

Court of Justice EU, 19 December 2018, Syed



COPYRIGHT LAW

The storage by a retailer of goods bearing a motif protected by copyright on the territory of the Member State where the goods are stored may constitute an infringement of the exclusive distribution right of article 4(1) of the InfoSoc Directive:

- the distribution right may include an act prior to the actual sale of a work or a copy thereof with the objective of making such a sale
- it must nonetheless be proven that the goods concerned are actually intended to be distributed to the public on the territory of the Member State in which those goods are protected by copyright

Although carrying out the sale is not a necessary element for the purpose of establishing an infringement of the right of distribution, it must nonetheless be proven, to that end, that the goods concerned are actually intended to be distributed to the public without the rightholder's consent, inter alia by their being offered for sale in a Member State where the work at issue is protected (see, by analogy, [judgment of 13 May 2015, *Dimensione Direct Sales and Labianca*, C-516/13, EU:C:2015:315](#), paragraphs 29 and 32 and the case-law cited).

- this cannot be inferred from the mere fact that the stored goods and the goods sold in store are identical

It cannot be excluded that all or part of the goods stored in circumstances such as those in the main proceedings are not intended to be sold on the territory of the Member State in which the motif displayed on the goods is protected, even when those goods are identical to those which are offered for sale in the retailer's shop. 34 In such a situation, if an approach such as that outlined in paragraph 32 of the present judgment were adopted, that would lead to the actual purpose of the goods considered not being taken into account and to all the stored goods being treated identically, although they may, in principle, be intended for different purposes.

35 Such an approach would thus result in extending the protection conferred by the exclusive distribution right beyond the framework established by EU law.

36 Therefore, it is for the referring court to determine, in the light of the evidence available to it, whether all

of the stored goods identical to those sold in the shop at issue, or only some of them, were intended to be marketed in that shop.

- as regards the determination of the purpose of the goods considered, account must be taken of all relevant factors, including the distance between the storage facility and the place of sale, the regular restocking of the shop with goods from the storage facilities at issue, accounting elements, the volume of sales and orders as compared with the volume of stored goods, or current contracts of sale

In the light of all the foregoing considerations, the answer to the questions referred is that Article 4(1) of Directive 2001/29 must be interpreted as meaning that the storage by a retailer of goods bearing a motif protected by copyright on the territory of the Member State where the goods are stored may constitute an infringement of the exclusive distribution right, as defined by that provision, when that retailer offers for sale, without the authorisation of the copyright holder, goods identical to those which he is storing, provided that the stored goods are actually intended for sale on the territory of the Member State in which that motif is protected. The distance between the place of storage and the place of sale cannot, on its own, be a decisive element in determining whether the stored goods are intended for sale on the territory of that Member State.

Source: curia.europa.eu

Court of Justice EU, 31 March 2010

(...)

Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

19 December 2018 (*)

(Reference for a preliminary ruling — Copyright and related rights — Directive 2001/29/EC — Article 4(1) — Distribution right — Infringement — Goods bearing a copyrighted motif intended for sale — Storage for commercial purposes — Storage facility separate from place of sale)

In Case C-572/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Högsta domstolen (Supreme Court, Sweden), made by decision of 21 September 2017, received at the Court on 28 September 2017, in the criminal proceedings against

Imran Syed,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Seventh Chamber, acting as President of the Fourth Chamber, K. Jürimäe (Rapporteur), C. Lycourgos, E. Juhász, and C. Vajda, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Riksåklagaren, by M. Hedström and K. Skarp, acting as Agents,

– the European Commission, by J. Samnadda and K. Simonsson, acting as Agents, after hearing the [Opinion of the Advocate General](#) at the sitting on 3 October 2018, 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 criminal proceedings brought by the Riksåklagaren (Prosecutor-General, Sweden) against Mr Imran Syed concerning the infringement of trade marks and infringements of copyright in literary and artistic works.

Legal context

International law

3 The World Intellectual Property Organisation (WIPO) adopted in Geneva, on 20 December 1996, 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) and came into force, as regards the European Union, on 14 March 2010 (OJ 2010 L 32, p. 1).

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.'

European Union law

5 Article 4 of Directive 2001/29, entitled '*Distribution right*', provides in paragraph 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.'

Swedish law

6 The lagen (1960:729) om upphovsrätt till litterära och konstnärliga verk (Law (1960:729) on copyright in literary and artistic works) transposes Directive 2001/29 into Swedish law.

7 Paragraph 53 of that law provides:

'Any person who, intentionally or through gross negligence, takes measures relating to a literary or artistic work which constitute an infringement of the copyright in that work held by a person in accordance with Chapter 1 or Chapter 2, or an infringement of Paragraph 41, second subparagraph, or of Paragraph 50, shall be liable to a fine or to a custodial sentence of up to two years.'

8 According to Paragraph 2 of that law, such a measure may comprise, for example, exploiting that work by making it available to the public without the rightholder's consent. The third subparagraph, point 4, of that paragraph specifies that a work is made available to the public, inter alia, when copies of the work are offered for sale, rent or loan, or are otherwise distributed to the public.

