

German Court Rules Valve May Prohibit Steam Account Transfers



The Regional Court of Berlin has dismissed the lawsuit of German consumer watchdog group Verbraucherzentrale Bundesverband („vzbv“) against Valve Inc. over the provisions in company’s terms of service that prohibit the sale or transfer of user accounts on the Steam digital distribution platform. It was the second time the consumer rights activists had sought the help of the courts to force Valve to allow such transfers - both times without success.

The reasons for the decision have not yet been published, and vzbv may still have the right to appeal the judgment. Even so, the ruling touches on hot issues of European copyright law and may have ramifications for the games industry and the used games market across all EU jurisdictions.

A Bit Of Background

German law has a strict set of rules on what is permitted and what is not in standard contracts used in B2C settings. Aside from a number of specific restrictions, one of the general limits - which gives considerable power to the courts - is that clauses are unenforceable if they deviate from essential principles of a statutory provision in a way that puts customers at an unreasonable disadvantage.

One such essential statutory principle, the consumer activists of vzbv have been arguing for years, is the doctrine of exhaustion. Put simply, this doctrine, which is a part of copyright law in many jurisdictions including the EU but also the USA and Canada (where it is also called the “first sale doctrine”), limits a copyright owner’s right to control individual copies of their copyrights material once they have distributed those individual copies. The distribution right in any one copy of a protected work, in other words, is exhausted once it has been exercised. Originally, this rule was developed to enable purchasers to resell their tangible copies of a work (like books or paintings), and today it is codified - albeit with slightly diverging wording - in two EU directives, namely those dealing with copyright in general (2001/29/EC) and copyright in computer software in particular (2009/24/EC).

In the first case against Valve, vzbv argued that if copyright law, through the doctrine of exhaustion, allowed the resale of used computer game DVDs, then a clause in a standard contract restricting the transfer of the online account necessary to play the game was at odds with the basic principles of statutory law and therefore unreasonable, abusive and, ultimately, unenforceable.

The matter was litigated all the way to Germany’s highest civil court, the Federal Court of Justice (Bundesgerichtshof; „BGH“), which dismissed the suit in 2010, finding that while the doctrine of exhaustion limited the rights holders’

powers with regards to an individual DVD, it did not require them to design their business in a way that facilitated the sale of used games and therefore did not make the Steam terms of service unenforceable.

Why Did They Try Again?

So what changed that prompted vzbv to try their luck again? In July of 2012, the Court of Justice of the European Union decided that the doctrine of exhaustion applied to digitally distributed computer software.

The question whether the doctrine of exhaustion could be applied to intangible copies has been the subject of intense debate. In the UsedSoft case, the CJEU decided that regardless of how the provisions on exhaustion are worded in Directive 2001/29/EC, the special provisions in the computer software directive 2009/24/EC permitted its application to intangible copies, and the contemporary realities of digital distribution required such application if the [doctrine of exhaustion applied to digitally distributed computer software](#).

The German consumer watchdogs read the UsedSoft case to mean that the doctrine of exhaustion, by virtue of European law, had to be interpreted broadly to give it practical effect, and this could only mean that German courts now had to rethink their old stance.

Are German Courts Contradicting the CJEU?

So is the Regional Court of Berlin going against CJEU case law? Not quite.

The judges’ comments at the oral hearing held a few days before the verdict transpired do indicate that they do not consider the doctrine of exhaustion to be applicable to digitally distributed computer games at all. However, this is not a direct contradiction of the UsedSoft decision.

In fact, in UsedSoft, the CJEU mentions a possible discrepancy between the provisions on exhaustion in the general copyright directive and the computer software directive that may very well mean that exhaustion for intangible copies cannot apply to anything but computer software. And in a very recent case involving pirated copies of video games, the CJEU, holding that such games, because of their audiovisual components, were „not only computer software“, considered them protected under the “general” copyright directive 2001/29/EC.

A second case dealing with the precise copyright status of video games (coming, incidentally, from Germany) is currently still before the European judges, so the case law on this issue must be considered in flux. But at least for the

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moment, it looks like digitally distributed video games are not subject to exhaustion in Europe.

But even as far as physically distributed games are concerned, and the doctrine of exhaustion must indubitably be applied, the court seems to agree with the BGH that the doctrine of exhaustion does not render the no-transfer clauses in Valve's terms of service unenforceable. The CJEU's *UsedSoft* case, of course, in spite of its consideration of distribution practices, does not require otherwise. The Berlin court could not have relied on it as mandatory EU case law forcing it to disregard the BGH's 2010 decision.

What This Means

For video game industry stakeholders in Germany, the EU and beyond, this ruling may not be entirely surprising. It is another strong signal that digital and hybrid distribution strategies limiting the potential for software piracy and protecting distribution networks against gray imports are feasible and the contractual clauses implementing them will be enforced by the courts.



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