

Court of Justice EU, 13 May 2015, Dimensione v Knoll

Knoll

Brno-chair



COPYRIGHT LAW

A holder of an exclusive right to distribute is allowed to prohibit offers for sale or targeted advertisement, even if it is not established that the advertisement gave rise to the purchase of that protected work by an EU buyer, in so far as that advertisement invited EU consumers to purchase it.

• 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.

It is irrelevant for an infringement of the distribution right, that such advertising is not followed by the transfer of ownership of work.

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.

• 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.

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Court of Justice EU, 13 May 2015

(L. Bay Larsen, K. Jürimäe (rapporteur), J. Malenovský, M. Safjan and A. Prechal)

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.

OPINION OF ADVOCATE GENERAL CRUZ VILLALÓN

delivered on 4 December 2014 (1)

Case C-516/13

Dimensione Direct Sales srl,

Michele Labianca

v

Knoll International SpA

(Request for a preliminary ruling from the Bundesgerichtshof (Germany))

(*Copyright — Directive 2001/29/EC — Distribution right — Article 4(1) — Concept of ‘distribution to the public’, by sale or otherwise, of the original or copy of a work — Contractual offers — Website offering reproductions of protected furniture for sale without*

the consent of the holder of the exclusive distribution right — Invitatio ad offerendum — Advertising measures)

1. In this case, the Court has before it three questions referred for a preliminary ruling on 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, (2) a provision which establishes for copyright holders an exclusive right to distribute the original or copies of their protected works. The facts giving rise to the dispute in the main proceedings, which differ from those encountered to date, for example in the judgments in Peek & Cloppenburg (3) and Donner, (4) provide the Court with the opportunity to look once again at the extent and scope of the distribution right under that provision and to define the boundaries of that concept.

I – Legal framework

A – EU law

2. Recital 28 in the preamble to Directive 2001/29 states:

‘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 copies thereof sold by the rightholder or with his consent outside the Community. Rental and lending rights for authors have been established in Directive 92/100/EEC. The distribution right provided for in this Directive is without prejudice to the provisions relating to the rental and lending rights contained in Chapter I of that Directive.’

3. Article 4 of Directive 2001/29, which establishes the exclusive distribution right, provides that:

‘1. Member States shall provide for authors, in respect of the original of their works or 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.’

B – German law

4. Paragraph 15 of the Law on copyright and related rights (Gesetz über Urheberrecht und verwandte Schutzrechte) (Urheberrechtsgesetz) (5) provides:

‘(1) The author shall have the exclusive right to exploit his work in material form; that right shall include in particular:

1. the right of reproduction (Paragraph 16);

2. the right of distribution (Paragraph 17);

3. the right of exhibition (Paragraph 18).

...’

5. Paragraph 17(1) of the UrhG defines the right of distribution as follows:

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

II – The facts giving rise to the main proceedings

6. Knoll International (6) SpA is a incorporated company under Italian law which belongs to the Knoll International group, whose parent company, Knoll Inc., (7) has its headquarters in Pennsylvania (USA). The Knoll group manufactures and sells furniture throughout the world, in particular furniture items designed by Marcel Breuer and Ludwig Mies van der Rohe, which are protected by copyright as works of applied art. Knoll International is the proprietor of the exclusive user rights under copyright law in the furniture designed by Marcel Breuer and is authorised to assert the copyright that Knoll holds in the furniture of Ludwig Mies van der Rohe.

7. Dimensione Direct Sales srl, (8) the first applicant in the main proceedings, is a private limited company incorporated under Italian law the Managing Director of which is the second applicant in the main proceedings, Mr Labianca. Dimensione Direct Sales distributes designer furniture by direct sale in Europe and offers furniture for sale on its website www.dimensione-bauhaus.com, which is available, inter alia, in German. In addition, in 2005 and in 2006, it advertised its offers in various daily newspapers and magazines, as well as in an advertising brochure, in Germany, stating: *‘Buy your furniture from Italy, but pay nothing until collection or delivery by a forwarding agent authorised to take payment (service arranged on request)’.*

8. On the basis of its copyright, Knoll International brought before the Landgericht Hamburg (Regional Court, Hamburg) (Germany) a claim seeking an order prohibiting the applicants in the main proceedings from offering for sale in Germany items of furniture corresponding to those designed by Marcel Breuer and Ludwig Mies van der Rohe on the ground that they do not come from Knoll International or from Knoll. By further claims, it requested that the applicants be required to provide information, that they be declared liable for damages and that the judgment be published.

