Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 11 September 2014[1]

Case C-419/13

Art & Allposters International BV
v
Stichting Pictoright

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

(Copyright and related rights — Directive 2001/29/EC — Distribution right — Exclusive right of authors to authorise or prohibit any form of distribution to the public — Exhaustion — Reproduction right — New form)

1. Can the holder of copyright in a pictorial work who has consented to the marketing in poster form of the image depicted prohibit the marketing of the same image as a canvas transfer? That is, in essence, the question at issue in the proceedings giving rise to the present reference for a preliminary ruling, and the Hoge Raad provides the Court of Justice with the opportunity, in resolving that question, to develop the case-law on Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.[2]

I – **Legislative framework**

A – *International law*

1. World Intellectual Property Organization (WIPO) Copyright Treaty[3]

2. In accordance with Article 1(4) of the Treaty, the contracting parties must comply with Articles 1 to 21 and the Appendix of the Berne Convention for the Protection of Literary and Artistic Works ('the Berne Convention').[4]

3. Article 6 of the Treaty, headed 'Right of Distribution', provides as follows:

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

1 — Original language: Spanish.

2 — OJ 2001 L 167, p. 10.

3 — Adopted in Geneva on 20 December 1996. Approved on behalf of the Community by Council Decision of 16 March 2000 (OJ 2000 L 89, p. 6).

4 — Convention of 9 September 1886, revised at Paris on 24 July 1971 and amended on 28 September 1979.

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorisation of the author.'

2. The Berne Convention

4. Under the heading 'Moral Rights', Article 6 *bis* of the Berne Convention provides as follows:

'(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorised by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.'

5. Under Article 12 of the Berne Convention, entitled 'Right of Adaptation, Arrangement and Other Alteration', '[a]uthors of literary or artistic works shall enjoy the exclusive right of authorising adaptations, arrangements and other alterations of their works'.

B – *Union law*

6. Recital 9 in the preamble to Directive 2001/29 states that '[a]ny 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.'

7. According to recital 10 in the preamble to the Directive, '[i]f authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work … Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.'

8. In the words of recital 28 in the preamble to the Directive, '[c]opyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the Community. This right should not be exhausted in respect of the original or of copies thereof sold by the rightholder or with his consent outside the Community …'

9. Recital 31 in the preamble to the Directive states that '[a] fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new

electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.'

10. Under the heading 'Reproduction right', Article 2 of Directive 2001/29 provides that '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 …'.

11. Article 4 of the directive, headed 'Distribution right', provides as follows:

'1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.

2. The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.'

C – *Netherlands law*

12. Article 4(1) of Directive 2001/29 was transposed into Netherlands law by the Auteurswet ('Law on Copyright').

13. Article 1 of the Law on Copyright defines copyright as the exclusive right of the author of a literary, scientific or artistic work, or his legal successors, to publish or reproduce that work, subject to the limitations provided for by law.

14. Under Article 12(1) of the Law on Copyright, publication of a literary, scientific or artistic work is defined as 'the publication of a reproduction of the work, in full or in part …'.

15. In accordance with Article 12b of the Law on Copyright, if a copy of a literary, scientific or artistic work has been distributed for the first time in a Member State by its author or by his legal successor or with his consent, the distribution of that copy in another form, with the exception of rental and lending, does not constitute an infringement of copyright.

II – **Facts**

16. Stichting Pictoright ('Pictoright') is a copyright collecting society incorporated under Netherlands law which looks after, inter alia, the rights of the successors in title to famous painters ('the rightholders').

17. Art & Allposters International BV ('Allposters') markets posters and other reproductions of works by those artists over the Internet.

18. Persons wishing to commission an art reproduction from Allposters can choose between a poster, a framed poster, a poster on wood or a poster on canvas. In the latter case, the reproduction process is as follows. A plastic coating is applied to a paper poster, the image is transferred from the poster onto a canvas by means of a chemical process and the canvas is stretched over a wooden frame. That process and its end result are called 'canvas transfer'.

19. Allposters failed to heed Pictoright's request to cease selling without its consent reproductions of its clients' works produced by means of that process, and consequently Pictoright brought an action against Allposters before the Rechtbank Roermond (Court of First Instance, Roermond), seeking the cessation of all direct and indirect infringements of the copyright and moral rights of the rightholders.

