Court of Justice EU, 24 October 2024, Kwantum v Vitra

COPYRIGHT

Subject matter of applied art falls within the material scope of EU law

- **Provided that that subject matter can be classified as a 'work' within the meaning of Directive 2001/29 (Infosoc)**

49 Where a subject matter of applied art has the characteristics described in the preceding paragraph of the present judgment and therefore constitutes a work, it must, as such, qualify for copyright protection, in accordance with that directive (…).

EU law precludes Member States from applying the criterion of material reciprocity to works of applied art of which the country of origin is a third country and the author of which is a national of a third country

- **'Work' concept Infosoc-Directive also covers third-country works of applied art**

59 (…) that directive which, moreover, does not lay down any condition relating to the country of origin of the work in question or to the nationality of the author of that work.
60 In the second place, as regards the context of those provisions, first, (…) it must be observed that, in defining the scope of Directive 2001/29 by means of a territorial criterion, the EU legislature necessarily took into account all the works for which protection is sought in the territory of the European Union, irrespective of the country of origin of those works or the nationality of their author.
61 (…) certain instruments of the harmonised copyright legislation provide for a specific regime for works in respect of which the country of origin, within the meaning of the Berne Convention, is a third country and the author of which is not a national of a Member State. (…)
62 (…) the interpretation set out in paragraph 60 of the present judgment is consistent with the objectives pursued by Directive 2001/29.

- **Application criterion of material reciprocity would undermine the harmonisation of copyright in the internal market**

68 (…) Indeed, under that criterion, works of applied art originating in third countries might be treated differently in different Member States, by virtue of provisions of treaty law applicable bilaterally between a Member State and a third country.

- **For the EU legislature alone to determine whether the grant of the rights laid down in Art. 2(a) and Art. 4(1) Infosoc-Directive should be limited**

Criterion of material reciprocity of Art. 2(7) Berne convention constitutes a limitation which, seeing Art. 52(1) Charter, must be provided for by law.

Article 351 TFEU must be interpreted as not permitting a Member State to apply the criterion of material reciprocity to a work from the United States of America

- **A Member State cannot rely on Article 2(7) of the Berne Convention in order to exempt itself from the obligations arising from the Infosoc-Directive**

86 (…) when an international agreement that has been concluded by a Member State prior to its accession to the European Union allows – as is the case in this instance – but does not require a Member State to adopt a measure which appears to be contrary to EU law, the Member State must refrain from adopting such a measure.
87 Furthermore, in a situation where, because of a development in EU law, a legislative measure adopted by a Member State in accordance with the power offered by an earlier international agreement appears contrary to EU law, the Member State concerned cannot rely on that agreement in order to exempt itself from the obligations that have arisen subsequently from EU law.

- **The Berne Convention does not prohibit granting copyright protection to such works and it does not preclude a claim to the benefit of any greater protection**

Source: **ECLI:EU:C:2024:914**

Court of Justice EU, 24 October 2024
(T. von Danwitz, A. Arabadjiev and I. Ziemele)
JUDGMENT OF THE COURT (First Chamber)
24 October 2024 (*)
(Reference for a preliminary ruling – Intellectual and industrial property – Copyright – Directive 2001/29/EC – Articles 2 to 4 – Exclusive rights – Copyright protection for subject matter of applied art the country of origin of which is not a Member State – Berne Convention – Article 2(7) – Criterion of material reciprocity – Division of competences between the European Union and its Member States – Application by the Member States of the criterion of material reciprocity – First paragraph of Article 351 TFEU)
In Case C-227/23,
REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), made by decision of 31 March

2023, received at the Court on 11 April 2023, in the proceedings
Kwantum Nederland BV,
Kwantum België BV
v
Vitra Collections AG,
THE COURT (First Chamber),
composed of T. von Danwitz, Vice-President of the Court, acting as President of the First Chamber, A. Arabadjiev and I. Ziemele (Rapporteur), Judges,
Advocate General: M. Szpunar,
Registrar: C. Di Bella, Administrator,
having regard to the written procedure and further to the hearing on 20 March 2024,
after considering the observations submitted on behalf of:
– Kwantum Nederland BV and Kwantum België BV, by C. Garnitsch, R. Rijks and M. van Gerwen, advocaten,
– Vitra Collections AG, by S.A. Klos, A. Ringnalda, advocaten, and M.A. Ritscher, Rechtsanwalt,
– the Netherlands Government, by E.M.M. Besselink and M.K. Bulterman, acting as Agents,
– the Belgian Government, by P. Cottin and A. Van Baelen, acting as Agents, and by A. Strowel, avocat,
– the French Government, by R. Bénard and E. Timmermans, acting as Agents,
– the European Commission, by M. Afonso, O. Glinicka, P.-J. Loewenthal and J. Samnadda, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 5 September 2024,
gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 2 to 4 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10), of Article 17(2) and Article 52(1) of the Charter of Fundamental Rights of the European Union (‘*the Charter*’), read in the light of Article 2(7) of the Convention for the Protection of Literary and Artistic Works, signed in Berne on 9 September 1886 (Paris Act of 24 July 1971), as amended on 28 September 1979 (‘*the Berne Convention*’), and of the first paragraph of Article 351 TFEU.

2 The request has been made in proceedings between Vitra Collections AG (‘*Vitra*’), a company governed by Swiss law, on the one hand, and Kwantum Nederland BV and Kwantum België BV (together, ‘*Kwantum*’), which operate, in the Netherlands and in Belgium, a chain of shops selling interior design articles, including furniture, on the other, on the ground that Kwantum marketed a chair which, according to Vitra, infringes copyright held by it.

Legal context

International law

The Berne Convention

3 Article 2(7) of the Berne Convention provides:

‘*Subject to the provisions of Article 7(4) of this Convention, it shall be a matter for legislation in the countries of the Union [established by this Convention] to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected. Works protected in the country of origin solely as designs and models shall be entitled in another country of the Union [established by this Convention] only to such special protection as is granted in that country to designs and models; however, if no such special protection is granted in that country, such works shall be protected as artistic works.*’

4 Article 5(1) of that convention provides:

‘*Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union [established by this Convention] other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.*’

5 Article 7(8) of the Berne Convention is worded as follows:

‘*In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.*’

6 Article 14ter(2) of that convention provides:

‘*The protection provided by the preceding paragraph may be claimed in a country of the Union [established by this convention] only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.*’

7 Article 19 of the Berne Convention provides:

‘*The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union [established by this Convention].*’

The TRIPS Agreement

8 Article 3 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (‘*the TRIPS Agreement*’), constituting Annex 1C to the Agreement establishing the World Trade Organization (WTO), signed in Marrakesh on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1), entitled ‘*National Treatment*’, provides:

‘*1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting*

organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS.

2. Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade.'

9 Article 9 of the TRIPS Agreement, entitled '*Relation to the Berne Convention*', provides, in paragraph 1 thereof:

'*Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.*'

The WCT

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

11 Article 1 of the WCT, entitled '*Relation to the Berne Convention*', provides, in paragraph 4 thereof:

'*Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention.*'

European Union law

Directive 2001/29

12 Recitals 6, 9 and 15 of Directive 2001/29 state:

'*(6) Without harmonisation at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency. ...*

...

(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. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

...

(15) The Diplomatic Conference held under the auspices of the [WIPO] in December 1996 led to the adoption of two new Treaties, the [WCT] and the "WIPO Performances and Phonograms Treaty"[, adopted in Geneva on 20 December 1996 and approved on behalf of the European Community by Decision 2000/278], dealing respectively with the protection of authors and the protection of performers and phonogram producers. ... This Directive also serves to implement a number of the new international obligations.'

13 Article 1 of Directive 2001/29, entitled '*Scope*', provides, in paragraph 1 thereof:

'*This Directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society.*'

14 Article 2 of that directive, entitled '*Reproduction right*', provides:

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

(a) for authors, of their works;

...'

15 Article 3 of Directive 2001/29, entitled 'Right of communication to the public of works and right of making available to the public other subject matter', provides, in paragraph 1 thereof:

'*Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.*'

16 Article 4 of that directive, entitled '*Distribution right*', provides, in paragraph 1 thereof:

'*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.*'

17 Article 5 of Directive 2001/29 lists the cases in which Member States may provide for exceptions and limitations to the exclusive rights provided for in Articles 2 to 4 of that directive.

18 Article 10 of that directive, entitled '*Application over time*', provides, in paragraph 1 thereof:

'*The provisions of this Directive shall apply in respect of all works and other subject matter referred to in this Directive which are, on 22 December 2002, protected by the Member States' legislation in the field of copyright and related rights, or which meet the criteria for protection under the provisions of this Directive or the provisions referred to in Article 1(2).*'

Directive 2001/84/EC

19 Article 7 of Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art (OJ 2001 L 272, p. 32), entitled 'Third-country nationals entitled to receive royalties', provides, in paragraph 1 thereof:

'*Member States shall provide that authors who are nationals of third countries and, subject to Article 8(2), their successors in title shall enjoy the resale right in*

accordance with this Directive and the legislation of the Member State concerned only if legislation in the country of which the author or his/her successor in title is a national permits resale right protection in that country for authors from the Member States and their successors in title.'

Directive 2006/116/EC

20 Article 7 of Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (OJ 2006 L 372, p. 12), entitled '*Protection vis-à-vis third countries*', provides, in paragraph 1 thereof:

'*Where the country of origin of a work, within the meaning of the Berne Convention, is a third country, and the author of the work is not a Community national, the term of protection granted by the Member States shall expire on the date of expiry of the protection granted in the country of origin of the work, but may not exceed the term laid down in Article 1.*'

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

21 Vitra manufactures designer furniture, including chairs designed by the since-deceased spouses, Charles and Ray Eames, who were nationals of the United States of America, and holds intellectual property rights over those chairs.

22 One of the chairs manufactured by Vitra is the Dining Sidechair Wood ('*the DSW chair*'), which was designed by those spouses as part of a furniture design competition organised by the Museum of Modern Art in New York (United States) in 1948 and exhibited in that museum from 1950.

23 Kwantum operates, in the Netherlands and in Belgium, a chain of shops selling interior design articles, in particular home furniture.

24 In 2014, Vitra ascertained that Kwantum was marketing a chair called the 'Paris chair', in breach, according to Vitra, of the copyright which it held in the DSW chair.

25 Hearing an action brought by Vitra, the rechtbank Den Haag (District Court, The Hague, Netherlands) held that Kwantum was not infringing Vitra's copyright in the Netherlands or in Belgium and that it was not acting unlawfully by marketing the Paris chair. That court therefore dismissed Vitra's claims and largely upheld Kwantum's claims.

26 That judgment was set aside by the Gerechtshof Den Haag (Court of Appeal, The Hague, Netherlands), which held that, by marketing the Paris chair, Kwantum was infringing Vitra's copyright in the DSW chair in the Netherlands and in Belgium.

