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JUDGMENT OF THE COURT (Fourth Chamber)

13 May 2015 (*)

(Reference for a preliminary ruling — Copyright — Directive 2001/29/EC — Article 4(1) — Distribution right – Concept of ‘distribution to the public’ — Offer for sale and advertising by a trader of a Member State on its website, by direct mail and in the press in another Member State — Reproductions of protected furniture for sale without the consent of the holder of the exclusive distribution right — Offer or advertising not leading to the purchase of the original or copies of a protected work)

In Case C-516/13,

REQUEST for a preliminary ruling under Article 267 TFEU, from the Bundesgerichtshof (Germany), made by decision of 11 April 2013, received at the Court on 27 September 2013, in the proceedings

Dimensione Direct Sales Srl,

Michele Labianca

v

Knoll International SpA,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, K. Jürimäe (Rapporteur), J. Malenovský, M. Safjan and A. Prechal, Judges,

Advocate General: P. Cruz Villalón,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 11 September 2014,

after considering the observations submitted on behalf of:

- Dimensione Direct Sales Srl, by H.-C. Salger, Rechtsanwalt,
- Labianca, by S. Dittl, Rechtsanwalt,
- Knoll International SpA, by M. Goldmann, Rechtsanwalt,
- the Spanish Government, by L. Banciella Rodríguez-Miñón, acting as Agent,
- the European Commission, by F.W. Bulst and J. Samnadda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 December 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(1) 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, on the one hand, Dimensione Direct Sales Srl ('Dimensione'), a company incorporated under Italian law, and Mr Labianca and, on the other, Knoll International SpA ('Knoll'), a company incorporated under Italian law, concerning an alleged infringement of Knoll's exclusive distribution right resulting from offers for sale, made by Dimensione, of reproductions of furniture protected by copyright in Germany through a targeted advertising campaign directed at that Member State.

Legal context

International law

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

4 Article 6 of the CT, headed 'Right of distribution', provides, in paragraph 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.'

EU law

5 Recitals 9 to 11 and 28 in the preamble to 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. ...

(11) A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.

...

(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 [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]. ...’

6 Article 4 of that 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 [European Union] in respect of the original or copies of the 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.’

German law

7 In accordance with Paragraph 15(1)(2) of the Law on copyright and related rights (Gesetz über Urheberrecht und verwandte Schutzrechte — Urheberrechtsgesetz) of 9 September 1965 (BGBl. 1965 I, p. 1273), the author is to have the exclusive right to exploit his work in material form. That right is to include in particular the right of distribution.

8 Paragraph 17(1) of that Law, as amended, provides:

‘The right of distribution is the right to offer to the public or to put into circulation the original or copies of the work.

...'

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

9 Knoll belongs to the Knoll group, whose parent company, Knoll Inc., has its headquarters in Pennsylvania (United States). That group manufactures high-value furniture and sells it worldwide. Knoll distributes, inter alia, 'Wassily' chairs and 'Laccio' tables designed by Marcel Breuer and 'Barcelona' chairs, stools, couches and tables, 'Brno' and 'Prague' chairs, and a 'cantilever' chair designed by Ludwig Mies van der Rohe (together, 'the protected designs'). Knoll is authorised to assert the exclusive copyright, held by its parent company, in those designs protected in Germany.

10 Dimensione is a private limited company whose Managing Director is Mr Labianca. Dimensione distributes designer furniture by direct sale in Europe and offers furniture for sale on its website.

11 In 2005 and 2006, Dimensione advertised furniture similar to the protected designs on its website, which is available in German, and in various German daily newspapers and magazines and in an advertising brochure, stating as follows:

'Buy your furniture from Italy, but pay nothing until collection or delivery by a forwarding agent authorised to take payment (service arranged on request).'

12 Since it believed that the items of furniture offered for sale by Dimensione were imitations or counterfeit versions of the protected designs, Knoll brought an action against Dimensione and Mr Labianca before the Landgericht Hamburg (Regional Court, Hamburg) seeking an order prohibiting them from offering that furniture for sale in Germany. In support of its action, Knoll submitted that those items of furniture are protected under copyright law as works of applied art. In its view, by advertising copies of the protected designs in Germany, Dimensione infringed its rights and those of its parent company under Paragraph 17(1) of the Law on copyright and related rights of 9 September 1965, as amended.