20. The action was dismissed by judgment of 22 September 2010, against which Pictoright lodged an appeal before the Gerechtshof te 's-Hertogenbosch (Court of Appeal, Hertogenbosch), which upheld the appeal by judgment of 3 January 2012. The appellate court relied on the case-law laid down by the Hoge Raad in its judgment of 19 January 1979,[5] according to which there is a new publication for the purposes of Article 12 of the Law on Copyright where the copy placed on the market by the rightholder is distributed to the public in a different form, which results in a new exploitation opportunity for those who market that new form of the copy which was originally distributed (the so-called '*Poortvliet* doctrine'). In the light of that case-law, the appellate court held that, since canvas transfers entail a substantial alteration of the posters whose image is transferred, the marketing of those canvas transfers requires the rightholders' consent.

21. Allposters lodged an appeal in cassation before the Hoge Raad, arguing that the *Poortvliet* doctrine had been wrongly applied as the concepts of exhaustion and publication in copyright law have in the meantime been harmonised in European law. Allposters takes the view that exhaustion within the meaning of Article 4(2) of Directive 2001/29 only occurs at the time of distribution of a work which is embodied in a tangible object if that copy is placed on the market by the rightholder or with the latter's consent. A possible later alteration of the copy or of the object does not have any consequences with regard to exhaustion.

22. For its part, Pictoright contends that the law regarding adaptation has not yet been harmonised and, therefore, the *Poortvliet* doctrine continues to be applicable. In any event, Pictoright submits that that doctrine — in particular, the notion that (substantial) alteration of the object prevents exhaustion — is consistent with EU law.

23. In those circumstances, the Hoge Raad made the present request for a preliminary ruling.

III – **The questions referred for a preliminary ruling**

24. The questions referred for a preliminary ruling on 24 July 2013 are worded as follows:

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

5 — NJ 1979/412, *Poortvliet*.

2 (a) If the answer to Question 1 is in the affirmative, does the fact that there has been an alteration as referred to in Question 1 have any bearing on the answer to the question whether exhaustion within the terms of Article 4(2) of the Copyright Directive is hindered or interrupted?

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

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

IV – **The procedure before the Court of Justice**

25. Written observations were submitted by the parties to the main proceedings, the French Government and the Commission. All those parties, together with the United Kingdom Government, presented oral argument at the hearing held on 22 May 2014. At the hearing, in accordance with Article 61(1) and (2) of the Rules of Procedure, the parties were invited to respond to three questions: (1) Whether a canvas transfer may be regarded as an adaptation of a work within the meaning of Article 12 of the Berne Convention. (2) Whether — for the purposes of assessing whether the distribution right has been exhausted — the principle of appropriate remuneration might be relevant in a case in which alteration increases the price of the object in which the protected work is incorporated. (3) Whether moral rights are of any relevance for the purposes of interpretation of the exhaustion rule.

V – **Arguments**

A – *The first question*

26. In relation to the first question referred, Allposters observes, as a preliminary point, that 'an alteration in respect of its form' must be construed as alteration of the medium in which the copyright-protected work is incorporated and not the image of which the work consists. Having clarified that point, Allposters submits that the question should be answered in the affirmative. Allposters takes the view that, in the present case, it is the medium rather than the work which has been altered and, as a result, the applicable provision is Article 4 of Directive 2001/29 which has completely harmonised the distribution right (paragraph 1) and the exhaustion rule (paragraph 2), from which it follows that there is no latitude at all for the Member States to provide for exceptions.

27. For its part, Pictoright opts for a negative reply as, in its opinion, Article 4 of Directive 2001/29 refers only to cases in which there has been no alteration of the reproduction of the protected work. In that connection, Pictoright contends that it is apparent from the wording of Article 4(2) that the exhaustion rule relates to the 'object', in other words the 'original or copies of the work', and that that concept does not cover reproductions transferred onto canvas, as these differ substantially from the originals or from copies of the originals owing to the significant alterations which posters undergo during the canvas transfer process.

28. Pictoright refers to the European Union case-law and legislation on trade marks, invoking Article 7(2) of Directive 2008/95/EC[6] and Article 13 of Regulation (EC) No 207/2009[7] which are practically identical and provide that the exhaustion of the rights conferred by a trade mark 'shall not apply where there exist legitimate reasons for the proprietor to oppose further commercialisation of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market'. On that basis, Pictoright submits that the right of adaptation in relation to copyright was not harmonised by the Union although the latter, in approving the WIPO Treaty, undertook to comply with Article 12 of the Berne Convention which grants the authors of literary or artistic works the exclusive right of authorising adaptations, arrangements and other alterations of their works.

