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Incidental Inclusion of Works – Mere Incidental Relevance of the Exception according to the German Bundesgerichtshof

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 **Case I ZR 177/13 of November 17, 2014: Moebelkatalog [Furniture Catalogue] published [here](#).**

According to a recent ruling of the German Highest Civil Court, the Bundesgerichtshof (“BGH”), the copyright exception for “incidental inclusion of a work or other subject matter in other material” (Article 5 (3) lit. i) Copyright Directive 2001/29) has to be interpreted narrowly. It is the first decision of the BGH on this copyright exception. The BGH did not refer the case to the CJEU, but thought its opinion was *acte clair*.

Facts of the case

The case name “Moebelkatalog” [Furniture Catalogue] refers to the furniture catalogue at issue in this case, published by the defendant, a manufacturer of office furniture. The catalogue was, *inter alia*, made publically available on the internet. The catalogue contained a photo of the defendant’s products in a decorated room, which included a painting by the claimant. The photo at issue is included in the BGH judgment [here](#).

The Claimant argued infringement of his copyright and sued for damages and for information for preparing the damages claim.

The two lower courts Landgericht [District Court] and Oberlandesgericht [Court of Appeal] Cologne both rejected the claims, as they thought the inclusion of the painting in the catalogue picture was merely incidental and would thus come under the exception of Article 57 German Copyright Act (“GCA”), which implements the incidental inclusion exception of Article 5 (3) lit i) Copyright Directive 2001/29.

The BGH decision

The BGH had no problem with also including acts of publically making available within the exception for incidental inclusion of a work into other material (para. 15).

But the BGH held that the catalogue picture was a copyright infringement. The inclusion of the painting in the picture of office furniture was not merely incidental, it ruled.

To determine whether the inclusion of a work in other material was merely “incidental”, the BGH

developed the following basic evaluation points. As a starting point, the evaluation had to take place from the viewpoint of the objective average observer [objektiver Durchschnittsbetrachter], see paras. 21 and 27.

For the evaluation as such, as a first step, the “main object” [“Hauptgegenstand”] of use needed to be determined (paras. 16 to 23) according to the BGH. In the case of the furniture catalogue, which contained multiple pictures, the main object was not the entire catalogue, but only the picture which contained the painting. Otherwise, the copyright protection would depend on the quantity of the other material (para. 19). Such a generous interpretation of the exception would not be in line with the CJEU case law on the exceptions and limitations in Article 5 Copyright Directive 2001/29. Pursuant to this case law, exceptions and limitations to copyright should be interpreted narrowly (para. 20, referring to CJEU C-5/08 of 16 July 2009, para. 56 – *Infopaq/DDF*).

As a second step to determine an “incidental” use, it is necessary to evaluate whether the work included in the other material was only incidental, when compared with the main object of use. It was not sufficient that the work included played a background role, it would have to be a genuine “incidental” role (para. 26). To determine a genuine incidental role, the BGH used the following two step test:

- Interchangeability: It would speak in favour of a mere incidental inclusion of a work, if it was interchangeable [“austauschbar”] with other works or could be entirely left out [“weglassen”], para. 27.
- Not part of the overall concept: Furthermore, it was an additional requirement that the objective average observer would not regard the work as part of the overall concept [“als zum Gesamtkonzept gehoerig”], paras. 28, 31. Such an additional requirement was necessary to ensure the narrow interpretation of the exception. The exception could only be applied if not even the slightest relationship to the main object of use could be identified. Rather, an incidental work had to be without any relationship to the main object. In relation to the main object, an incidental role could be characterised as “accidental” [“Zufaelligkeit”] and random [“Beliebigkeit”].

In this case, the picture had a certain aesthetic relevance to the pictures of office furniture. It was chosen and was not included in the picture by accident or randomly.

Comment and outlook

This is truly a very strict and rightholder friendly approach to the exception for incidental works. The exception will not apply if a work has a dramaturgic relationship to the main object. No film producer or theatre production will be able to rely on the exception for the decoration of the set for a film or a theatre play, if the decoration serves a dramaturgic purpose. The relevance of the exception is limited to inclusions which are genuinely accidental and genuinely random. With this interpretation from the BGH, the incidental work exception will only play an incidental role among the copyright exceptions.

What might be a bit surprising, however, is the fact that the BGH thought its interpretation to be *acte clair* and that no reference to the CJEU would be necessary (para. 32). The two lower courts in the case had read Article 57 GCA and Article 5 (3) lit i) Copyright Directive 2001/29 differently and more generously. Thus, one could say that an opportunity was missed to clarify the interpretation of Article 5 (3) lit i) Copyright Directive 2001/29 at the European court level. European copyright lawyers will have to wait for another case, if they think that it was not *acte*

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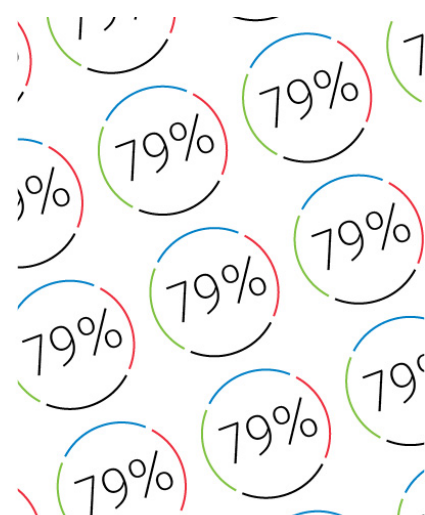
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