

Headnotes

to the order of the First Senate of 19 July 2011

– 1 BvR 1916/09 –

- 1. The extension of the entitlement to fundamental rights to cover legal entities from Member States of the European Union constitutes an expansion of the application of the protection of fundamental rights under German law as a result of the European Treaties because of the priority of application of the fundamental freedoms on the Single Market (Article 26.2 TFEU) and because of the general ban on discrimination on grounds of nationality (Article 18 TFEU).**
- 2. An ordinary (non-constitutional) court may misjudge the significance and gravity of the fundamental rights of the Basic Law by virtue of the presumption that the law of the European Union does not permit any leeway in the implementation of EU law.**



IN THE NAME OF THE PEOPLE

**In the proceedings
on
the constitutional complaint**

of the firm C... S.p.A., Italy,

- authorised representatives: Rechtsanwälte Deubner & Kirchberg,
Mozartstraße 13, 76133 Karlsruhe –

against the judgment of the Federal Court of Justice (Bundesgerichtshof) of
22 January 2009 – I ZR 148/06 –

the Federal Constitutional Court – First Senate – with the participation of Justices

Kirchhof (Vice President),
Gaier,
Eichberger,
Schluckebier,
Masing,
Paulus,
Baer, and
Britz

ruled on 19 July 2011:

The constitutional complaint is rejected as unfounded.

Grounds:

A.

The constitutional complaint gives rise to the question of whether legal entities domiciled outside of Germany, but in a Member State of the European Union, may invoke fundamental rights of the Basic Law (*Grundgesetz* – GG). Moreover, it relates to compliance with the fundamental right of property in the interpretation and application of national law based on Union law.

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I.

1. The judgment of the Federal Court of Justice impugned with the constitutional complaint relates to the substantive scope of the distribution right that is reserved to the author under § 17 of the Copyright Act (*Urheberrechtsgesetz* – UrhG) in the version of 23 June 1995 (Federal Law Gazette (*Bundesgesetzblatt* – BGBl) I p. 842) that is material to the present case, and under § 96 of the Copyright Act in the version of 10 September 2003 (Federal Law Gazette I p. 1774). In the dispute at hand, the questions of interpretation emerge from the placing of imitations of Le Corbusier furniture in a cigar lounge operated by the defendant of the original proceedings. The complainant has been granted to an exclusive copyright license for the manufacture and sale of such furniture.

a) § 17 of the Copyright Act was amended by the Third Act Amending the Copyright Act (*Drittes Gesetz zur Änderung des Urheberrechtsgesetzes*) of 23 June 1995 (Federal Law Gazette I p. 842) as follows:

Distribution right

(1) The distribution right is the right to offer to the public or to put into circulation the original work or copies thereof.

(2) If the original work or copies thereof have been put into circulation in the territory of the European Union or of another Contracting State of the Convention Concerning the European Economic Area through sale thereof with the consent of the holder of the distribution right, their further distribution shall be permissible with the exception of rental.

(3) In the meaning of the provisions of this Law, rental shall be the temporary making available for use for the purpose of directly or indirectly making profits. However, making original works or copies thereof available for use shall not be deemed to constitute rental if the original works or copies thereof are

1. edifices or works of applied art, or

2. made available in the context of a work or service relationship for the exclusive purpose of being used in fulfilling obligations arising out of the work or service relationship.

The Reform Act served to implement Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ L 346 of 27 November 1992, p. 61), since replaced by Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 (OJ L 376 of 27 December 2006, p. 28; hereinafter: Rental and Lending Directive), in German domestic law. According to Article 3.2 of this Directive, it explicitly does not cover rental and lending rights in relation to works of applied art.

The term “distribution” is a prerequisite for the reasoning of the Bill of 21 December 1994 (*Bundestag* document (*Bundestagsdrucksache* – BTDrucks) 13/115, pp. 7

and 12). It was always broadly understood as “any kind of putting into circulation of works” (see the explanatory memorandum to § 17 contained in the Government draft of the Copyright Act of 23 March 1962, *Bundestag* document IV/270, pp. 47-48). According to the general opinion prevailing until the impugned ruling was handed down, “putting into circulation” (*Inverkehrbringen*) within the meaning of § 17.1 of the Copyright Act meant any act by which the original work or copies of the work is transferred from a company’s internal sphere to the general public; any transfer of factual control was deemed to be sufficient for this (see Decisions of the Federal Court of Justice in Civil Matters (*Entscheidungen des Bundesgerichtshofes in Zivilsachen* – BGHZ) 113, 159 <160 et seq.>; Loewenheim, in: Schricker, *Urheberrecht*, 3rd ed. 2006, § 17, para. 12 with further references). Accordingly, for instance, the Berlin Higher Regional Court (*Kammergericht*) adjudged the equipment of hotel rooms with imitation of Le Corbusier furniture to constitute an infringement of the distribution right, regardless of whether there had been an assignment of possession under civil law (judgment of 30 April 1993 – 5 U 2548/91 –, *Gewerblicher Rechtsschutz und Urheberrecht* – GRUR 1996, pp. 968 <969-970>).

b) § 96 of the Copyright Act reads as follows: 12

Prohibition of exploitation 13

(1) Unlawfully made copies may be neither distributed nor used for public exhibition. 14

(2) Unlawfully made broadcasts may not be fixed on video or audio recording mediums or publicly exhibited. 15

According to the reasoning of the Bill, this provision, the wording of which, with the exception of its title, is identical to that contained in the Copyright Act of 9 September 1965 (Federal Law Gazette I p. 1273), is intended to clarify that the party who, on the basis of contractual or statutory permission, is entitled to distribute or publicly reproduce a work may not use any unlawfully made copies to do so (see the individual reasoning re § 106, *Bundestag* document IV/270, p. 103). Its main application was considered to be the distribution of copies legally made abroad and subsequently imported to Germany, where making such copies would have been illegal in Germany (see Federal Court of Justice (*Bundesgerichtshof* – BGH), judgment of 6 October 1994 – I ZR 155/90 “Cliff Richard II” –, *Neue Juristische Wochenschrift* – NJW 1995, p. 868 <870>; Meckel, in: Dreyer/Kotthoff/Meckel, *Urheberrecht*, 2nd ed. 2009, § 96, para. 1). 16

c) Under certain conditions, § 97.1 of the Copyright Act grants the owner of a right protected under the Copyright Act an entitlement to a judgment to cease and desist. The provision reads as follows: 17

Actions for Injunction and Damages 18

(1) Any person unlawfully infringing a copyright or any other right protected by this Act may be required by the injured party to remove the infringement, or, if there is a 19

risk of recurrent infringement, to cease and desist...