9 That law does not expressly prohibit the storage of protected goods for the purpose of sale.

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

10 Mr Syed ran a retail shop in Stockholm (Sweden) in which he sold clothes and accessories with rock music motifs. In addition to offering the items for sale in that shop, Mr Syed stored such goods in a storage facility adjacent to the shop and in another storage facility located in Bandhagen (Sweden), in a suburb of Stockholm. It is established that Mr Syed's shop was regularly restocked with merchandise from those storage facilities.

11 It has been determined that the sale of several of those items infringed trade marks and copyrights. Criminal proceedings were brought against Mr Syed for trademark infringement and breach of Law (1960:729) before the tingsrätten (District Court, Sweden). According to the åklagaren (Public Prosecutor, Sweden), Mr Syed infringed the claimants' copyright by unlawfully making available to the public clothes and flags bearing the motifs protected by copyright. The prosecutor therefore took the view that all of the goods bearing such motifs which were in the shop and in the storage facilities were being offered for sale or distributed to the public, and that such acts therefore constituted an infringement of Law (1960:729).

12 The tingsrätten (District Court) found Mr Syed guilty of trade mark infringement concerning all the goods discovered. That court also found him guilty of infringing Law (1960:729) with regard to the goods bearing a copyrighted motif which were in the shop he was running, as well as with regard to the goods stored in both the storage facilities at issue, in so far as identical goods were offered for sale in the shop. The tingsrätten (District Court) took the view, in holding Mr Syed liable for the goods in the storage facilities as well, that the concept of '*offering for sale*' goods which infringe the copyright held by the claimants did not apply solely to the goods which, at a given point in time, were located in Mr Syed's shop, but also applied to the identical goods in the storage facilities. In contrast, that court held that the other goods in the storage facilities could not be regarded as having been offered for sale. For all of those infringements, the tingsrätten (District Court) sentenced Mr Syed to a suspended custodial sentence and to 80 per diem fines.

13 Hearing the case on appeal, the Svea hovrätt, Patent- och marknadsöverdomstolen (Svea Court of Appeal, Stockholm, Sweden: patent and commercial division) found that Mr Syed had infringed Law (1960:729) only in so far as the goods located in his shop were concerned and not in relation to the goods in the storage facilities. That court took the view that Mr Syed had stored those goods for the purpose of sale. However, it could not be considered that those goods had been offered for sale or distributed to the public. Similarly, the handling of goods in the storage facilities did not, according to the court hearing the appeal, constitute an attempt or preparation to commit an

infringement of Law (1960:729). The sentence given to Mr Syed was reduced, in so far as Mr Syed was sentenced to a suspended custodial sentence and 60 per diem fines.

14 Before the Högsta domstolen (Supreme Court, Sweden), the referring court in this case, the Riksåklagaren (Prosecutor-General) claimed that Mr Syed should be found guilty in respect of the same goods as those which the tingsrätten (District Court) had found to establish an infringement of Law (1960:729). He also submitted that the Högsta domstolen (Supreme Court) should refer the matter to the Court of Justice for a preliminary ruling concerning the interpretation of Article 4(1) of Directive 2001/29.

15 Before the referring court, Mr Syed argued that it followed from the case-law of the Court of Justice that infringement of a rightholder's distribution right by an offer for sale requires acts directed towards the public with the aim of transferring each specific item. He contended that the purchase and storage of goods cannot be considered to be such acts. An interpretation to the contrary would extend the scope of criminal liability, in breach of the principle of legality.

16 The referring court notes that Law (1960:729) and Directive 2001/29 do not expressly prohibit the storage of goods bearing a copyrighted motif for the purpose of sale. It adds that, following the decision of the [Court of Justice of 13 May 2015, *Dimensione Direct Sales and Labianca* \(C-516/13, EU:C:2015:315\)](#), there may be an infringement of an author's exclusive right under Article 4(1) of Directive 2001/29 as a result of measures or steps that take place prior to the performance of a contract of sale. Nonetheless, the question arises whether goods bearing a protected motif which are kept, by a person, in storage facilities can be regarded as being offered for sale when that person offers identical goods for sale in a retail shop run by him.

17 In those circumstances, the Högsta domstolen (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

1. When goods bearing protected motifs are unlawfully offered for sale in a shop, can there also be an infringement of the author's exclusive right of distribution under Article 4(1) of Directive 2001/29 as regards goods with identical motifs, which are held in storage by the person offering the goods for sale?

2. Is it relevant whether the goods are held in a storage facility adjacent to the shop or in another location?

Consideration of the questions referred

18 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 4(1) of Directive 2001/29 must be interpreted as meaning that the storage, by a retailer, of goods bearing a motif protected by copyright on the territory of the Member State where the goods are stored may constitute an infringement of the copyright holder's exclusive right of distribution, as referred to in that provision, when that retailer offers for sale in a shop, without the authorisation of the copyright holder, goods

identical to those which the retailer is storing without that rightholder's authorisation. The referring court also asks the Court of Justice to specify whether it is relevant, in that regard, to consider the distance between the place of storage and the place of sale.

19 Under Article 4(1) of Directive 2001/29, Member States are to provide an exclusive right for 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.

20 It should be observed that, since Directive 2001/29 serves to implement in the European Union the obligations of the Union under, inter alia, the CT and since, 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 of 13 May 2015, *Dimensione Direct Sales and Labianca*, C-516/13, EU:C:2015:315](#), paragraph 23 and the case-law cited). 21 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 ([judgment of 13 May 2015, *Dimensione Direct Sales and Labianca*, C-516/13, EU:C:2015:315](#), paragraph 24 and the case-law cited).