13 The Landgericht Hamburg granted Knoll's application. The Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg), ruling on the appeal brought by Dimensione and by Mr Labianca, upheld the judgment given at first instance. Dimensione and Mr Labianca then brought an appeal on a point of law ('Revision') before the Bundesgerichtshof (the referring court).

14 The Bundesgerichtshof observes that the success of that appeal is dependent on the interpretation of Article 4(1) of Directive 2001/29 and in particular the question whether the distribution right laid down in that provision includes the right to offer the original or a copy of a protected work to the public for sale. If that question is to be answered in the affirmative two further questions arise, namely, first, whether the right to offer the original of a work or copies of it also includes the exclusive right to advertise those

objects, and, second, whether the distribution right is infringed where no purchase of such an original or such copies takes place on the basis of the offer for sale of them. The referring court takes the view that those questions must be answered in the affirmative.

15 In those circumstances, the Bundesgerichtshof decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Does the distribution right under Article 4(1) of Directive 2001/29 include the right to offer the original or copies of the work to the public for sale?’

If the first question is to be answered in the affirmative:

2. Does the right to offer the original or copies of the work to the public for sale include not only contractual offers, but also advertising measures?

3. Is the distribution right infringed even if no purchase of the original or copies of the work takes place on the basis of the offer?’

Consideration of the questions referred

Admissibility

16 At the outset, it must be noted that Dimensione and Mr Labianca claim, in essence, that the first question is hypothetical because, by using the word ‘offer’, it refers to the contractual offer which, by its nature, is binding on the seller, whereas the facts at issue in the main proceedings concern only advertising measures which, under German law, are not binding on the seller, but constitute merely an invitation, sent to potential buyers, to submit an offer to buy to the seller.

17 In that regard, suffice it to note that, according to settled case-law of the Court, questions relating to the interpretation of EU law, referred by the national court in the legal and factual context which it defines under its jurisdiction, enjoy a presumption of relevance (see, *inter alia*, judgment in *X*, C-651/11, EU:C:2013:346, paragraph 20 and the case-law cited). The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment in *Chartered Institute of Patent Attorneys*, C-307/10, EU:C:2012:361, paragraph 32 and the case-law cited).

18 However, that is not the case here. In fact, the case in the main proceedings concerns Dimensione’s commercial practice consisting both of offers to sell and advertising measures which do not give rise to the purchase of protected designs.

19 Therefore, the first question must be found to be admissible.

Substance

20 By its questions, which should be examined together, the referring court asks, in essence, whether Article 4(1) of Directive 2001/29 must be interpreted as meaning that it allows a holder of an exclusive right to distribute a protected work to prevent an offer for sale or an advertisement of the original or a copy of that work, even if it is not established that that offer or advertisement gave rise to the purchase of the protected object by an EU buyer.

21 In accordance with that provision, an exclusive right is granted to 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.

22 It should be borne in mind that the notion of ‘distribution’ under that provision, constitutes an independent concept of EU law, the interpretation of which cannot be contingent on the legislation applicable to transactions in which a distribution takes place (see, to that effect, judgment in *Donner*, C-5/11, EU:C:2012:370, paragraph 25).

23 It also follows from the case-law of the Court that, since Directive 2001/29 serves to implement in the European Union its obligations under, inter alia, the CT and, according to settled case-law, EU legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the European Union, the notion of ‘distribution’, contained in Article 4(1) of that directive, must be interpreted in accordance with Article 6(1) of the CT (judgment in *Donner*, C-5/11, EU:C:2012:370, paragraph 23).

24 The notion of ‘distribution to the public ... by sale’ in Article 4(1) of that directive therefore has the same meaning as the expression ‘making available to the public ... through sale’ in Article 6(1) of the CT (see, to that effect, judgment in *Donner*, C-5/11, EU:C:2012:370, paragraph 24).

25 Taking that context into account, the Court specifically found that distribution to the public is characterised by a series of acts going, at the very least, from the conclusion of a contract of sale to the performance thereof by delivery to a member of the public. A trader in such circumstances bears responsibility for any act carried out by him or on his behalf giving rise to a ‘distribution to the public’ in a Member State where the goods distributed are protected by copyright (judgments in *Donner*, C-5/11, EU:C:2012:370, paragraphs 26 and 27, and in *Blomqvist*, C-98/13, EU:C:2014:55, paragraph 28).