27 On appeal, the referring court, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), considers that the dispute concerns the applicability and the scope of the second sentence of Article 2(7) of the Berne Convention which, with respect to works protected in the country of origin solely as designs and models, provides, inter alia, that such works are to be entitled in another country of the Union established by that convention only to such special protection as is granted in that country to designs and models, thereby laying down a criterion of material reciprocity.

28 In that regard, the referring court notes, first, that, although the European Union is not a party to the Berne Convention, it has, through international treaties, undertaken to comply with Articles 1 to 21 of that convention. Moreover, it observes that EU legislation does not contain any provision relating to the criterion of material reciprocity referred to in the second sentence of Article 2(7) of that convention, with the result that the question arises as to whether the Member States may themselves determine whether or not they will disapply that criterion with respect to a work the country of origin of which is a third country and the author of which is a national of a third country.

29 Second, the referring court states that copyright in a work of applied art is an integral part of the right to protection of intellectual property enshrined in Article 17(2) of the Charter. It considers that **the judgment of 8 September 2020, Recorded Artists Actors Performers (C-265/19, EU:C:2020:677)**, whereby the Court of Justice interpreted a provision of the WIPO Performances and Phonograms Treaty, to which the European Union is a party, raises the question whether EU law, in particular Article 52(1) of the Charter, requires, with respect to the limitation on the exercise of copyright in a work of applied art by the criterion of material reciprocity referred to in the second sentence of Article 2(7) of the Berne Convention, that such a limitation be provided for by law, namely by means of a clear and precise rule. In that regard, the referring court observes that it could be inferred from that judgment that it is for the EU legislature alone, and not for the national legislatures, to determine whether, in the European Union, copyright in a work of applied art may be limited by the application of Article 2(7) of the Berne Convention in respect of a work of applied art which comes from a third country and the author of which is not a national of a Member State of the European Union, and, if so, to define that limitation clearly and precisely. In its view, as EU law currently stands, the EU legislature has not provided for such a limitation.

30 Third, it notes that Kwantum argued before the referring court that the criterion of material reciprocity referred to in the second sentence of Article 2(7) of the Berne Convention falls within the scope of the first paragraph of Article 351 TFEU. In the referring court's view, it is necessary to determine to what extent that provision is capable of affecting the application of the second sentence of Article 2(7) of that convention with regard to the claims relating to the Kingdom of Belgium.

31 In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the situation at issue in these proceedings fall within the material scope of EU law?

Should the preceding question be answered in the affirmative, the following questions are also submitted.

(2) Does the fact that copyright [in] a work of applied art forms an integral part of the right to protection of intellectual property enshrined in Article 17(2) of the Charter mean that EU law, in particular Article 52(1) of the Charter, in order to limit the exercise of copyright (within the meaning of Directive [2001/29]) [in] a work of applied art by application of the [criterion of] material reciprocity [provided for in] Article 2(7) [of the Berne Convention], requires this limitation to be provided for by law?
(3) Must Articles 2, 3 and 4 of Directive [2001/29] and Articles 17(2) and 52(1) of the Charter, read in the light of Article 2(7) [of the Berne Convention], be interpreted as meaning that it is solely for the EU legislature (and not for national legislatures) to determine whether the exercise of copyright (within the meaning of Directive [2001/29]) in the European Union can be limited by application of the [criterion of] material reciprocity provided for in Article 2(7) [of the Berne Convention] in respect of a work of applied art whose country of origin within the meaning of [that convention] is a third country and whose author is not a national of an EU Member State and, if so, to define that limitation clearly and precisely … ?
(4) Must Articles 2, 3 and 4 of Directive [2001/29], read in conjunction with Articles 17(2) and 52(1) of the Charter, be interpreted as meaning that[,] as long as the EU legislature has not provided for a limitation [on] the exercise of copyright (within the meaning of Directive [2001/29]) [in] a work of applied art by application of the [criterion of] material reciprocity [provided for in] Article 2(7) [of the Berne Convention], EU Member States may not apply that [criterion] in respect of a work of applied art whose country of origin within the meaning of [that convention] is a third country and whose author is not a national of an EU Member State?
(5) In the circumstances at issue in the present proceedings and given the time of the establishment of (the predecessor of) Article 2(7) [of the Berne Convention], are the conditions of the first paragraph of Article 351 TFEU satisfied for [the Kingdom of] Belgium, meaning that [that Member State] is therefore free to apply the [criterion of] material reciprocity provided for in Article 2(7) [of that convention], taking into account the fact that[,] in the present case[,] the country of origin acceded to the Berne Convention on 1 May 1989?'

Consideration of the questions referred

Admissibility

32 In the first place, Kwantum submits that the referring court has not explained how the '*situation at issue in these proceedings*', an expression which that court uses in its first question without defining it, falls within the material scope of EU law and that the request for a preliminary ruling is not necessary to enable it to give judgment in the main proceedings, with the result that the questions referred by that court are hypothetical.

33 According to the Court's settled case-law, the procedure provided for in Article 267 TFEU is an instrument of cooperation between the Court and the national courts by means of which the Court provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them (**judgment of 27 April 2023, Castorama Polska and Knor, C-628/21, EU:C:2023:342**, paragraph 25 and the case-law cited).

34 In that regard, it should be recalled that, in those proceedings, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of each case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling. It follows that questions relating to EU law enjoy a presumption of relevance. 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 bears no relation 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 of 27 April 2023, Castorama Polska and Knor, C-628/21, EU:C:2023:342**, paragraph 26 and the case-law cited).

35 It is also apparent from settled case-law that the need to provide an interpretation of EU law which will be of use to the referring court requires that court to define the factual and legislative context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based. The order for reference must also set out the precise reasons why the national court is unsure as to the interpretation of EU law and considers it necessary to refer a question to the Court for a preliminary ruling (**judgment of 27 April 2023, Castorama Polska and Knor, C-628/21, EU:C:2023:342**, paragraph 27 and the case-law cited).

36 In the present case, it is apparent from the considerations set out in paragraphs 28 to 30 of the present judgment that the referring court has clearly defined the legal and factual context of the dispute in the main proceedings, since the first question referred for a preliminary ruling seeks specifically to determine whether that dispute falls within the material scope of EU law. Furthermore, it is apparent from those paragraphs that that court has set out to the requisite legal standard the reasons why it is unsure as to the interpretation of certain provisions which it considers necessary in order to enable it to deliver its judgment, with the result that it cannot be held that the interpretation sought bears no relation to the purpose of the main action or that the problem raised is hypothetical. In those circumstances, the presumption of relevance referred to in paragraph 34 of the present judgment cannot be called into question.

37 In the second place, in their written observations, Kwantum and the Netherlands Government argue that the issues which it is for the referring court to resolve in the dispute in the main proceedings relate solely to

Article 2(7) and Article 5(1) of the Berne Convention, such that there is no provision of EU law requiring interpretation by the Court of Justice.

38 Such an argument, which concerns, in essence, the need for the questions referred for a preliminary ruling in order to give judgment in the dispute in the main proceedings, cannot be accepted. As is apparent from the order for reference, the referring court asks the Court of Justice whether EU law, in particular Directive 2001/29, read in the light of the relevant provisions of the Charter, and Article 351 TFEU, precludes the national court from applying Article 2(7) of the Berne Convention in the dispute in the main proceedings.

39 That issue relates to the substance of the questions referred.

40 Furthermore, as the referring court has correctly pointed out, even if the European Union is not a contracting party to the Berne Convention, it is required to comply with Articles 1 to 21 of that convention under, first, Article 1(4) of the WCT, to which it is a party (**judgments of 13 November 2018, Levola Hengelo, C-310/17, EU:C:2018:899**, paragraph 38, and of **12 September 2019, Cofemel, C-683/17, EU:C:2019:721**, paragraph 41 and the case-law cited), and, second, Article 9 of the TRIPS Agreement, with the result that that convention has indirect effects within the European Union (see, to that effect, **judgments of 15 March 2012, SCF, C-135/10, EU:C:2012:140,** paragraph 50, and of 18 November 2020, Atresmedia Corporación de Medios de Comunicación, C-147/19, EU:C:2020:935, paragraph 36) and that the Court may find it necessary to interpret its provisions (see, to that effect, **judgments of 16 July 2009, Infopaq International, C-5/08, EU:C:2009:465**, paragraph 34; of **16 March 2017, AKM, C-138/16, EU:C:2017:218**, paragraphs 21 and 44; and of **12 September 2019, Cofemel, C-683/17, EU:C:2019:721**, paragraph 42).

41 It follows that the questions referred for a preliminary ruling are admissible.

Substance

The first question

42 By its first question, the referring court asks whether the situation at issue in the main proceedings falls within the material scope of EU law.

43 In the present case, it is common ground that the dispute in the main proceedings concerns an action brought by Vitra before the Netherlands courts, by which that company claims copyright protection in the Netherlands and in Belgium for the DSW chair – designed by nationals of the United States of America and originating in that third country – in respect of which Kwantum allegedly marketed imitations.

44 In that regard, it should be recalled that, as is apparent from Article 1(1) of Directive 2001/29, that directive concerns the legal protection of copyright and related rights in the framework of the internal market.

45 As the Advocate General observed, in essence, in points 31 and 33 of his Opinion, the scope of that directive is defined not in accordance with the criterion of the country of origin of the work or of the nationality of its author, but by reference to the internal market, which equates to the territorial scope of the treaties as set out in Article 52 TEU. Subject to Article 355 TFEU, that territorial scope comprises the territories of the Member States (see, to that effect, **judgment of 8 September 2020, Recorded Artists Actors Performers, C-265/19, EU:C:2020:677**, paragraph 59 and the case-law cited).

46 Furthermore, in accordance with Article 10(1) of Directive 2001/29, the provisions of that directive, which harmonises certain aspects of copyright and related rights in the information society, are to apply in respect of all works and other subject matter referred to therein which, on the date laid down for its transposition, meet the criteria for protection under the provisions of that directive. It follows that Directive 2001/29 may be applicable to the dispute in the main proceedings.

47 In particular, the Court has previously held that Article 2(a) and Article 3(1) of Directive 2001/29 define a copyright holder's exclusive rights in the European Union of reproduction and communication to the public in unequivocal terms, those provisions forming a harmonised legal framework that ensures a high and even level of protection for the rights of reproduction and communication to the public and constituting measures of full harmonisation of the corresponding substantive law (see, to that effect, **judgment of 29 July 2019, Funke Medien NRW, C-469/17, EU:C:2019:623**, paragraphs 35 to 38). Furthermore, as regards Article 4(1) of Directive 2001/29, it is clear from its wording that that provision also defines in unequivocal terms the exclusive right of distribution to the public referred to therein, that measure constituting, like the abovementioned provisions, a measure of full harmonisation of the corresponding substantive law.