2. a) At the same time, § 17 of the Copyright Act serves to implement 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 L 167 of 22 June 2001, p. 10; hereinafter: Copyright Directive). The legal basis of this is to be found in the provisions on legal coordination and approximation in the Single Market (Article 47.2, Article 55 and Article 95 EC, today Article 53.1, Article 62 and Article 114 of the Treaty on the Functioning of the European Union – TFEU). Its harmonisation purpose is touched on in particular in recitals 1, 3, 4, 6 and 7, whilst the envisioned high level of protection in the field of intellectual property is emphasised in recitals 4, 9 to 12 and 22. 20

As becomes apparent from its recital 15, the Copyright Directive serves at the same time to implement two international agreements of 20 December 1996, namely the WIPO Copyright Treaty (WCT; UNTS Vol. 2186, p. 121; OJ L 89 [2000], p. 6; Federal Law Gazette 2003 II p. 754, which entered into force on 6 March 2002, on 14 March 2010 for Germany and the European Union) and the WIPO Performances and Phonograms Treaty (WPPT; UNTS Vol. 2186, p. 203; OJ L 89 [2000], p. 6; Federal Law Gazette 2003 II pp. 754, 770, which entered into force on 20 May 2002, on 14 March 2010 for Germany and the European Union). As shown by their Preambles, the Treaties are to maintain and develop in particular the rights of authors, performers and producers of phonograms. 21

b) The Copyright Directive regulates the distribution right in its Article 4: 22

Distribution right 23

(1) Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise. 24

(2) The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent. 25

In order to interpret Article 4.1 of the Copyright Directive, the Federal Court of Justice in a parallel case to these original proceedings requested by order of 5 October 2006 – I ZR 247/03 – (GRUR 2007, p. 50) a preliminary ruling of the Court of Justice of the European Union (hereinafter: European Court of Justice) under Article 267 TFEU, *inter alia* on the question of whether it can be assumed that there is a distribution to the public otherwise than by sale, within the meaning of Article 4(1) of Directive 2001/29, in the case where it is made possible for third parties to make use of items of copyright-protected works without the grant of use involving a transfer of de facto power to dispose of those items. The subject of these proceedings, which the complainant of the present proceedings had also initiated, was the placing of imitations of 26

Le Corbusier furniture that had been acquired in Italy for use by customers in the rest area of a department store and for decorative purposes in its shop windows.

In its submission order, the Federal Court of Justice made reference to its case-law, under which distribution within the meaning of Article 4.1 of the Copyright Directive is generally considered to have taken place if the original or copies thereof were offered to the public from a company's internal sphere through transfer of ownership or possession (even if for a merely temporary period) (loc. Cit., <51>). According to the Federal Court of Justice, the question had not yet been clarified as to whether this was also the case if works were made available to the public without a transfer of ownership or of possession, and hence without a transfer of de facto power to dispose. In its view, this was to be answered in the affirmative because of the wording of Article 4.1 of the Copyright Directive and the recitals, which were said to demand a high level of protection (loc. Cit., <52>).

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The European Court of Justice, however, ruled that, for the purpose of the directive, the concept of distribution only applies where there is a transfer of ownership (judgment of 17 April 2008 – C-456/06 *Peek & Cloppenburg/Cassina* –, ECR 2008, p. I.-2731, para. 41). It stated as grounds (paras. 29 et seq.) that the directive does not give a precise explanation of the concept of distribution, but that the concept is defined in Article 6.1 WCT and in Article 8.1 and Article 12.1 WPPT. As stated in its recital 15, the Copyright Directive was intended to implement the Community's obligations under these Treaties, under which distribution only applies to cases where ownership is transferred. Article 4.1 of the Copyright Directive is hence to be interpreted accordingly. The European Court of Justice held that these findings are not affected by recitals 9 to 11 of the directive; a high level of protection can only be achieved within the framework put in place by the Community legislature (paras. 37 et seq.).

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II.

1. The complainant, a limited liability company under Italian law domiciled in Italy, manufactures upholstered furniture from the plans of the architect and furniture designer Charles-Édouard Jeanneret-Gris, known as Le Corbusier, who died in 1965. Since 1965, there have been exclusive copyright licensing agreements between the complainant and the Fondation Le Corbusier in Paris, which exercises the rights of the deceased author, and two further legal successors of Le Corbusier, for the worldwide manufacture and sale of specific furniture designed by Le Corbusier. The contracts also permit the complainant to take legal action against copyright infringements.

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The defendant of the original proceedings, a cigar manufacturer, furnished a cigar lounge in an art and exhibition hall. It acquired imitations of armchairs and sofas of Le Corbusier furniture from a company domiciled in Bologna (which appeared as intervening third party on the defendant's side in the original proceedings), and placed these in the lounge. The intervening third party has not been granted utilisation rights

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under copyright law with regard to the furniture models.

The complainant obtained a ruling by the Regional Court (*Landgericht*) and the Higher Regional Court (*Oberlandesgericht*) ordering the defendant to refrain from exploiting unauthorised copies of copyrighted Le Corbusier furniture models in the Federal Republic of Germany, in particular by placing them in said cigar lounge and from using them for commercial purposes. The courts based the right to the issuance of a judgment to cease and desist on § 97.1 in conjunction with § 17.1 of the Copyright Act, and in doing so based this on a broad definition of distribution. The operating principle was said to be, to the extent possible, the appropriate participation of the author in the economic benefit of his work. Accordingly, the author should, where possible, participate comprehensively in each new instance of exploitation. Transfer of possession within the meaning of §§ 854 et seq. of the Civil Code (*Bürgerliches Gesetzbuch – BGB*) was said not to be necessary for this; simply making the furniture factually available to the customers of the cigar lounge was deemed sufficient. 31

The intervening third party lodged a complaint to the Federal Court of Justice against the non-admission of the appeal on points of law by the Higher Regional Court. 32

2. In the proceedings regarding the complaint against denial of leave to appeal, the Federal Court of Justice initially postponed the ruling with regard to the preliminary ruling proceedings initiated in the above-mentioned parallel case under Article 267 TFEU. 33

After the judgment of the European Court of Justice of 17 April 2008 in the parallel case (loc. cit.), the Federal Court of Justice admitted the appeal on points of law in the original proceedings. With the impugned judgment of 22 January 2009 (*Rechtssprechungsdienst Zeitschrift für Urheber- und Medienrecht – ZUM-RD 2009*, p. 531), it struck down the judgment of the Higher Regional Court and remitted the action, amending the ruling of the Regional Court. The Federal Court of Justice ruled in the same way in the parallel case (judgment of 22 January 2009 – I ZR 247/03 –, *GRUR 2009*, p. 840). 34

The Federal Court of Justice stated as grounds for the decision that the complainant was not entitled to the issuance of a judgment to cease and desist under § 97.1 of the Copyright Act, given that the defendant had not infringed the distribution right within the meaning of § 15.1 no. 2 and § 17.1 of the Copyright Act by placing the furniture, and had also not contravened the prohibition of exploitation under § 96 of the Copyright Act. 35

a) Since the distribution right under Article 4.1 of the Copyright Directive constitutes harmonised European law, § 17 of the Copyright Act is to be interpreted in conformity with the directive. The directive was said in this regard to give rise not only to a minimum degree of protection that the Member States may not fall short of when determining their own level of protection, but to define a binding provision of the distribution 36

right, also within the meaning of maximum protection. This was said to ensue from the purpose of the directive to harmonise different provisions of domestic law on copyright and related rights in the interest of legal certainty and of the functionality of the Single Market and to avoid non-uniform actions on the part of the Member States. The opposing view put forward in parts of the literature was said to be based on the fact that the provisions on the distribution right in the WIPO treaties only granted minimum rights and the Contracting Parties remained able to provide more than such a minimum protection. However, the Federal Court of Justice argued that the conclusions to be drawn from this reasoning only relate to the interpretation of the provision contained in Article 4.1 of the Copyright Directive, and hence to the question, now answered by the European Court of Justice in the affirmative, as to whether distribution within the meaning of this provision of the directive only applied in case of a transfer of ownership.

