

National Group: Latvia
Title: Exhaustion issues in copyright law
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Reporter within Working Committee: Ingrida VEIKSA, Turiba University
Date: 25.04.2014

Questions

I. Current law and practice

Right of distribution

- 1) Does the copyright law of your country recognise the right of distribution within the meaning of Article 6, paragraph (1) of WCT? If so, please cite the provisions which set forth the definition of the right of distribution and recognise such right.

Yes, with respect to the use of work an author has the exclusive rights to distribute the work (Art.15 Part 1 Point 4). The same rights are granted also to the use of a computer program (Art.15 Part 2 Point 1) and a database (Art.15 Part 3 Point 2). The Copyright Law defines the distribution as an activity by which the original or copy of the copyright or neighbouring rights object is sold or otherwise alienated (Art.1 Point 11). Additionally, with respect to the use of the neighbouring rights, objects rightowners have the exclusive rights to distribute: fixation of performance (Art.48 Part 3 Point 3), phonogram (Art.51 Part 1 Point 1), film (Art.50 Point1), fixation of broadcast (Art.53 Part 1 Point 6) and photographic image of the screen from a broadcast (Art.53 Part 1 Point 3).

Exhaustion of copyright-protected works

- 2) Does the copyright law of your country recognise the exhaustion of copyright-protected works after the first sale of the work with the authorisation of the author? Is it recognised by statutory law or case law?

Yes, the Copyright Law includes Article 32 Exhaustion of Distribution Rights, which sets forth that the right to distribute a work shall be exhausted from the moment when such work is sold or otherwise alienated in the European Union for the first time if it has been done by the author himself or herself, or with his or her consent.

- 3) How does your law treat exhaustion of copyright-protected works?

Specifically,

- a) Does exhaustion of rights occur for all kinds of works or is exhaustion limited to certain kinds of works?

The exhaustion of rights applies only to works embodied in concrete material objects or the copies which are sold or otherwise alienated (Art.32 of the Copyright Law).

- b) Which right can be exhausted? Is it (a) the right of distribution, and/or (b) the right of reproduction, and/or (c) the right of lending and/or renting of copies?

The exhaustion of rights refers only to the rights of distribution (Art.32 of the Copyright Law) and there is no reference to the exhaustion of the rights of reproduction and the rights of lending.

The rights of reproduction are defined as the making of one or more copies, by any means and in any form and scale, fully or partially, of an object of copyright or neighbouring rights, also short-term or long-term storage in electronic form of an object of copyright or neighbouring rights or a part thereof, as well as the making of three-dimensional copies of a two-dimensional object or two-dimensional copies of a three-dimensional object (Art.1 Point 17).

The rights of lending are defined as an action by the user of the original or a copy of the work of an author, the fixation of a performance, a phonogram or a film, by means of which the object of copyright or neighbouring rights is made available through the intermediation of a publicly accessible institution to an unlimited number of people for a limited period of time, not for the purpose of gaining direct or indirect economic or commercial benefit (Art 1, Point 16).

- c) What are the requirements for exhaustion of rights to occur? What activities by rightholders are required for exhaustion to apply? Are licensees/buyers required to take any positive steps for exhaustion to be applicable?

The exhaustion of rights occurs when (i) a work is sold or otherwise alienated in the European Union for the first time; and (ii) it is done by the author himself or herself or with his or her consent. No licensees/buyers are required to take any steps for exhaustion to be applicable.

- d) If the rightholder A distributes lawful copies made by A to people including B, B purchases a copy from A and sells it to C, and thereafter A cancels the sales agreement between A and B because of non-payment of the price by B to A, may A assert his/her copyright against C? May C rely on exhaustion of A's rights to the work (or the right of distribution)? In this connection, which party (A or C) will keep the right of ownership in the tangible copy?

First sale of a copyrighted work is the only express requirement necessary for exhaustion of rights to take place. According to Article 2004 of the Civil Law a sales agreement shall be considered to have been entered into force when both parties have agreed on the subject-matter of the purchase and the purchase price. Thus, one could assume that a later cancellation of the already concluded agreement would not have any reverse effect on exhaustion of rights. Namely, the A's rights would be considered to be exhausted notwithstanding the cancellation. A further argument supporting this conclusion is that C is a bona fide purchaser.

Hence, in this situation, A would not be entitled to assert copyright against C since C could rely on exhaustion of A's rights. Further C would keep the right of ownership in the tangible copy.

