

CJEU introduces ‘purpose’ requirement into the distribution right

Kluwer Copyright Blog
March 13, 2019

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Please refer to this post as: Bernd Justin Jütte, ‘CJEU introduces ‘purpose’ requirement into the distribution right’, Kluwer Copyright Blog, March 13, 2019, <http://copyrightblog.kluweriplaw.com/2019/03/13/cjeu-introduces-purpose-requirement-into-the-distribution-right/>

In its judgment of 19 December 2018 in Criminal proceedings against Imran Syed (C-572/17) the Court of Justice of the European Union (CJEU) rules that the storage of copyright infringing items constitutes infringement of the distribution right if identical items are also held at the actual place of sale and those items are intended to be sold. It thereby partially follows the Opinion of Advocate General (AG) Campos Sánchez-Bordona (discussed [here](#)). The ruling does not come as a surprise, rather it is merely the logical result of the extension of the Court’s jurisprudence in *Peek & Cloppenburg* and *Dimensione Direct Sales and Labianca*.



In this case, which was referred to the CJEU by the Swedish Supreme Court (Högsta domstolen), the defendant, Mr Syed, operated a shop in the centre of Stockholm from where he sold t-shirts with motifs that infringed copyright. Mr. Syed stocked identical t-shirts in two of his storage facilities, one of which was connected to his shop and one which was located in a suburb of Stockholm. The lower courts had disagreed on the question whether storage of items identical to those offered for sale in Mr Syed’s shop constituted an act within the scope of Article 4(1) of Directive 2001/29/EC (‘InfoSoc Directive’). The Högsta domstolen therefore referred two questions to the CJEU which sought to clarify whether the storage of goods imprinted with infringing motifs in a storage facility constitutes an act of distribution within the meaning of Article 4(1) Directive 2001/29/EC when identical goods are offered for sale in a shop operated by the same person, and whether the distance between the shop and the storage facilities mattered

The judgment of the Court

With reference to *Dimensione Direct Sales and Labianca*, the Court reiterates that the exclusive right of distribution is also infringed by acts prior to a sale. The process of distribution “is characterised by a series of acts going, at the very least, from the conclusion of a contract of sale to the performance thereof by delivery to a member of the public.” (para. 22, emphasis added) This implies that acts prior to the conclusion of the contract can also be covered by the scope of Article 4(1), including offers for sale that are binding on the seller (paras 23-4). An eventual transfer of ownership is therefore not necessary to trigger the distribution right (para. 24). It is however necessary to prove, in order to find an infringement, that the seller had the intention that the goods in question would be offered to the public for sale (para. 27).

The storage of goods in a detached facility, which are identical to those offered at the retail location, can only be an indication that the seller intended the stored goods to be sold (paras 31-2). Such goods could also be intended to be sold elsewhere and would, in this case, not fall within the scope of the distribution right. The Court underlines the importance of the purpose for which the goods are stored, and only an intention to introduce the goods into a causal chain that would lead to a potential sale would fall within the scope of Article 4(1); the storage of goods for other purposes would not implicate the distribution right (para. 34).

Accordingly, in order to avoid an extension of Article 4(1) “beyond the framework established by EU law”, the purpose of the storage must be established. It is the task of the national court to find, in a particular situation, whether the storage of goods constitutes “an act prior to a sale”, in other words whether the goods were meant to be sold (para. 36).

Here, the CJEU is slightly more nuanced in its approach by charging the national court with the task of assessing whether the goods in storage which are identical to items sold in a shop (which is controlled by the same person) are indeed intended for sale in that shop. When making this assessment, the national judge must take a variety of factors into consideration, of which the distance between the storage facility and the shop is only one factor. Other factors that the court proposes are whether the shop is regularly restocked from that particular storage facility, the accounts of the shop, and a comparison of the volume of sales with the level of stock (para. 39). The AG had merely stated that the distance between the shop and the different storage locations was irrelevant but had not suggested any other factors that a national court should take into consideration (para. 62 of the Opinion).

Comment

With its *Syed* judgment the CJEU continues to develop the concept of distribution under EU copyright law. The Court extends the causal chain events that might lead to a transfer of ownership of a given good. As a result, right holders are given more opportunities to enforce their exclusive distribution right, even at a point in the distribution chain at which the goods are only in storage.

The Court also introduced a new test into the concept of distribution. Storing goods with infringing motifs only constitutes an infringing act under Article 4(1) if the purpose of the storage is to sell them within the EU. The element of purpose must be determined based on factors, such as those listed in para. 39 of the judgment (s.a.). The AG had suggested that such purpose could be inferred from the existence of identical goods in the warehouse as well as the shop. Such an approach would have also covered the storage of goods that are not intended for sale (in the EU). This also puts the distribution in line with Article 10(3)(b) of Directive (EU) 2015/2436 (Trademark Directive) and Article 9(3)(b) of Regulation (EU) 2017/1001 (Trademark Regulation), which reserve the right to stock items for the purposes of offering goods or putting them on the market to the owner of a trademark.

Pursuant to *Syed* it can be expected that any act that reflects an intention to offer or sell an item that is protected by copyright law will come within the scope of the distribution right. The CJEU has established an objective standard to determine whether a person pursues the aim of offering an item in question for sale. Although the list of factors that can indicate an intention to sell is open, the Court withstood the temptation to introduce a legal assumption comparable to that established for the right to communication to the public of Article 3 of Directive 2001/29/EC (see [here](#)).