Kluwer Copyright Blog

Copyright Exceptions and Digital Exhaustion addressed by the European Court of Human Rights (yes, the one in Strasburg!)

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Over the last decades, European lawyers got used to the – at times remarkable and even forceful – interventions of the Court of Justice of the EU (CJEU) in copyright law. But last year, one supranational interference with copyright law surprisingly did not come from Luxemburg, but from Strasbourg: the judgment in *Safarov v Azerbaijan*.

The *Safarov* case

In 2009, Safarov authors a book. An NGO makes his entire work available for download. He sues for copyright infringement and claims damages. The claim is dismissed in first instance and on appeal. The arguments were that the NGO had removed the book from its website and that the exceptions for personal use and for reprographic reproduction for the preservation of cultural heritage applied. The Azerbaijani Supreme Court upholds this decision in 2011. It confirms the reasoning and adds that, by publishing hardcopies of his book, the author had exhausted his right of communication to the public. Safarov then turns to the European Court of Human Rights (ECtHR), complaining that Azerbaijan had violated Protocol 1 to the European Convention on Human Rights (ECHR).

In a judgement of 1 September 2022, the ECtHR scrutinized the text of exceptions in national copyright legislation and unanimously considered that the Azerbaijani judiciary failed to provide sufficient reasons to apply either statutory exceptions or the exhaustion doctrine to the unconsented online publication. It therefore held that there was a violation of the positive obligation of the State of Azerbaijan to effectively protect intellectual property (IP) pursuant to Article 1 of Protocol 1.

Copyright as Protected Possessions

Article 1 of Protocol 1 protects “the right to peaceful enjoyment of possession”. It has long been uncontested that copyright is in the scope of that provision (*Mykytovych*; *Balan*; *SIA AKKA*; *AsDAC*). Similarly, the CJEU has confirmed the fundamental protection of IP (Art. 17(2) EU Charter) at various occasions, in particular in relation to copyright (e.g., *Deutsche Grammophon* (§17-18); *Musik-Vertrieb Membran* (§9); *Laserdisken* (§62): *Promusicae* (§62); *SABAM* (§42)). Hence, *Safarov* is hardly a surprise where the ECtHR confirms that authorities have a positive obligation to take the measures necessary to guarantee that copyright holders can effectively enjoy their rights by enforcing them and seeking damages, even when it comes to litigation between private parties. Nonetheless, it was highlighted that the judgment demonstrates “a remarkable twist” in the sense that the Court is traditionally very cautious in finding human rights violations in IP disputes between private parties (see *SIA AKKA*; *Mih?ilescu*), and that it had priorly only found violations in instances where the State itself directly interfered with IP rights (e.g., *Balan*; *Kamoy*; *AsDAC*).

After establishing that protected possession is at hand, courts usually determine whether there is interference, whether that interference has an accessible and precise legal base, whether it is justified by compelling reasons of general interest or by the need to protect the rights and freedoms of others, and whether it is proportional. However, in *Safarov*, these elements were not at stake. Indeed, it was undisputed that Azerbaijan has modern copyright legislation in place. Instead, Safarov’s main allegation was that the judiciary had applied the law in an unlawful and arbitrary way by finding that certain exceptions and the exhaustion doctrine applied.

Statutory Exceptions

Pursuant to Azerbaijani copyright law, the statutory exception for private use only applies to personal use by natural persons and not to entire reproductions, so the ECtHR remarks. Moreover, the cultural heritage exception only applies to libraries, archives and educational institutions, and depends on specific additional criteria. Having read these national provisions, the Court argues that the domestic courts did not sufficiently substantiate why these exceptions were applicable when an NGO makes an entire book available on its website.

This is not the first occasion where an international court considers the relation between copyright exceptions and fundamental rights protection. By the 2019 *Funke*, *Pelham* and *Spiegel* triptych, the CJEU notably closed the door for national courts to rely directly on fundamental rights as potential means of defence against alleged copyright infringements, in cases where no statutory exceptions are applicable. When enacting the closed list of exceptions, the CJEU considered, the EU legislator already took into account fundamental rights. Instead of relying on “external” limitations derived from fundamental rights, courts should therefore rather “internalize” fundamental rights arguments when interpreting harmonized exceptions.

For now, Luxemburg and Strasburg case law are not in conflict. Whereas the CJEU considered the potential of fundamental rights as a means to expand the boundaries of what third parties can do without a rightholder’s permission, the ECtHR precisely dealt with fundamental rights as a guarantee that these boundaries are not overly and arbitrarily expanded to the rightholder’s detriment. Nonetheless, juxtaposing the case law of both courts could give rise to tensions. On the one hand, the CJEU essentially tells national courts to stretch statutory exceptions if necessary to safeguard the fundamental rights the legislator had in mind. On the other hand, *Safarov* now

essentially warns courts to have clear, well-elaborated arguments when attributing an overly permissive reading to the text of those exceptions. This feels like balancing on a tightrope.