48 It should be added, as regards the question whether those provisions apply to a subject matter of applied art such as the DSW chair at issue in the main proceedings, that the Court has held that such subject matter may be classified as a 'work', within the meaning of Directive 2001/29, where two cumulative conditions are satisfied. First, the subject matter concerned must be original in the sense that it is the author's own intellectual creation. Second, only something which is the expression of the author's own intellectual creation may be classified as a 'work' within the meaning of Directive 2001/29 (**judgment of 13 November 2018, Levola Hengelo, C-310/17, EU:C:2018:899**, paragraphs 35 to 37 and the case-law cited).

49 Where a subject matter of applied art has the characteristics described in the preceding paragraph of the present judgment and therefore constitutes a work, it must, as such, qualify for copyright protection, in accordance with that directive (see, to that effect, **judgment of 12 September 2019, Cofemel, C-683/17, EU:C:2019:721**, paragraph 35 and the case-law cited).

50 In those circumstances, it must be held that, provided that the substantive conditions laid down by Directive 2001/29 are satisfied and, in particular, that a subject matter of applied art such as that at issue in the main proceedings may be classified as a 'work' within the meaning of that directive, the provisions of that directive are applicable.

51 In the light of the foregoing considerations, the answer to the first question is that a situation in which a company claims copyright protection for a subject matter of applied art marketed in a Member State, provided that that subject matter may be classified as a '*work*' within the meaning of Directive 2001/29, falls within the material scope of EU law.

The second to fourth questions

52 According to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court should, where necessary, reformulate the questions referred to it. It is for the Court to extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation, having regard to the subject matter of the dispute (judgment of 30 April 2024, M.N. (EncroChat), C-670/22, EU:C:2024:372, paragraph 78 and the case-law cited).

53 As the Advocate General observed, in essence, in point 22 of his Opinion, it is apparent from the file before the Court that, in the dispute in the main proceedings, the conduct at issue consists in the marketing by Kwantum of objects, namely copies of a chair, in breach of the copyright held by Vitra, with the result that Article 2(a) and Article 4(1) of Directive 2001/29, which confer on the author of a work, respectively, the exclusive rights of reproduction and distribution of that work, are relevant. By contrast, it is not apparent from that file that that conduct is capable of constituting communication to the public of a work, within the meaning of Article 3(1) of that directive.

54 In those circumstances, it must be held that, by its second to fourth questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 2(a) and Article 4(1) of Directive 2001/29, read in conjunction with Article 17(2) and Article 52(1) of the Charter, must be interpreted as precluding Member States from applying the criterion of material reciprocity laid down in the second sentence of Article 2(7) of the Berne Convention in respect of a work of applied art the country of origin of which is a third country and the author of which is a national of a third country.

55 In order to answer those questions, it is necessary to determine, first, whether the abovementioned provisions apply to a work of applied art the country of origin of which is a third country or the author of which is a national of a third country, and, second, whether those provisions preclude the application, in national law, of the criterion of material reciprocity laid down in the second sentence of Article 2(7) of the Berne Convention.

56 As a preliminary point, it should be recalled that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union; that interpretation must take into account the wording of that provision, its context and the objectives pursued by the rules of which it forms part (**judgment of 8 September 2020, Recorded Artists Actors Performers, C-265/19, EU:C:2020:677**, paragraph 46 and the case-law cited).

57 In the first place, as regards the wording of Article 2(a) and Article 4(1) of Directive 2001/29, it should be noted that, according to those provisions, Member States are to provide authors with exclusive rights to authorise or prohibit, first, direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part, of their works, and, second, in respect of the original of their works or of copies thereof, any form of distribution to the public by sale or otherwise.

58 In that regard, it must be observed that those provisions do not expressly specify whether the concept of '*work*' referred to therein covers a work of applied art originating in a third country, or whether the concept of '*author*', within the meaning of those provisions, covers the author of such a work who is a national of a third country.

59 The fact remains that the Court has previously held, as has been recalled in paragraphs 48 and 49 of the present judgment, that, where a subject matter may be classified as a '*work*' within the meaning of Directive 2001/29, it must, as such, qualify for copyright protection, in accordance with that directive which, moreover, does not lay down any condition relating to the country of origin of the work in question or to the nationality of the author of that work.

60 In the second place, as regards the context of those provisions, first, in the light of what is stated in paragraphs 44 and 45 of the present judgment, it must be observed that, in defining the scope of Directive 2001/29 by means of a territorial criterion, the EU legislature necessarily took into account all the works for which protection is sought in the territory of the European Union, irrespective of the country of origin of those works or the nationality of their author.

61 Second, it should be noted that certain instruments of the harmonised copyright legislation provide for a specific regime for works in respect of which the country of origin, within the meaning of the Berne Convention, is a third country and the author of which is not a national of a Member State. Thus, Directive 2006/116, in particular Article 7(1) thereof, provides that the copyright protection granted by the Member States to such works is to expire on the date of expiry of the protection granted in the country of origin of the work, but may not exceed the term laid down in that directive. As Vitra contends, such a regime, which specifically concerns the protection of the rights of authors and of works the country of origin of which is a third country, would serve no purpose if the protection of the works in question were not ensured under Directive 2001/29.

62 In the third place, the interpretation set out in paragraph 60 of the present judgment is consistent with the objectives pursued by Directive 2001/29.

63 In that regard, first, as is stated in recital 6 of that directive, the latter seeks, inter alia, to avoid significant differences in protection and thereby restrictions on the

free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency, and any harmonisation of copyright must, according to recital 9 of that directive, take as a basis a high level of protection. Such an objective would be disregarded if Directive 2001/29 regulated, in the European Union, only copyright protection for works originating in a Member State or works the author of which is a national of a Member State.

64 Second, recital 15 of Directive 2001/29 states that that directive also serves to implement a number of the international obligations arising from the WCT. In that regard, in accordance with Article 9(1) of the TRIPS Agreement and Article 1(4) of the WCT, the European Union must comply, first, with Articles 1 to 21 of the Berne Convention, as stated in paragraph 40 of the present judgment, and, second, with the appendix to that convention. It is apparent from Article 5(1) of the Berne Convention that authors are to enjoy, in respect of works for which they are protected under that convention, in countries of the Union established by that convention other than the country of origin of the work, the rights which their respective laws do now or may hereafter grant to their nationals.

65 Thus, as the Advocate General observed in point 30 of his Opinion, it would be contrary to the international obligations of the European Union implemented by Directive 2001/29 in the field of intellectual property for that directive to harmonise copyright in respect of works the country of origin of which is a Member State or the author of which is a national of a Member State, while leaving it to the national law of the Member States to determine the legal regime applicable to works the country of origin of which is a third country or the author of which is a national of a third country.

66 Accordingly, it must be held that Article 2(a) and Article 4(1) of Directive 2001/29 apply to works of applied art originating in third countries or the authors of which are nationals of such countries.

67 With regard to whether those provisions preclude Member States from applying, in national law, the criterion of material reciprocity laid down in the second sentence of Article 2(7) of the Berne Convention in respect of a work of applied art the country of origin of which is a third country or the author of which is a national of a third country, it has been recalled in paragraph 57 of the present judgment that, according to Article 2(a) and Article 4(1) of Directive 2001/29, Member States are to provide authors with exclusive rights to authorise or prohibit the reproduction and distribution to the public of their works. Furthermore, as is apparent from the preceding paragraph of the present judgment, those provisions apply to works of applied art originating in third countries or the authors of which are nationals of such countries.

68 First, the application by a Member State of that criterion of material reciprocity would not only be contrary to the wording of those provisions, as the Advocate General stated in point 53 of his Opinion, but would also undermine the objective of that directive, which consists in the harmonisation of copyright in the internal market. Indeed, under that criterion, works of applied art originating in third countries might be treated differently in different Member States, by virtue of provisions of treaty law applicable bilaterally between a Member State and a third country.

69 Second, in any event, since the intellectual property rights referred to in paragraph 66 of the present judgment are protected under Article 17(2) of the Charter, any limitation on the exercise of those rights must, in accordance with Article 52(1) of the Charter, be provided for by law and respect the essence of those rights and freedoms.

70 In the present case, it must be held that the application, by a Member State, of the criterion of material reciprocity laid down in the second sentence of Article 2(7) of the Berne Convention may constitute such a limitation, inasmuch as that application is liable to deprive the potential holder of those rights of the enjoyment and exercise thereof in a part of the internal market, namely in the territory of the Member State applying that clause.

71 As is apparent from Article 52(1) of the Charter, such a limitation must be provided for by law.

72 In that regard, the Court has held that, where a rule of EU law harmonises copyright protection, it is for the EU legislature alone, and not the national legislatures, to determine whether the grant in the European Union of that copyright should be limited in respect of works the country of origin of which is a third country or the author of which is a national of a third country (see, to that effect, **judgment of 8 September 2020, Recorded Artists Actors Performers, C-265/19, EU:C:2020:677**, paragraph 88).

73 By adopting Directive 2001/29, the EU legislature is deemed to have exercised the competence previously devolved on the Member States in the field concerned. Thus, within the scope of that directive, the European Union must be regarded as having taken the place of the Member States, which are no longer competent to implement the relevant stipulations of the Berne Convention (**judgment of 26 April 2012, DR and TV2 Danmark, C-510/10, EU:C:2012:244**, paragraph 31 and the case-law cited).

74 In the present case, as the Advocate General observed, in essence, in point 40 of his Opinion, as EU law currently stands, neither Article 2(a) nor Article 4(1) nor any other provision of Directive 2001/29 contains a limitation such as that referred to in paragraph 70 of the present judgment.

75 Moreover, it is true that the objective of Directive 2001/29 is indeed to harmonise only certain aspects of copyright and related rights, of which a number of provisions also disclose the intention of the EU legislature to grant a degree of discretion to the Member States in the implementation of the directive (**judgments of 29 July 2019, Funke Medien NRW, C-469/17, EU:C:2019:623**, paragraph 34, and of 29 July 2019, Spiegel Online, C-516/17, EU:C:2019:625, paragraph 23 and the case-law cited).

76 That said, the Court has also held that the list of exceptions and limitations, contained in Article 5 of Directive 2001/29, to the exclusive rights provided for in Articles 2 to 4 of that directive is exhaustive, so as not to undermine the effectiveness of the harmonisation of copyright and related rights effected by that directive and the objective of legal certainty pursued, as well as the requirement of consistency in the implementation of those exceptions and limitations (see, to that effect, **judgment of 29 July 2019, Funke Medien NRW, C-469/17, EU:C:2019:623**, paragraphs 56, 62 and 63 and the case-law cited). As EU law currently stands, Article 5 of that directive does not contain any limitation similar to that of the criterion of material reciprocity referred to in the second sentence of Article 2(7) of the Berne Convention.

