

JUDGMENT OF THE COURT (Fourth Chamber)

22 January 2015

(Reference for a preliminary ruling - Intellectual property - Copyright and related rights - Directive 2001/29/EC - Article 4 - Distribution right - Exhaustion rule - Concept of 'object' - Transfer of the image of a protected work from a paper poster to a painter's canvas - Replacement of the medium - Impact on exhaustion)

In Case C 419/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Netherlands), made by decision of 12 July 2013, received at the Court on 24 July 2013, in the proceedings

Art & Allposters International BV

v

Stichting Pictoright,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as a Judge of the Fourth Chamber, K. Jürimäe (Rapporteur), M. Safjan and A. Prechal, Judges,

Advocate General: P. Cruz Villalón,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 22 May 2014, after considering the observations submitted on behalf of:

- Art & Allposters International BV, by T. Cohen Jehoram and P.N.A.M. Claassen, advocaten,
- Stichting Pictoright, by M. van Heezik, A.M. van Aerde and E.J. Hengeveld, advocaten,
- the French Government, by D. Colas and F.-X. Bréchet, acting as Agents,
- the United Kingdom Government, by V. Kaye, acting as Agent, assisted by N. Saunders, Barrister,
- the European Commission, by J. Samnadda and F. Wilman, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 September 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4 of 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).

2 The request has been made in proceedings between Art & Allposters International BV ('Allposters') and Stichting Pictoright ('Pictoright') regarding a possible infringement, by Allposters, of copyright exploited by Pictoright, resulting from the transfer of images of protected works from a paper poster to a painter's canvas and the sale of those images on that new medium.

Legal context

International law

WIPO Copyright Treaty

3 The World Intellectual Property Organization (WIPO) adopted the WIPO Copyright Treaty in Geneva on 20 December 1996. That Treaty was approved on behalf of the European Community by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6).

4 The Treaty provides, in Article 1(4) thereof, that the Contracting Parties are to comply with Articles 1 to 21 and the Appendix of the Convention for the Protection of Literary and Artistic Works, signed at Berne on 9 September 1886 (Paris Act of 24 July 1971), as amended on 28 September 1979 ('the Berne Convention').

5 Article 6 of the WIPO Copyright Treaty, entitled 'Right of distribution', provides:

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorising the making available to the public of the original and copies of their works through sale or other transfer of ownership.

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties

to determine the conditions, if any, under which the exhaustion of the right in paragraph 1 applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorisation of the author.'

Berne Convention

6 Article 12 of the Berne Convention, entitled 'Right of Adaptation, Arrangement and Other Alteration', provides:

'Authors of literary or artistic works shall enjoy the exclusive right of authorising adaptations, arrangements and other alterations of their works.'

EU law

7 Recitals 9, 10, 28 and 31 of Directive 2001/29 state:

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. ...

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work. ...

...

(28) Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the Community. This right should not be exhausted in respect of the original or of copies thereof sold by the rightholder or with his consent outside the Community. ...

...

(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their

harmonisation should be based on their impact on the smooth functioning of the internal market.'

8 Article 2 of that directive, entitled 'Reproduction right', is worded as follows:

'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works;

...'

9 Article 4 of the same directive, entitled 'Distribution right', provides:

'(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.

(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.'

Netherlands law

10 Article 4(1) of Directive 2001/29 was transposed into national law by Articles 1 and 12(1)(1) of the Law on copyright of 23 September 1912 (Auteurswet; 'Law on copyright').

11 Article 1 of the Law on Copyright provides:

'Copyright is the exclusive right of the author of a literary, scientific or artistic work or his successors in title, to publish it and to reproduce it, subject to the limitations laid down by law.'

12 Article 12(1) of that law provides:

'Publication of a literary, scientific or artistic work shall include:

1 the publication of a reproduction of the work, in full or in part ...'

13 Article 12b of the Law, which is intended to transpose Article 4(2) of Directive 2001/29 into national law, is worded as follows:

'If a copy of a literary, scientific or artistic work has been distributed by transfer of ownership for the first time in one of the Member States of the European Union or in a State which is a party to the European Economic Area [(EEA)] by its author or his successor in title or with his consent, the distribution of that copy in another manner, with the exception of renting or lending, does not constitute an

infringement of copyright.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 Pictoright is a Netherlands copyright collecting society which looks after the interests of copyright owners affiliated to it. It also safeguards, in the Netherlands, the interests of foreign artists and their heirs on the basis of agreements concluded with foreign entities with the same purpose. Pictoright is mandated to exploit copyright on behalf of the rightholders in particular by licensing and by taking action against infringements of that copyright.