22 Taking that context into account, the Court has 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 ([judgment of 13 May 2015, *Dimensione Direct Sales and Labianca*, C-516/13, EU:C:2015:315](#), paragraph 25 and the case-law cited).

23 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 ([judgment of 13 May 2015, *Dimensione Direct Sales and Labianca*, C-516/13, EU:C:2015:315](#), paragraph 26).

24 In that regard, if distribution to the public must be considered as proven where a contract of sale and dispatch has been concluded, the same is true of an offer of a contract of sale which binds its author, since such an offer constitutes, by its very nature, an act prior to a sale being made ([judgment of 13 May 2015, *Dimensione Direct Sales and Labianca*, C-516/13, EU:C:2015:315](#), paragraph 27).

25 The Court has also held, in essence, that such an act can constitute an infringement of the exclusive

distribution right, provided for in Article 4(1) of Directive 2001/29, even if that act is not followed by the transfer of ownership to a purchaser of the protected work or a copy thereof (see, to that effect, [judgment of 13 May 2015, *Dimensione Direct Sales and Labianca*, C-516/13, EU:C:2015:315](#), paragraph 32).

26 Therefore, an act prior to the actual sale of a work or a copy thereof protected by copyright, which takes place without the rightholder's consent and with the objective of making such a sale, may infringe the distribution right as defined in Article 4(1) of Directive 2001/29 (see, to that effect, [judgment of 13 May 2015, *Dimensione Direct Sales and Labianca*, C-516/13, EU:C:2015:315](#), paragraph 28).

27 Although carrying out the sale is not a necessary element for the purpose of establishing an infringement of the right of distribution, it must nonetheless be proven, to that end, that the goods concerned are actually intended to be distributed to the public without the rightholder's consent, inter alia by their being offered for sale in a Member State where the work at issue is protected (see, by analogy, [judgment of 13 May 2015, *Dimensione Direct Sales and Labianca*, C-516/13, EU:C:2015:315](#), paragraphs 29 and 32 and the case-law cited).

28 In the case in the main proceedings, Mr Syed was storing goods bearing copyrighted motifs and was selling — without the rightholder's consent — identical goods in a shop.

29 It must be established whether such storage can be considered to be an act prior to a sale which may constitute an infringement of the exclusive distribution right, as defined in Article 4(1) of Directive 2001/29.

30 In that regard, it should be noted that the storage of goods bearing copyrighted motifs may be considered such an act if it is established that those goods are actually intended to be sold to the public without the rightholder's authorisation.

31 In this respect, the fact that a person, who sells in a shop goods bearing copyrighted motifs without the rightholder's authorisation, stores goods which are identical may be an indication that the stored goods are also intended to be sold in that shop and, accordingly, that that storage may constitute an act prior to a sale being made, which is liable to infringe that rightholder's distribution right.

32 However, it cannot be inferred from the mere fact that the stored goods and the goods sold in the person's shop are identical that the storage constitutes an act carried out with the aim of making a sale on the territory of the Member State in which those goods are protected by copyright.

33 It cannot be excluded that all or part of the goods stored in circumstances such as those in the main proceedings are not intended to be sold on the territory of the Member State in which the motif displayed on the goods is protected, even when those goods are identical to those which are offered for sale in the retailer's shop.

34 In such a situation, if an approach such as that outlined in paragraph 32 of the present judgment were adopted, that would lead to the actual purpose of the goods considered not being taken into account and to all the stored goods being treated identically, although they may, in principle, be intended for different purposes.

35 Such an approach would thus result in extending the protection conferred by the exclusive distribution right beyond the framework established by EU law.

36 Therefore, it is for the referring court to determine, in the light of the evidence available to it, whether all of the stored goods identical to those sold in the shop at issue, or only some of them, were intended to be marketed in that shop.

37 In that regard, the Court considers it useful to provide the following guidance.

38 As regards the determination of the purpose of the goods considered, account must be taken of all the factors which may demonstrate that the goods concerned are stored with a view to their being sold, without the rightholder's consent, on the territory of the Member State where the motifs displayed on the goods are protected by copyright.

39 Although, among those factors, the distance between the storage facility and the place of sale may constitute evidence that can be used in seeking to establish that the goods concerned are intended to be sold in that place of sale, that evidence cannot, on its own, be decisive. It may, on the other hand, be taken into account in a concrete analysis of all the factors likely to be relevant, such as, for example, the regular restocking of the shop with goods from the storage facilities at issue, accounting elements, the volume of sales and orders as compared with the volume of stored goods, or current contracts of sale.

40 In the light of all the foregoing considerations, the answer to the questions referred is that Article 4(1) of Directive 2001/29 must be interpreted as meaning that the storage by a retailer of goods bearing a motif protected by copyright on the territory of the Member State where the goods are stored may constitute an infringement of the exclusive distribution right, as defined by that provision, when that retailer offers for sale, without the authorisation of the copyright holder, goods identical to those which he is storing, provided that the stored goods are actually intended for sale on the territory of the Member State in which that motif is protected. The distance between the place of storage and the place of sale cannot, on its own, be a decisive element in determining whether the stored goods are intended for sale on the territory of that Member State.

