

# Kluwer Copyright Blog

## When are we selling those T-Shirts? – AG Campos Sánchez-Bordona considers storage as part of distribution

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The right of distribution is the least controversial of the three exclusive rights contained in the [Information Society Directive](#) (InfoSoc Directive). Yet, every now and then the Court of Justice



of the European Union (CJEU) is asked to re-examine its scope. With far less interpretative imagination compared with the right of communication to the public, the Court has steered a steady course (see e.g. [here](#)), and the [Opinion](#) of AG Campos Sánchez-Bordona does not constitute an exception to this. In *Riksåklagaren v Imran Syed* the Swedish Supreme Court (Högsta domstol) is asking the CJEU whether the right of distribution under Article 4(1) of the InfoSoc Directive also extends to the storing of infringing products that are not (yet) offered for sale.

Mr Syed operates a store in Stockholm where he sold pirated copies of rock music themed clothing and accessories. He kept some of the items in his store and further items in an attached storage room and another warehouse, located in a different area of Stockholm. He regularly restocked the store with items from both storage facilities. In criminal proceedings the Swedish first instance court found, alongside infringements of trade marks, infringement of copyrights for items in the store as well as identical items in the storage room and the warehouse. Items that were only found in the warehouse or the storage room were not found to be infringing. At second instance the appeals court declined infringement for any items found in the storage room and the warehouse, as they had not yet been offered for sale. The prosecution appealed, arguing that an offer for sale of items in a shop also extended to identical items that are located in storage. The Supreme Court stayed the proceedings and referred two questions to the CJEU. It asked, first, whether the right to distribution under Article 4(1) InfoSoc Directive is also infringed when goods are kept in a storage facility controlled by the seller and identical infringing goods are offered for sale in the seller's store. In addition, the referring court asked whether it is of any relevance whether the storage facility is connected to the shop or located elsewhere.

## The Opinion of the Advocate General

The AG first recalls that the right of distribution is not (any longer) limited to acts that have as their direct result the change of ownership of a work or a copy of a work. In *Peek & Cloppenburg* the Court had ruled that the display of an unauthorized copy of a piece of furniture for merely decorative purposes does not fall within the scope of protection of Article 4. In this case, the display of a copy was not aimed at transferring the ownership of the object. This was different in *Donner* and in *Dimensione*, where certain acts constituted copyright infringements. Pursuant to the Court, the acts were elements of a chain that led from the conclusion of the contract to its fulfilment, which also included, in *Donner*, the transport (by a third party) of infringing objects to the purchaser. The scope of Article 4 was further extended when the Court decided in *Dimensione* that the mere advertising of infringing goods also constitutes an act of distribution, because an invitation to make an offer is part of a causal chain that can result in the sale of said object; whether the sale would ultimately be realized is, according to the Court, irrelevant.

The broad scope of the distribution right would then require an assessment of whether the storage of clothes in a warehouse is an element in the chain of events that can lead to a sale, when identical clothes are also located in the shop of the trader. The CJEU has traditionally followed an interpretation that reduces the ‘distribution’ process to the transaction between the retailer and the customer, thus excluding any prior steps. It does so with reference to the similar formulations in Article 4 InfoSoc Directive (“*distribution to the public by sale or otherwise*”) and Article 6(1) WCT (“*making available to the public ... through sale or other transfer of ownership*”).

In the present case, Mr Syed is a retailer and sells his goods directly to the public, which entails the application of Article 4. The offer to sell, which he makes by displaying the articles of clothing in his shop, certainly includes the items in the shop. The AG also considers that identical items that are located in the storage of the shop or any warehouse of the retailer are also subject to the offer made by Mr Syed. The items stored in places other than the sales area are still directly connected to the items displayed. They serve as substitutes, which can quickly replace sold stock, or the trader can retrieve, upon request from a customer, items in a different size or colour that are otherwise identical to infringing objects in the shop.

Such an interpretation, according to the AG, serves to provide minimum protection under Article 6(1) WCT and also safeguards a high level of protection pursuant to Recital 9 InfoSoc Directive. This approach enables a preventive control of infringements before a change in ownership occurs. Any other interpretation that would limit the control to individual transactions would render protection of works under the distribution right ineffective. The AG rejected a proposal made by the Commission in its submission to apply a three-pronged test that would look at the particular circumstances and the relation between the items stored and potential sales. Instead, he suggests that storage by a retailer *per se* constitutes part of the distribution process. How far the warehouse is located from the shop is, in the eyes of the AG, irrelevant.

## Comment

The reasoning of the AG seems uncontroversial, and it would not come as a surprise if this is one of the copyright cases in which the Court agrees with the opinion of the AG. Without overstressing the boundaries of Article 4, the Opinion provides for a sensible and economically reasonable solution which protects the interests of rightholders against abuse by traders. The construction of a causal chain between an act and the final transfer of ownership should, in most

cases, be clearly identifiable. The AG should also be lauded for resisting the temptation to introduce yet another complicated test, which would inquire into the subjective state of mind of a potential infringer. This had been suggested by the Commission, which opposed a presumption of infringement of the distribution right based on the parallel existence of identical goods in storage and in the shop. Instead, it would have required an assessment of the defendant's purpose in storing the goods in his warehouse and storage room.

The judgment is also easily transferrable to situations in which no physical store exists. Online retailers would then be solely judged by the goods they might be offering on their websites. The storage of potentially infringing copies of works would then only be infringing if an invitation to make an offer has been made expressly. Thus, the opinion provides clear and unambiguous guidance for the interpretation of the right of distribution and, more importantly, its limits.

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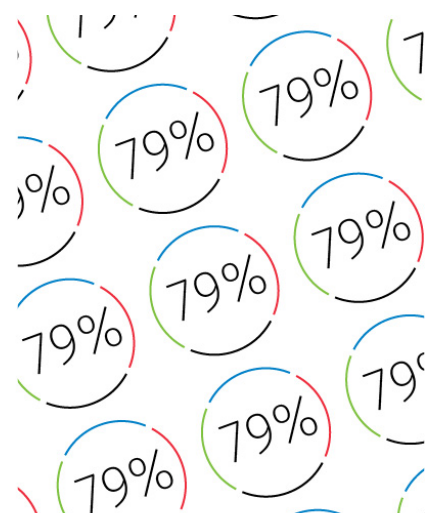
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