

Kluwer Copyright Blog

ECtHR finds violation of right to property by State's failure to enforce copyright

Bernd Justin Jütte (University College Dublin) · Tuesday, September 20th, 2022

In *Safarov v. Azerbaijan* (Appl. no. 885/12) the European Court of Human Rights (ECtHR) finds that the defendant State violated Article 1 of Protocol No.1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In its judgment of 1 September 2022, the Court determines that Azerbaijan failed to enforce copyright in respect of the unlawful digital reproduction and communication of a published book.



Photo by Brandi Redd on Unsplash

The facts of the case date back to the first decade of the current millennium. In 2009, the applicant, Mr Rafiq Firuz oglu Safarov, published a book with the title “Changes in the ethnic composition of the people of Irevan Governorate in the nineteenth and twentieth centuries”. One year later, in 2010, the Irali Public Union (IPU), a nongovernmental organization, made the book available on its website (www.history.az) in electronic form. The book was later removed, after it had already been downloaded 417 times. The applicant brought unsuccessful claims for pecuniary and non-pecuniary damages before the Azerbaijani courts. It seems that the different courts found that the publication of the book was within the scope of existing exceptions of the Azerbaijani Law on Copyright and that the physical publication of the book had, the Supreme Court seemed to suggest, exhausted the right to control the further (electronic) communication of the published book.

The applicant complained that the decisions of the Azerbaijani courts constitute a violation of Article 1 of Protocol No. 1 of the European Convention of Human Rights. Although the IPU did not pursue an economic interest when making his book available online, the applicant argued that his copyright was infringed. The Azerbaijani Government argued that the IPU had made the book available to the general public for informatory, non-commercial purposes and that the applicant had failed to demonstrate that he had suffered any damage.

Analysis

The ECtHR began by underlining that in disputes between private parties, the State incurs a positive obligation to protect the right to property. While States enjoy a margin of appreciation to determine how substantive copyright law reflects domestic social and economic policies, the legal system must provide adequate remedies to address violations of (intellectual) property rights. The decisions rendered by national courts must apply national law correctly and cannot be “arbitrary or otherwise manifestly unreasonable”.

Indeed, the applicant had not claimed that substantively his rights were not sufficiently protected, but that the application of Azerbaijani copyright law to the case was incorrect to an extent that it reflected arbitrariness. The ECtHR agreed by finding that the Azerbaijani courts had applied exceptions to a situation in which they should not have applied and construed a rule of copyright exhaustion where none existed. First, it found that the exception that permits reproduction for private use did not apply. Article 17.1 of the Law on Copyright applies only to “physical persons”, whereas the IPU is a legal person. Furthermore, the exception applies to personal uses and not to the making available to an indeterminate number of persons, and reproduction of entire books is excluded by virtue of Article 17.2. Second, the exception under Article 18 applies only to libraries, archives and educational institutions. The IPI did not fall within any of these categories and had merely uploaded the book under the section of its website entitled ‘Library’. The Azerbaijani further limited their assessment of Article 18 to the element of commercial purpose. But failed to address the relevant substantive requirements under subparagraphs (a) and (b). Third, the ECtHR found that the rule of exhaustion under Article 15.3, read in the light of Article 6 of the 1996 WIPO Copyright Treaty (WCT) and the corresponding Agreed Statement, clearly restricted the rule to physical copies. In this case, however, the reproduction had been made available in digital form.

The Court concluded that the Azerbaijani courts had failed to provide sufficient reasons for their findings and had failed to provide positive protection of intellectual property as required by Article 1 of Protocol No. 1 ECHR. However, the Court did not award the sum of damages requested by the applicant, which would have amounted to a total of 128,286 Euros in pecuniary and non-pecuniary damages, but instead awarded a global sum of 5,000 Euros.

Comment

The facts of the case raise no new issue that has not been discussed elsewhere; they are fairly straightforward and unproblematic. The legal issues raised have been authoritatively decided by the CJEU for example in *Pelham* (see [here](#)) and *Tom Kabinet* (see [here](#)). The interesting aspect of the ruling is the Court’s objection to the overly flexible application of rules contained in Azerbaijan’s national copyright law. First, the question whether copyright is exhausted by the physical publication of a book (distribution) with effect for its digital dissemination (communication to the public and reproduction) has now been settled in the EU, and nothing in the relevant national law in this case suggested that this should be different, read in the light of the Agreed Statement concerning Articles 6 and 7 WCT. Second, the attempt of the national courts to rely on the apparent object and purpose of copyright exceptions without considering their substantive requirement demonstrates a commitment to legal certainty and foreseeability. It also demonstrates that the protection of copyright, and intellectual property in general, as determined by statutory rules cannot be shifted by creative (and possibly policy-driven) application of the law by courts. This evokes strongly the notorious trilogy (*C-476/17*, *C-516/17*, *C-469/17*), in which the

CJEU rejected judicial flexibility and maintained that it is the letter of the law that counts. At best, the ruling is a confirmation of the CJEU's stance on all matters addressed, at worst, the ECtHR's ruling is a scolding of the Azerbaijani courts for not applying its domestic law properly.

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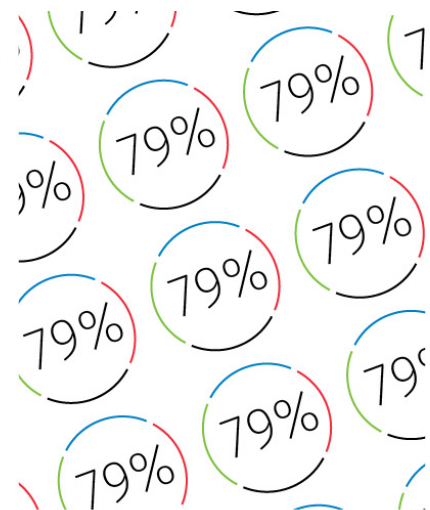
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