Further, the Federal Court of Justice held that on the basis of the case law of the European Court of Justice, a third party did not encroach on the distribution right to which the author was entitled in exclusivity under § 15.1 no. 2 and § 17.1 of the Copyright Act if the third party made available imitations of copyrighted models of furniture to the public merely for use.

b) It was also said that the complainant is not entitled to the claims asserted because of a violation of the prohibition of exploitation under § 96.1 of the Copyright Act. Under this provision, unlawfully made copies may not be distributed. Direct application of § 96.1 of the Copyright Act, the Federal Court of Justice held, was impossible because the definition of “distribution” corresponded to that of § 17 of the Copyright Act, the prerequisites of which were not met. In addition, the Federal Court of Justice held that an analogous application of this provision was not possible in the absence of an unintentional regulatory gap. According to the ruling of the European Court of Justice, the Community legislature had deliberately restricted the distribution right to cases where ownership of the original work or of a copy thereof had been transferred.

III.

With its constitutional complaint, the complainant alleges a violation of its rights under Article 14.1 and Article 101.1 sentence 2 of the Basic Law.

1. The complainant considers itself to be entitled to lodge a complaint. As a foreign legal entity domiciled in an EU Member State, notwithstanding Article 19.3 of the Basic Law, it deems itself able to complain of a violation of its fundamental right of property. In the complainant’s opinion, it is without significance that it is not directly entitled as an author, but only on the basis of contractual agreements with the Fondation Le Corbusier.

2. In the complainant’s opinion, the impugned judgment violates Article 14.1 of the Basic Law.

a) The complainant argues that the consequence of the Federal Court of Justice's interpretation of § 17.1 of the Copyright Act is that the author can no longer prohibit other forms of distribution than the transfer of ownership. The Federal Court of Justice has not dealt with the constitutional justification for this encroachment because it has presumed that it was bound by this interpretation pursuant to European Union law. The Federal Court of Justice has thereby overlooked that forms of distribution not consisting of a transfer of ownership are from the outset not covered by the regulatory scope of the Copyright Directive, so that the directive does not determine the interpretation of national law in this respect. Even if one were to see this differently, the Federal Court of Justice certainly would not have been allowed to presume that the directive provides a maximum of protection. The Copyright Directive regulates only a minimum level of protection, as was apparent from its recitals 9 to 12. § 17.1 of the Copyright Act should have been interpreted in conformity with the constitution so as to also encompass a transfer of possession or use. This conforms to the decades of case law of the Federal Court of Justice (until the impugned ruling) and of the higher courts, as well as to the view of the German legislature.

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The complainant argues further that the interpretation by the Federal Court of Justice leads to a situation in which the essential core of an author's copyright, namely the ability to dispose of one's rights to a work in one's own responsibility and to exclude third parties from using the work, is no longer guaranteed. The intervening third party deliberately circumvented German copyright by selling its imitations in Italy and letting the buyer bring them to Germany. Thereby, the transfer of possession or use in Germany constitutes the only legal act that the author could target or could have targeted under the former case law.

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b) The complainant further maintains that the reasoning of the Federal Court of Justice is not tenable in terms of § 96 of the Copyright Act. The purpose of the provision should be understood in a way that no third party can exploit the results of an unlawful act for themselves. Since § 96 of the Copyright Act is not harmonised by Community law, the Federal Court of Justice cannot base its decision on the intention of the Community legislature.

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3. Further, the complainant alleges that the judgment violates its right to its statutory judge. The submitted questions in the parallel case have been inadequate. After the initial questions had been answered, the Federal Court of Justice should have re-submitted the case to the European Court of Justice and asked whether the use of copyrighted works without transfer of the de facto power of disposal fell within the area of application of the Copyright Directive at all. Had this question been answered in the negative, there would have been no Community law prerequisites for the interpretation of "distribution" within the meaning of § 17.1 of the Copyright Act. Equally imperative would have been a submission of the question of whether Article 4.1 of the Copyright Directive defines a minimum degree of protection or, at the same time, the maximum permissible degree of protection. The Federal Court of Justice, by contrast, answered this question, which was material to the ruling, by itself. The lack of a sub-

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mission to the European Court of Justice is evidently untenable, since a possible contrary view is clearly preferable to the view held by the Federal Court of Justice; the literature unanimously assumes that the directive merely defines a minimum degree of protection, a point that the Federal Court of Justice has certainly recognised.

IV.

The intervening third party of the defendant and the German Association for the Protection of Intellectual Property (GRUR) have submitted statements with regard to the constitutional complaint (the latter printed in *Gewerblicher Rechtsschutz und Urheberrecht* – GRUR 2010, p. 698). 46

1. In the view of the intervening third party on the side of the defendant, the manufacturer of the imitation furniture, the constitutional complaint is inadmissible because the complainant is not entitled to lodge it. The exclusive copyright agreement is limited to the rights to manufacture and to sell the furniture. Furthermore, as a foreign legal entity, the complainant cannot invoke a violation of the German fundamental right of property. While the violation allegedly originates from an interpretation of German copyright law in conformity with the directive, only the European Court of Justice can determine whether the directive is in line with fundamental human rights of Union law. 47

The intervening party further argues that it is apparent from the ruling of the European Court of Justice of 17 April 2008 (*loc. cit.*) that the Court assumed that the directive fully harmonised the definition of distribution. The definition of distribution merely determines the content and limits of property in a permissible manner. 48

2. According to the statement by the German Association for the Protection of Intellectual Property, the conclusion drawn by the Federal Court of Justice from the judgment of the European Court of Justice of 17 April 2008 that the Copyright Directive regulated the maximum of protection is not imperative. Also, even if the rights of distribution should be completely harmonised, the Member States are not prevented from granting further exclusive rights. 49

However, the German Association for the Protection of Intellectual Property sees a gap in the framework of copyright protection only in those cases where copies of a work that are manufactured abroad – without infringing local copyright laws – are used domestically without a transfer of ownership and without exclusive rental rights being applicable (which is said to be the case with works of applied art, § 17.3 sentence 2 no. 1 of the Copyright Act). By contrast, the Association believes that the exclusive distribution right continues to encompass, including with regard to applied art, the case of copies of works acquired abroad being re-sold in Germany. 50

B.