29. The French Government has limited its submissions to this first question, taking the view that it should be answered jointly with question 2(a). In the French Government's view, it is apparent from Article 4(1) and (2) of Directive 2001/29, in the light of recital 28 in the preamble thereto, that the author of a protected work has the exclusive right to authorise or prohibit the first form of distribution, by sale or otherwise, of any tangible item or any object in which the work or a copy thereof is incorporated. Accordingly, the distribution right is exhausted only if the rightholder has made or consented to the first sale or transfer of ownership of that tangible item or that object.

30. As far as the present case is concerned, the French Government submits that a canvas transfer of a work or a copy of a work entails the creation of a new object the reproduction and distribution of which it falls to the holder of the exclusive rights to authorise or prohibit. The fact that the work may have been put on the market in another form does not exhaust the rightholder's exclusive distribution right in relation to the new object.

31. The French Government takes the view that that is the only interpretation which accords with the objective of Directive 2001/29 of ensuring that authors have a high level of protection of their rights and appropriate remuneration for the use of their works. That is supported by the fact that the canvas-transfer process has a bearing not only on an author's exclusive distribution right but also on other aspects of copyright, such as the exclusive rights of reproduction and adaptation, although the latter is not formally recognised by EU law.

32. The United Kingdom Government argued at the hearing that the concept of publication covers only acts relating to the transfer of ownership of the object. Difficulties may arise where, after the object has been placed on the market with the author's permission, it is altered in such a way that, although a different object is created, the original work is not affected, as would be the case where a collage is created using photographs published in a magazine. Nevertheless, in the view of the United Kingdom Government, the distribution right will have been exhausted in this type of situation.

33. The United Kingdom Government submits that the Court must be very cautious as regards the determination of the conditions for the exhaustion of that right. In its opinion, it should not be concluded that the right is not exhausted when copies of a work are reused or recycled in different forms. The United Kingdom Government believes that once the first authorised sale of an object has taken place, the key question is whether the production of a new article entails an unauthorised reproduction of the author's intellectual creation. If that is not the case, there is nothing to preclude the purchaser from using the article however he sees fit.

6 — Directive of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (OJ 2008 L 299, p. 25).

7 — Council Regulation of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

34. For its part, the Commission proposes that the answer to the first question should be that Article 4 of Directive 2001/29 applies to a situation such as that in the main proceedings and, in particular, that the rightholders concerned may, in principle, rely on the distribution right defined in Article 4(1). In the Commission's view, the distribution right should be interpreted broadly, taking into account the expressions 'any form of distribution' and 'the original of their works or of copies thereof' used in Article 4(1), and the objective pursued by Directive 2001/29, namely to ensure that authors have a high level of protection.

35. The Commission submits that the alteration of form resulting from a canvas transfer does not mean that the end result cannot be regarded as a 'copy' of a work within the meaning of Article 4(1) of Directive 2001/29. Depending on the alteration, the end result will be either a copy which is identical to the poster or a new reproduction of the original work which should also be regarded as a 'copy'. In both cases, it is the Commission's view that the rightholder has an exclusive right to authorise or prohibit distribution of the end result of the canvas transfer.

B – *The second question*

36. Allposters proposes that question 2(a) should be answered in the negative. Allposters submits that where the medium in which the protected work is incorporated is altered, interruption of the exhaustion rule is contrary to the principle of free movement of goods and the rationale of copyright. The right to exploit the protected object commercially is therefore limited to its first dissemination, which guarantees that the rightholder benefits.

37. Allposters points out that, in the field of copyright, a distinction is made between the *corpus mechanicum* (the tangible object) and the *corpus mysticum* (the intangible creation), and it is only the latter which constitutes a work for the purpose of copyright and benefits from copyright protection. Allposters submits that the content of the work should be considered independently of the medium in which it is incorporated, which is not an element of the 'intellectual creation itself'. Allposters is of the opinion that, in the instant case, a canvas transfer entails an alteration of the *corpus mechanicum* in so far as paper is replaced with canvas, but that the *corpus mysticum* is unaltered. Since, from the point of view of copyright, there is no alteration of the reproduction of the protected work, the alteration of the medium in which it is incorporated does not have an effect on the application of the exhaustion rule and does not interrupt it.