15 Allposters, through its websites, markets posters and other reproductions depicting the works of famous painters, which are covered by the copyright exploited by Pictoright. Among other products, Allposters offers its clients reproductions in the form of posters, framed posters, posters on wood and images on canvases. In order to produce an image on canvas, a synthetic coating (lamine) is first applied to a paper poster depicting the chosen work. Next, the image on the poster is transferred from the paper to a canvas by means of a chemical process. Finally, that canvas is stretched over a wooden frame. The image of the work disappears from the paper backing during the process. Allposters refers to both it and its result as 'canvas transfer'.

16 Pictoright opposed the sale of canvas transfers reproducing works protected by copyright without the consent of its clients, the holders of that copyright, calling on Allposters to cease that activity and threatening legal proceedings.

17 As Allposters refused to respond to that request, Pictoright brought an action against it before the Rechtbank Roermond (Roermond District Court) seeking that it be ordered to cease all infringement, direct or indirect, of the rightholders' copyright and moral rights.

18 By decision of 22 September 2010, the Rechtbank Roermond dismissed that action. Pictoright then appealed against that decision before the Gerechtshof te 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch) which, by judgment of 3 January 2012, annulled the decision and upheld most of Pictoright's claims.

19 In the latter court's view, the sale of a poster or canvas which reproduces

an artistic work constitutes a publication within the meaning of Netherlands law. It followed from the judgment of the Hoge Raad der Nederlanden of 19 January 1979 (NJ 1979/412, Poortvliet) that there is a new publication, within the meaning of Article 12 of the Law on copyright, where the copy of a work placed on the market by the rightholder is distributed to the public under another form, to the extent that whoever markets that new form of that copy has new opportunities for exploitation ('the Poortvliet doctrine'). Taking the view that the paper poster, marketed with the copyright holder's consent, underwent a major alteration offering Allposters new opportunities for exploitation, in so far as that alteration allows it to charge higher prices and to target a different group, the Gerechtshof te 's-Hertogenbosch found that the marketing of canvas transfers constituted a publication which was prohibited under national law and rejected Allposters' argument that the distribution right had been exhausted.

20 Allposters brought an appeal in cassation before the referring court. It challenges *inter alia* the relevance of the Poortvliet doctrine and the interpretation given to the concepts of 'exhaustion' and 'publication', which, it submits, are harmonised within the European Union. Allposters considers that there is exhaustion of the distribution right, within the meaning of Article 4(2) of Directive 2001/29, upon distribution of a work incorporated into a tangible object if it has been offered for sale by the copyright holder or with his consent. Any subsequent alteration to that object has no impact on exhaustion of the distribution right. Pictoright maintains, on the other hand, that, in the absence of harmonisation of the adaptation right in EU law in the field of copyright, the Poortvliet doctrine remains valid or is at least in compliance with EU law.

21 In those circumstances, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does Article 4 of Directive 2001/29 govern the answer to the question whether the distribution right of the copyright holder may be exercised with regard to the reproduction of a copyright-protected work which has been sold and delivered within the [EEA] by or with the consent of the rightholder in the case where that reproduction had subsequently undergone an alteration in respect of its form and is again brought into circulation in that form?

(2) (a) If the answer to Question 1 is in the affirmative, does the fact that there has been an alteration as referred to in Question 1 have any

bearing on the answer to the question whether exhaustion within the terms of Article 4(2) of [Directive 2001/29] is hindered or interrupted?

(b) If the answer to Question 2(a) is in the affirmative, what criteria should then be applied in order to determine whether an alteration exists in respect of the form of the reproduction which hinders or interrupts exhaustion within the terms of Article 4(2) of [Directive 2001/29]?

(c) Do those criteria leave room for the criterion developed in Netherlands national law to the effect that there is no longer any question of exhaustion on the sole ground that the reseller has given the reproductions a different form and has disseminated them among the public in that form (judgment of the Hoge Raad of 19 January 1979 in Poortvliet, NJ 1979/412)?'

Consideration of the questions referred for a preliminary ruling

22 The jurisdiction of the Court, in the procedure laid down in Article 267 TFEU, is confined to considering provisions of EU law only and it has no jurisdiction to rule on the compatibility of national law, including the case-law of the Member States, with EU law (see, to that effect, *Triveneta Zuccheri and Others v Commission*, C 347/87, EU:C:1990:129, paragraph 16, and *Schwarz*, C 321/07, EU:C:2009:104, paragraph 48).