26 It follows from that line of case-law, including the words ‘at the very least’ used by the Court, that it is not excluded that the acts or steps preceding the conclusion of a contract of sale may also fall within the concept of distribution and be reserved, exclusively, to the holders of copyright.

27 Although the Court has already held that distribution to the public must be considered proven where a contract of sale and dispatch has been concluded (judgment in *Blomqvist*, C-98/13, EU:C:2014:55, paragraph 29), the same is true of an offer of a contract of sale which binds its author. In fact, such an offer constitutes, by its very nature, an act prior to a sale being made.

28 As regards an invitation to submit an offer, or a non-binding advertisement for a protected object, those also fall under the series of acts taken with the objective of making a sale of that object. Indeed, the Court held in paragraph 30 of the judgment in *Donner* (C-5/11, EU:C:2012:370) that a trader who directs his advertising at members of the public residing in a given Member State and creates or makes available to them a specific delivery system and payment method, thereby enabling those members of the public to receive delivery of copies of works protected in that Member State, makes, in the Member State where the delivery takes place, a ‘distribution to the public’ under Article 4(1) of Directive 2001/29.

29 The Court has also held, concerning goods coming from a non-member State which are copies of goods protected in the European Union by copyright, that those goods may infringe that right where it is proven that they are intended to be put on sale in the European Union, such proof being provided, inter alia, where it turns out that the goods have been sold to a customer in the European Union or offered for sale or advertised to consumers in the European Union (see, to that effect, judgment in *Blomqvist*, C-98/13, EU:C:2014:55, paragraph 32).

30 The same interpretation applies by analogy in the case of a commercial act, such as an offer for sale or an advertisement addressed by the trader of a Member State, through its website, to consumers located in the territory of another Member State in which the objects concerned are protected by copyright.

31 There may be an infringement of the exclusive distribution right, under Article 4(1) of Directive 2001/29, where a trader, who does not hold the copyright, sells protected works or copies thereof and addresses an advertisement, through its website, by direct mail or in the press, to consumers located in the territory of the Member State in which those works are protected in order to invite them to purchase it.

32 It follows from that conclusion that it is irrelevant, for a finding of an infringement of the distribution right, that such advertising is not followed by the transfer of ownership of the protected work or a copy thereof to the purchaser.

33 Indeed, although it is true that the Court has held, in its judgment in *Peek & Cloppenburg* (C-456/06, EU:C:2008:232, paragraphs 33, 36 and 41), which concerned the option of using reproductions of a protected work, that the concept of distribution to the public of the original of a work or a copy thereof, for the purpose of Article 4(1) of Directive 2001/29, entails a transfer of the ownership of that object, the fact remains that an infringement of the distribution right can be observed where consumers located in the

territory of the Member State in which that work is protected are invited, by targeted advertising, to acquire ownership of the original or a copy of that work.

34 That interpretation is consistent with the objectives of that directive set out in recitals 9 to 11, which state that the harmonisation of copyright must take as a basis a high level of protection, that authors have to receive an appropriate reward for the use of their work and that the system for the protection of copyright must be rigorous and effective (see judgment in *Peek & Cloppenburg*, C-456/06, EU:C:2008:232, paragraph 37).

35 In the light of the foregoing considerations, the answer to the questions referred is that Article 4(1) of Directive 2001/29 must be interpreted as meaning that it allows a holder of an exclusive right to distribute a protected work to prevent an offer for sale or a targeted advertisement of the original or a copy of that work, even if it is not established that that advertisement gave rise to the purchase of the protected work by an EU buyer, in so far as that that advertisement invites consumers of the Member State in which that work is protected by copyright to purchase it.

Costs

36 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(1) 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 it allows a holder of an exclusive right to distribute a protected work to prevent an offer for sale or a targeted advertisement of the original or a copy of that work, even if it is not established that that advertisement gave rise to the purchase of the protected work by an EU buyer, in so far as that advertisement invites consumers of the Member State in which that work is protected by copyright to purchase it.

[Signatures]

* Language of the case: German.