The constitutional complaint is admissible. 51

I.

As a measure taken by German authorities, the impugned judgment of the Federal Court of Justice is amenable to a constitutional complaint within the meaning of § 90.1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG), including where it relates to legal provisions which implement Union law in German law (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 126, 286 <298-299>). 52

The Federal Constitutional Court in principle does not exercise its jurisdiction to decide on the applicability of European Union law that is cited as the legal basis for any acts of German courts and authorities in the sovereign jurisdiction of the Federal Republic of Germany and does not review such legislation by the standard of the fundamental rights contained in the Basic Law, as long as the European Union generally ensures effective protection of fundamental rights, including through the case law of the European Court of Justice, which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law in each case, and in so far as they generally safeguard the essential content of fundamental rights (see BVerfGE 73, 339 <387>; 102, 147 <162-163>; 125, 260 <306>). This also applies to domestic legal provisions which implement mandatory requirements of a directive in German law. Constitutional complaints which challenge the application of provisions of national law which are completely determined in terms of European Union law are in principle inadmissible (see BVerfGE 125, 260 <306>). 53

These principles, however, do not prevent a review of the impugned judgment. If, as is the case here, the constitutional complaint against a court ruling is based on the allegation that a court, in interpreting national law on implementation, has misjudged the leeway available to the Member States with regard to the implementation of EU law, then the complainant is invoking a violation of German fundamental rights in a field of law that is not fully determined in terms of Union law. In this regard, the complainant may also claim that the court had wrongly considered itself to be bound by Union law. 54

II.

In accordance with § 90.1 of the Federal Constitutional Court Act, the complainant has the capacity and is entitled to lodge a complaint. It is sufficient for a constitutional complaint to be admissible that the complainant demonstrates the possibility of a violation of a right with regard to which he or she may lodge a constitutional complaint (see BVerfGE 125, 39 <73> with further references). 55

1. a) Article 19.3 of the Basic Law does not oppose the capacity to lodge a complaint alleging a violation of Article 14.1 of the Basic Law. 56

In its previous case law, the Federal Constitutional Court did reject the application of the substantive fundamental rights for foreign legal entities in general, invoking the wording of Article 19.3 of the Basic Law (see BVerfGE 21, 207 <208-209>; 23, 229 57

<236>; 100, 313 <364>). More recent chamber rulings, however, left it open as to whether this case law is also applicable to legal entities from Member States of the European Union (see orders of the Second Chamber of the First Senate of 2 April 2004 – 1 BvR 1620/03 –, NJW 2004, p. 3031, and of 27 December 2007 – 1 BvR 853/06 –, *Neue Zeitschrift für Verwaltungsrecht – NVwZ* 2008, pp. 670-671). In view of the bans on discrimination under Union law as interpreted by the European Court of Justice (see ECJ, judgment of 20 October 1993 – joindered cases C-92/92 and C-326/92 *Phil Collins* –, ECR 1993, p. I.-5145, paras. 30 et seq., 35; judgment of 5 November 2002 – C-208/00 *Überseering* –, ECR 2002, p. I.-9919, paras. 76 et seq.), it appears to be at least possible that the complainant domiciled in Italy is a holder of the fundamental right of property.

b) The entitlement of the complainant to lodge a complaint with regard to its fundamental right of property cannot be countered by stating that it is not itself the author of the furniture models, but has concluded exclusive contracts with the legal successors of Le Corbusier regarding the manufacture and marketing of Le Corbusier's furniture models. The complainant has hence assumed the position of Le Corbusier's successors where their intellectual property rights, guaranteed by Article 14.1 of the Basic Law, are concerned (see BVerfG, order of the First Chamber of the First Senate of 10 May 2000 – 1 BvR 1864/95 –, GRUR 2001, p. 43). Therefore, the complainant's action cannot be categorised as a – generally inadmissible – representative action (*Prozessstandschaft*), where third-party rights are claimed on one's own behalf (see BVerfGE 25, 256 <263>; 31, 275 <280>; 56, 296 <297>).

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2. With regard to the complaint of deprivation of the statutory judge under Article 101.1 sentence 2 of the Basic Law, the complainant can also be deemed capable and entitled to lodge a complaint. This corresponds to the established case law of the Federal Constitutional Court, since anyone may be entitled to the rights ensuing from Article 101.1 sentence 2 and Article 103.1 of the Basic Law, regardless of whether they are a natural or a legal, a domestic or a foreign person (see BVerfGE 12, 6 <8>; 18, 441 <447>; 64, 1 <11>).

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III.

The complainant has also done justice to the principle of subsidiarity with regard to the complaint of deprivation of the statutory judge under Article 101.1 sentence 2 of the Basic Law.

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1. Over and above the mere formal exhaustion of legal remedies, before filing a constitutional complaint, the complainant must make use of all available procedural remedies given the circumstances of the case in order to prevent or remove the alleged violation of fundamental rights in the proceedings that are directly linked with the violation and closest to the subject-matter of the dispute (see BVerfGE 112, 50 <60>; established case law). The parties concerned in court proceedings are, however, not obliged in principle to make legal arguments unless non-constitutional procedural law demands that a party explain the relevant law. Accordingly, in the original

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proceedings preceding a constitutional complaint, the (future) complainant need only present the facts in such a way that a review of the relevant issues of constitutional law is possible; this is then to be carried out by the courts. The complainant need not conduct the ordinary proceedings in the manner of an anticipated constitutional dispute (see BVerfGE 112, 50 <60 et seq.>).

It may be different in those cases in which, given a sensible assessment of the substantive law and of the respective situation under procedural law, a request can only have prospects of success if constitutional considerations are introduced in the ordinary proceedings (see BVerfGE 112, 50 <62>). It should further be taken into account that the complaint of a violation of fundamental procedural rights, in particular Article 101.1 sentence 2 and Article 103.1 of the Basic Law, can no longer be invoked in the proceedings of the constitutional complaint unless all means available under procedural law have previously been exhausted in order to prevent or remedy this violation (see BVerfGE 95, 96 <127>; 112, 50 <62>). This means in particular that the available legal remedies must be invoked in a manner that is admissible (see BVerfGE 95, 96 <127>).

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Under § 23.1 sentence 2 clause 1 and § 92 of the Federal Constitutional Court Act, the complainant must explain in a substantiated manner that he has complied with the requirements emerging from these requirements in his constitutional complaint, if they are not evidently adhered to (see BVerfGK 4, 102 <103-104>).

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2. In the context of a complaint of a violation of Article 101.1 sentence 2 of the Basic Law, the obligation of the complainant thus described generally includes a duty to file motions or make suggestions to the court with the objective of ensuring that the case is tried by the statutory judge.