Costs

41 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 the storage by a retailer of goods bearing a motif protected by copyright on the territory of the Member State where the goods are stored may constitute an infringement of the exclusive distribution right, as defined by that provision, when that retailer offers for sale, without the authorisation of the copyright holder, goods identical to those which he is storing, provided that the stored goods are actually intended for sale on the territory of the Member State in which that motif is protected. The distance between the place of storage and the place of sale cannot, on its own, be a decisive element in determining whether the stored goods are intended for sale on the territory of that Member State.

[Signatures]

* Language of the case: Swedish

OPINION OF ADVOCATE GENERAL CAMPOS SÁNCHEZ-BORDONA

delivered on 3 October 2018(1)

Case C-572/17

Riksåklagaren

v

Imran Syed

(Request for a preliminary ruling from the Högsta domstolen (Supreme Court, Sweden))

(Reference for a preliminary ruling — Copyright and related rights — Information society — Distribution right — Infringement — Clothing bearing signs identical with, or similar to, registered EU trade marks — Storage for commercial purposes — Storage separate from the retail shop)

1. The Högsta domstolen (Supreme Court, Sweden) has to decide on an appeal brought against a judgment at second instance, which found against a trader for having sold in his shop and stored in his warehouses, one adjacent to the shop and another located in a Stockholm suburb, a number of textile products that, without the authorisation of the rightholders, included rock music images and motifs protected by copyright.

2. The question that the national court is referring to the Court of Justice concerns the limits of one aspect of copyright, namely the right to authorise or prohibit distribution to the public of a work or copies thereof, which is covered by Directive 2001/29/EC. (2) Specifically, the lower court wishes to know whether, and to what extent, this right covers goods in storage, in addition to the articles sold.

I. Legal context

A. International law

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

4. Article 6 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.'

B. EU law. Directive 2001/29 (4)

5. According to recital 9 of that Directive:

'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 ...'

6. Recital 11 states:

'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.'

7. According to recital 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 ...'

8. Article 4 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.'

C. National law. Lagen (1960:729) om upphovsrätt till litterära och konstnärliga verk (5)

9. According to Paragraph 2 of the Law on copyright, a 'measure' that infringes copyright may consist, inter alia, of exploiting a work without the author's consent, by making it available to the public, in particular when offering copies of the work for sale, rental or loan or when otherwise distributing such copies to the public (Paragraph 2, third subparagraph, point 4 of that Law).

10. According to Paragraph 53, anyone who intentionally or with gross negligence adopts 'measures' in relation to a literary or artistic work that infringe the copyright over that work, referred to in Chapters 1 and 2, shall receive a fine or a prison sentence of up to two years.

II. Background to the dispute, questions referred and procedure before the Court of Justice

A. Facts

11. Mr Syed ran a shop in the Gamla Stan area of Stockholm, in which he sold, inter alia, clothing and accessories bearing rock music motifs. These were pirated copies that infringed the trade mark rights and copyright of the respective rightholders. The goods were not only found in the shop, but also in an adjacent warehouse and in another warehouse located in the Bandhagen district, which is a suburb to the south of Stockholm.

12. On being accused in criminal proceedings of infringements of both trade mark rights and the Law on copyright, Mr Syed stated before the Tingsrätt (District Court, Sweden) that the shop was regularly supplied with goods from both warehouses.

13. According to the Riksåklagaren (Swedish Public Prosecutor), the infringement committed was twofold:

– On the one hand, the defendant was infringing trade mark rights by unlawfully using, in his economic activity of selling clothing and accessories, signs identical with, or similar to, trade marks registered in the Union. The infringement was committed when the goods were imported into Sweden, when they were offered for sale in his shop and when they were stored for commercial purposes, both in the shop as well as in an adjacent warehouse and in the Bandhagen warehouse. (6)

– On the other hand, the defendant was also infringing copyright by unlawfully making available to the public clothing and articles bearing images protected by the copyright of their rightholders. The infringement consisted of offering the goods for sale or engaging in any other form of distribution to the public in the shop, at the adjacent warehouse and at the Bandhagen warehouse. In the alternative, the defendant was accused of attempting or preparing to commit the same infringement against the Law on copyright.

14. The Tingsrätt (District Court) found Mr Syed guilty of infringing trade mark rights in relation to all the articles found. It also found him guilty of infringing the Law on copyright with regard to the articles displayed in the shop and those identical articles that were found in the warehouses (599 items of clothing). In its judgment, it imposed a suspended prison sentence and a daily fine in respect of 80 days.

15. That court indicated that the offer for sale made by Mr Syed was not limited to the articles that were in the shop, but also extended to those identical goods stored in both warehouses. However, with regard to those goods found solely in the warehouses that were not the same as those in the shop, it acquitted Mr Syed on the grounds that he had not placed them on sale or attempted or prepared to commit an infringement of the Law on copyright.

16. When the judgment was appealed, the Svea hovrätt, Patent- och marknadsöverdomstolen (Svea Court of Appeal, Stockholm, Sweden; Patent and Trade Mark Court of Appeal) partly allowed Mr Syed's appeal and acquitted him of infringing the Law on copyright with regard to the goods stored in the two

warehouses that were identical to those sold in the shop.