38. Allposters believes that the situation would be different only in the exceptional event that the alteration of the medium infringed the copyright holder's moral rights, which protect the entirety of the work and which, according to case-law, apply both to original works and to reproductions of those works, without being limited to the first time the work is put on the market. In Allposters' view, however, that is not the situation in this case.

39. Since it proposes that question 2(1) should be answered in the negative, Allposters refrains from answering questions 2(b) and (c), although it contends that the *Poortvliet* doctrine is not current and conflicts with Article 4(2) of Directive 2001/29.

40. In the light of its proposed answer to the first question, Pictoright makes submissions only in the alternative in relation to the second question, arguing that alteration of a work has the effect of hindering or interrupting exhaustion of the distribution right. In that connection, Pictoright observes that Directive 2001/29 takes as its starting point a high level of protection and that, moreover, exhaustion, as a limitation of the rightholder's distribution right, must be interpreted restrictively.

41. Pictoright takes the view that the copyright holder is entitled to decide not only *whether* but also *in what form* he wishes to put his work into circulation, meaning that he could impose conditions on the licences he grants. Pictoright submits, by analogy with EU law relating to trade marks, that there is no reason why a copyright holder should have to acquiesce in the subsequent placing of his work — or a copy thereof — on the market once the state of the reproduction of his work has been altered, since, otherwise, actual harm could be caused to the artist's reputation and the exclusivity of his work, which would not be compatible with Article 12 of the Bern Convention.

42. As regards questions 2(b) and (c), Pictoright submits that, in accordance with *Peek & Cloppenburg*,[8] it should be left to the Member States to choose which criteria it wishes to apply in order to determine whether there has been an alteration in the form of a reproduction which hinders or interrupts exhaustion within the meaning of Article 4(2) of Directive 2001/29.

43. In the alternative, Pictoright proposes that either criteria should be established for the application of Article 12 of the Berne Convention which grants the author of a work the exclusive right to authorise any adaptation, arrangement or alteration of that work, or criteria should be established which are similar to those laid down in Article 6 *bis* of the Convention, which provides that there is an alteration of the form of a reproduction which is liable to hinder or interrupt exhaustion if the alteration in question infringes the author's moral rights within the meaning of Article 6 *bis*. In Pictoright's opinion, those criteria would leave room for the application of the *Poortvliet* doctrine.

44. The United Kingdom Government submits that the adaptation of a work entails a form of reproduction of that work, but that this is not so in the case of a canvas transfer since such a transfer does not involve an intellectual creation and sufficient originality. Moreover, in the view of the United Kingdom Government, since there is no reproduction, any increase in the price of the object in which the protected work is incorporated would be irrelevant, as the appropriate remuneration would already have been received in respect of the sale of the original object. Finally, the United Kingdom Government contends that moral rights should not be taken into consideration either for the purposes of the interpretation of Article 4(2) of Directive 2001/29.

45. The Commission refers jointly to the three parts of the second question, proposing, first, that the material scope of the exhaustion rule in Article 4(2) of Directive 2001/29 should be analysed by reference to the term 'object' used in the provision. Based on a literal, legislative, comparative and judicial interpretation, the Commission concludes that 'object' must be construed as a work, or a copy thereof, incorporated in a tangible item, which represents an intellectual creation by the author whose legal protection Directive 2001/29 seeks to ensure.

46. The Commission goes on to submit that an alteration in respect of the form is an important criterion for assessing exhaustion. Where the 'object' has undergone a certain amount of alteration of its form since the first sale in the EEA with the consent of the rightholder, the decisive criterion for establishing whether or not there is exhaustion is whether, following that alteration, it continues to be the same tangible item which represents the author's intellectual creation or whether the alteration is such that it is another tangible item with a different form which represents that creation. In the first case, distribution will be covered by the consent previously granted. In the second case, there will be no exhaustion and the interests of rightholders which Directive 2001/29 seeks to protect will justify the exception relating to the free movement of goods.

8 — C-456/06, EU:C:2008:232, paragraphs 31 and 34.

47. As far as the possible application of the *Poortvliet* doctrine is concerned, the Commission contends that, in accordance with case-law, in a situation such as that in the present case, the matter of exhaustion is governed in its entirety by Union law. Accordingly, it is for the national court to determine the extent to which that doctrine is compatible with Directive 2001/29, as interpreted by the Court of Justice, and to guarantee the full effect of Union law.