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If the statutory judge is the European Court of Justice, there is, however, no provision for a corresponding submission by the parties; rather, a national court of final instance is obliged under the prerequisites of Article 267.3 TFEU to bring the matter before the European Court of Justice ex officio (see BVerfGE 82, 159 <192-193>). The principle of subsidiarity is hence satisfied if the arguments put forward, when subjected to a judicial review by the ordinary court, made the necessity of a submission to the European Court of Justice appear obvious.

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3. Accordingly, the complainant has admissibly lodged the complaint of deprivation of the statutory judge. It submitted an expert report to the Federal Court of Justice, *inter alia* on the question of the full or partial harmonisation of the distribution right by Article 4 the Copyright Directive, and hence still satisfied the requirements emerging from the principle of subsidiarity. The expert report afforded sufficient reason to the Federal Court of Justice to clarify the need for preliminary ruling proceedings on its own accord.

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C.

The constitutional complaint is unfounded. The complainant may invoke the fact of being a holder of fundamental rights of the Basic Law, including the fundamental right of property from Article 14.1 of the Basic Law (I.). However, no violation of Article 14.1 of the Basic Law by the impugned judgment can be determined (II.). The judgment also does not violate the complainant's right to its statutory judge under Article 101.1 sentence 2 of the Basic Law (III.). 67

I.

As a legal entity domiciled in Italy, the complainant is a holder of fundamental rights under the Basic Law. The extension of the entitlement to fundamental rights to cover legal entities from Member States of the European Union constitutes an expansion of the application of the protection of fundamental rights under German law brought about as a result of the European Treaties because of the supremacy and binding effect of the fundamental freedoms of the Single Market (Article 26.2 TFEU) and because of the general ban on discrimination on grounds of nationality (Article 18 TFEU). 68

1. Under Article 19.3 of the Basic Law, the fundamental rights also apply to domestic legal entities to the extent that the nature of such rights permits. Concerning the fundamental rights allegedly violated here, there is no doubt that the nature of the fundamental rights in question permits their applicability to legal entities in general (see on Article 14.1 of the Basic Law: BVerfGE 4, 7 <17>; 23, 153 <163>; 35, 348 <360>; 53, 336 <345>; 66, 116 <130>; on the fundamental procedural rights: BVerfGE 3, 359 <363>; 12, 6 <8>; 18, 441 <447>; 19, 52 <55-56>; 64, 1 <11>; 75, 192 <200>). 69

a) By contrast, the Senate has so far ruled that foreign legal entities may not invoke substantive fundamental rights, unlike procedural fundamental rights such as Article 101.1 sentence 2 and Article 103.1 of the Basic Law (see BVerfGE 12, 6 <8>; 18, 441 <447>; 21, 362 <373>; 64, 1 <11>). In its reasoning, it has referred to the wording and meaning of Article 19.3 of the Basic Law, which has been understood to prohibit such an expansive interpretation (see BVerfGE 21, 207 <208-209>; 23, 229 <236>; 100, 313 <364>). In other rulings, both Senates of the Federal Constitutional Court have deliberately left open the question of whether foreign legal entities can be entitled to fundamental rights (see in general BVerfGE 12, 6 <8>; 34, 338 <340>; 64, 1 <11>; as well as BVerfGE 18, 441 <447> with regard to Article 14.1 of the Basic Law). 70

The Federal Constitutional Court has, however, not yet dealt in detail with the more specific question of whether foreign legal entities domiciled in the European Union may be holders of substantive fundamental rights of the Basic Law. While, in a ruling from 1968, it had declared the constitutional complaint of an association under French law domiciled in France to be inadmissible without giving any further grounds (BVerfGE 23, 229 <236>); in the ruling from 1973 on a French trading company, its ability to hold fundamental rights remained explicitly open (BVerfGE 34, 338 <340>). 71

In the literature, the issue is contentious (see in favour Drathen, *Deutschengrundrechte im Lichte des Gemeinschaftsrechts*, 1994; H. Dreier, in: the same, *GG*, Vol. 1, 2nd ed. 2004, *Art. 19 Abs. 3*, paras. 20-21, 83-84; Huber, in: v. Mangoldt/Klein/Starck, *GG*, 6th ed. 2010, *Art. 19 Abs. 3*, paras. 305 et seq.; Kotzur, *Die Öffentliche Verwaltung – DÖV* 2001, pp. 192 <195 et seq.>; Remmert, in: Maunz/Dürig, *GG*, *Art. 19 Abs. 3*, paras. 93 et seq. <Mai 2009>; disagreeing Bethge, *Die Grundrechtsberechtigung juristischer Personen nach Art. 19 Abs. 3 Grundgesetz*, 1985, pp. 46 et seq.; Quaritsch, in: Isensee/Kirchhof, *HStR V*, 2nd ed. 2000, § 120, paras. 36 et seq.; v. Mutius, in: *Bonner Kommentar zum GG* 1975, *Art. 19 Abs. 3*, paras. 50 and 52; Weinzierl, *Europäisierung des deutschen Grundrechtsschutzes?*, 2006).

b) According to the wording of Article 19.3 of the Basic Law, the fundamental rights apply “to domestic legal entities”. Because of the restriction to domestic legal entities, an expansion of the provision’s application cannot be based on the wording of Article 19.3 of the Basic Law. It would exceed the limit of the wording if one wished to base one’s interpretation in conformity with Union law on an interpretation of the characteristic “domestic” as “German, including European” legal entities. Even if the territory of the Member States of the European Union, considering the area “of freedom, security and justice without internal frontiers” and the free movement of persons (Article 3.2 TEU) guaranteed to its citizens, is no longer “abroad” in the classical sense, this does not make it “domestic” in the meaning of territorial sovereignty (see BVerfGE 123, 267 <402-403>).

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The provision was, however, not based on any desire on the part of the draftpersons of the Basic Law to permanently exclude legal entities from Member States of the European Union from invoking fundamental rights. The General Drafting Committee (*Redaktionsausschuss*) of the Parliamentary Council (*Parlamentarischer Rat*) concluded in a draft of Article 20a of the Basic Law, corresponding to today’s Article 19.3 of the Basic Law, that “there was no good reason to also grant the constitutional protection of fundamental rights to foreign legal entities” (Parliamentary Council, document (*Drucks.*) 370 of 13 December 1948). For this reason, the chairman of the Committee for Questions of Principle (*Ausschuss für Grundsatzfragen*), v. Mangoldt, proposed to insert the word “domestic”, with which the committee agreed (concise minutes of the 32nd meeting of the Policy Committee, document 578 of 11 January 1949, p. 10).

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The development of a united Europe was still in its infancy in 1948/49. Since then, the European Union has increasingly taken shape, and is structured today as a highly integrated “association of states” (*Staatenverbund*) (BVerfGE 123, 267 <348>) in which the Federal Republic of Germany participates under Article 23.1 of the Basic Law. The expansion of the application of Article 19.3 of the Basic Law takes up this development.