- e) Are there any statutory exceptions to the exhaustion of rights, e.g. transformation of the work by the licensee/buyer prior to re-selling?

The Copyright Law does not provide any explicit exceptions to the exhaustion of distribution rights, as it is, for example, set forth by the Patent Law regarding inventions.

- f) May the exhaustion of rights be waived contractually?

The Copyright Law does not provide such possibility.

- 4) What is the rationale/justification under your law for the exhaustion of rights?

The initial Copyright Law, valid from May 11, 2000, provided the exhaustion of distribution rights only regarding the territory of Latvia. The current provisions on the exhaustion of distribution rights were introduced by the amendments valid from May 1, 2004 and the territory of the exhaustion of distribution rights was amended from Latvia to the European Union according to the requirements of Directives 91/250/EEC, 92/100/EEC, 96/9/EC and 2001/29/EC.

International exhaustion (specific issue 1)

- 5) Does your law recognise international exhaustion of copyright? Specifically, if a copyright-protected work stored on a tangible medium (such as CD or DVD) which was lawfully made and distributed outside your jurisdiction is imported into and sold in your jurisdiction, may the holder of the copyright in your jurisdiction assert his/her copyright against such copy?

No, the international exhaustion of distribution rights is not recognized by the Copyright Law. Since the law explicitly refers to the exhaustion of such rights for the territory of European Union, the holder of the copyright may assert his/her copyright against the import and sale of goods in the market of the European Union.

- 6) If your law recognises international exhaustion of rights, what is the rationale/justification under your law for such international exhaustion?

Since the international exhaustion of rights is not recognized in Latvia, there is no rationale / justification for it.

On-line exhaustion (specific issue 2)

- 7) Does your law recognise on-line exhaustion or exhaustion in the case of downloaded copies of copyrightable works? Under which conditions are which kind of rights in different kinds of copyright-protected works exhausted?

No, the Copyright Law does not recognize on-line exhaustion or exhaustion in the case of downloaded copies of copyrightable works. The exhaustion of rights applies only to works embodied in concrete material objects or the copies thereof and which are sold or otherwise alienated (Art.32 of the Copyright Law).

The Copyright Law includes provisions arising out of the implementation 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; therefore, the explanation provided within the respective preamble Point 29 may be referred to, namely "The question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the rightholder. Therefore, the same applies to rental and lending of the original and copies of works or other subject-matter which are services by nature. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides."

The Copyright Law includes the reference that it contains legal provisions resulting from the Directive 91/250/EEC¹ in the legal protection of computer programs. According to the ruling of Court of Justice of the European Union (CJEU) in the case *UsedSoft v. Oracle*, this Directive should (as *lex specialis* in relation to Directive 2001/29/EC) be interpreted as allowing to apply the principle of exhaustion to the download (intangible) copies of software. Nevertheless, nothing in the wording of the Copyright Law suggests that the respective CJEU ruling has been transposed into the national legal system.

¹ Current Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs

- 8) Are rights exhausted in a perpetual or non-perpetual licence? Are "re-sellers" of digital copies allowed to further re-sell such digital copies under the circumstances described in *UsedSoft v. Oracle*? Can multi-user-licences be split up and sold separately?

Since on-line exhaustion or exhaustion in the case of downloaded copies of copyrightable works is not recognized by the Copyright Law, comments whether it is allowed to further resell the digital copies or split up and sell separately licences cannot be provided. A lot will depend on the implementation of CJEU ruling in Latvia.

- 9) Is a distinction made for each kind of copyright-protected work (computer programs, music files, e-books and videos)?

Since the Copyright Law does not recognize on-line exhaustion or exhaustion in the case of downloaded copies of copyrightable works, there is no distinction made based on a kind of copyright-protected work.

- 10) If your exhaustion regime for digital works differs from that for analogue works, what is the rationale/justification for such difference?

Since the Copyright Law does not provide regulation on the exhaustion regime for digital works, there are no comments regarding the difference between such regime and the one for analogue works.

Exhaustion of copyright-protected works in case of recycling and repair of goods (specific issue 3)

- 11) In the case of recycling or repair of goods which are copyright-protected works, to what extent may one recycle or repair such goods without infringing (1) the right of reproduction, (2) the right of adaptation, the right of arrangement and/or other alteration rights; or (3) the right to integrity?