9. The Landgericht Hamburg granted the claims raised by Knoll International and that decision was upheld on appeal by the Hanseatisches Oberlandesgericht (Higher Regional Court, Hamburg) (Germany). The applicants in the main proceedings were then given leave to lodge an appeal on a point of law (‘Revision’) before the referring court.

III – The questions referred for a preliminary ruling and the procedure before the Court

10. Taking the view that the resolution of the dispute before it required a ruling from the Court on the interpretation of Article 4(1) of Directive 2001/29, the Bundesgerichtshof (Federal Court of Justice) (Germany) referred the following three questions to the Court for a preliminary ruling:

‘1. Does the distribution right under Article 4(1) of Directive 2001/29/EC 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?*

11. In its order for reference, the Bundesgerichtshof set out the reasons why it considers that its three questions should be answered in the affirmative. Noting that one of the objectives of Directive 2001/29 is to guarantee a high level of protection of copyright and an appropriate reward, it takes the view that Article 4(1) thereof must be interpreted as having a broad scope.

12. In the opinion of the Bundesgerichtshof, the exclusive right to authorise or prohibit ‘any form of distribution’ to the public, ‘by sale or otherwise’, of the original of a work or copies thereof should cover the offer for sale of reproductions, that is to say not only an offer to conclude a contract but also an advertising measure, and that this is the case even where no purchase is made of the original of a work or a reproduction thereof. The offer must thus be understood in the economic sense of that term and is not co-extensive with the contract-law concept of ‘offer’, so that an advertising measure inviting those to whom it is addressed to purchase a reproduction of a work constitutes in itself an offer to the public which is covered by the distribution right under Article 4(1) of Directive 2001/29.

13. The referring court considers that the judgment in *Peek & Cloppenburg* (9) does not preclude that interpretation of the distribution right. Although it is true that, in that judgment, the Court held that the concept of ‘distribution to the public’ covers only acts which entail a transfer of ownership, the grounds that it adopted in this regard cannot be interpreted as meaning that the distribution right under Article 4(1) of Directive 2001/29 does not cover any act preparatory to such a transfer. The offer for sale of an original or a copy of a work is associated with a transfer of the ownership of that object inasmuch as it is intended to bring about such a transfer.

14. It also points out that, in its judgment in *Donner*, (10) the Court held that a trader who directs his advertising at members of the public residing in a given Member State and creates or makes available to them a specific delivery system and payment method, or allows a third party to do so, thereby enabling those members of the public to receive delivery of copies of works protected by copyright in that same Member State, makes, in the Member State where the delivery takes place, a ‘distribution to the public’ within the meaning of Article 4(1) of Directive 2001/29.

15. The applicants and the defendants in the main proceedings, the Spanish Government and the European Commission submitted written observations and presented oral argument at the public hearing held on 11 September 2014.

IV – The questions referred for a preliminary ruling

A – Observations of the parties

16. The applicants in the main proceedings argue that, in the situation at issue in the main proceedings, that is to say a mere offer of copyright-protected furniture, there can be no distribution within the meaning of Article 4(1) of Directive 2001/29, either ‘by sale’ or ‘otherwise than by sale’. Although, in its judgment in *Donner*, (11) the Court took advertising measures into consideration, it was only as evidence of the trader’s intention to target members of the public in the Member State in which the distribution actually took place.

17. The idea that it is necessary to advocate a broad interpretation of the concept of distribution in order to protect rightholders and in particular in order not to adversely affect their commercial prospects is unfounded where an offer does not lead to a purchase. In such a case, the rightholder does not suffer any loss or harm and is not therefore entitled to compensation. Similarly, there is no need to broaden the concept of distribution so as to prohibit advertising measures, since Article 9(1)(a) of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (12) expressly permits the competent courts to issue an interlocutory injunction intended to prevent any imminent infringement of an intellectual property right. Acts preliminary to an act infringing an intellectual property right can therefore be prohibited on that basis without there being any need for those acts themselves to be regarded as infringing the rights in question.