17. According to the Svea hovrätt (Svea Court of Appeal), although Mr Syed had stored articles for the purpose of sale, he had not offered them for sale or distributed them to the public in any other way, which meant that possession of the goods in the warehouses did not constitute an attempt or preparation to commit that offence. It therefore found that Mr Syed had infringed the Law on copyright only with regard to the clothing in the shop. Consequently, it imposed a suspended prison sentence and reduced the daily fine to 60 days.

18. The Public Prosecutor disagreed with the Appeal Court judgment and lodged an appeal with the Högsta domstolen (Supreme Court). In his view, the offer of goods for sale in a shop should also include the possibility of purchasing identical goods stored in warehouses. He therefore asked for Mr Syed also to be found guilty of an infringement of the Law on copyright with regard to the 599 items of clothing, found in the warehouses, that were identical to those displayed in the shop. In the alternative, he asked for the accused to be found guilty of attempting to commit this same infringement, although he did not indict him for preparing to commit that offence.

19. Mr Syed objected to the appeal on the grounds that, in accordance with the case-law of the Court of Justice, infringement of a distribution right by an offer for sale requires an act directed towards the public with the aim of transferring each specific item. Accepting that the purchase and storage of goods could constitute such an act would involve an excessively broad interpretation of the concept of distribution, incompatible with the principle of legality.

20. According to the Högsta domstolen (Supreme Court), in the legislative procedure transposing Directive 2001/29 into Swedish law, the Swedish Government stated that, for an act to fall within the scope of the distribution right regulated by Article 4(1) of that directive, it is not necessary for that act to have been consummated. It is sufficient for the copy to have been offered through an advertising measure, for example. It adds that neither the Law on copyright nor Directive 2001/29 explicitly prohibit the storage of protected works for the purpose of their sale. (7)

21. According to the referring court, it follows from the judgment in *Dimensione Direct Sales and Labianca* (8) that an infringement of exclusive copyright may exist, in accordance with Article 4(1) of Directive 2001/29, where a person adopts measures or carries out acts prior to concluding a contract of sale, for example by offering protected goods for sale. However, the question raised is whether the person who stores protected goods in his warehouse can be regarded as offering them for sale when he sells identical goods in a shop that he owns.

B. Questions referred for a preliminary ruling

22. In those circumstances, the Högsta domstolen (Supreme Court) has referred the following questions to the Court of Justice for a preliminary ruling:

(1) When goods bearing protected motifs are unlawfully offered for sale in a shop, can there also be an infringement of the author's exclusive distribution right under Article 4(1) of Directive 2001/29 with regard to goods bearing identical motifs that are stored in warehouses by the person offering the goods for sale?

(2) Is it relevant whether the goods are stored in a warehouse adjacent to the shop or elsewhere?

C. Proceedings before the Court of Justice

23. The request for a preliminary ruling was lodged with the Court Registry on 28 September 2017; only the Public Prosecutor and the Commission submitted written observations. It was not considered necessary to hold an oral hearing.

III. Summary of the arguments of the parties

24. According to the Public Prosecutor, who confirms his position expressed before the referring court, the consequences that an overly narrow interpretation of the distribution right could have on the application of Directive 2004/48/EC should be taken into account. (9) He asserts that the procedural measures and penalties provided for in that directive presuppose that an infringement has been committed or will be imminently committed.

25. The Public Prosecutor considers that, when a trader stores goods bearing copyright-protected motifs on his premises, he is attempting to obtain an economic or commercial advantage. (10) The offer of goods in a shop is intended to encourage consumers also to purchase those identical goods stored in the warehouse. According to the Public Prosecutor, any other interpretation would be irreconcilable with the principles of Dimensione Direct Sales and would not ensure a high level of effective and rigorous protection. (11)

26. He therefore suggests that the answer to the questions referred should be that the goods at issue infringe the author's exclusive distribution right, laid down in Article 4(1) of Directive 2001/29, it being irrelevant whether the goods are stored in premises adjacent to the shop or in other more distant premises.

27. The Commission proposes to turn first in the analysis of the questions to Dimensione Direct Sales, specifically to the principles that give copyright holders the right to prohibit any form of distribution of goods bearing their work, as well as the concept of distribution as an autonomous concept under EU law. (12) According to that judgment, this concept can cover both a contract of sale and delivery of the article purchased to the customer, as well as other operations prior to the contract, (13) including advertising measures. (14)

28. It follows from those principles that goods stored in premises other than the shop infringe the rightholder's distribution right if it is proven that they are being offered for sale or advertised to consumers. However, this conclusion does not really answer the questions of the referring court, as its query is whether stored goods can be assimilated to those actually

offered for sale in the shop, regardless of whether they are sold or advertised.

29. The Commission does not consider that such assimilation is possible, as this would involve adopting an a priori position with regard to the commercial purpose of stored goods solely on account of the fact that other similar goods have been sold to the public. Consequently, the intention of the person concerned with regard to the goods, from the commercial point of view, should be examined.

30. In this respect, the Commission proposes a number of criteria for determining the commercial purpose of the goods: (a) the identity of the goods with others that are protected by copyright and displayed for sale in the shop; (b) a physical, financial or administrative link between the warehouse and the shop; and (c) the regular supply of the shop with goods from the warehouse.