Copyright Law does not provide any measurements to what extent one may recycle or repair goods without infringement of rights. One have to ask permission to transform a work (with respect to the use of his or her own work, an author, has exclusive rights: to arrange, to adapt, or to otherwise transform a work- Art.15 Part 1 Point 11).

II. Policy considerations and proposals for improvements of the current law

- 12) How should the law treat exhaustion of rights?

Specifically,

- a) Should exhaustion of rights occur for all kinds of works or should exhaustion be limited to certain kinds of works?

Exhaustion of rights should apply to all kinds of works.

- b) Which right(s) should be exhausted?

Only distribution rights should be exhausted.

- c) What should be the requirements for exhaustion of rights to occur?

Only distribution rights of works embodied in concrete material objects should be exhausted.

- d) Should copyright be exhausted even if the first sale of a copy by which exhaustion occurs is cancelled due to non-payment of the sales price or similar circumstance?

Yes.

International exhaustion (specific issue 1)

- 13) Should there be international exhaustion of copyrights?

No, there should not be international exhaustion of copyrights, since that would prevent effective exploitation of rights and benefiting from them, which is of importance for the rightholders.

On-line exhaustion (specific issue 2)

- 14) Should there be on-line exhaustion of downloaded copies? In your view, are downloaded copies fully comparable with copies stored on tangible data media?

Downloaded copies are not embodied, they are not distributed, but have been made available. It does not comply with provisions of exhaustion of rights.

- 15) If there should be on-line exhaustion, under which conditions should different kinds of rights be exhausted? Should there be any differences between downloading a work and streaming it? Should rights be exhausted in a perpetual or non-perpetual licence? Should "re-sellers" of digital copies be allowed to further re-sell such digital copies? Should multi-user-licences be split up and sold separately?

Multi-user-licences can't be split up and sold separately, because they are intended for sale in a package, so the price is set accordingly.

- 16) Should a distinction be made for each type of copyright-protected work (e.g. computer programs, music, books and films)?

Considering the way digitalisation is challenging the traditional understanding of the scope and subject matter of copyright protection there should be room for discussion.

Exhaustion of copyright-protected works in case of recycling or repair of goods (specific issue 3)

- 17) To what extent should one be able to recycle or repair goods which are copyrightable works without infringing (1) the right of reproduction, (2) the right of adaptation, arrangement and other alteration rights; and (3) the right to integrity?

If in the case of recycling of goods one creates a new copyright-protected work, which comply with definition of work (the result of an author's creative activities in any domain - Art.1, Point 2), it is a new independent work. If service master just repairs a good, it does not fulfil the requirements of work, and does not belong to a service performer. One should be able to recycle or repair copyrightable works without infringing where it is done in a fair manner.

III. Proposals for harmonisation

- 18) Should exhaustion of rights as set forth in Question 12 above generally be harmonised? Please provide your reasons.

Yes. Copyright protected works easy cross borders and harmonisation is essential tool for protection of rightowners

- 19) Should international exhaustion of rights be harmonised or not? Please provide your reasons.

There should not be a question of harmonisation since we do not consider international exhaustion to be a viable option.

- 20) Should on-line exhaustion of rights be harmonised? Please provide your reasons.

Distribution is performed when original or copy of the copyright or neighbouring rights object is sold or otherwise alienated. It is impossible on-line. There is nothing to harmonise

- 21) Should exhaustion of rights in case of recycling and repair of goods be harmonised? Please provide your reasons.

Yes.

With regard to Questions 18 through 21, if you note that harmonisation is desirable, we will assume that harmonisation should be as your proposals for improvements of the current law as described in your answers to Questions 12 through 17. If that is not the case, please explain.

SUMMARY

Under the current Latvian law exhaustion of rights concerns only the rights of distribution in relation to all kinds of copyright-protected works, given that they are embodied in concrete material objects. We feel that this model strikes a good balance between the interests of copyrights owners and public interests. Thus there is no need to reconsider the scope of rights that can be exhausted. The same applies the requirements for exhaustion.

We do not recognise the need for international exhaustion of copyrights as it prevents effective exploitation of rights and benefiting from them. Further, we are highly sceptical of the concept of on-line exhaustion as such for the reason that it does not mesh well with the traditional understanding of the scope and subject matter of copyright protection.

In our view the lack of harmonisation in the area of exhaustion of rights may undermine the effective protection of copyright owners.