

# Update: Valve May Prohibit Steam Account Transfers – German Judgment Published



As already reported in one of our recent publications, the Regional Court of Berlin has recently 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 court of Berlin has now published the reasons of its decision, which we explain in more detail in this **Update**, 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 strict rules on what is permitted and what is not in standard contracts. One of the general limits – giving 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, consumer activists have been arguing for years, is the doctrine of exhaustion. Put simply, this doctrine limits a copyright owner's right to control individual copies of their material once distributed. 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 the EU directives, dealing with copyright in general (2001/29/EC) and copyright in computer software in particular (2009/24/EC).

In the first case against Valve, litigated all the way to Germany's highest civil court, the Federal Court of Justice (Bundesgerichtshof; "BGH"), 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 unenforceable. The suit was dismissed in 2010, the BGH 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?

In July of 2012, the European Court of Justice decided in the famous *UsedSoft* case that the doctrine of exhaustion, traditionally only applicable to physical, tangible copies of works, also applied to digitally distributed computer software.

The ECJ 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 ECJ?

So is the Regional Court of Berlin going against ECJ case law? Not quite. On the contrary, even.

In the reasons for judgement published now, the court makes it clear that the Steam service is not comparable to the situation that the ECJ had to assess in *UsedSoft*. In that case, a company purported to be selling only software licenses, which the ECJ permitted with its extensive application of the doctrine of exhaustion. But it also clearly stated that even this extensive interpretation did not apply to any services connected to the software, such as support or maintenance agreements. The Berlin judges consider the Steam service to contain a host of such additional services, such as matchmaking, provision of updates, and the operation of servers for the very multiplayer experience itself.

The court even goes beyond this reasoning, which, by itself, would have been enough to dismiss vzbv's lawsuit. It also strongly hints that it does not consider the *UsedSoft* extension of the doctrine of exhaustion to intangible copies applicable to computer games at all.

In fact, in *UsedSoft*, the ECJ mentions a 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 ECJ, 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.

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But even as far as physically distributed games are concerned, and the doctrine of exhaustion must indubitably be applied, the court expressly agrees with the BGH that the doctrine of exhaustion does not render the no-transfer clauses in Valve's terms of service unenforceable. It even quotes lengthy passages from the 2010 BGH decision verbatim (which is fairly uncommon in German judgments) to underline its stance that nothing has changed.

## 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. Please note: vzbv still has the right to appeal the judgment.



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