IV. Analysis

A. Preliminary observation

31. The questions referred have arisen in criminal proceedings against Mr Syed, which requires me to make a preliminary clarification. The Swedish legislature has chosen to criminalise the infringement of copyright over a literary or artistic work, through Paragraph 53 of the Law on copyright, by referring to other provisions of the same Law. Express reference is not made, at least in its wording, to Directive 2001/29.

32. The EU legislature has not used, in this respect, the possibility of defining criminal offences or of approximating or harmonising the criminal laws of the Member States (Article 83(1) and (2) TFEU). In the absence of such legislation, the Court of Justice can provide the referring court with an appropriate interpretation of Directive 2001/29, but cannot intervene in the dispute with regard to the criminal aspects of the law of one of those Member States, since, I repeat, there is no harmonising legislation in this respect.

33. Directive 2004/48 lays down only 'civil and administrative measures, procedures and remedies' (Article 16) to protect intellectual property rights. Although it states that 'criminal sanctions also constitute, in appropriate cases, a means of ensuring the enforcement of intellectual property rights', (15) such sanctions are not included within its scope. Moreover, Article 2(3)(c) states that 'this Directive shall not affect ... any national provisions in Member States relating to criminal procedures or penalties in respect of infringement of intellectual property rights'.

34. Mr Syed has expressed his fear before the referring court that, as a result of using civil law instead of criminal law to define the criminal offence, the Court of Justice will interpret the concept of 'distribution' too loosely, by including goods stored but not yet sold, contrary to the principle that criminal offences should be clearly and precisely defined.

35. I do not believe that this argument is tenable. The Court of Justice has to interpret Article 4(1) of Directive 2001/29 regardless of the consequences that may be determined by the referring court from the

point of view of Swedish criminal law. (16) That interpretation is limited to examining the scope of protection of the author's right to authorise or prohibit the distribution of his works. If, in accordance with Swedish law, it is sufficient for that right to have been infringed in order to incur criminal liability, that is something that does not depend on Directive 2001/29 or its interpretation by the Court of Justice.

36. Mr Syed's observation actually stems from a criticism of how the criminal offence laid down by Paragraph 53 of the Law on copyright is defined. This criticism censures a possible infringement of the principles of legality and legal certainty, as the provision allegedly does not respect the requirement that offences and penalties should be previously prescribed by law.

37. Such an argument is, I repeat, outside the scope of these proceedings, for which reason it must not be taken into account. The Court of Justice will have to confine itself, within the preliminary ruling dialogue maintained with national courts, to providing the referring court with an interpretation of the distribution right under Article 4(1) of Directive 2001/29.

B. Questions referred

38. It is evident from the account set out in the order for reference that Mr Syed works with goods bearing reproductions of works protected by copyright, without authorisation from their rightholders. In order to better understand the specific facts behind the questions of the referring court, it must be clarified that:

- some of the pirated goods were offered for sale in the shop of Mr Syed, who has been convicted of this act at both first and second instance, with regard to which the appeal court has no doubts;
- other such goods (namely 599 items of clothing identical to those displayed in the shop) were found in Mr Syed's warehouses;
- the rest of the pirated goods were also found in the warehouses, but were not offered for sale and were not identical to the clothing displayed in the shop.

39. Therefore, the referring court is asking whether the distribution right extends to the second category of articles, namely those which bear the same 'protected motifs' as those sold in the shop but which are stored on other premises. It also wishes to know whether the greater or lesser proximity of the warehouses (one adjacent to the shop and the other located in a suburb to the south of Stockholm) has any bearing on the answer.

40. The referring court's questions are best understood by referring to the case-law of the Court of Justice to date, which I will summarise below.

41. The Peek & Cloppenburg (17) judgment determined whether the distribution right in Article 4(1) of Directive 2001/29 was infringed when a chain of clothing shops placed, in a rest area for customers of one of its shops and in the window of another shop, armchairs and sofas designed by Charles-Édouard Jeanneret (Le Corbusier) and protected by copyright, but manufactured without the consent of their rightholder (an undertaking engaged in the production of upholstered furniture).

42. The Court of Justice replied, in essence, that 'only acts which entail a transfer of the ownership of that object' fall within the concept of distribution to the public of the original of a work or a copy thereof otherwise than through sale, within the meaning of the provision at issue. (18)

43. However, in two subsequent judgements, it broadened the concept of distribution by including acts that go beyond mere acts of transferring ownership.

44. Accordingly, in Donner, (19) a question was asked with regard to the behaviour of a carrier who acted as an accomplice in the unauthorised distribution of reproductions of furniture protected by copyright, which an Italian company supplied to its customers in Germany. (20)

45. On the basis 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', the Court of Justice held that 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. Any such act carried out by a third party may also be attributed to him, where he specifically targeted the public of the State of destination and must have been aware of the actions of that third party'. (21)

46. In Dimensione Direct Sales, it was debated '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'. (22)

47. Based on previous case-law, the Court of Justice accepted that the copyright holder was entitled to object to the seller's advertising (which offered counterfeit items on its website, in newspapers and magazines, as well as in an advertising brochure). It stated in particular that:

- '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'; (23)

- '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'. (24)

48. Consequently, the Court of Justice rejected the argument that an act subsequent to the advertising, involving the transfer of ownership of the protected work or a copy thereof to the purchaser, was necessary in order to find that the distribution right had been infringed.