VI – **Assessment**

48. Reduced to its essential elements, the substantive question raised in the present proceedings is whether consent granted for the purpose of distributing the reproduction of a work of art in poster form also encompasses the distribution of that work of art in canvas form.

A – *Preliminary considerations*

49. According to the account of the facts of the dispute in the order for reference and to the information supplied by the parties in their pleadings and at the hearing, it is clear that there is no commercial connection between Pictoright and Allposters. The copyright holders have certainly authorised the reproduction of the paintings at issue in poster form but that right was not acquired by Allposters. Allposters acquires on the market posters distributed by those who have been authorised to reproduce the paintings at issue in that form and, using those posters, it produces canvases which it, in turn, offers for sale on the market.

50. It is equally clear that, as far as the posters themselves are concerned, the distribution right was exhausted, at the latest, when those posters were acquired by Allposters. The difficulty is that Allposters effects reproductions on canvas using the very posters in respect of which the distribution right has been exhausted. It follows from this that Allposters' activity is not confined to distribution and that instead it also, first of all, carries out a process of manipulation of those posters, leading to a product which is, shall we say, different.

51. From that perspective, the question could be asked whether a difficulty has arisen in relation to the reproduction right; in other words, whether or not Allposters lawfully acquired the right to reproduce the works in question on canvas, it being immaterial in that regard whether it did so directly or through the manipulation of reproductions on paper.

52. Those are not the terms in which the referring court frames its question on the interpretation of Directive 2001/29, that is, in terms of the reproduction right. The question is framed in relation to the distribution right; in other words, whether Pictoright is entitled to rely, in so far as it is a 'non-exhausted' right, on the right to control distribution of the pictorial works in question as the basis of its claim seeking prohibition of the commercialisation of its works on a textile medium.

53. My Opinion will therefore avoid any arguments based on the reproduction right laid down in Article 2 of Directive 2001/29 and will analyse the question of interpretation referred by the Hoge Raad on the basis of the right invoked by that court in its question, that is on the basis of the distribution right enshrined Article 4 of the directive.

B – *The first question*

54. Pictoright submits that canvas transfer entails an alteration of the 'original or a copy of the work' and, therefore, involves an 'adaptation' of the work, meaning that the question is outside the scope of Directive 2001/29 which does not cover the right of adaptation. In other words, Pictoright takes the view that canvas transfer affects the *work* and not solely the *object* or material medium in which the work is embodied.

55. On the other hand, Allposters, the Commission and the French Government contend that canvas transfer entails an alteration of the *object* or material medium, meaning that this is a case of 'distribution' and not 'adaptation', with the result that Directive 2001/29 is applicable.

56. It is therefore necessary to establish, first, whether or not the situation on which the referring court is required to rule constitutes an 'adaptation' of the work, since in that case Directive 2001/29 will not be applicable as it does not cover the so-called 'right of adaptation' which, for the purposes of the European Union, is guaranteed in the Berne Convention.

57. Article 12 of the Berne Convention reserves to authors 'the exclusive right of authorising adaptations, arrangements and other alterations of their works.' To my mind, the situation in the main proceedings does not correspond to a case of 'adaptation'. Strictly speaking, an 'adaptation' affects a 'work' in so far as it is the result of an artistic creation. A typical case would be a cinema *adaptation* of a literary work, a process whereby the artistic product of a great writer is turned into a product of cinematographic art, in other words, an artistic expression which *recreates* the subject-matter of that work in its own language and its own conceptual and expressive universe, which differ from those in which it was originally conceived.

58. One of the essential elements of 'adaptation' as a process of adjustment of the subject-matter of an artistic creation to the methods of expression peculiar to different types of art lies in the diversity of *languages* and artistic techniques. Another of its essential elements concerns adaptation as a technique of creative expression which seeks to *intervene* in the work itself rather than to adjust the work to the expressive characteristics of another artistic language, making the work, in its own language, a different work in so far as it is only vaguely recognisable in its original expression.

59. In the present case, it is clear to me that a canvas transfer does not affect the image reproduced, that is the 'work' or end result of the artistic creation. On the contrary, the merit of a canvas transfer lies in the fact that the original image is reproduced exactly on the canvas. Thus, on the one hand, the original work is not transferred into a different artistic language from that in which it was conceived and, on the other hand, there is no distortion of the image or removal of elements from the composition or addition of elements that are not part of the artist's creation. As far as possible, it is a question of achieving the highest degree of identity with the original.

60. In those circumstances, I believe that the situation at issue in the main proceedings does not come within the concept of 'adaptation'.