77 Thus, Directive 2001/29 may be distinguished in that respect from other instruments of copyright harmonisation that have been adopted by the EU legislature in accordance with the provisions of that convention.

78 In particular, that convention provides, inter alia, for limited exceptions relating to works of applied art, the term of protection and the resale right, by virtue of which the parties to that convention may apply a criterion of material reciprocity and, as such, are not required to apply national treatment, in accordance with Article 5(1) of that convention.

79 While the EU legislature has decided to apply a criterion of material reciprocity, first, to Article 7(1) of Directive 2006/116 as regards the term of protection, and, second, to Article 7(1) of Directive 2001/84 as regards the resale right, in accordance with Article 7(8) and Article 14ter(2) of the Berne Convention, that legislature has not, by contrast, included in Directive 2001/29 or in any other provision of EU law a limitation of the exclusive rights granted to authors by Article 2(a) and Article 4(1) of that directive in the form of a criterion of material reciprocity such as that laid down in the second sentence of Article 2(7) of the Berne Convention. In that regard, as has been stated in paragraph 72 of the present judgment, it is for the EU legislature alone, and not the national legislatures, in accordance with Article 52(1) of the Charter, to provide, by means of EU legislation, whether the grant in the European Union of the rights laid down in Article 2(a) and Article 4(1) of that directive should be limited (see, to that effect, **judgment of 8 September 2020, Recorded Artists Actors Performers, C-265/19, EU:C:2020:677**, paragraphs 88 and 91).

80 In the light of all the foregoing considerations, the answer to the second to fourth questions is that Article 2(a) and Article 4(1) of Directive 2001/29, read in conjunction with Article 17(2) and Article 52(1) of the Charter, must be interpreted as meaning that, as EU law currently stands, they preclude Member States from applying, in national law, the criterion of material reciprocity laid down in the second sentence of Article 2(7) of the Berne Convention in respect of a work of applied art the country of origin of which is a third country and the author of which is a national of a third country. It is for the EU legislature alone, in accordance with Article 52(1) of the Charter, to provide, by means of EU legislation, whether the grant in the European Union of the rights laid down in Article 2(a) and Article 4(1) of that directive should be limited.

The fifth question

81 By its fifth question, the referring court asks, in essence, whether the first paragraph of Article 351 TFEU must be interpreted as permitting a Member State to apply, by way of derogation from the provisions of EU law, the criterion of material reciprocity contained in the second sentence of Article 2(7) of the Berne Convention in respect of a work the country of origin of which is the United States of America.

82 According to the first paragraph of Article 351 TFEU, the rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, are not to be affected by the provisions of the Treaties.

83 As the Court has previously held, the Berne Convention displays the characteristics of an international agreement for the purposes of Article 351 TFEU (**judgment of 9 February 2012, Luksan, C-277/10, EU:C:2012:65**, paragraph 58).

84 The purpose of the first paragraph of Article 351 TFEU is to make clear, in accordance with the principles of international law, that application of the Treaty does not affect the commitment of the Member State concerned to respect the rights of third countries under an agreement preceding its accession and to comply with its corresponding obligations (**judgment of 9 February 2012, Luksan, C-277/10, EU:C:2012:65**, paragraph 61).

85 In that regard, in view of the answer given to the second to fourth questions, it must be held that the Member States may no longer avail themselves of the option of applying the criterion of material reciprocity referred to in the second sentence of Article 2(7) of the Berne Convention, even though that convention entered into force before 1 January 1958.

86 As is apparent from the case-law of the Court, when an international agreement that has been concluded by a Member State prior to its accession to the European Union allows – as is the case in this instance – but does not require a Member State to adopt a measure which appears to be contrary to EU law, the Member State must refrain from adopting such a measure (judgments of 28 March 1995, Evans Medical and Macfarlan Smith, C-324/93, EU:C:1995:84, paragraph 32, and of **9 February 2012, Luksan, C-277/10, EU:C:2012:65**, paragraph 62).

87 Furthermore, in a situation where, because of a development in EU law, a legislative measure adopted by a Member State in accordance with the power offered by an earlier international agreement appears contrary to EU law, the Member State concerned cannot rely on that agreement in order to exempt itself from the obligations that have arisen subsequently from EU law (**judgment**

of 9 February 2012, Luksan, C-277/10, EU:C:2012:65, paragraph 63).

88 It should be added that, in the present case, the first sentence of Article 2(7) of the Berne Convention grants discretion to the parties to that convention by providing, inter alia, that it is to be a matter for legislation in the countries of the Union established by that convention to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models are to be protected.

89 As the Advocate General observed in points 59 to 62 of his Opinion, first, it is not apparent from the wording of that provision that it prohibits a State party to the Berne Convention from granting copyright protection to a work of applied art which, in the country of origin of that work, is protected only under a special regime as a design. Second, such a prohibition would run counter to the objective of that convention, reflected in the principle of '*national treatment*' and of the minimum level of protection resulting from its substantive provisions, which is to ensure protection for authors outside the country of origin of a work. Third and lastly, it is in any event expressly stated in Article 19 of the Berne Convention that the provisions thereof are not to preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a State party to that convention.

90 In those circumstances, a Member State cannot rely on Article 2(7) of the Berne Convention in order to exempt itself from the obligations arising from Directive 2001/29.

91 In the light of the foregoing considerations, the answer to the fifth question is that the first paragraph of Article 351 TFEU must be interpreted as not permitting a Member State to apply, by way of derogation from the provisions of EU law, the criterion of material reciprocity contained in the second sentence of Article 2(7) of the Berne Convention in respect of a work the country of origin of which is the United States of America.

Costs

92 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (First Chamber) hereby rules:

1. A situation in which a company claims copyright protection for a subject matter of applied art marketed in a Member State, provided that that subject matter may be classified as a '*work*' within the meaning 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, falls within the material scope of EU law.

2. Article 2(a) and Article 4(1) of Directive 2001/29, read in conjunction with Article 17(2) and Article 52(1) of the Charter of Fundamental Rights of the European Union,

must be interpreted as meaning that, as EU law currently stands, they preclude Member States from applying, in national law, the criterion of material reciprocity laid down in the second sentence of Article 2(7) of the Convention for the Protection of Literary and Artistic Works, signed in Berne on 9 September 1886 (Paris Act of 24 July 1971), as amended on 28 September 1979, in respect of a work of applied art the country of origin of which is a third country and the author of which is a national of a third country. It is for the EU legislature alone, in accordance with Article 52(1) of the Charter of Fundamental Rights, to provide, by means of EU legislation, whether the grant in the European Union of the rights laid down in Article 2(a) and Article 4(1) of that directive should be limited.

3. The first paragraph of Article 351 TFEU must be interpreted as not permitting a Member State to apply, by way of derogation from the provisions of EU law, the criterion of material reciprocity contained in the second sentence of Article 2(7) of the Convention for the Protection of Literary and Artistic Works, signed in Berne on 9 September 1886 (Paris Act of 24 July 1971), as amended on 28 September 1979, in respect of a work the country of origin of which is the United States of America.

[Signatures]

OPINION OF ADVOCATE GENERAL

SZPUNAR

delivered on 5 September 2024 (1)

Case C-227/23

Kwantum Nederland BV,

Kwantum België BV

v

Vitra Collections AG

(Request for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands))

(Reference for a preliminary ruling – Intellectual property – Copyright – Directive 2001/29/EC – Articles 2 and 4 – Rights of reproduction and distribution – Copyright protection of works of applied art whose country of origin is not a Member State – Berne Convention – Article 2(7) – Material reciprocity criterion – Division of powers between the European Union and its Member States – Article 17(2) of the Charter of Fundamental Rights of the European Union – Fundamental right to the protection of intellectual property – Article 52(1) of the Charter of Fundamental Rights of the European Union – Limitations – First paragraph of Article 351 TFEU)

Introduction

1. It is commonly accepted that copyright originates from royal privileges granted to printers and publishers. Probably because of that origin, which was anchored in personal privileges, and contrary to what is the general rule in civil law, copyright protects, in principle, works of national authors or works published for the first time

on national territory, while excluding authors of foreign works from the benefit of that protection. (2)
2. Authors benefit from that protection outside the territories of their respective countries only under international agreements. At present, the main instrument of international law in matters of copyright globally is the Berne Convention for the Protection of Literary and Artistic Works. (3) The European Union is not party to that convention. However, all the Member States are and the European Union must comply with the substantive provisions of that convention in accordance with its other international commitments. (4)
3. The Berne Convention is based on the principle of national treatment, in other words, the principle of assimilation. In accordance with that principle, authors who are nationals of the signatory States of that convention enjoy in the other signatory States, in principle, the same rights as national authors in respect of the area covered by that convention.
4. However, there are some rare exceptions to the principle of national treatment in the Berne Convention. One of them concerns the protection of works of applied art. Owing to the wide disparity in the means and extent of protection of such works, the contracting parties have not managed to agree on a common regime for such protection. This results in legal derogations containing the material reciprocity clause according to which works of applied art originating in countries in which such works are protected solely as designs are not entitled, in the other signatory countries, to such protection in addition to copyright protection.
5. In EU law, works of applied art are eligible for copyright protection, notwithstanding the fact that they may also be covered by a special protection regime as designs. The question that arises in the present case is, in essence, whether the Member States are still free to apply the reciprocity clause contained in the Berne Convention to works of applied art originating in third countries which protect those works solely under a special regime.

Legal framework

International law

The Berne Convention

6. Article 2(1) and (7) of the Berne Convention provides inter alia:
'*1. The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as: … works of applied art ….*
…
7. … it shall be a matter for legislation in the countries of the Union [constituted by this Convention] to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected …. Works protected in the country of origin solely as designs and models shall be entitled in another country of the Union [constituted by this Convention] only to such special protection as is granted in that country to designs and models; however, if no such special protection is granted in that country, such works shall be protected as artistic works.'
7. Under Article 5(1) to (3) of the Berne Convention:
'*1. Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union [constituted by this Convention] other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.*
2. The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his [or her] rights, shall be governed exclusively by the laws of the country where protection is claimed.
3. Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he [or she] is protected under this Convention, he [or she] shall enjoy in that country the same rights as national authors.'
8. Last, Article 19 of the Berne Convention provides:
'*The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union [constituted by this Convention].*'

The TRIPS Agreement and the WIPO Copyright Treaty

9. Article 9(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights(5) ('*the TRIPS Agreement*') provides that WTO members will comply with Articles 1 through 21 of the Berne Convention and the Appendix thereto.
10. The World Intellectual Property Organisation (WIPO) adopted the WIPO Copyright Treaty (6) in Geneva on 20 December 1996. Under Article 1(4) of that treaty, the contracting parties must comply with Articles 1 to 21 and the Appendix of the Berne Convention.

