# [DE] OLG Köln rules that publication of photo on Deutschlandradio website did not represent commercial use under CC licence provisions

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In a ruling of 31 October 2014 (case no. 6 U 60/14), the Oberlandesgericht Köln (Cologne Court of Appeal - OLG) decided that the publication of a photograph on the Deutschlandradio website did not represent commercial use for the purposes of the Creative Commons licence (CC licence).

The plaintiff, a photographer, had offered his photographs for public use under the conditions of the Creative Commons Attribution Non-Commercial 2.0 licence (CC-BY-NC). After the defendant, a public corporation that operates the Deutschlandradio radio station, had made one of the plaintiff's photographs publicly accessible on its website "dradiowissen.de" to illustrate an article published on the site, the plaintiff instigated legal proceedings against the defendant for unlawful commercial use of his copyright-protected work.

The first-instance Landgericht Köln (Cologne District Court - LG) had upheld the complaint in a ruling of 5 March 2014 (case no. 28 O 232/13). It held that, given the lack of a binding definition of "non-commercial use", which is the wording used in the CC licence, could only be interpreted as purely private use. Since the Deutschlandradio website did not represent purely private use, it must, by implication, represent commercial use. Therefore, the use of the work in question, which fell under the Creative Commons BY-NC 2.0 licence, was deemed to be unlawful.

The OLG Köln disagreed with the LG and partially overturned its ruling. It did not consider that the defendant's use of the plaintiff's image amounted to commercial use. According to OLG, CC licences should be interpreted as being designed for worldwide use on the internet. Therefore, the meaning of the term "non-commercial" should not exclusively be interpreted under German law. Under the CC licence, which defined the concept of commercial use in Article 4(b), commercial use existed if the actual use was designed to create a commercial benefit or payment in kind. However, this was not the case if, as in the current situation, a broadcaster only used an image to illustrate an article. Therefore, the OLG found that the photographer was not entitled to any licence payment.

The OLG also ruled that cropping an image was not, per se, a breach of the licence conditions. In the case at hand, however, the defendant had cropped the

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image in such a way that the name of the photographer and original author of the image in the bottom right-hand corner had been removed. Although the defendant had mentioned the photographer's name on its website, the CC licence required that any mention of the author's name contained in the image be retained. The OLG found, therefore, that cropping the image had changed its core message and the defendant had created an adaptation under Article 23(1) of the Urheberrechtsgesetz (Copyright Act - UrhG). Based on this reasoning, the OLG granted the plaintiff's claim to an injunction against the defendant concerning its use of the disputed photograph in its current cropped form.

***Urteil des OLG Köln, Az. 6 U 60/14, 31. Oktober 2014***

http://openjur.de/u/746870.html

*Ruling of the Cologne Court of Appeal, Case 6 U 60/14 of 31 October 2014*

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