18. *Knoll International* takes the view that, in the light of the circumstances of the case in the main proceedings, the referring court, by its questions, seeks in essence to determine whether the advertising conducted by *Dimensione Direct Sales* can be prohibited inasmuch as it infringes its exclusive distribution right under Article 4(1) of Directive 2001/29. It considers, however, that those questions are based on an erroneous interpretation of the scope of the distribution right under that provision, which, it contends, is based on the interpretation given by the Court in its judgment in *Peek & Cloppenburg*, (13) which, it says, is excessively restrictive.

19. In its submission, the Court held that the exclusive distribution right confers on the copyright holder only the right to control the transfer of ownership of the original or a copy of a work of applied art, to the exclusion of any other right. However, such an interpretation disregards the meaning and objective of Directive 2001/29.

20. *Knoll International* considers that the question raised in the request for a preliminary ruling is in essence whether Article 4(1) of Directive 2001/29 must, in accordance with international law, be regarded as legislation providing minimum protection or, on the contrary, harmonised maximum protection.

21. It takes the view in this regard that the World Intellectual Property Organization Copyright Treaty, signed in Geneva on 20 December 1996 and approved on behalf of the European Community by Council

Decision 2000/278/EC of 16 March 2000, (14) cannot be interpreted as infringing the rights guaranteed by national legislation, in this instance all the imaginable known and unknown rights to exploit its work in immaterial and material form which Paragraph 17(1) of the UrhG grants to the copyright holder. Article 4(1) of Directive 2001/29, as interpreted in accordance with the CT, cannot therefore have a restrictive effect on the rights which the authors of works of art already enjoyed in the Member States before that directive was adopted.

22. Knoll International therefore proposes that the answer to the questions referred for a preliminary ruling should be that the distribution right provided for in Article 4(1) of Directive 2001/29 includes the right to offer for sale to the public the original or a copy of a work, it being understood that that right includes not only contractual offers but also advertising measures and that that right may be infringed even where the offer does not lead to a purchase. It considers that, in any event, Article 4(1) of Directive 2001/29 does not preclude national legislation which grants that right to the author.

23. The Spanish Government proposes a separate affirmative reply to the three questions referred to the Court.

24. First of all, citing the judgment in Donner, (15) the Spanish Government points out that there can be no distribution without a contract for sale and delivery of the item purchased to the purchaser. However, it states that, in order for a sale to take place, it is essential for an offer of sale to be made to the public and therefore considers that the distribution right must include the offer to conclude a contract as an indispensable preparatory element of a contract of sale.

25. Next, it expresses the view that the distribution right includes not only the offer to conclude a contract but also advertising, in so far as, by virtue of its purpose, that offer forms part of the chain of acts preparatory to the sale of a product and the sale could not have taken place without it.

26. Lastly, it states that the exclusive distribution right may be infringed in the absence of any actual sale, since the offer is made as part of a sales and distribution channel specifically geared towards the purchase of the protected items at issue, which entails conduct targeted at a specific audience.

27. The position adopted by the Commission underwent changes between the written and the oral stages of the procedure.

28. In its written observations, it argued principally that, under the current case-law of the Court as it emerges from the judgments in Peek & Cloppenburg (16) and Donner, (17) the existence of an act of distribution within the meaning of Article 4(1) of Directive 2001/29 is conditional upon a sale or other transfer of ownership. In its submission, that restrictive interpretation of the concept of distribution, which excludes transactions preceding the conclusion of a contract of sale from the scope of Article 4(1) of Directive 2001/29, is not at odds with the objective

pursued by that directive, namely to guarantee a high level of protection, and is, moreover, a guarantee of legal certainty, in so far as the existence of a sale or other form of transfer of ownership may be established on the basis of objective criteria.

29. During the oral procedure, however, the Commission stated that the exclusion of any offer to sell from the concept of distribution could create a gap in the protection of copyright holders, inasmuch as they would not be able to avail themselves of the legal remedies provided for in Directive 2004/48 until it was established that a sale had actually taken place. It therefore considers that the concept of distribution is conceivably capable of being interpreted as including certain offers, provided, on the one hand, that the opening-up of that concept is carefully circumscribed and the criteria for determining whether an offer is covered by the distribution right are precisely and uniformly defined by the Court and, on the other hand, that paragraphs 1 and 2 of Article 4 of Directive 2001/29 are interpreted separately. In other words, if a mere offer may in certain circumstances be regarded as falling within the scope of paragraph 1, irrespective of whether a sale or other transfer of ownership has actually taken place, it cannot on the other hand be regarded as exhausting the distribution right under paragraph 2.