European Union law

11. Article 2(a), Article 3(1) and Article 4(1) of Directive 2001/29/EC (7) provide:
'*Article 2*
Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:
(a) for authors, of their works;
…
Article 3
1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.
…

Article 4

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.'

Netherlands law

12. Articles 2 to 4 of Directive 2001/29 are transposed, in Netherlands law, by Articles 1, 12 and 13 of the Wet van 23 september 1912, houdende nieuwe regeling van het auteursrecht (Auteurswet 1912) (8) (Law of 23 September 1912 on copyright), as amended. Point 11 of Article 10(1) of that law mentions works of applied art and industrial designs among the categories of protected works. Since the Berne Convention is directly applicable in the Netherlands, there was no need to transpose any of its provisions into Netherlands law.

The facts, the procedure and the questions referred for a preliminary ruling

13. Vitra Collections AG ('*Vitra*'), a company governed by Swiss law, produces designer furniture, in particular chairs, including the Dining Sidechair Wood ('*the DSW chair*'), designed by the now deceased couple Charles and Ray Eames, who were citizens of the United States of America. That chair belongs to a set of chairs designed by that couple in a furniture design competition organised by the Museum of Modern Art of New York (United States) in 1948 and has been exhibited in that museum since 1950. Vitra holds the copyrights on those chairs.

14. Kwantum Nederland BV and Kwantum België BV, companies governed by Netherlands law (collectively, '*Kwantum*') operate, in the Netherlands and in Belgium, a chain of stores selling household articles, in particular furniture.

15. In 2014, Vitra found that Kwantum had been offering and marketing a chair under the name '*Paris*' since 8 August 2014 which allegedly infringed its copyright on the DSW chair. Hearing the action brought by Vitra, the rechtbank Den Haag (District Court, The Hague, Netherlands) held, however, that Kwantum did not infringe Vitra's copyrights in the Netherlands and in Belgium and that it did not act unlawfully by marketing the Paris chair. That court therefore rejected Vitra's applications and largely granted Kwantum's applications.

16. That judgment was set aside by the Gerechtshof Den Haag (Court of Appeal, The Hague, Netherlands), which considered that Kwantum had infringed Vitra's copyrights on the DSW chair in the Netherlands and Belgium since 22 March 2017 and that, by marketing the Paris chair in the Netherlands and Belgium, it had acted unlawfully towards Vitra since 8 August 2014. That court considered, in particular, that the reciprocity clause contained in Article 2(7) of the Berne Convention was not applicable in the present case, according to the settled case-law of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), on the ground that the United States, the country of origin of the work at issue, does not, in general, exclude designs from copyright protection. Therefore, the fact that, in the present case, that chair did not enjoy such protection in the country of origin does not preclude the application of the clause in question.

17. The parties to the dispute brought a main appeal and a cross-appeal against the judgment delivered on appeal before the Hoge Raad der Nederlanden (Supreme Court), the referring court. In the main appeal, Kwantum disputes the manner in which the appeal court interpreted and applied the reciprocity clause contained in Article 2(7) of the Berne Convention. On the other hand, in its cross-appeal, Vitra submits that that clause is not, in any event, applicable to the dispute. The referring court considers it necessary to analyse that cross-appeal first, since it has a broader scope.

18. In those circumstances, the Hoge Raad der Nederlanden (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the situation at issue in these proceedings fall within the material scope of EU law?

Should the preceding question be answered in the affirmative, the following questions are also submitted.

(2) Does the fact that copyright on a work of applied art forms an integral part of the right to protection of intellectual property enshrined in Article 17(2) of the [Charter of the Fundamental Rights of the European Union ("the Charter")] mean that EU law, in particular Article 52(1) of the Charter, in order to limit the exercise of copyright (within the meaning of Directive [2001/29]) on a work of applied art by application of the material reciprocity test of Article 2(7) [of the Berne Convention], requires this limitation to be provided for by law?

(3) Must Articles 2, 3 and 4 of Directive [2001/29] and Articles 17(2) and 52(1) of the Charter, read in the light of Article 2(7) [of the Berne Convention], be interpreted as meaning that it is solely for the EU legislature (and not for national legislatures) to determine whether the exercise of copyright (within the meaning of Directive [2001/29]) in the European Union can be limited by application of the material reciprocity test provided for in Article 2(7) [of the Berne Convention] in respect of a work of applied art whose country of origin within the meaning of [that convention] is a third country and whose author is not a national of [a] Member State and, if so, to define that limitation clearly and precisely ***(see judgment of 8 September 2020, Recorded Artists Actors Performers, C-265/19, ["the judgment in RAAP"], EU:C:2020:677)?***

(4) Must Articles 2, 3 and 4 of Directive [2001/29], read in conjunction with Articles 17(2) and 52(1) of the Charter, be interpreted as meaning that as long as the EU legislature has not provided for a limitation of the exercise of copyright (within the meaning of Directive [2001/29]) on a work of applied art by application of the material reciprocity test of Article 2(7) [of the Berne Convention], ... Member States may not apply that test in respect of a work of applied art whose country of origin within the meaning of [that convention] is a third country and whose author is not a national of [a] Member State?

(5) In the circumstances at issue in the present proceedings and given the time of the establishment of (the predecessor of) Article 2(7) [of the Berne Convention], are the conditions of the first paragraph of Article 351 TFEU satisfied for [the Kingdom of] Belgium, meaning that Belgium is therefore free to apply the material reciprocity test provided for in Article 2(7) [of that convention], taking into account the fact that in the present case the country of origin acceded to the Berne Convention on 1 May 1989?'

19. The request for a preliminary ruling was received at the Court on 11 April 2023. Written observations have been submitted by the parties to the main proceedings, by the Netherlands, Belgian and French Governments and by the European Commission. The parties to the main proceedings, the French Government and the Commission were represented at the hearing, which took place on 20 March 2024.

Analysis

20. In the present case, the referring court submits five questions to the Court for a preliminary ruling. The first question is worded in a very general way and concerns the applicability, in the dispute in the main proceedings, of EU law. The second, third and fourth questions concern whether, in the light of certain provisions of EU law, in particular the relevant provisions of Directive 2001/29 and of Article 17(2) of the Charter, Member States are free to apply the reciprocity clause contained in Article 2(7) of the Berne Convention to works of applied art. Last, the fifth question concerns the applicability of the first paragraph of Article 351 TFEU.

21. Although the referring court makes its other questions conditional upon an affirmative answer to the first question, it is, in my view, precisely the analysis of the provisions mentioned in the second, third and fourth questions, particularly the provisions of Directive 2001/29, that will enable the first question to be answered. I therefore propose to proceed directly to the analysis of the second, third and fourth questions. I shall then briefly analyse the specific case raised in the fifth question.

The second, third and fourth questions

22. I note, at the outset, that although, in its questions referred for a preliminary ruling, the referring court mentions Articles 2 to 4 of Directive 2001/29, Article 3 thereof, which establishes the right of communication to the public, does not seem to be concerned in the main proceedings. There is nothing in the file to indicate that an infringement of that right is complained of in the main proceedings, since the conduct at issue consists in the production and marketing of chairs, material objects, which are allegedly counterfeits of the objects protected by the copyright held by Vitra. I therefore consider myself permitted to exclude that Article 3 from the analysis in the present case. In any event, in the present case, as regards copyright in the strict sense, it is Article 2(a) of that directive which is concerned.

23. By its second, third and fourth questions referred for a preliminary ruling, which I propose to examine together, the referring court asks, in essence, whether Article 2(a) and Article 4 of Directive 2001/29, and Article 17(2) of the Charter, must be interpreted as precluding the Member States from applying the reciprocity clause contained in Article 2(7) of the Berne Convention to works of applied art originating in third countries. I propose to begin the analysis of that question with the provisions of that directive.

Article 2(a) and Article 4 of Directive 2001/29

24. Article 2(a) and Article 4 of Directive 2001/29 confer on authors exclusive rights to authorise or prohibit, respectively, reproduction and distribution of their works. The dispute in the main proceedings concerns a work of applied art originating in the United States, a country of which the authors of that work are also nationals. (9) In the context of the present case, it is therefore necessary to determine, in the first place, whether those provisions apply to such works and, in the second place, whether they permit the application to them by the Member States of the reciprocity clause contained in Article 2(7) of the Berne Convention.

– Applicability of Article 2(a) and Article 4 of Directive 2001/29 to works of applied art originating in third countries

25. As a reminder, Article 2(a) and Article 4 of Directive 2001/29 confer exclusive rights on '*authors*' over their '*works*'. (10) In so far as that directive does not refer to the national law of the Member States as regards the definition of those concepts, according to settled case-law, they must be regarded as autonomous concepts of EU law which must be interpreted and applied uniformly. (11)

26. Concerning the concept of '*work*', the Court has held in particular, on the subject, specifically, of works of applied art, that that concept entails that there is an original subject matter, in the sense of being the author's own intellectual creation. Moreover, copyright protection relates only to the expression of such creation that is identifiable with sufficient precision and objectivity. (12) In order for a subject matter to be capable of being regarded as original, it is both necessary and sufficient that it reflects the personality of its author, as an expression of his or her free and creative choices. (13) Where a subject matter has those characteristics and therefore constitutes a work, it must qualify for copyright protection, in accordance with Directive 2001/29. (14)

27. However, neither Directive 2001/29, nor the case-law on the concept of '*work*' within the meaning of that directive lay down a condition that their applicability is limited to works originating in Member States or countries belonging to the European Economic Area (EEA). Therefore, in my opinion, that directive must be construed as meaning that it is irrelevant, for a work to be able to qualify for the protection conferred by the directive, whether its country of origin is a Member State of the EEA or a third country. (15)

28. The Court has already had occasion to adopt a similar solution. Faced with a similar question concerning the concept of '*performers*' within the meaning of Article 8(2) of Directive 2006/115/EC, (16) it held that, since that provision contains no condition that a performer must have a connection with an EEA

Member State, it cannot be applied by Member States in such a way as to limit the right which it confers to performers with such a connection with an EEA Member State while excluding from it nationals of third countries who do not have such a connection. (17) In reaching that conclusion, the Court relied in particular on the obligation contained in Article 4 of the World Intellectual Property Organisation Performances and Phonograms Treaty, (18) to apply to nationals of the signatory States of that treaty national treatment as regards, in particular, the right to equitable remuneration, as provided for in Article 8(2) of Directive 2006/115. (19)

29. Similarly, Article 9(1) of the TRIPS Agreement and Article 1(4) of the WIPO Copyright Treaty, which require compliance with the substantive provisions of the Berne Convention, the European Union is under an obligation to apply national treatment, that is to say, the treatment provided for in the harmonised provisions in the field of copyright, to authors of works originating in the signatory States of those international instruments (including, in particular, the United States), in accordance with Article 5 of that convention. That obligation relates inter alia to the exclusive rights laid down in Article 2(a) and Article 4 of Directive 2001/29, one of the objectives of that directive being, according to recital 15 thereof, the implementation of the WIPO Copyright Treaty. (20)

30. It would be contrary to those international obligations of the European Union to harmonise copyright in respect of works whose countries of origin are the Member States and to leave to the national law of those Member States the task of deciding the fate of works originating in third countries. In such a situation, the objective of applying '*national treatment*', that is to say, the same treatment as that provided for in the harmonised rules, to that second category of works, would be easily compromised. The European Union's international obligations do not therefore permit the provisions of Directive 2001/29 to be interpreted as meaning that they relate only to works originating in the Member States.