49. It follows from this case-law that the Court of Justice has expanded the concept of distribution contained in Article 4(1) of Directive 2001/29. It has evolved from the mere act of transferring ownership to include acts preparatory to the sale of the object, such

as the trader's offer (directly or via its website) or other acts for the purpose of making such a sale, including transport of the goods by a third party.

50. Of course, the solutions provided by the Court of Justice (25) are to be viewed in the context of those cases, which must also occur here. It only remains to determine whether the storage of clothing in warehouses, where this is identical to the clothing displayed for sale in the shop, forms part of the series of acts aimed at its marketing.

51. In order to determine the scope of the author's exclusive right to prohibit any form of distribution to the public within the meaning of Article 4(1) of Directive 2001/29, it may be useful to refer to the economic background of the concept of 'distribution' of a product. In commercial practice, this is defined as all actions, processes and relationships by which a product is taken from its manufacture to its final use, either in a further production stage or by delivery to the final consumer. (26)

52. It is doubtful, however, that, from the legal perspective that is relevant in this case, the exclusive right to authorise or prohibit distribution referred to in Directive 2001/29 has such a wide scope. Contrary to the view that even the first transfer (from the producer to a wholesaler) falls within the scope of that right, it may be that this prerogative of the copyright holder only applies to the transaction between the retailer and the final consumer. (27)

53. In the light of international agreements concluded by the Union, (28) the Court of Justice has opted for the second view, interpreting the term 'distribution to the public by sale' in Article 4(1) of Directive 2001/29 as a synonym for the 'making available to the public ... through sale' contained in Article 6(1) of the CT. As a result, 'public' is taken to mean the consumer or end user, but not the intermediaries in the distribution chain, in particular wholesalers, despite the fact that the CT does not define the term 'public', which leaves the legislature or courts of the Contracting Parties to clarify this term. (29)

54. It is not disputed that Mr Syed is a retailer selling to final consumers. He therefore operates in the final segment of the distribution chain to which the author's right to authorise or prohibit the distribution of his protected works applies. On that basis, the scope of that right must be examined where goods identical to those displayed for sale in the shop are stored in the seller's warehouses.

55. I have already indicated that the case-law includes, among distribution acts, 'at the very least' the contract of sale and delivery of the purchased good to the purchaser, (30) as well as the offer for sale and non-binding advertising. (31) I also believe that the offer for sale is not limited solely to goods displayed in a given commercial establishment, but also applies to those that, where identical, are temporarily stored in a warehouse of the seller, in readiness to replace those that are sold.

56. Goods are displayed inside the shop or in its window with the aim of selling the highest possible

number of articles, which can of course be presumed for any trader. Clothing (in this case, T-shirts with rock music motifs) that is situated inside the shop represents *pars pro toto* the rest of the stock. They have a direct link with each other, which is none other than the act leading to their sale.

57. I consider, therefore, that the right to object to the distribution of articles bearing reproductions that infringe copyright extends not only to those items that are already in the shop, but also to those that, where they bear the same reproductions, are stored in the seller's warehouses, pending their transfer to the shop.

58. This interpretation is consistent with the minimum protection enshrined in Article 6(1) of the CT, which includes preparatory acts for sale, (32) as well as with the aim of Directive 2001/29 of providing a high level of protection of intellectual property rights, as stated in recital 9 thereof.

59. In addition, this guarantees the practical effect of the provision, which seeks to prevent the marketing of goods manufactured in breach of copyright, which therefore makes the right to control distribution of the work or copies thereof preventive in nature. If this control could only be exercised once the sale was made, with the exercise of the distribution right being focused on each individual transaction (this seems to be Mr Syed's position), this would in fact prevent its effective protection, given the difficulties in ascertaining the place and time where and when the articles were sold, particularly those in storage.

60. Although I agree with the Commission that, in this case, the intention to sell can be inferred from some products being offered in the shop and other similar products being located, in turn, in the warehouses, I do not consider it essential to generalise a test such as the one recommended, which is overly rigid. In particular, an assessment of the link (physical, financial or administrative) between shop and warehouse could be too formalistic, in addition to shedding little light on how this could be proven.

61. I also believe that, given the close link between the clothing that Mr Syed sold in the shop and the clothing that he stored in the warehouses, combined with his status as a trader, storage formed part of the series of acts leading to the sale. In summary, the right to prohibit or authorise distribution should be extended to those products, as a right inherent in the copyright.

62. In that context, the remoteness or proximity of the warehouses is irrelevant. If the size or colour requested by a customer is not available in the warehouse adjacent to the shop, there is nothing to prevent Mr Syed from undertaking to transfer the item, in a relatively short time, from the warehouse situated in the Bandhagen district (and in fact this is entirely logical and makes common sense). Such acts would still fall within the series of acts taken with the aim of selling that item.

63. Lastly, returning to the criminal context of the dispute before the Swedish courts, I must reiterate that the answer suggested in this case is provided within the strict context of the interpretation of Directive 2001/29.

It is therefore the exclusive responsibility of those courts, based on the way in which their national law defines their criminal offences and the various stages of the iter criminis (intention; preparatory acts; acts of performance; attempt and consummation) to decide whether or not a crime has been committed and to what degree its perpetrator may be held liable.