B – Analysis

30. Before I set about giving an answer to the questions raised by the referring court, I must make three preliminary observations.

31. First of all, it should be noted that the primary purpose of the action brought by Knoll International in the main proceedings is to obtain an order from the referring court prohibiting Dimensione Direct Sales, in accordance with Paragraph 15(1)(2) of the UrhG, from offering for sale copies of protected furniture not originating either from Knoll International itself or from Knoll, it being important to bear in mind that that head of claim is not based on the finding that sales of furniture have actually been made and duly recorded. Although neither Knoll International nor the referring court have said as much, the measure sought would essentially involve prohibiting Dimensione Sales Direct from using its website for the purposes of offering the furniture at issue for sale to the public in Germany. In other words, it would amount to prohibiting it from marketing the furniture at issue within German territory via its website, or even, more broadly, by means of mere advertising measures.

32. The present case differs, therefore, on the facts, from the cases concerning the interpretation of Article 4(1) of Directive 2001/29 previously examined by the Court which have been cited by the parties. Thus, in the case that gave rise to the judgment in Peek & Cloppenburg, (18) the facts at issue concerned the exhibition to the public of reproductions of protected furniture and the possibility that the public in question might use those reproductions, in the absence of any marketing, and therefore of any actual and duly recorded sales of that furniture, or of any intention to

market it. Conversely, in the cases which gave rise to the judgments in Donner (19) and Blomqvist, (20) the goods at issue had been the subject of an actual and duly recorded sale and/or a delivery or attempted delivery. The premise in the case in the main proceedings, on the other hand, is that Dimensione Direct Sales intends to market the furniture at issue but no actual sale or delivery has been recorded.

33. Next, the referring court states, without being challenged in this regard, on the one hand, that the items of furniture at issue are protected by copyright in Germany as works of applied art and, on the other hand, that, on its website, Dimensione Direct Sales offers copies of that furniture for sale, inter alia, to the public in Germany without the authorisation of the rightholders in that furniture, in this instance without the authorisation of Knoll International and/or Knoll.

34. It must be pointed out in this regard that, although it is for the referring court to establish the accuracy of the factual allegations made, in so doing, it must also, in accordance with Article 3(2) of Directive 2004/48, ensure that the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights are applied in such a manner as to avoid the creation of barriers to legitimate trade (21) and to provide safeguards against their abuse. In particular, it is incumbent upon it to ascertain that the furniture at issue has not been lawfully put on the market by the rightholders or with their consent and that their exclusive distribution right in it has not been exhausted, in accordance with Article 4(2) of Directive 2001/29.

35. Lastly, it is important to point out that, by its second question, the referring court is asking the Court, in essence, whether, in addition to contractual offers, 'advertising measures' too are capable of falling within the scope of the distribution right under Article 4(1) of Directive 2001/29. However, the referring court provides very little information concerning the advertising measures that Dimensione Direct Sales is alleged to have carried out or which are otherwise said to be involved, referring only to advertisements in daily newspapers and magazines in 2005 and 2006. (22) Nor does it provide a precise explanation of the reasons why it is of the view that it needs an answer to that question in order to be able settle the dispute before it and take the measures sought by Knoll, as summarised in point 31 of this Opinion.

36. As is clear from the settled case-law of the Court, the need to provide an interpretation of EU law which will be of use to the national court makes it necessary that the national court should define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based. (23) The Court has also repeatedly held that the justification for a request for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered, but rather that it is necessary for the effective resolution of a dispute concerning EU law. (24)

37. I therefore consider that, in the absence of any detailed evidence of the factual situation at issue and of

any indication of the nature and scope of the measures that the referring court is contemplating granting, it is not possible for the Court to give a useful specific answer (25) to its second question and that that question must therefore be declared inadmissible.