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2. The expansion of the scope of application of the protection of fundamental rights to cover legal entities from the European Union corresponds to the contractual obliga-

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tions taken on through the European Treaties, as they are expressed in particular in the European fundamental freedoms and – in a subsidiary fashion – the general ban on discrimination contained in Article 18 TFEU. The fundamental freedoms and the general ban on discrimination prohibit the unequal treatment of domestic and foreign enterprises from the European Union in the sphere of application of Union law, and in this regard override the limitation of protection of fundamental rights to domestic legal entities provided for in Article 19.3 of the Basic Law.

a) The ban on discrimination on grounds of nationality has been entrenched in the European Treaties since 1957, and was taken over unchanged in the Treaty of Lisbon in Article 18 TFEU. It is a fundamental principle of Union law (ECJ, judgment of 27 October 2009 – C-115/08 *Austria/CEZ* –, EuZW 2010, p. 26, para. 89; see already H. P. Ipsen, *Europäisches Gemeinschaftsrecht*, 1972, p. 592), which is further developed in the fundamental freedoms. The ban on discrimination is part of the core precepts of Union citizenship, and must be directly applied by Member States' courts; it protects not only natural persons, but also legal entities (see ECJ, judgment of 20 October 1993 – *Phil Collins* –, loc. cit., paras. 30 et seq.). The general ban and the specific bans on discrimination oblige the Member States and all their bodies and agencies to place legal entities from another EU Member State on the same footing as domestic ones, including where the available means of legal recourse is concerned. The European Court of Justice already ruled in preliminary ruling proceedings submitted by the Federal Court of Justice that freedom of establishment under the law of the European Union demands a non-discriminatory evaluation of the capacity to enjoy rights, and hence to be a party to legal proceedings before the German civil courts (judgment of 5 November 2002 – *Überseering* –, loc. cit., paras. 76 et seq.).

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b) An expansion of the scope of application of fundamental laws does not become redundant because equivalent protection of the complainant is available in another fashion. Certainly, legal entities domiciled in another EU Member State may in any case invoke the direct application of primary Union law in ordinary court proceedings, and hence are also not denied legal protection, even if they do not invoke the fundamental rights afforded by the German Basic Law. However, it is not sufficient for equivalent protection in the field of application of the bans on discrimination under Union law if foreign legal entities strive in the ordinary proceedings towards being treated in the same manner in substantive terms as domestic legal entities, but under Article 93.1 no. 4a of the Basic Law are unable, by virtue of not being a holder of fundamental rights, to enforce them with the aid of the Federal Constitutional Court.

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c) For the bans on discrimination under Union law, derived from the fundamental freedoms and Article 18 TFEU, to become applicable, the affected legal entities from the European Union must operate in an area within the sphere of application of Union law. The sphere of application of the Treaties in this regard is determined by the respective state of the primary and secondary law of the European Union, and hence by the sovereign rights transferred to it in the European Treaties (Article 23.1 sentence 2 of the Basic Law, Article 5.1 sentence 1 and Article 5.2 TEU, see BVerfGE 123, 267

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<349 et seq.>; 126, 286 <302>). In particular, the Treaties are applicable where the realisation of the fundamental freedoms of the Treaty and the execution of Union law are at issue. The activity of the complainant, who *inter alia* invokes a copyright that is (partly) harmonised by Union law, which allegedly has been violated by economic activities in Germany, falls in the sphere of application of the Treaties in this sense (see ECJ, judgment of 20 October 1993 – *Phil Collins* –, loc. cit., paras. 22, 27; judgment of 6 June 2002 – C-360/00 *Ricordi* –, ECR 2002, p. I-5088, para. 24).

d) Through the expansion of the application of Article 19.3 of the Basic Law, legal entities which are domiciled in other EU countries are dealt with in precisely the same way as domestic legal entities. This implies, conversely, that EU foreigners can be held up to the same provisions of the constitution as domestic legal entities. The precondition for invoking the fundamental rights is hence an adequate domestic connection of the foreign legal entity which makes the application of the fundamental rights necessary in the same way as for domestic legal entities. This will generally be the case if the foreign legal entity is operating in Germany and is able to file lawsuits before the ordinary (non-constitutional) courts here and to be sued before them (see on the facts with regard to the fundamental procedural rights already BVerfGE 12, 6 <8>; 18, 441 <447>).

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e) There is no need for a submission to the European Court of Justice by the Federal Constitutional Court. The national courts themselves are entitled to effect an interpretation of national law that is in conformity with Union law. The correct interpretation of the bans on discrimination under Union law is so obvious here as to leave no scope for any reasonable doubt (“acte clair”; see ECJ, judgment of 6 October 1982 – Case 283/81 *C.I.L.F.I.T.* –, ECR 1982, p. 3415, para. 16).

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3. The expansion of the application of Article 19.3 of the Basic Law to cover legal entities from other Member States of the European Union is a reaction to developments in the European Treaties and Union legislation, and avoids a collision with Union law. The Federal Republic of Germany is bound by Article 18 TFEU and the bans on discrimination derived from the fundamental freedoms, including their supremacy of application over national law (see BVerfGE 126, 286 <301-302>). The expansion of the application of German fundamental rights respects the principle that the law of the European Union, given that it is supranational in nature, does not have any derogating effect with respect to the law of the Member States, but only derogates from the application of the latter insofar as required by the Treaties and permitted by the application order contained in the ratifying legislation. Member States’ law hence merely becomes inapplicable (see BVerfGE 123, 267 <398 et seq.>; 126, 286 <301-302>). The provisions of European Union law do not suppress Article 19.3 of the Basic Law, but merely prompt an extension of the protection of fundamental rights to further legal subjects of the Single Market. Article 23.1 sentences 2 and 3 of the Basic Law permits – insofar as the requirements pursuant to Article 79.2 and Article 79.3 of the Basic Law are complied with – a transfer of public authority to the European Union even to an extent where the scope of the guarantees of the Basic Law is altered or supple-

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mented; the dictum contained in Article 79.1 sentence 1 of the Basic Law, i.e., that amendments to the Basic Law must be explicit, does not apply in this case (see report of the Joint Constitutional Commission (*Gemeinsame Verfassungskommission*) of 5 November 1993, *Bundestag* document 12/6000, p. 21; Pernice, in: H. Dreier, *GG*, Vol. 2, 2nd ed. 2006, *Art. 23*, para. 87; Scholz, in: Maunz/Dürig, *GG*, October 2009, *Art. 23*, para. 115). With the agreement on the part of the Federal Republic of Germany in the Treaties to the precursors of Article 18 TFEU and to the fundamental freedoms, safeguarding the boundaries of Article 79.2 and Article 79.3 of the Basic Law, the primacy of application of the bans on discrimination on Union law was also approved by the majority required by Article 23.1 sentence 3 of the Basic Law (see BVerfGE 126, 286 <302>). This also exerts an impact on the scope of application of the fundamental rights insofar as an extension of the scope of fundamental rights to include legal entities from the European Union avoids unequal treatment within the sphere of application of the bans on discrimination under Union law concerning the capacity to enjoy fundamental rights. The individual fundamental rights of the Basic Law, however, are not affected as a result of the expansion of Article 19.3 of the Basic Law.