31. However, in my opinion, it is not even necessary to refer to the European Union's international obligations. The wording of Directive 2001/29 is sufficient in itself. According to paragraph 1 of Article 1 thereof, entitled '*Scope*', that directive '*concerns the legal protection of copyright and related rights in the framework of the internal market*'. The scope of that directive is therefore defined not in accordance with the criterion of the origin of the work or of the nationality (or place of residence) of its author, but territorially, by reference to the internal market, which equates to the territorial scope of the treaties. (21) Works originating in third countries, or subject matter imitating those works, can circulate in the internal market on the same basis as works originating in the Member States, creating the need for protection '*in the framework of the internal market*', as required by Article 1(1) of Directive 2001/29, of the copyrights relating to those works. Therefore, by using in that directive, without reservation, the term '*works*' and by defining the scope of the directive using the territorial criterion, the EU legislature had necessarily to take into account all works whose protection is required in EU territory, irrespective of their country of origin.

32. That conclusion is corroborated by Article 10(1) of Directive 2001/29, which concerns its application over time. Under that provision, that directive applies not only to works which, on the date of its transposition, were protected by the legislation of the Member States in the field of copyright, but also to works which, on the same date, '*[met] the criteria for protection under the provisions of [that] Directive*', that is to say, in particular, the criteria stated in point 26 of this Opinion. Works such as those at issue in the main proceedings which, on the date of transposition of the directive, were not protected under the national law of the Member States because of the application of the reciprocity clause contained in Article 2(7) of the Berne Convention, but which nonetheless fulfil the criteria for protection under Directive 2001/29, as interpreted by the Court, are therefore protected.

33. The same reasoning can be applied to the concept of '*author*'. First, the European Union's international obligations do not allow authors who are nationals of third countries to be left outside the harmonised copyright framework, irrespective of the country of origin of their works. (22) Second, since the EU legislature has used the term '*authors*' without specifying their nationality or place of residence, that term must be interpreted as referring to any author seeking to protect his or her rights within the internal market.

34. Those conclusions are not called into question by Article 17 of Directive 98/71/EC (23) or Article 96(2) of Regulation (EC) No 6/2002, (24) which state that designs protected under those instruments are also eligible for protection under the law of copyright of the Member States and that the extent to which, and the conditions under which, such a protection is conferred, including the level of originality required, are to be determined by each Member State.

35. In the first place, those provisions apply subject to the subsequent harmonisation of copyright at the level of EU law, effected in particular by Directive 2001/29. (25) In that regard, the Court, after analysing the provisions in question, (26) ruled that it '*must be held that designs are capable of classification as "works" within the meaning of [that directive], if they meet the two requirements mentioned [in point 26 of this Opinion]*', (27) that is to say the conditions for protection identified by the Court on the basis of that directive for all categories of works.

36. In the second place, Article 17 of Directive 98/71 and Article 96(2) of Regulation No 6/2002 apply, as is clear from their wording, not to works of applied art in general, but only to designs registered in accordance with that directive or to Community designs protected under that regulation. (28) On the other hand, works of applied art that have never qualified for protection as designs in the European Union, as is the case with the work at issue in the main proceedings, are not concerned

by those provisions and therefore fall, in any event, within the scope of general copyright rules, in particular those contained in Directive 2001/29. Those provisions therefore lay down not a principle of general scope governing the protection of works of applied art in EU copyright law, but a rule for overlapping protection regimes confined to the substantive scope of the acts concerned, namely the subject matter protected as designs under those acts.

37. Thus, Article 2(a) and Article 4 of Directive 2001/29 apply to works of applied art originating in third countries whose authors are nationals of such countries. The argument of Kwantum and of the Netherlands and Belgium Governments that not EU law, but only the Berne Convention is applicable in the case in the main proceedings is consequently erroneous.

38. It must therefore now be ascertained whether Article 2(a) and Article 4 of Directive 2001/29 allow the Member States to apply the reciprocity clause contained in Article 2(7) of the Berne Convention.

– Possibility of applying the reciprocity clause contained in Article 2(7) of the Berne Convention

39. Since the copyright protection of works of applied art originating in third countries is harmonised in EU law, only that law can allow application of the reciprocity clause contained in Article 2(7) of the Berne Convention. It must therefore be verified whether EU law actually allows it.

40. Directive 2001/29 does not contain any provision along the lines of that clause or even any provision suggesting differential treatment of works of applied art on the basis of their country of origin. There is no such provision in any other act of EU law. It must therefore be stated that EU law does not explicitly provide for the application of that clause. It must still be verified whether EU law implicitly provides for that clause.

41. In my view, the answer is clearly in the negative.

42. The clause in question, which makes the copyright protection of certain works conditional on the existence of similar protection, that is to say, copyright protection, as artistic works, in the country of origin, would constitute a clear derogation from the rule contained in Article 2(a) and Article 4 of Directive 2001/29, as interpreted by the Court, according to which all works are protected, provided that they meet the criteria for classification as works. (29) Such a derogation would have to be provided for explicitly.

43. Other texts of EU law on copyright provide systemic confirmation of that conclusion. Two other reciprocity clauses concerning the duration of protection and '*droit de suite*' (30) provided for in the Berne Convention have been expressly transposed into EU law. (31)A contrario, therefore, the absence in Directive 2001/29 of a reciprocity clause mirroring the clause contained in Article 2(7) of that convention clearly indicates that that clause is not applicable in EU law. A different interpretation would call into question the consistency of the system of EU copyright law.

44. In that regard, I am not persuaded by the French Government's arguments that that difference results from the wording of various reciprocity clauses in the Berne Convention. According to that government, whereas the clauses contained in Article 7(8) and Article 14ter(2) of that convention would require, for their application, positive action by the national legislature (in the present case, the EU legislature), the clause contained in Article 2(7) of that convention has automatic effect, and therefore express confirmation would be required not for the application but for the waiving of that clause.

45. The two clauses in question are not, from that point of view, drafted significantly differently from the clause contained in Article 2(7) of the Berne Convention. According to Article 7(8) of that convention, '*the term [of protection] shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work*'. Therefore, the result that the EU legislature intended to achieve by Article 7(1) of Directive 2006/116, namely to limit the term of protection of works originating in third countries to the term granted in those countries, is automatic in this case. Waiving or limiting that rule would require action by the legislature, in accordance with the wording '*unless the legislation of that country otherwise provides*'. Likewise, Article 14ter(2), of that convention provides that '*the protection provided by the preceding paragraph [namely the "droit de suite"] may be claimed in a country of the Union [constituted by the convention] only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed*'. That is, in essence, the same rule as that flowing from Article 7(1) of Directive 2001/84. (32) It may be applied directly.

46. The two clauses mentioned in the previous point are not, therefore, such as to require express implementation in national law. If the EU legislature has nonetheless considered it necessary to reproduce them in acts of secondary law, that is because, contrary to the French Government's assertions, the Berne Convention has no direct effect in EU law.

47. I observe that the European Union is not a party to the Berne Convention, since that convention, in accordance with Article 29(1) thereof, is open to accession only by States and not international organisations. However, the European Union has committed to comply with the substantive provisions of that convention under Article 9(1) of the TRIPS Agreement and Article 1(4) of the WIPO Copyright Treaty. However, even assuming that, because of those commitments, the substantive provisions of that convention must be regarded as having the same effects as those of the two international instruments, (33) those instruments do not have direct effect. (34) That lack of direct effect relates to all the reciprocity clauses contained in the convention, including the one in Article 2(7) thereof.

48. Consequently, I do not share the French Government's view, also expressed by the Netherlands Government, that waiving application of the reciprocity clause contained in Article 2(7) of the Berne Convention

would require a specific rule to that effect which is not contained in Directive 2001/29.

49. In law, silence can be as explicit as words. The use, in Directive 2001/29, of the terms '*works*' and '*authors*' without specifying the countries of origin of those works or the nationality or place of residence of those authors is therefore a sufficiently explicit expression of the EU legislature's intention to waive application of the reciprocity clause in question. No additional confirmation is necessary in this case.

50. Last, as regards the Netherlands Government's argument that it follows from the explanatory memorandum and the initial proposals for Directive 98/71 and Regulation No 6/2002 that the EU legislature intended only to prohibit recourse to the reciprocity clause contained in Article 2(7) of the Berne Convention in relations between Member States, while leaving intact its application in relations with third countries, it is sufficient to note that those documents date from 1993 and, as is shown in particular by the explanatory memorandum to that regulation, (35) were drawn up in the expectation of a more complete harmonisation of copyright law. Currently, the only thing that may be proved by Article 17 of that directive and Article 96(2) of that regulation, as finally adopted, which, moreover, are not relevant in the present case, (36) is that, as regards the subject matters concerned by those acts, namely registered designs and Community designs, in so far as they are also capable of qualifying for copyright protection, the reciprocity clause is not applicable to them, since those provisions establish the principle of cumulative protection irrespective of the country of origin of those subject matters as works of applied art.

51. Those considerations lead me to the conclusion that neither Directive 2001/29 nor any other act of EU law contains, either explicitly or implicitly, a reciprocity clause such as that provided for in Article 2(7) of the Berne Convention.

52. Moreover, in so far as Article 2(a) and Article 4 of Directive 2001/29 are applicable without reservation to works of applied art, the Member States cannot apply the reciprocity clause in respect of the rights harmonised by those provisions without infringing them. As the Court has already had occasion to state, by adopting that directive, the EU legislature is deemed to have exercised the competence previously devolved on the Member States in the field of intellectual property. Within the scope of that directive, the European Union must be regarded as having taken the place of the Member States, which are no longer competent to implement the relevant stipulations of the Berne Convention. (37)

53. It should be added that leaving the Member States to apply the reciprocity clause in question of their own free will would not only be contrary to the clear wording of Article 2(a) and Article 4 of Directive 2001/29, but would call into question the objective of that directive, which is the harmonisation of copyright in the internal market. That would lead necessarily to works of applied art being treated differently in different Member States. Consequently, only the EU legislature may decide to make that reciprocity clause applicable in the EU legal system by adopting for that purpose an express derogation from the provisions of that directive.