61. It must be concluded, therefore, that when the referring court states in its first question that the 'reproduction had … undergone an alteration in respect of its form', it does not mean that the alteration identified constitutes an 'adaptation' within the meaning of Article 12 of the Berne Convention. The 'alteration in respect of its form' must rather be construed as referring to an alteration of the *medium* in which the work is incorporated and not of the work as such, in other words, of the work as the product of artistic creation.

62. On that basis, it is immaterial whether or not the right of adaptation has been harmonised or whether it is appropriate to apply Article 12 of the Berne Convention. All that matters is that the right at issue is the one referred to in Article 4 of Directive 2001/29 — that is, the right which grants holders the exclusive right to authorise or prohibit any form of distribution to the public of the original or of copies of the protected work — and that, in accordance with case-law and with the objective of the directive itself, that provision can be deemed to have harmonised completely the rule on

exhaustion of the distribution right,[9] irrespective of the fact that, also in accordance with case-law, Directive 2001/29 'must normally be given an autonomous and uniform interpretation throughout the Community'.[10]

63. In short, the first question should be answered in the affirmative, that is, to the effect that the right at issue in the main proceedings is 'the right of distribution' of the specific copies in which the reproduced work of art is embodied, with the result that Article 4 of Directive 2001/29 is applicable.

C – *The second question*

1. The significance of an 'alteration in respect of its form'

64. The central question of the case then arises, that is, whether an 'alteration in respect of its form' (i.e. in respect of the material medium in which the reproduction is incorporated) hinders or interrupts exhaustion of the distribution right within the meaning of Article 4(2) of Directive 2001/29.

65. It is necessary to return to the wording of the provision:

'The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.'

66. The difficulty lies in establishing whether, in a case such as this, the term 'object' refers to the artistic creation or its material *medium*. For the reasons set out, it is clear that it refers to the latter, as Allposters, the French Government and the Commission also contend.

67. Clearly, the object in question cannot be the *work* as *corpus mysticum*, since copyright in the *work* thus construed is 'exhausted' only when ownership of that right is transferred, while exhaustion of the distribution right occurs when ownership of something necessarily different is transferred: specifically, ownership of the object on which the work has been reproduced.

68. In other words: once ownership of the object (material medium) is transferred, the distribution right is exhausted, but not ownership of copyright, the *object* of which continues to be the artistic creation.

69. To my mind, that interpretation is confirmed by the wording of recital 28 in the preamble to Directive 2001/29, which states that copyright protection 'includes the exclusive right to control distribution of the work incorporated in a *tangible article*',[11] and goes on to state that the first sale 'of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of *that object*',[12] clearly referring to the aforementioned 'tangible article'.[13]

70. On that basis, I believe that question 2(1) should be answered to the effect that an 'alteration in respect of the form' is relevant for the purposes of determining whether exhaustion within the meaning of Article 4(2) of Directive 2001/29 is hindered or interrupted. This is because the distribution right may be transferred in respect of any possible material medium or solely in respect of certain media.

9 — See, in that connection, *Laserdisken* (C-479/04, EU:C:2006:549), paragraphs 23 to 25.

10 — *Infopaq International* (C-5/08, EU:C:2009:465), paragraph 27.

11 — Emphasis added.

12 — Emphasis added.

13 — The Court ruled on those lines in *UsedSoft* (C-128/11, EU:C:2012:407), paragraph 60.

2. The relevant criteria for establishing the existence of 'an alteration in respect of the form'

71. Next, it is necessary to determine, in accordance with question 2(b), 'what criteria should then be applied in order to determine whether an alteration exists in respect of the form of the reproduction which hinders or interrupts exhaustion within the terms of Article 4(2) of the Copyright Directive'.

72. According to the Commission, in that connection, regard should be had to the degree of alteration in question, as what is crucial is to determine 'whether, following the alteration, it is still the *same* tangible item which represents the author's intellectual creation or whether the alteration of the item concerned creates *another* tangible item which represents that creation in another form'. [14]

73. To my mind, in the present case the nature of the alteration undergone by the material medium in which the artists' intellectual creation is incorporated is such that it could also be argued that, in fact, the process carried out by Allposters amounts to a new reproduction of the protected intellectual creations.