38. In the light of those observations, and on the understanding that I shall be examining the first and third questions jointly, I should start by recalling that, in its judgment in Peek & Cloppenburg, (26) the Court held that neither Article 4(1) of Directive 2001/29 nor any other provision of that directive gives an adequate definition of the concept of distribution to the public of a work protected by copyright. (27) The Court has also stated, however, that that concept must be interpreted, as far as is possible, (28) in the light of the provisions of the CT, since Directive 2001/29 serves to implement the Community's obligations (29) under that Treaty and the purpose of Article 4 is to transpose Article 6 of the CT. (30)

39. Pointing out that Article 6(1) of the CT defines the concept of the right of distribution enjoyed by authors of literary and artistic works as the exclusive right to authorise the making available to the public of the original or copies of their works through sale or 'other transfer of ownership', (31) the Court held that the concept of distribution by sale or otherwise should be interpreted as 'a form of distribution which entails a transfer of ownership'. (32)

40. Reiterating, furthermore, that the content of the notion of 'distribution' under Article 4(1) of Directive 2001/29 must be given an independent interpretation under EU law, which cannot be contingent on the legislation applicable to transactions in which a distribution takes place, (33) the Court also stated that 'distribution to the public [was] 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'. (34)

41. Contrary to the arguments put forward by Dimensione Direct Sales, the definitions thus given by the Court, which, as I have already pointed out, (35) must be viewed in the context in which they arose, cannot be interpreted as meaning that there can be no infringement of the exclusive distribution right where no actual sale has taken place, provided that the measures capable of being prohibited under the exclusive distribution right can be said to have been taken in a context manifestly intended to promote the completion of such a sale.

42. As Advocate General Jääskinen put it so well in his Opinion in Donner, (36) 'the notion of distribution by sale must be interpreted in a manner which gives authors practical and effective control over the commercialisation of copies of their work, from its reproduction through channels of commerce to exhaustion of copyright under Article 4(2) of Directive 2001/29'.

43. This may be the case, first of all, with contractual offers or any offer to sell protected items which is made, without the rightholder's consent, via a website that makes available to interested parties the tools for

settling the cost of their purchases and provides them with the means of having them delivered.

44. Where a website presents itself as a commercial site that markets protected items, be this on a permanent, periodic or one-off basis, by providing precise details about those items and their prices and incorporating features making it technically possible to purchase them and have them delivered to the purchaser, (37) that is to say as a site configured to enable the conclusion of contracts of sale, that website must be regarded as constituting evidence of the intention to set up a channel for the distribution of those items which, whether the natural or legal persons responsible for the website comply with the applicable legal requirements or not, (38) is caught by the prohibition contained in Article 4(1) of Directive 2001/29.

45. In such circumstances, which appear to be on all fours with those of the dispute in the main proceedings, the intention of those responsible for the website to market the protected items is sufficiently clear and the probability that sales have actually been made or are actually being made is sufficiently great to entitle the copyright holders to obtain an order prohibiting such conduct by virtue of their exclusive distribution right, provided that that right is not exhausted under Article 4(2) of Directive 2001/29, it being for the court to which an application to that effect has been made, where appropriate, to take the measures provided for *inter alia* in Article 6 of Directive 2004/48 to ensure that the necessary evidence is presented.

46. We must, on that basis, set aside the argument put forward by Dimensione Direct Sales to the effect that there is no need to advocate a broad interpretation of the distribution right under Article 4(1) of Directive 2001/29, since it is possible for the judicial authorities of the Member States, on the basis of Article 9(1)(a) of Directive 2004/48, to issue against *‘the alleged infringers’* interlocutory injunctions intended to prevent any imminent infringement of an intellectual property right. The questions put to the Court by the referring court relate, after all, to the substance of the distribution right, not to the procedural rules by means of which an imminent infringement of an intellectual property right may otherwise be prevented.

47. The same might also be said, more broadly but by the same token, of any invitation to treat (*invitatio ad offerendum*) and indeed of any advertising measure (39) concerning protected items which is targeted at a specific audience, provided that these are put in place, through the intermediary of or in connection with a website, *inter alia*, with the manifest intention of furthering the conclusion of contracts for the sale of those items or of contributing decisively towards the transfer of ownership in them.