54. The fact raised by Kwantum that, in the dispute in the main proceedings, Vitra did not rely on the provisions of Directive 2001/29 is irrelevant in this context. The provisions of a directive are not, in principle, directly applicable, but must be transposed into the domestic law of the Member States which is then called upon to govern the rights and obligations of individuals. The Kingdom of the Netherlands does not make works originating in third countries subject to its domestic copyright law, by directly applying the provisions of the Berne Convention. This does not constitute, in my opinion, a measure correctly transposing Directive 2001/29 because, as the present case shows, that convention may contain rules incompatible with that directive. The fact remains that, in a legal situation such as that in the Netherlands, that convention must be regarded as a measure transposing that directive. It is therefore natural for individuals to rely on that convention in order to claim protection of their rights. However, this does not mean that that directive thereby becomes inapplicable.

– Compatibility of the non-application of the reciprocity clause with the Berne Convention

55. I should point out now that, in my view, non-application, in EU law, of the reciprocity clause contained in Article 7(2) of the Berne Convention does not conflict with the obligations of the European Union or of the Member States under that convention. According to my interpretation of that provision, and contrary to the allegations made by Kwantum and by the Netherlands, Belgian and French Governments, that reciprocity clause is not binding on the signatory States. In that regard, I agree with the positions of Vitra and the Commission.

56. First, that follows from the very wording of Article 2(7) of the Berne Convention. That provision lays down three rules of law. The first (contained in the first sentence) establishes the principle that the parties to that convention are free to protect works of applied art by copyright or by a special protection regime as designs, the two protection regimes not being mutually exclusive. The second rule (first part of the second sentence) constitutes the reciprocity clause as such, under which, in the case of a work which is protected in its country of origin only by a special regime as a design, only the protection of such a special regime can be claimed in another country in which there are cumulative protection regimes for that category of works. Last, the third rule (second part of the second sentence) establishes that, where the country in which protection is claimed does not provide for a special regime for designs, the work in question must qualify for copyright protection in accordance with the general principle of national treatment.

57. Those provisions of Article 2(7) of the Berne Convention can be easily explained. Since that convention accepts, by way of derogation from its general rules, that works of applied art, which are, however, among the protected subject matters listed in

Article 2(1) thereof, cannot qualify for copyright protection or for the minimum protection established by that convention, an imbalance would exist between works originating in countries applying cumulative protection and works originating in countries applying only special protection, (38) if the general principle of national treatment were to be applied . The reciprocity clause makes it possible to avoid such an imbalance.

58. The fact remains that Article 2(7) of the Berne Convention leaves it to the parties to that convention to regulate the manner in which works of applied art are protected, as the first sentence of that paragraph expressly provides. The first part of the second sentence, according to which works '*shall be entitled ... only*' to special protection, merely indicates the absence of an obligation to grant copyright protection to works which, in their country of origin, are protected only by the special regime for designs. However, that does not mean that the country in which protection is claimed cannot grant to such works double protection of its own free will. Such an interpretation would contradict the first sentence and the freedom allowed to the parties to regulate the protection of works of applied art. Moreover, Article 2(7) of that convention does not absolutely rule out that works which, in their country of origin, are protected only as designs can be protected by copyright in other countries. Under the third rule, copyright protection is mandatory in countries which do not apply a special regime, notwithstanding the type of protection granted in the country of origin.

59. Therefore, according to its wording, Article 2(7) of the Berne Convention does not prohibit the grant of copyright protection (also) to works of applied art which, in their country of origin, are protected only under a special regime for designs.

60. Second, the binding nature of the reciprocity clause would contradict the objective of the Berne Convention, which is to provide protection for authors outside the countries of origin of their works, (39) including for works of applied art. That convention pursues that objective by two means: the principle of national treatment, which is the cornerstone of that regulation, and the '*conventional minimum*' of protection resulting from its substantive provisions. In accordance with Article 5(1) and (3) of that convention, national treatment (naturally) and the conventional minimum apply to works whose protection is claimed in a country other than the country of origin of the work. (40) However, that convention in no way aims to compare levels of protection between signatory States or to introduce a general condition of material reciprocity. (41) All of the rules contained in Article 2(7) of the Berne Convention, which are, in essence, contrary to the objective and principles of that convention, are a safety valve that has enabled works of applied art to be included in the – non-exhaustive – list of categories of protected works. (42)

61. The authors of the Berne Convention therefore had no reason to make the reciprocity clause contained in Article 2(7) of that convention binding. The signatory States are at liberty to use it, but full application of the principle of national treatment best enables the objectives of that convention to be achieved.

62. Last, third, even assuming that the reciprocity clause established in Article 2(7) of the Berne Convention is binding in nature, that obligation would be very relative, since Article 19 of that convention expressly allows signatory States to provide for greater protection than that provided for in that convention and for authors to claim – and, which goes without saying, to obtain – application of that greater protection. Any prohibition on granting works of applied art double protection in spite of the absence of such protection in the country of origin would therefore be, in any event, inoperative.

63. Furthermore, the opinion that the reciprocity clause in question is optional is also broadly shared in the legal literature. (43)

64. Therefore, in my view, nothing in the Berne Convention precludes EU law from granting erga omnes copyright protection of works of applied art, by waiving application of the reciprocity clause contained in Article 2(7) of that convention.

– Summary of this section

65. The foregoing considerations lead me to conclude that Article 2(a) and Article 4 of Directive 2001/29 preclude Member States from applying the reciprocity clause contained in Article 2(7) of the Berne Convention in respect of the rights covered by those provisions. That finding is sufficient to answer the questions submitted by the referring court, including the first one, since it clearly follows that EU law is applicable to the dispute in the main proceedings.

Article 17(2) of the Charter

66. Those considerations also lead me to conclude that it is not necessary to rely on the Charter in order to give the referring court a response that will be useful for the resolution of the dispute in the main proceedings.

67. If the Court were to follow my analysis and hold that the situation in the main proceedings is governed by the provisions of Directive 2001/29, which do not provide for a reciprocity clause similar to that contained in Article 2(7) of the Berne Convention and do not allow the Member States to apply that clause directly, any change to that situation would, in any event, require action by the EU legislature, without it being necessary to rely on Article 52(1) of the Charter, read in conjunction with Article 17(2) thereof. However, the question whether such hypothetical legislative action would be compatible with the Charter extends beyond the present case.

68. If the Court were to consider, on the other hand, that Directive 2001/29 is not applicable to works of applied art originating in third countries whose authors are not nationals of the Member States, the dispute in the main proceedings would fall outside the scope of EU law, as is claimed by Kwantum and by the Netherlands and Belgian Governments. Consequently, the Charter would not be applicable.

69. Moreover, since the Berne Convention is not directly applicable in the EU legal system, (44) the question of the compatibility of the reciprocity clause contained in

Article 2(7) of the Berne Convention with the Charter does not arise.

Answer to the questions and final remark

70. In the light of the foregoing considerations, I propose that the answer to the second, third and fourth questions referred for a preliminary ruling should be that Article 2(a) and Article 4 of Directive 2001/29 must be interpreted as precluding the Member States from applying the reciprocity clause contained in Article 2(7) of the Berne Convention.

71. Even though the referring court does not raise a question in this regard, for the sake of completeness, I believe that it is still useful to address the question of the effects of such an answer on the dispute in the main proceedings.

72. Article 2(a) and Article 4 of Directive 2001/29 confer on authors of works of applied art originating in third countries, in a sufficiently precise and unconditional manner, the exclusive right to authorise or prohibit any reproduction of those works and any distribution of copies thereof. However, the dispute in the main proceedings is a dispute between private parties: Kwantum and Vitra. Therefore, according to the Court's settled case-law, (45) those provisions cannot be directly relied upon by Vitra against Kwantum. It can be otherwise only if Netherlands law itself makes it possible to disapply a rule of national law (in the present case Article 2(7) of the Berne Convention) that is contrary to a precise and unconditional provision of EU law, which it is for the referring court to verify. (46)

73. If that is not the case, the referring court is nonetheless required to interpret its national law, which should be understood here to mean Article 2(7) of the Berne Convention, which is directly applicable in Netherlands law, so as to ensure the maximum effectiveness of Directive 2001/29, that is to say, recognition of the rights conferred by that directive on authors of works of applied art originating in third countries. (47) That could lead the referring court to minimise the scope of the reciprocity clause in question by adopting, in cases of doubt, the interpretation most favourable to the protection of the works concerned on the basis of national treatment, as provided for in Article 5 of that convention. Accordingly, that court could confirm the interpretation adopted by the court of second instance in the main proceedings.

74. That could temporarily alleviate, in the dispute in the main proceedings, the inadequacies of the Netherlands legal system. The full compliance of that system with Directive 2001/29 would, however, require action by the national legislature. As regards the rights harmonised by that directive, the domestic copyright law of all Member States should apply directly to all works, irrespective of their country of origin and of the nationality or place of residence of their author.

The fifth question

75. By its fifth question referred for a preliminary ruling, the referring court asks, in essence, whether the first paragraph of Article 351 TFEU must be interpreted as allowing a Member State to apply, by way of derogation from the provisions of EU law, the reciprocity clause currently contained in Article 2(7) of the Berne Convention against the holder of the copyrights on a work whose country of origin is the United States, where the temporal requirements for its application are met. Of course, that question will be relevant only if the Court endorses my proposed answer to the second, third and fourth questions referred for a preliminary ruling.

76. While the referring court asks that question in respect of Belgium, it is probably because the facts complained of by Vitra against Kwantum partly took place in that Member State and, according to the referring court, fall within the scope of Belgian law. However, in Belgium, as in the Netherlands, the Berne Convention is directly applicable to works originating in third countries. The referring court does not ask the same question in respect of the Netherlands, since the reciprocity clause in question entered into force, in respect of that Member State, after the date stated in the first paragraph of Article 351 TFEU.

77. As a reminder, under that provision, the rights and obligations resulting from agreements concluded before 1 January 1958 between one or more Member States and one or more third countries are not affected by the provisions of the treaties.