4. The duty of the Federal Constitutional Court remains to review European law to ascertain that the identity of the national constitution is maintained, that the competences assigned under the system of conferred powers are complied with, and that the guarantee of a level of protection essentially equivalent to that of the protection of fundamental rights under German law is retained. The identity of the constitution (see BVerfGE 123, 267 <354, 398 et seq.>; 126, 286 <302-303>) is evidently not affected by the expansion of the application of Article 19.3 of the Basic Law.

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II.

Article 14.1 of the Basic Law is not violated by the impugned judgment. The complainant's copyright is subject to the constitutional right to property (1.) which the courts must adhere to when interpreting national law, where European Union law leaves them leeway of interpretation in this regard (2.). The Federal Court of Justice's interpretation of the provisions contained in §§ 17 and 96 of the Copyright Act, which were decisive to the dispute, in conformity with the directive is however compatible with the Basic Law (3.).

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1. The statutory right of the author to control the distribution of copies of his or her work in §§ 17 and 96 of the Copyright Act constitutes property within the meaning of Article 14.1 of the Basic Law. Under these provisions, authors of applied art also enjoy this right where the design reflects the required degree of creativity. There is no dispute that this is the case here.

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The constitutive characteristics of copyright as property within the meaning of the constitution include the fundamental attribution of the pecuniary proceeds of the creative effort to the author by means of private-law legislation, as well as his or her freedom to be able to dispose of it as he or she sees fit. Where the particulars are con-

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cerned, it is up to the legislature, when determining the precise content of copyright protection under Article 14.1 sentence 2 of the Basic Law, to define proper standards ensuring utilisation and suitable exploitation in line with the nature and the social significance of the right (see BVerfGE 31, 229 <240-241>; 79, 1 <25>). The legislature has relatively broad leeway in this regard (see BVerfGE 21, 73 <83>; 79, 1 <25>; 79, 29 <40>). The guarantee of property does not require that all the conceivable potential for economic exploitation is attributed to the author (see BVerfGE 31, 248 <252>; 31, 275 <287>).

2. a) When interpreting and applying copyright law, the civil courts have to adhere to the lines drawn by the constitutional guarantee of property and must follow the balancing of interests reflected in the legislation in a manner which respects the protection of the author's property rights on the one hand as well as any competing third-party fundamental rights on the other hand, and avoids disproportionate restrictions on fundamental rights (see BVerfGE 89, 1 <9>). If several interpretations are possible in the court's interpretation and application of provisions of non-constitutional law, the court must give preference to an interpretation that corresponds to the values enshrined in the constitution (see BVerfGE 8, 210 <221>; 88, 145 <166>), and which ascertains the fundamental rights of those concerned – in keeping with the principle of practical concordance (*praktische Konkordanz*) – in the broadest possible respect. The influence exerted by fundamental rights on the interpretation and application of the provisions of civil law is not restricted to general clauses, but covers all elements of the provisions of civil law which are amenable to and in need of interpretation (see BVerfGE 112, 332 <358> with further references).

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As for instance in tenancy law and labour law, it is, however, also generally not a matter for the Federal Constitutional Court to instruct the civil courts as to how they are to rule in detail in individual copyright disputes (see BVerfG, order of the Second Chamber of the First Senate of 21 December 2010 – 1 BvR 2760/08 –, GRUR 2011, p. 223, para. 19 with further references). Rather, the threshold of a violation of constitutional rights that needs to be corrected by the Federal Constitutional Court is not reached until the interpretation of the civil courts reveals errors that are based on a fundamentally incorrect view of the significance of the guarantee of property, in particular of its scope of protection, and which are also of some weight in its substantive significance for the case at issue, in particular because the balancing of the conflicting legal positions in the private law context is adversely affected by these errors (see BVerfGE 89, 1 <9-10>; 95, 28 <37>; 97, 391 <401>; 112, 332 <358-359>).

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b) In particular, fundamental rights are violated if the civil court does not take any account at all of the impact of fundamental rights, or has made an incorrect assessment of the impact of fundamental rights on the outcome of a case, and the decision is based on the misjudgment of the influence exerted by the fundamental right (see BVerfGE 97, 391 <401>). This may be the case if a court, presuming that it is bound by allegedly mandatory Union law, considers itself to be prevented from taking the fundamental rights of the Basic Law into account. If Union law provides leeway to the

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Member States in the implementation of European Union law, this is to be filled out in conformity with the Basic Law (see BVerfGE 113, 273 <300 et seq.>). When interpreting provisions of national civil law which are not, or not completely, determined by Union law, the ordinary courts must bring to bear the influence of fundamental rights (see BVerfGE 118, 79 <95 et seq.>).

Whether there is leeway in the implementation of EU law is to be ascertained by interpretation of the Union law on which the national implementation law is based, in particular, therefore, of the directives that have been implemented. The interpretation of acts of secondary Union law at national level is a matter first and foremost for the ordinary courts. Where appropriate, the latter have also to take the necessity of a request for a preliminary ruling under Article 267 TFEU – also in relation to the protection of fundamental rights – into account.

If the ordinary courts consider themselves being unequivocally without leeway bound by Union law without requesting a preliminary ruling from the European Court of Justice, this is a matter for review by the Federal Constitutional Court. The latter is not restricted to a mere review of arbitrariness. With the ascertainment or negation of leeway for implementation of EU law, it is the ordinary courts' decision that makes a first determination whether fundamental rights of the Basic Law must be taken into consideration, and whether, according to the case-law of the Federal Constitutional Court, it refrains from reviewing national acts of implementation according to the standard of the Basic Law, as long as the European Union, including the case law of the European Court of Justice, ensures effective protection of fundamental rights which, in terms of its content and effectiveness, is substantially similar to the protection of fundamental rights that is indispensable under the Basic Law (see BVerfGE 73, 339 <387>; 102, 147 <161>; 123, 267 <335>).

c) If a Member State has no leeway in the implementation of EU law, the ordinary court must review the applicable Union law, where necessary, for its compatibility with the fundamental rights of the Union and, if required, initiate preliminary ruling proceedings under Article 267 TFEU (see BVerfGE 118, 79 <97>). The same applies if Union law, including European fundamental rights (see Article 6 TEU in conjunction with the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms), gives rise to as yet unresolved questions of interpretation. In terms of fundamental rights, a submission may be necessary in particular in cases where the court has or must have doubts as to the concurrence of a European legal act or of a ruling of the European Court of Justice with the fundamental rights of Union law, which guarantee protection of fundamental rights corresponding to the fundamental rights of the Basic Law.