48. Consequently, I propose that the Court’s answer to the questions referred for a preliminary ruling by the national court should be that Article 4(1) of Directive 2001/29 must be interpreted as meaning that the distribution right under that provision includes the right of the holder of copyright in the original or copies of a protected work to prohibit any person from offering the

original or copies of that work for sale to the public without his consent, including where that offer has not led to a purchase, provided that that offer is made with the manifest intention of concluding contracts of sale or any other act involving a transfer of ownership in them.

V – Conclusion

49. I invite the Court to answer the questions referred for a preliminary ruling by the national court as follows:

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 the distribution right under that provision includes the right of the holder of copyright in the original or copies of a protected work to prohibit any person from offering the original or copies of that work for sale to the public without his consent, including where that offer has not led to a purchase, provided that that offer is made with the manifest intention of concluding contracts of sale or any other act involving a transfer of ownership in them.

1 – Original language: French.

2 – OJ 2001 L 167, p. 10.

3 – C-456/06, EU:C:2008:232.

4 – C-5/11, EU:C:2012:370.

5 – ‘The UrhG’.

6 – ‘Knoll International’.

7 – ‘Knoll’.

8 – ‘Dimensione Direct Sales’.

9 – EU:C:2008:232.

10 – EU:C:2012:370.

11 – EU:C:2012:370.

12 – OJ 2004 L 157, p. 45.

13 – EU:C:2008:232.

14 – OJ 2000 L 89, p. 6, ‘the CT’.

15 – EU:C:2012:370.

16 – EU:C:2008:232.

17 – EU:C:2012:370.

18 – EU:C:2008:232.

19 – EU:C:2012:370.

20 – C-98/13, EU:C:2014:55.

21 – See in this regard the preamble to, and Article 41(1) of, the Agreement on Trade-Related Aspects of Intellectual Property Rights, contained in Annex C to the Agreement establishing the World Trade Organization, approved on behalf of the Community, so far as concerns matters within its competence, by Council Decision 94/800/EC of 22 December 1994 (OJ 1994 L 336, p. 1, at p. 214). See also the judgment in *Bericap Záródástechnikai* (C-180/11, EU:C:2012:717).

22 – See point 8 of this Opinion.

23 – See, *inter alia*, the judgment in *ŐFAB* (C-147/12, EU:C:2013:490, paragraph 45 and the case-law cited).

24 – See, *inter alia*, the judgment in *Romeo* (C-313/12, EU:C:2013:718, paragraph 40 and the case-law cited).

25 – See in that regard, *inter alia*, the judgments in *Meilicke* (C-83/91, EU:C:1992:332, paragraphs 32 and

33) and Zurita García and Choque Cabrera (C-261/08 and C-348/08, EU:C:2009:648, paragraph 35).
26 – EU:C:2008:232.
27 – Loc. cit., paragraph 29.
28 – Judgments in Peek & Cloppenburg (EU:C:2008:232, paragraphs 30 and 31) and Donner (EU:C:2012:370, paragraph 23).
29 – Judgment in Peek & Cloppenburg (EU:C:2008:232, paragraph 31).
30 – Loc. cit., paragraph 35.
31 – Loc. cit., paragraph 32.
32 – Loc. cit., paragraph 33.
33 – Judgment in Donner (EU:C:2012:370, paragraph 25).
34 – Judgments in Donner (EU:C:2012:370, paragraph 26) and Blomqvist (EU:C:2014:55, paragraph 28).
35 – See points 31 and 32 of this Opinion.
36 – Advocate General’s Opinion in Donner, C-5/11, EU:C:2012:195, point 53.
37 – On this point, see the Communication from the Commission of 16 December 2013, entitled ‘A roadmap for completing the single market for parcel delivery — Build trust in delivery services and encourage online sales’ [COM(2013) 886 final].
38 – These might be the provisions of Directive 2003/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on Electronic Commerce’) (OJ 2000 L 178, p. 1) or the requirements laid down by the directive on the protection of consumers in respect of distance contracts. See, in particular, Articles 6 and 8 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64).
39 – See the judgment in Donner (EU:C:2012:370, paragraph 29). See also, albeit by converse inference, the Opinion of Advocate General Jääskinen in Donner (EU:C:2012:195, point 54).