

Kluwer Copyright Blog

Allposters ECJ Decision: no exhaustion of rights in modifications of the copyright work.

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In its recent decision (22 January 2015) in the Allposters case ([C-419/13](#)), the ECJ confirmed that exhaustion of the distribution rights does not apply to works that have been modified. The copyright owner can therefore still oppose the distribution of the modified work, even if he had agreed to the distribution of the original work.

The degree of modification needed -or sufficient- to claim that exhaustion of rights does not apply is still uncertain: the ECJ confirmed that if the modification amounts to a new reproduction, the exhaustion of rights will not apply (even if the “original” copy is destroyed in the process of making the new copy). This is the case if the physical medium on which the work was displayed is changed (e.g. in the “canvas transfer” process described below). Also, the ECJ seems to consider that the value of the copyright work after modification may also be of importance: if the right owner could have asked for higher royalties for the “modified” work, the exhaustion could be put aside. Whether other modifications, e.g. inclusion of the work in other works, division of the works in parts, etc., are sufficient, remains unclear; but such modifications could also fall under the right to object to alterations of the copyright work foreseen in article 12 of the Berne Convention which, as confirmed by the Court, has no equivalent provision in [Directive 2001/29](#).

The facts and reasoning of the ECJ:

Allposters markets posters of famous paintings. Amongst other products, Allposters offers images on canvases. In order to produce an image on canvas, a synthetic coating (lamine) is first applied to the paper poster of the chosen painting. Next, the image on the poster is transferred from the paper to a canvas by means of a chemical process. Finally, that canvas is stretched over a wooden frame. At the end of the process, the image of the painting has disappeared from the poster. That process is known as “canvas transfer”.

The question arises whether the owners of the copyright in the paintings, who had authorised the reproduction and sale of the paintings in poster form, can oppose to the sale of the paintings reproduced on canvas, following transfer of these images from the posters to the canvases. Allposters argued that the distribution rights of the copyright owners are exhausted by the first sale of the posters on the European market with the consent of the copyright owners.

The ECJ stated that the parties were in disagreement: first, as to whether exhaustion of the distribution right covers the “tangible object” into which a work or its copy is incorporated or the “author’s own intellectual creation”; and, secondly, as to whether the “alteration of the medium”, as undertaken by Allposters, has an impact on exhaustion of the exclusive distribution right.

As to the first question, the court answered -not very surprisingly- that the exhaustion of the distribution right applies only to the “tangible object” as such. The Court refers (among others) to article 4.2 of Directive 2001/29 which states that exhaustion applies only to the first sale of the “object”, and to recital 28 of the Directive, which refers to the “work incorporated in a tangible article” and the fact that exhaustion applies to the right to control the resale of the “object” as such.

In relation to the second question, the ECJ considered whether the fact that the object has undergone subsequent alterations to its physical medium has an impact on the exhaustion of rights. In that regard, the ECJ held that a replacement of the medium results in the creation of a “new object”: such an alteration to the copy of the protected work is actually sufficient to constitute a new reproduction, which is covered by the exclusive right of the author and requires his authorisation (notwithstanding any issue of exhaustion of the distribution rights).

Allposters argued that the canvas transfer is not a reproduction, as there is no “multiplication of copies” (the work no longer appears on the poster). The ECJ, however, rejected that argument, finding that what is important is whether the altered object itself, taken as a whole, is physically the object that was placed onto the market with the consent of the right owner. The ECJ added that the consent of the right owner does not cover the distribution of an object incorporating his work if that object has been altered in such a way that “it constitutes a new reproduction” of the work. Therefore, the distribution right was not exhausted upon the first sale of the posters.

This interpretation is also consistent with the principal objective of EU Directive 2001/29: to establish a high level of protection, allowing the copyright owner to obtain an appropriate reward for the use of their works. In the present case, the economic value of the canvases significantly exceeds that of posters and if the distribution right was exhausted upon the first sale of the posters, the right owners would be deprived from (part of) the appropriate remuneration for this type of exploitation of their work.

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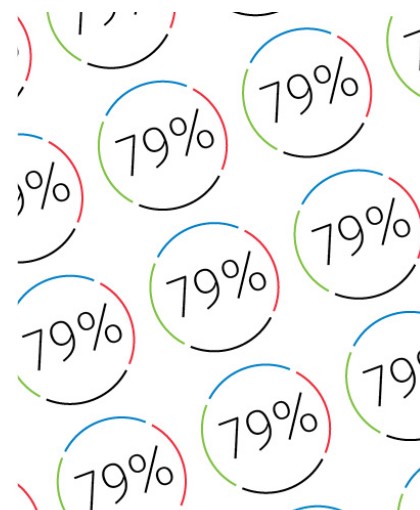
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