artistic value available to any third party and that this infringes § 18a of the Austrian Copyright Act. A photo of the counterfeit Corbusier armchairs therefore infringes the copyright of Le Corbusier.

Consequently, sitting on counterfeits is still permitted, but showing them online, e.g. on a website, is not.