



Press and Information

Court of Justice of the European Union
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Judgment in Case C-5/11
Titus Alexander Jochen Donner

The free movement of goods may be restricted on grounds of protection of copyright

A Member State may bring an action under national criminal law against a transporter for the offence of aiding and abetting the prohibited distribution of copyright-protected works on national territory, even where those works are not protected by copyright in the vendor's Member State

Mr Donner, a German national, was found guilty by the Landgericht München II (Regional Court, Munich II, Germany) of aiding and abetting the prohibited commercial exploitation of copyright-protected works. According to the findings of the regional court, between 2005 and 2008 Mr Donner had distributed replicas of furnishings in the so-called 'Bauhaus'¹ style, which was protected by copyright in Germany, for sale to customers residing in Germany.

These replicas originated from Italy, where they were not protected by copyright between 2002 and 2007, nor were they fully protected at the relevant time because, according to Italian case-law, that protection was unenforceable against producers who had reproduced or offered them for sale and/or marketed them for a certain time. The replicas had been offered for sale to customers residing in Germany by the Italian undertaking Dimensione Direct through advertisements and supplements in newspapers, direct publicity letters and a German-language internet website.

For transport to customers residing in Germany, Dimensione recommended using the Italian transport undertaking In.Sp.Em, of which Mr Donner was the principal director. The In.Sp.Em drivers collected the items ordered by German customers in Italy and paid the relevant purchase price to Dimensione. The In.Sp.Em drivers then collected the purchase price and freight charges from the customer on delivery in Germany. From a legal point of view, ownership of the goods sold by Dimensione was transferred in Italy to the German customers. The transfer of the power of disposal over the goods, however, did not take place until the goods were handed over to the purchaser in Germany, with the help of Mr Donner. Thus, according to the regional court, the distribution for the purposes of copyright did not take place in Italy, but rather in Germany, where it was prohibited in the absence of authorisation from the copyright holders.

Mr Donner appealed on a point of law against the judgment of the regional court to the Bundesgerichtshof (Federal Court of Justice, Germany). That court seeks to know whether the application of German criminal law gives rise, in the present case, to an unjustified restriction on the free movement of goods, as guaranteed under EU law.

In its judgment delivered today, the Court of Justice observes, firstly, that the application of criminal law in the present case presupposes that there has been, on the national territory, a 'distribution to the public' for the purposes of EU law². In that regard, it finds that a trader who directs his advertising at members of the public residing in a given Member State and creates or makes available to them a specific delivery system and payment method, or allows a third party to do so, thereby enabling those members of the public to receive delivery of copies of works protected by

¹ These included chairs from the Aluminium Group, designed by Charles and Ray Eames, Wagenfeld lights, designed by Wilhelm Wagenfeld, seating, designed by Le Corbusier, the occasional table called the 'Adjustable Table' and 'Tubelight' lamps, designed by Eileen Gray, and tubular steel cantilever chairs, designed by Mart Stam.

² 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).

copyright in that same Member State, makes, in the Member State where the delivery takes place, such a distribution. In the present case, the Court leaves it to the national court to determine whether there is evidence supporting a conclusion that that trader did actually make such a distribution to the public.

Secondly, the Court finds that the prohibition on distribution in Germany which is sanctioned by national criminal law does constitute a restriction on the free movement of goods. Such a restriction may, however, be justified by reasons relating to the protection of industrial and commercial property.

The restriction in question is based on the differing conditions of copyright protection operating across the EU³. These differences are inseparably linked to the very existence of those rights. In the present case, the protection of the right of distribution cannot be deemed to give rise to a disproportionate or artificial partitioning of the markets. The application of criminal law provisions may be considered necessary to protect the specific subject-matter of the copyright, which confers inter alia the exclusive right of exploitation. **The restriction in question thus seems to be justified and proportionate to the objective pursued.**

Accordingly, the Court's answer is that EU law does not preclude a Member State from bringing an action under national criminal law for the offence of aiding and abetting the prohibited distribution of copyright-protected works where such works are distributed to the public on the territory of that Member State (Germany) in the context of a sale, aimed specifically at the public of that State, concluded in another Member State (Italy) where those works are not protected by copyright or the protection conferred on them is not enforceable as against third parties.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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³ The Court has ruled earlier to that effect as regards the disparity between the different national legal rules governing copyright in Case [341/87 EMI Electrola](#).