

CONCEPTS
Decision: no exhaustion of rights in case of modifications of the copyrighted work.

PRACTICE AREAS

In its decision of today (22 January 2015) in the Allposters-case (C-419/13), the ECJ confirms that exhaustion of the distribution rights does not apply to works that have been modified. The copyright owner can therefore still oppose to a distribution of the modified work, even if he had agreed with the distribution of the original work. What (degree) of modification is needed -or sufficient- to claim that exhaustion or rights does not apply, may still be discussed: the ECJ confirms 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 medium on which the work was displayed, is changed (e.g. for “canvas transfer”); also, the ECJ seems to consider that the value of the copyrighted 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 oppose to alterations of the copyrighted work foreseen in article 12 of the Berner Convention which, as is confirmed by the Court, is not harmonized by the Directive 2001/29.

The facts and the reasoning of the ECJ: Allposters markets posters of famous paintings. Among other, Allposters offers images on canvases. In order to produce an image on canvas, a synthetic coating (laminate) is first applied to the paper poster with 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 on the paintings, who had authorized the reproduction and the sales of the paintings on the posters, can oppose to the sale of the paintings on canvases, after transfer of these paintings from the posters to the canvases. Allposters argues that the distribution rights of the copyright owners are exhausted by the first sale of the posters on the European market with the content of the copyright owners. The ECJ states that the parties are 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 for the first question, the court answers -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 the European 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. As for the second question, the ECJ states that it must be assessed 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, a replacement of the medium results in the creation of a “new object”: such alteration of 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 authorization

(notwithstanding any issue of exhaustion of the distribution rights). All posters invoked that the canvas transfer is not a reproduction, as there is no “multiplication of copies” (the work does not appear anymore on the poster). The ECJ however rejects that argument: 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 adds 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. This interpretation is also found consistent with the principal objective of the 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 the right owners would be deprived from (part of) the appropriate remuneration for such type of exploitation of their work.



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