V. Conclusion

64. In the light of the foregoing, I propose to the Court of Justice that the answer to the questions referred by the Högsta domstolen (Supreme Court, Sweden) should be 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 exclusive right to authorise or prohibit any form of distribution to the public of the original of works or of copies thereof, which that provision covers, applies to goods that are stored in the warehouses of a trader, which incorporate protected motifs identical to those borne by the goods offered for sale by the trader in a shop that he owns. For this purpose, the distance between the warehouses and the shop is irrelevant.’

1 Original language: Spanish.

2 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).

3 OJ 2000 L 89, p. 6.

4 The laws of the Member States on intellectual property were harmonised in the main through Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (OJ 1993 L 290, p. 9), which was subsequently amended and then repealed by Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 (OJ 2006 L 372, p. 12), which codifies the earlier versions. The aim of one of those amendments was to regulate the protection of copyright and related rights in the ‘information society’, through Directive 2001/29.

5 Swedish Law (1960:729) on copyright in literary and artistic works (‘the Law on copyright’), which transposed Directive 2001/29 into Swedish law.

6 The infringement of trade mark rights is not at issue in this request for a preliminary ruling.

7 The referring court refers to Paragraph 10 of Chapter 1 of the Varumärkeslagen (2010:1877) (Swedish Law (2010:1877) on trade marks) and to Article 9(3)(b) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1), since replaced by Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1).

8 Judgment of 13 May 2015, *Dimensione Direct Sales and Labianca* (C-516/13, EU:C:2015:315, ‘*Dimensione Direct Sales*’).

9 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45).

10 He quotes from the Communication of the Commission to the European Parliament, the Council and the European Economic and Social Committee — Guidance on certain aspects of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights (Brussels, 29.11.2017, COM(2017) 708 final, p. 9), which states as follows: ‘It follows from the above that, in the Commission’s view, the concept of commercial scale, as used in various provisions of IPRED, should not be understood in purely quantitative terms; instead, certain qualitative elements, such as whether the activity in question is normally carried out for economic or commercial advantage, should be taken into account as well.’

11 He refers to the judgment of 17 April 2008, *Peek & Cloppenburg* (C-456/06, EU:C:2008:232, paragraph 37).

12 *Dimensione Direct Sales*, paragraphs 21 and 22.

13 *Ibid.*, paragraphs 25 and 26.

14 *Ibid.*, paragraphs 29 to 32.

15 Recital 28.

16 Some of the Court of Justice judgments to which I will refer later on have interpreted this Directive in requests for preliminary rulings specifically made in criminal proceedings.

17 Judgment of 17 April 2008, *Peek & Cloppenburg* (C-456/06, EU:C:2008:232).

18 *Ibid.*, paragraph 36.

19 Judgment of 21 June 2012, *Titus Alexander Jochen Donner* (C-5/11, EU:C:2012:370).

20 *Ibid.*, paragraph 12. The Italian company ‘used advertisements and supplements in newspapers, direct publicity letters and a German-language internet website to offer replicas of furnishings in the so-called “Bauhaus” style for sale to customers residing in Germany, without having a licence to market them in Germany’.

21 *Ibid.*, paragraphs 26 and 27. Italics added. See, in this same respect, but in terms of the import into a Member State of counterfeit goods through a website located in a third country, the judgment of 6 February 2014, *Martin Blomqvist* (C-98/13, EU:C:2014:55, paragraph 28). In that case, Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights (OJ 2003 L 196, p. 7) was applied.

22 *Dimensione Direct Sales* judgment, paragraph 20. The case was between a company selling furniture (which was an imitation or counterfeit of protected works) directly or over the internet and the holder of the copyright over those creations.

23 Ibid., paragraph 28.

24 Ibid., paragraph 32.

25 I agree with Advocate General Cruz Villalón as regards the particular importance of the factual context of each case so far considered by the Court of Justice; see his Opinion in *Dimensione Direct Sales* (C-516/13, EU:C:2014:2415, point 41).

26 See, for example, Martinek, M., '1. Kapitel. Grundlagen des Vertriebsrechts', in Martinek, M. and Semler, F.-J. (eds.), *Handbuch des Vertriebsrechts*, Editorial C.H. Beck, Munich, 1996, p. 3.

27 Bently, L. and Sherman, B., *Intellectual Property Law*, Oxford University Press, 3rd edition, 2009, p. 144.

28 Judgment of 21 June 2012, *Donner* (C-5/11, EU:C:2012:370, paragraph 23).

29 This seems to be a constant in the CT; see Reinbothe, J., 'Chapter 7. The WIPO Copyright Treaty — Article 6', in Reinbothe, J. and Von Lewinski, S., *The WIPO Treaties on Copyright — A Commentary on the WCT, the WPPT, and the BTAP*, 2nd edition, Oxford University Press, 2015, p. 110. Although a broader interpretation of the concept of 'public' could be proposed, its assimilation to the figure of the final consumer is consistent with the case-law of the Court of Justice on Article 3 of Directive 2001/29.

30 Judgment of 21 June 2012, *Donner* (C-5/11, EU:C:2012:370, paragraph 26).

31 *Dimensione Direct Sales*, paragraph 28.

32 Reinbothe, J., *op. cit.*, p. 111.