74. That process involves the transfer onto canvas of an image originally reproduced on paper, involving a clear alteration of the tangible medium in which distribution of the pictorial works was authorised. What makes this alteration rather unusual is that canvas transfer does not transfer the image onto any kind of medium but rather onto the same kind of medium as that in which the original work is embodied. Therefore, in my opinion, the question could arise whether the right actually at issue is the right of distribution or, even more importantly, the right of reproduction of the artistic work in its entirety, that is, that work as a whole made up of an image embodied in a particular medium. In other words, it could be argued that Allposters does not merely distribute on paper an image originally embodied in canvas and that instead it in fact reproduces the entire artistic creation. In short, Allposters does not commercialise the *image of a painting* but rather an *equivalent of the painting itself*.

75. Leaving aside that last point, and in line with the terms in which the Hoge Raad framed this question, as I stated at points 49 to 53, the Court must limit its reply to establishing whether, in the circumstances of the case, the alteration made by Allposters entails such a significant change to the material medium that it involves, at least, the distribution of the reproduced works in respect of which the right guaranteed to Pictoright under Article 4 of Directive 2001/29 has not been exhausted.

76. On that basis, it seems quite clear to me that the alteration in question is sufficiently significant and qualified to conclude that Pictoright's distribution right cannot be regarded as exhausted as far as that alteration is concerned. The significance of the alteration is the result of the fact that it does not involve any change in the material medium in which the distributed work is incorporated, but rather just the use of a medium which is of the same nature as the medium in which the intellectual creation was originally embodied That factor gives the present case a very specific character, distinguishing it from those cases in which the nature of the medium used for distribution of the intellectual creation is such that it cannot lead to confusion with the original work. The collages to which the United Kingdom Government refers are a typical example.

77. In my view, it should be sufficient to conclude that, in the circumstances of the case, the alteration made by Allposters is sufficiently significant to consider that there has been a substantial change in the tangible medium in which the protected work is incorporated with the result that exhaustion of the distribution right must be ruled out. Aside from that consideration, I believe that it would be inappropriate to give an abstract ruling on the conditions which must, as a general rule, be satisfied in

14 — The Commission's statement, paragraph 59. Italics in original.

order to find that there is an alteration which is sufficient for the purposes of excluding exhaustion of the distribution right. On the contrary, this case involves a judicial definition of the scope of a legislative provision, which can only be carried out on a case-by-case basis when further proceedings are brought in relation to specific, individual disputes.

78. In short, I believe that the right of Pictoright to control the distribution of reproductions of the works concerned was not exhausted upon the first sale of the posters, since what Allposters seeks to distribute is clearly a 'different thing', notwithstanding the fact that that 'different thing' was obtained as a result of manipulation of the posters in question, which is an arbitrary factor that cannot be decisive.

3. The national case-law relevant to the case and its compatibility with Union law

79. The third and final part of the second question asks whether the Netherlands case-law (the *Poortvliet* doctrine) is compatible with Union law.

80. According to the Hoge Raad, that doctrine maintains that, in principle, 'there is a new publication … where the copy placed on the market by the rightholder is distributed to the public in a different form, which results in a new exploitation opportunity for those who market that new form of the copy which was originally distributed'. [15]

81. On that basis, it is quite clear that the Court is not called upon to rule on the correctness of national law. The Court should merely indicate to the referring court that it is for the latter — in the light of the interpretation of Directive 2001/29 carried out by the Court and having regard to the criteria provided to it for the purpose of applying that directive to the situation at issue — to determine whether or not that case-law is compatible with Union law.

VII – **Conclusion**

82. In the light of the foregoing considerations, I propose that the Court should reply as follows to the questions referred for a preliminary ruling:

(1) 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 governs the answer to the question whether the distribution right of the copyright holder may be exercised with regard to the reproduction of a copyright-protected work which has been sold and delivered within the European Economic Area by or with the consent of the rightholder in the case where that reproduction had subsequently undergone an alteration in respect of its form and is placed on the market again in that form.

(2) (a) The fact that there has been an alteration as referred to in Question 1 has a bearing on the answer to the question whether exhaustion within the terms of Article 4(2) of Directive 2001/29 is hindered or interrupted.

(b) In a situation such as that at issue in the main proceedings, an alteration consisting of the use of a material medium of the same nature as that in which the original work is incorporated excludes exhaustion of the right of distribution within the meaning of Article 4(2) of Directive 2001/29.

15 — Point 3.3 of the order for reference.

(c) It is for the national court to assess whether the foregoing leaves room for the criterion developed in Netherlands national law.