Digital exhaustion

The ECtHR also dedicated a paragraph to the Azerbaijani Supreme Court's argumentation about the principle of exhaustion. Pursuant thereto, the copyright holder is no longer entitled to control the further distribution of a copy of their work after that copy had been put on the market with the rightholder's consent. Dictated by the importance to have freely marketable goods, the underlying idea is that by the act of first marketing, the rightholder was able to reap their reward, thus 'exhausting' the exclusive right to control distribution of that specific copy.

The exhaustion doctrine was conceived with physically sold hardcopies in mind. With the advent of the internet, the question arose as whether it should be extended over the dissemination via download. In this debate, Article 6(2) WCT was often invoked. Pursuant thereto, it pertains to the discretion of its Parties to "determine the conditions, if any, under which the exhaustion of [the distribution right] applies after the first sale or other transfer of ownership of the original or a copy of the work with authorization of the [rightholder]". An agreed statement clarifies that "the original and copies" refers exclusively to "fixed copies that can be put into circulation as tangible objects". Given that the preparatory works indicate that the non-exhaustible right of making available was intended to function as the "basic rule for the proper functioning of the electronic marketplace", the WCT provided arguments against digital exhaustion. Interestingly, the *Safarov* judgment also relies on these provisions.

In the EU, the digital exhaustion debate was settled in two judgments. In *UsedSoft*, the CJEU upheld that exhaustion can apply to the downloading of copies of a computer program, at least if the rightholder had conferred an open-ended user right in return for payment. The distribution right in the Computer Program Directive was broadly conceived, and the downloading of a program was held "functionally equivalent" to its supply on a CD-ROM. By contrast, in *Tom Kabinet*, the CJEU found that there is no such thing as a "second-hand" downloaded e-book. Copyright in e-books is subject to the InfoSoc Directive, it argued, which transposed the WCT. As a result, so the judgment teaches, each new transfer of an e-book amounts to an act of communication to the public in the sense of Article 3 InfoSoc Directive, which explicitly excludes the exhaustion.

Whether to honour the digital exhaustion doctrine or not, has always seemed a matter of national or EU law. Applied to *Safarov*, it would thus seem that only the Azerbaijani legislator and judiciary are entitled to assess its merits for national copyright law. Nonetheless, the ECtHR "observes" that the wording of the national "provision on the rule of exhaustion of the right to distribution", as invoked by the Supreme Court, read together with the "Agreed statement concerning Article 6 [WCT]", suggests that that rule "referred to lawfully published and fixed copies of works which were put into circulation by sale as tangible objects". "As is apparent from the facts", the ECtHR continues, "while the applicant had published his book and physical copies were available in the book market, nothing suggests that he had ever authorised its reproduction and communication to the public in a digital form. The Supreme Court did not explain why it considered this provision relevant to the circumstances of the present case where the dispute concerned not the distribution of the lawfully published copies of the applicant's book but its reproduction in a new, digital, form and its online publication without his consent."

What does this excerpt mean for the digital exhaustion debate? Some commentators have remarked (e.g., here and here) that the ECtHR provided the neck shot for digital exhaustion: the WCT distribution right refers to tangible copies only, *et voilà*: adios digital exhaustion! While the ECtHR surely shows its reservations with regard to that doctrine, there is however a more moderate way to read the cited paragraph. In that reading, the ECtHR merely notes that the author had only consented to the distribution of paper copies and that it his consent to marketing via download had not been proven. Even if exhaustion would apply to downloads, the rightholder would indeed always retain the right to give permission for the first marketing of each new "digital copy" with an accompanying user licence. At the very least, as the ECtHR rightfully remarked, a rightholder would need to consent to reproducing its paper book into a digital copy and to its subsequent communication via the internet.

Read in the latter sense, the ECtHR did not take a stance on the digital exhaustion debate. Quite to the contrary, it essentially avoided entering the debate at all. That would make sense, because it is not placed to interpret internal or international copyright provisions but only to judge alleged ECHR violations. Nonetheless, European national courts now clearly need to make sure to explicitly put forward well-elaborated arguments when deciding in favour of digital exhaustion.

Clash of the Titans?

What are *Safarov*'s takeaways? First, that ECHR States need to make sure that their copyright legislation is effectively enforced in practice, also between private parties. Second, that national courts are expected to elaborate solid reasoning when arguing that copyright claims should be dismissed in light of a broad reading of an exception or the exhaustion principle.

This judgment's immediate impact on copyright law should not be exaggerated. At least in the EU, there seems no reason to reconsider established case law. Nonetheless, it would be interesting to see what the future beholds. Following some 30 years after the CJEU, the ECtHR is now the second international court in Europe explicitly dealing with the interpretation of copyright and its balance with other fundamental rights. Especially in light of CJEU case law preventing national courts from overruling copyright claims by direct reference to fundamental rights, let's see how long Luxemburg and Strasburg can keep playing without getting into conflict.

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