3. According to these standards, a violation by the impugned judgment against the complainant's freedom of property under Article 14.1 of the Basic Law cannot be ascertained. It is constitutionally unobjectionable under these circumstances that the Federal Court of Justice assumes that the Copyright Directive in the interpretation by

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the European Court of Justice does not leave any leeway for including in the protection of the distribution right under § 17.1 of the Copyright Act (a) and § 96.1 of the Copyright Act (b) the mere making available for use of imitation furniture. The significance and scope of the guarantee of property enshrined in Article 14.1 of the Basic Law have hence not been misjudged.

a) Various views are held on the harmonisation of the distribution right by the Copyright Directive (see the documentation in the impugned judgment, loc. cit., paras. 13-14, as well as Goldmann/Möller, GRUR 2009, p. 551 <554-555>; v. Lewinski, in: Hilty/Drexler/Nordemann, *Festschrift für Loewenheim*, 2009, pp. 175 <180 et seq.>; Schulze, GRUR 2009, pp. 812 <813-814>; see also the statement of the GRUR in the above proceedings, loc. cit.). The Federal Court of Justice correctly points out that § 17 of the Copyright Act is to be interpreted in a manner that is in conformity with the directive. From a constitutional standpoint, it was permitted to assume that the presumption of a merely partial harmonisation would be incompatible with the purpose of harmonisation of the directive, as defined in particular in recitals 1, 4, 6 and 7, and with the free movement of goods provided by Union law. The European Court of Justice did not mention any leeway in the implementation of EU law in the parallel case, and expressly reserved expansions of the definition of “distribution” to the Union legislature (judgment of 17 April 2008, loc. cit., paras. 37 et seq.). When opting for an interpretation in terms of a final definition of “distribution”, the Advocate General also invoked the need for protection of the free movement of goods under Union law from Article 28 EC (now Article 34 TFEU) (Opinion of 17 January 2008, ECR 2008, p. I.-2731, paras. 33 et seq.). The Federal Court of Justice was hence able to presume that the judgment of the European Court of Justice does not leave it any leeway to, in terms of an interpretation of § 17 of the Copyright Act that is in conformity with the Basic Law, surpass the protection of the distribution right that is prescribed in the directive. Hence, the Federal Court of Justice raised the question as to the leeway available in the implementation of EU law and, without a violation of the constitution, answered in conformity with Union law and with the case law of the European Court of Justice.

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b) The Federal Court of Justice was also permitted to use the same definition of “distribution” in § 96 of the Copyright Act as in § 17 of the Copyright Act, and it was permitted to presume that the definition of “distribution” is also indirectly covered by the harmonisation brought about by Article 4 of the Copyright Directive, and that hence no leeway remained for an interpretation in conformity with the constitution. The fact that the definitions of “distribution” in §§ 17 and 96 of the Copyright Act correspond to each other is in conformity with the general opinion (see only Bullinger, in: Wandtke/Bullinger, *Praxiskommentar zum Urheberrecht*, 3rd ed. 2009, § 96, para. 9).

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III.

The impugned judgment does not deprive the complainant of its statutory judge (Article 101.1 sentence 2 of the Basic Law).

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1. The European Court of Justice is the statutory judge within the meaning of Article 101.1 sentence 2 of the Basic Law. Subject to the prerequisites of Article 267.3 TFEU, the national court is obliged ex officio to bring the matter to the European Court of Justice (see BVerfGE 82, 159 <192-193>). 96

Under the case law of the European Court of Justice, a national court of final instance must comply with its obligation to submit if a question of Community law arises in proceedings pending before it, unless the court has established that “the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt” (ECJ, judgment of 6 October 1982, loc. cit., para. 21). The materiality of the question of European Union law to the ruling for the initial dispute, in contrast, is adjudged solely by the national court (see ECJ, judgment of 6 October 1982, loc. cit., para. 10; judgment of 27 June 1991 – C-348/89 *Mecanarte* –, ECR 1991, p. I.-3277, para. 47; BVerfGE 82, 159 <194>). 97

The Federal Constitutional Court, however, only reviews whether the interpretation and application of the competence rule of Article 267.3 TFEU on a sensible appreciation of the concepts underlying the Basic Law no longer appears to be comprehensible and is manifestly untenable (see BVerfGE 82, 159 <194 et seq.>; 126, 286 <315 et seq.>). The obligation to make a submission is dealt with in a manifestly untenable manner in those cases in which a court of last instance deciding on the merits does not at all consider making a submission despite the question of Union law being – in its view – material to the ruling although it itself has doubts as to the correct answer to the question (fundamental disregard of the obligation to make a submission), or in which the court of last instance deciding on the merits deliberately deviates in its ruling from the case law of the Court of Justice regarding questions which are material to the ruling and nonetheless does not make a submission or refrains from making a renewed submission (deliberate deviation without a willingness to make a submission). If material case law of the Court of Justice is not yet available with regard to a question of Community law which is material to the ruling, or if existing case law has possibly not yet exhaustively answered the question which is material to the ruling, or if a further development of the case law of the Court of Justice not only appears as a distant possibility, Article 101.1 sentence 2 of the Basic Law is only deemed to have been violated if the court of the principal proceedings at final instance has unjustifiably transgressed the evaluation framework necessarily available to it in such cases (incompleteness of the case law; see BVerfGE 82, 159 <195-196>; 126, 286 <316-317>). In such cases, the review of a violation of Article 101.1 sentence 2 of the Basic Law does not primarily depend on the justifiability of the ordinary courts’ interpretation of the substantive Union law which is material to the dispute, but on the justifiability of the handling of the obligation to submit under Article 267.3 TFEU (see BVerfG, Order of the First Senate of 25 January 2011 – 1 BvR 1741/09 –, NJW 2011, p. 1427, paras. 104-105; substantially similar in BVerfGE 126, 286 <317-318>). 98

2. Under these standards, there is no untenable handling of the obligation to submit. 99

In that the Federal Court of Justice has submitted the questions which it considered to be material to the ruling to the European Court of Justice in the parallel case, it has not fundamentally misjudged Article 267.3 TFEU also in the case at dispute. Even if Union law permits the submission of a question of interpretation that is the same or similar (see ECJ, judgment of 11 June 1986 – C-14/86 *Pretore di Salò* –, ECR 1987, p. 2545, para. 12; established case law), from a constitutional point of view the Federal Court of Justice did not have to re-submit the case to the European Court of Justice if, in its assessment, the answer of the Court of Justice did not leave any room for “reasonable doubt” (ECJ, judgment of 6 October 1982, loc. cit., para. 21). From the impugned judgment, one can deduce the reasonable conviction of the Federal Court of Justice that Article 4.1 of the Copyright Directive constitutes a fully harmonised provision of the distribution right and that the European Court of Justice has finally and comprehensively clarified the interpretation of the definition of distribution contained in the directive. 100

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**Bundesverfassungsgericht, Beschluss des Ersten Senats vom 19. Juli 2011 -
1 BvR 1916/09**

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