23 In those circumstances, the questions referred, which should be considered together, must be understood to mean that the referring court is asking, in essence, whether the rule of exhaustion of the distribution right set out in Article 4(2) of Directive 2001/29 applies in a situation where a reproduction of a protected work, after having been marketed in the European Union with the copyright holder's consent, has undergone an alteration of its medium, such as the transfer of that reproduction from a paper poster onto a canvas, and is placed on the market again in its new form.

24 As a preliminary matter, it should be noted that *Pictoright* is of the view that, owing to the significant alteration undergone by the posters in the process of transfer onto the canvases of reproductions of protected works, those canvases are adaptations of those works, which are not covered by the distribution right. It submits that the adaptation right in the field of copyright is not harmonised in EU law but is governed by Article 12 of the Berne Convention.

25 It should therefore be assessed whether the facts at issue in the main proceedings fall within the scope of Directive 2001/29.

26 With regard to the adaptation right, it is true that Article 12 of the Berne

Convention confers on authors of literary or artistic works an exclusive right of authorising adaptations, arrangements and other alterations of their works and that there is no equivalent provision in Directive 2001/29.

27 However, and without having to interpret the concept of 'adaptation' within the meaning of Article 12, it is sufficient to state that both the paper poster and the canvas transfer contain the image of a protected artistic work and thus fall within the scope of Article 4(1) of Directive 2001/29 as copies of a protected work marketed within the European Union. That provision recognises the exclusive right of authors, in respect of the original of their works or of copies thereof, to authorise or prohibit any form of distribution to the public by sale or otherwise.

28 It must therefore be held that the facts at issue in the main proceedings fall within the scope of Article 4 of Directive 2001/29.

29 With regard to the conditions of application of the exhaustion rule, it follows from Article 4(2) of Directive 2001/29 that the distribution right is not exhausted in respect of the original or copies of a work, except where the first sale or other transfer of ownership in the European Union of that object is made by the rightholder or with his consent.

30 Moreover, according to the case-law of the Court, Article 4(2) does not leave it open to the Member States to provide for an exhaustion rule other than that set out in that provision, to the extent that, as follows from recital 31 of Directive 2001/29, differences in the national laws governing exhaustion of the right of distribution are likely to affect directly the smooth functioning of the internal market (see, to that effect, judgment in *Laserdisken*, C 479/04, EU:C:2006:549, paragraphs 24 and 56).

31 Taking the wording of that article as a basis, the Court found that for the distribution right to be exhausted, two conditions must be fulfilled: first, the original of a work or copies thereof must have been placed on the market by the rightholder or with his consent and, second, they must have been placed on the market in the European Union (see judgment in *Laserdisken*, EU:C:2006:549, paragraph 21).

32 In the case in the main proceedings, it is undisputed that posters reproducing works of famous painters, which are covered by the copyright the holders of which are represented by Pictoright, have been placed on the market in the EEA with the consent of those rightholders.

33 However, the parties in the main proceedings are in disagreement, first, as to whether exhaustion of the distribution right covers the tangible object into which a work or its copy is incorporated or the author's own intellectual creation and, secondly, as to whether the alteration of the medium, as undertaken by Allposters, has an impact on exhaustion of the exclusive distribution right.

34 With regard, first, to the purpose of the distribution right, Article 4(2) of Directive 2001/29 refers to the first sale or other transfer of ownership of 'that object'.

35 In addition, according to recital 28 to Directive 2001/28, '[c]opyright protection under [that directive] includes the exclusive right to control distribution of the work incorporated in a tangible article'. According to that recital, the 'first sale in the [European Union] of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the [European Union]'.

36 Similarly, according to settled case-law of the Court, literary and artistic works may be the subject of commercial exploitation, whether by way of public performance or of the reproduction and marketing of the recordings made of them (judgment in FDV, C 61/97, EU:C:1998:422, paragraph 14 and the case-law cited).

37 It follows from the foregoing considerations that the EU legislature, by using the terms 'tangible article' and 'that object', wished to give authors control over the initial marketing in the European Union of each tangible object incorporating their intellectual creation.

38 That finding, as the European Commission correctly states, is supported by international law, and in particular by the WIPO Copyright Treaty, in the light of which Directive 2001/29 must be interpreted as far as possible (see, to that effect, judgments in *Laserdisken*, EU:C:2006:549, paragraphs 39 and 40; *Peek & Cloppenburg*, C 456/06, EU:C:2008:232, paragraphs 30 and 31; *Football Association Premier League and Others*, C 403/08 and C 429/08, EU:C:2011:631, paragraph 189; and *Donner*, C 5/11, EU:C:2012:370, paragraph 23).

