



CongressToronto
Adopted resolution
September 17, 2014

Resolution

Question 240

Exhaustion issues in copyright law

AIPPI

Noting that:

- 1) Exhaustion of copyrights is neither mentioned in the Berne Convention of 1886, as amended in 1979, nor in the Rome Convention of 1961.
- 2) Article 6 of the TRIPS Agreement of 1994 provides that signatories are free to regulate the question of exhaustion, subject to the non-discrimination rules of national treatment and most favoured nation treatment.
- 3) The WIPO Copyright Treaty of 1996 ("WCT") does not contain any specific rules or standards regarding exhaustion of copyrights.
- 4) Unlike exhaustion of other intellectual property rights, AIPPI has not previously studied exhaustion issues in copyright law.
- 5) In the resolution on Question 205 "Exhaustion of IPRs in cases of recycling or repair of goods", which was limited to consideration of patents, designs and trademarks, it was noted that exhaustion of copyrights in cases of recycling or repair of goods presents additional complexities and should be a matter of further study.

Considering that:

- 1) Almost all of the reporting Groups report that they recognise the right of distribution within the meaning of Article 6, paragraph (1) of WCT.
- 2) The overwhelming majority of reporting Groups report that their copyright laws recognise at least the domestic exhaustion of copyrights after the initial authorised sale of a copyrighted work.
- 3) In almost all jurisdictions, the Groups report that exhaustion occurs after a copyright holder authorises the sale or transfer of a copy of a work within a defined jurisdiction.
- 4) The majority of the Groups report that even after a particular copy of a work is distributed with the authority of the copyright holder, the copyright holder has the right to prohibit or authorise the reproduction of the work and/or prohibit or authorize the creation of new or different versions of the work. In addition, the work remains subject to the moral rights of a given jurisdiction. The Groups are equally split on whether exhaustion rights currently can be waived contractually.
- 5) The Groups report that the rationale for exhaustion includes: a) the free movement of goods; b) balancing the rights of the copyright holder and the owner of a copy; and c) competition.
- 6) Nearly half of the Groups report their jurisdictions recognise only regional exhaustion (EU/EEA), some Groups recognise international exhaustion generally and other Groups do not recognise international exhaustion at all.
- 7) The jurisdictions are not consistent in their approaches to on-line exhaustion.
- 8) The type of on-line exhaustion (including the type of copyrighted work) and the rationale for such exhaustion are inconsistent and vary, in some instances, based on the current technology addressed.
- 9) Harmonisation of certain aspects of exhaustion law will lead to certainty.
- 10) The term "copy" as used in this resolution includes both the original and a reproduction thereof.

Resolves that:

- 1) “Exhaustion” should be defined as the loss of the copyright holder’s right to exercise control of a copy of a copyrighted work, following the first sale or other transfer of ownership of that copy, with the authority of the copyright holder.
- 2) The legitimate first sale or other transfer of ownership of tangible copies of copyrighted works should be subject to exhaustion; however, only the right of distribution should be exhausted.
- 3) There should be no exhaustion of the rights in the case of streaming.
- 4) If a third party purchases a copy of a work from a buyer who subsequently fails to pay the initial seller, and such third-party purchase takes place without knowledge of the buyer’s breach of contract, the rights of the initial seller in the copy should be exhausted.
- 5) There should be no general international exhaustion of rights. However, jurisdictions may provide for regional exhaustion between jurisdictions.
- 6) Even if the distribution right is exhausted for goods which are copyrighted works, whether recycling or repair of such goods constitutes infringement of (i) the right of reproduction of the copyright holder, (ii) the right of adaptation, arrangement and other alteration of the copyright holder and (iii) the moral rights (right to integrity) of the author should be examined independently.
- 7) Online-exhaustion should be further studied in a separate question.