78. The reciprocity clause contained in the current Article 2(7) of the Berne Convention was introduced by the Brussels Act revising that convention, which was adopted on 26 June 1948. That act entered into force in Belgium on 1 August 1951. The United States acceded to the Berne Convention on 1 March 1989. (48)

79. The first paragraph of Article 351 TFEU has already been the subject of an interpretation by the Court. In particular, in connection with a provision of the Berne Convention (other than Article 2(7) thereof), the Court has stated that the purpose of the first paragraph of Article 351 TFEU is to make it clear, in accordance with the principles of international law, that application of the Treaty does not affect the commitment of the Member State concerned to respect the rights of third countries under an agreement preceding its accession and to comply with its corresponding obligations. However, when such an agreement allows, but does not require, a Member State to adopt a measure which appears to be contrary to EU law, the Member State must refrain from adopting such a measure. (49)

80. The Court added that that case-law must also be applicable mutatis mutandis when, because of a development in EU law, a legislative measure adopted by a Member State in accordance with the power offered by an earlier international agreement appears contrary to EU law. In such a situation, the Member State concerned cannot rely on that agreement in order to exempt itself from the obligations that have arisen subsequently from EU law. (50)

81. However, as is apparent from the foregoing considerations, (51) the reciprocity clause contained in Article 2(7) of the Berne Convention is not, in my view, binding on the parties to that convention, it merely derogates from their unconditional obligation to apply national treatment to works of applied art. Therefore, we are concerned, in the present case, with the situation

envisaged in the case-law of the Court in which an international agreement allows a Member State to adopt a measure which appears to be contrary to EU law, without requiring it to do so. In such a situation, the Member State concerned must refrain from adopting that measure. (52)

82. Since the reciprocity clause at issue is contrary to Article 2(a) and Article 4 of Directive 2001/29, the Member States must refrain from using it, even if they acceded to the Brussels Act revising the Berne Convention before 1958. I therefore share Vitra's opinion that, in essence, the Kingdom of Belgium has no obligation towards the United States resulting from that convention to apply different treatment to works of applied art originating in the United States.

83. However, I doubt whether the date of accession of the United States to the Berne Convention, which is after 1 January 1958, has any bearing on the possible application of the first paragraph of Article 351 TFEU.

84. It is true that, in spite of the multilateral nature of the Berne Convention, the obligations which arise, in particular, from its substantive provisions must rather be regarded as a set of bilateral obligations of countries in which copyright protection is claimed from the countries of origin of the works concerned.

85. However, the Berne Convention admits reservations only in a very limited number of cases and does not allow its application to new acceding States to be limited. Therefore, the commitments made by the Member States under that convention before 1958 (53) automatically concern all countries which become parties to that convention after that date, without those Member States being able to oppose it. The first paragraph of Article 351 TFEU must therefore be interpreted as meaning that it covers those commitments irrespective of the date of accession of the third party concerned to the convention.

86. However, that concerns only the binding provisions of the Berne Convention, and the reciprocity clause contained in Article 2(7) of that convention is not one of them. Moreover, it is a theoretical problem, because, since the European Union is bound by the substantive provisions of that convention by the TRIPS Agreement and the WIPO Copyright Treaty, cases of incompatibility of EU law with the convention should not arise.

87. I therefore propose that the answer to the fifth question referred for a preliminary ruling should be that the first paragraph of Article 351 TFEU must be interpreted as not allowing a Member State to apply, by way of derogation from the provisions of EU law, the reciprocity clause currently contained in Article 2(7) of the Berne Convention against the holder of the copyrights on a work whose country of origin is the United States.

Conclusion

88. In the light of the foregoing considerations, I propose that the Court's answers to the questions referred for a preliminary ruling by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) should be as follows:

(1) Article 2(a) and Article 4 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

must be interpreted as precluding the Member States from applying the reciprocity clause contained in Article 2(7) of the Berne Convention for the Protection of Literary and Artistic Works, signed in Berne on 9 September 1886 (Paris Act of 24 July 1971), as amended on 28 September 1979.

(2) The first paragraph of Article 351 TFEU

must be interpreted as not allowing a Member State to apply, by way of derogation from the provisions of EU law, the reciprocity clause currently contained in Article 2(7) of the Berne Convention against the holder of the copyrights on a work whose country of origin is the United States of America.

1 Original language: French.

2 See, for example, von Lewinski, S., International Copyright Law and Policy, Oxford University Press, Oxford, 2008, pp. 8 and 9.

3 Convention signed in Berne on 9 September 1886 (Paris Act of 24 July 1971), as amended on 28 September 1979 ('the Berne Convention').

4 See points 9 and 10 of this Opinion.

5 Agreement set out in in Annex 1C to the Agreement establishing the World Trade Organisation (WTO), signed in Marrakesh on 15 April and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

6 Treaty approved by Council Decision 2000/278/EC of 16 March 2000 on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (OJ 2000 L 89, p. 6) ('the WIPO Copyright Treaty').

7 Directive 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).

8 Stb. 1912, No 308.

9 The country of origin of the work at issue in the main proceedings is determined in accordance with Article 5(4) of the Berne Convention, according to which, in essence, for published works, the country of origin is the country of first publication. For the application of the reciprocity clause contained in Article 2(7) of that convention, the determining factor is therefore the country of origin of the work. Although the referring court also mentions the nationality of the authors of that work, it is probably because Netherlands law protects not only works whose country of origin is the Netherlands, but also those whose authors are Netherlands nationals and, by extension, those of authors from other Member States (see Articles 47 and 51 of the Law of 23 September 1912 on copyright). The situation in the main proceedings could therefore have

been different if the authors of that work were nationals of a Member State.

10 Article 4 states that this applies to originals or copies of the work.

11 See, in particular, **judgment of 12 September 2019, Cofemel (C-683/17, 'the judgment in Cofemel', EU:C:2019:721, paragraph 29**).

12 **Judgment in Cofemel (paragraphs 29 and 32).**

13 **Judgment in Cofemel (paragraph 30 and the case-law cited).**

14 **Judgment in Cofemel (paragraph 35).**

15 However, the protection is limited at territorial level (see point 31 of this Opinion).

16 Directive of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 2006 L 376, p. 28).

17 **See the judgment in RAAP (paragraphs 49, 61, 68 and 71).**

18 Treaty adopted in Geneva on 20 December 1996 and approved on behalf of the European Community by Decision 2000/278 (OJ 2000 L 89, p. 6).

19 See **the judgment in RAAP (paragraphs 62 to 68).**

20 Moreover, just like the Berne Convention, the WIPO Copyright Treaty governs copyright protection in countries other than the country of origin of the work. Logically, a measure implementing that treaty cannot therefore exclude from its scope works originating in third countries.

21 See, by analogy, on the scope of Directive 2006/115**, the judgment in RAAP (paragraphs 58 and 59).**

22 Since the main criterion for determining the country of origin of a work is, according to the Berne Convention, the place of publication, that country does not necessarily coincide with the author's nationality or place of residence.

23 Directive of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs (OJ 1998 L 289, p. 28).

24 Council Regulation of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

25 See in particular **my Opinion in Cofemel (C-683/17, EU:C:2019:363, points 33 to 48).**

26 **Judgment in Cofemel (paragraphs 44 to 47).**

27 **Judgment in Cofemel (paragraph 48**). The Court refers, of course, to the relevant paragraph of that judgment.

28 Which may or may not be registered.

29 That is to say, the criteria mentioned in point 26 of this Opinion.

30 Provided for, respectively, in Article 7(8) and Article 14ter(2) of the Berne Convention.

31 See, respectively, Article 7 of Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (OJ 2006 L 372, p. 12) and Article 7 of Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art (OJ 2001 L 272, p. 32).

32 It is true that that provision, according to which the Member States must accord the resale right to authors and to their successors in title of third countries if the legislation of the third country in question accords the same right to 'authors from the Member States and their successors in title', appears to be more specific than that of the Berne Convention ('if legislation in the country to which the author belongs so permits'). However, since Article 5(1) of that convention requires national treatment to be applied to works originating in other signatory States, the result of those two provisions will be the same, namely the mutual recognition of the 'droit de suite' of authors and their successors in title who are nationals of the Member States and of the third country concerned.

33 See, by analogy, **judgment of 27 February 2024, EUIPO v The KaiKai Company Jaeger Wichmann (C-382/21 P, EU:C:2024:172, paragraph 62).**

34 See, on the TRIPS Agreement, judgment of 27 February 2024, EUIPO v The KaiKai Company Jaeger Wichmann (C-382/21 P, EU:C:2024:172, paragraph 63), and, on the WIPO Copyright Treaty, by analogy, judgment of 15 March 2012, SCF (C-135/10, EU:C:2012:140, paragraphs 47 and 48). Moreover, the fact that the Berne Convention has not been published in the Official Journal of the European Union is, in my view, a further indication that the provisions of that convention do not have direct effect in EU law (see, to that effect, judgment of 11 December 2007, Skoma-Lux, C-161/06, EU:C:2007:773, paragraphs 37 and 38 and the case-law cited).

35 COM(93) 342 final, pp. 54 and 55.

36 **See point 36 of this Opinion**.

37 **Judgment of 26 April 2012, DR and TV2 Danmark (C-510/10, EU:C:2012:244, paragraph 31**).

38 Which is normally less extensive than copyright protection.

39 As I mentioned in the introduction to this Opinion, the copyright legislation of many countries protect only national works and authors.

40 Protection in the countries of origin is left to the legislation of those countries.

41 On the contrary, Article 5(2) of the Berne Convention expressly provides that the enjoyment and exercise of protection under that convention are independent of the existence of protection in the country of origin of the work.

42 On the genesis and history of those rules, see, inter alia, Goldstein, P., Hugenholtz, P.B., International Copyright, Oxford University Press, Oxford, 2019, pp. 198 to 202.

43 See, expressly so, Schaafsma, S.J., Intellectual Property in the Conflict of Laws: The Hidden Conflict-of-Law Rule in the Principle of National Treatment, Edward Elgar Publishing, Cheltenham, 2022, pp. 334 and 358. See also, to that effect, inter alia, Goldstein, P., Hugenholtz, P.B., International Copyright, Oxford University Press, Oxford, 2019, p. 202, and von Lewinski, S., International Copyright Law and Policy,

Oxford University Press, Oxford, 2008, p. 114. Although, in its opinion on the present case, the European Copyright Society considers that the reciprocity clause established in Article 2(7) of the Berne Convention is binding in nature, that organisation recognises that the parties to that convention can derogate from it on the basis of Article 19 thereof. The result is therefore the same (see: 'Opinion of the European Copyright Society on certain selected aspects of Case C-227/23, Kwantum Nederland and Kwantum België', 16 April 2024, accessible on the website europeancopyrightsociety.org).

44 **See point 47 of this Opinion.**

45 Judgment of 11 April 2024, Gabel Industria Tessile and Canavesi (C 316/22, EU:C:2024:301, paragraph 22).

46 Judgment of 11 April 2024, Gabel Industria Tessile and Canavesi (C-316/22, EU:C:2024:301, paragraphs 23 and 24).

47 See, most recently, judgment of 25 April 2024, Maersk and Mapfre España (C-345/22 to C-347/22, EU:C:2024:349, paragraph 63 and the case-law cited).

48 And not on 1 May 1989, as stated in the fifth question referred for a preliminary ruling.

49 **Judgment of 9 February 2012, Luksan (C-277/10, EU:C:2012:65, paragraphs 61 and 62 and the case-law cited).**

50 **Judgment of 9 February 2012, Luksan (C-277/10, EU:C:2012:65, paragraph 63).**

51 **See points 55 to 64 of this Opinion.**

52 **See point 79 of this Opinion.**

53 Or, in the case of the Member States which acceded to the European Union after that date, before the date of their accession.