39 Article 6(1) of that Treaty provides that authors of literary and artistic works are to enjoy the exclusive right of authorising the making available to the public of the original and copies of their works through sale or other transfer of ownership. In that regard, the significance of the term 'copy' was explained by the Contracting Parties by an agreed statement concerning Articles 6 and 7 of the Treaty adopted by the Diplomatic Conference of 20 December 1996, at which the

Treaty itself was also adopted. According to that statement, 'the expressions "copies" and "original and copies" being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects'.

40 Accordingly, it should be found that exhaustion of the distribution right applies to the tangible object into which a protected work or its copy is incorporated if it has been placed onto the market with the copyright holder's consent.

41 In the second place, it must be assessed whether the fact that the object, which was marketed with the copyright holder's consent, has undergone subsequent alterations to its physical medium has an impact on exhaustion of the distribution right within the meaning of Article 4(2) of Directive 2001/29.

42 In the case in the main proceedings, the alteration carried out consists in a transfer of the image of an artistic work from a paper poster onto a painter's canvas, by means of the process described in paragraph 15 of this judgment, resulting in the replacement of the paper medium by a canvas. It follows from the observations of the parties in the main proceedings that that technique increases the durability of the reproduction, improves the quality of the image in comparison with the poster and provides a result closer to the original of the work.

43 In that regard, it must be held that, as the French Government correctly argues, a replacement of the medium, as was carried out in the case in the main proceedings, results in the creation of a new object incorporating the image of the protected work, whereas the poster itself ceases to exist. Such an alteration of the copy of the protected work, which provides a result closer to the original, is actually sufficient to constitute a new reproduction of that work, within the meaning of Article 2(a) of Directive 2001/29, which is covered by the exclusive right of the author and requires his authorisation.

44 Allposters nevertheless maintains that the transfer onto canvas cannot be categorised as reproduction on the ground that there is no multiplication of copies of the protected work since the image is transferred and no longer appears on the poster. It explains that the ink which reproduces the work is not altered and that the work itself is not affected in any way.

45 That argument cannot be accepted. The fact that the ink is saved during the transfer cannot affect the finding that the image's medium has been altered. What is important is whether the altered object itself, taken as a whole, is,

physically, the object that was placed onto the market with the consent of the rightholder. That does not appear to be the case in the dispute in the main proceedings.

46 Consequently, the consent of the copyright holder does not cover the distribution of an object incorporating his work if that object has been altered after its initial marketing in such a way that it constitutes a new reproduction of that work. In such an event, the distribution right of such an object is exhausted only upon the first sale or transfer of ownership of that new object with the consent of the rightholder.

47 That interpretation is supported by the principal objective of Directive 2001/29 which, according to recitals 9 and 10 of that directive, is to establish a high level of protection of, inter alia, authors, allowing them to obtain an appropriate reward for the use of their works (see judgments in SGAE, C 306/05, EU:C:2006:764, paragraph 36; Peek & Cloppenburg, EU:C:2008:232, paragraph 37; and Football Association Premier League and Others, EU:C:2011:631, paragraph 186).

48 However, it follows from the arguments advanced before the Court by the parties in the main proceedings that the copyright holders did not consent to the distribution of the canvas transfers, at least not expressly. Accordingly, applying the rule of exhaustion of the distribution right would deprive those rightholders of the possibility of prohibiting those objects from being distributed or, in the event of distribution, of requiring appropriate reward for the commercial exploitation of their works. In that regard, the Court has already held that, in order to be appropriate, such remuneration must be reasonable in relation to the economic value of the exploitation of the protected work (see, by analogy, judgment in Football Association Premier League and Others, EU:C:2011:631, paragraphs 107 to 109). As regards canvas transfers, the parties in the main proceedings acknowledge that their economic value significantly exceeds that of posters.

49 Having regard to all the foregoing considerations, the answer to the questions asked is that Article 4(2) of Directive 2001/29 must be interpreted as meaning that the rule of exhaustion of the distribution right set out in Article 4(2) of Directive 2001/29 does not apply in a situation where a reproduction of a protected work, after having been marketed in the European Union with the copyright holder's consent, has undergone an alteration of its medium, such as the transfer of that reproduction from a paper poster onto a canvas, and is placed on

the market again in its new form.

Costs

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 4(2) of 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 must be interpreted as meaning that the rule of exhaustion of the distribution right set out in Article 4(2) of Directive 2001/29 does not apply in a situation where a reproduction of a protected work, after having been marketed in the European Union with the copyright holder's consent, has undergone an alteration of its medium, such as the transfer of that reproduction from a paper poster onto a canvas, and is placed on the market again in its new form.

[Signatures]