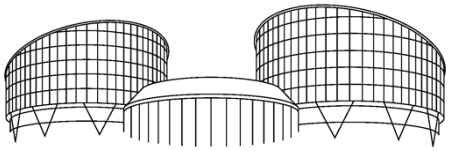

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF SAFAROV v. AZERBAIJAN

(Application no. 885/12)

JUDGMENT

Art 1 P1 • Peaceful enjoyment of possessions • Positive obligations • Domestic courts' failure to provide reasons for dismissing copyright infringement claim against a private party, who published a digital version of the applicant's book online, without authorisation or paying royalties

STRASBOURG

1 September 2022

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Safarov v. Azerbaijan,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Síofra O'Leary, *President,*
Mārtiņš Mits,
Lətif Hüseynov,
Lado Chanturia,
Ivana Jelić,
Arnfinn Bårdsen,
Kateřina Šimáčková, *judges,*
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the application (no. 885/12) against the Republic of Azerbaijan lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Azerbaijani national, Mr Rafig Firuz oglu Safarov (*Rafiq Firuz oğlu Səfərov* – "the applicant"), on 22 December 2011;

the decision to give notice to the Azerbaijani Government ("the Government") of the complaints concerning Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 to the Convention and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 28 June 2022,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The present case concerns the applicant's complaint about the State's failure to protect his intellectual property interests in relation to the infringement of his copyright on account of unauthorised reproduction of his book and its online publication. It raises issues mainly under Article 1 of Protocol No. 1 to the Convention.

THE FACTS

2. The applicant was born in 1959 and lives in Baku. He was represented by Mr F. Agayev, a lawyer based in Azerbaijan.

3. The Government were represented by their Agent, Mr Ç. Əsgərov.

4. The facts of the case may be summarised as follows.

5. The applicant is the author of a book entitled "Changes in the ethnic composition of the people of Irevan Governorate in the nineteenth and twentieth centuries" which was published in 2009.

6. On an unspecified date in 2010 the *Irali* Public Union (hereafter *Irali*), a youth NGO, published an electronic version of the book on the website of one of their projects www.history.az.

7. On an unspecified date in 2010 the applicant became aware of the publication of his book on the above-mentioned website. The information on the website stated that the book had been downloaded 417 times.

8. On an unspecified date in 2010 *Irali* removed the book from the website at the applicant's request.

9. On 3 August 2010 the applicant lodged a civil claim with the Sabail District Court against *Irali*. Relying on, *inter alia*, Articles 14, 15, 30, 31 and 45 of the Law on Copyright and Related Rights (hereafter "Law on Copyright") (see paragraphs 14-15 and 18-20 below), the applicant complained that *Irali* had reproduced a digital version of his book and published it on its website without his authorisation or paying him any royalties. He claimed 50,067 Azerbaijani manats (AZN) (approximately 47,460 euros (EUR) at the material time) in respect of pecuniary damage and AZN 28,800 (approximately EUR 27,300 at the material time) in respect of non-pecuniary damage.

10. On 13 October 2010 the Sabail District Court, while holding that the applicant's book had been published by *Irali* on its website, dismissed his claims relying mainly on the introductory paragraph of Article 18.1 of the Law on Copyright (see paragraph 17 below). The court further held that the book had been removed from the website at the applicant's request and that the applicant had failed to prove that he had suffered pecuniary or non-pecuniary damage.

11. On 22 November 2010 the applicant lodged an appeal with the Baku Court of Appeal. In addition to his previous submissions (see paragraph 9 above), he argued that (i) the first-instance court had failed to mention any of the purposes listed exhaustively in the sub-paragraphs of Article 18 of the Law on Copyright and (ii) that Article concerned solely libraries, archives and educational institutions.

12. On 24 January 2011 the Baku Court of Appeal upheld the first-instance court's judgment, reiterating its reasoning. It relied additionally on Article 17.1 of the Law on Copyright (see paragraph 16 below).

13. On 14 June 2011 the Supreme Court dismissed the applicant's cassation appeal. In addition to the reasoning provided by the lower courts, it also referred to Articles 14. 1 (q) and 15.3 of the Law on Copyright (see paragraphs 14-15 below). The court noted that by publishing his book and by making its copies available by way of sale, the applicant had made use of his right to communicate his work. It further noted that the aim of publishing the book by the defendant under the library section of its website had been to provide information on the history of Azerbaijan.

RELEVANT LEGAL FRAMEWORK

I. RELEVANT DOMESTIC LAW

Law on Copyright and Related Rights of 5 June 1996

14. Article 14.1 of the Law provided:

Moral (non-property) rights

"1. The author of a work has the following moral (non-property) rights:

a) the right to be recognised as the author of the work (copyright);

...

q) the right to communicate or allow to communicate his or her work in any form... (right to communicate)."

15. Article 15 of the Law provided as follows:

Property (economic) rights

"1. The author or another owner of copyright has an exclusive right to use his or her work in any form and by any means, except in cases provided for by the Law.

2. The author's exclusive right to use his or her work shall mean the right to perform, authorise or prohibit to perform the following acts:

direct or indirect reproduction of the work (right of reproduction);

distribution of copies of the work by any means, including sale, rental and other means (right of distribution);

...

Royalties must be paid for the use of work except where the author himself or herself refuses to accept royalties, or with the restrictions provided for by the Law.

3. If lawfully published copies of a work had been put into circulation by way of sale, the subsequent distribution of those copies without the author's consent and payment of royalties to the author (except in the case provided under Article 16 of the Law) is allowed.

However, the right to distribute the original or copies of the work by renting those copies, regardless of the right of ownership, remains with the author or the other owner of the copyright.

4. The author has the right to receive royalties for each type of use of the work (right to receive royalties). The amount and the method for calculating royalties shall be determined by a contract concluded between authors (right holders) and users..."

Article 16 of the Law concerned works of art and right to an interest in resales.

16. Article 17 of the Law, as in force at the material time, provided as follows:

Personal use of works and phonograms

"1. Reproduction, in one copy, of a lawfully published work by a physical person for exclusively personal purposes, without any gainful intent, is allowed without the consent of the author or another owner of the copyright or payment of royalties, except in cases provided for by under paragraph 3 of this Article.

2. Paragraph 1 of this Article is not applicable in the following cases:

...

reprographic reproduction of the originals of books (in their entirety)..."

Article 17.3 concerned the reproduction of audio-visual work and phonogram.

Reprographic reproduction, as defined under Article 4 of the Law, was facsimile reproduction in any size of the original or a copy of the work (written and other graphic work) by photocopying or using technical means other than publishing.

17. Article 18 of the Law provided as follows:

Reprographic reproduction of works by libraries, archives and educational institutions

"1. It shall be permissible to make a reprographic reproduction of a work to a certain volume necessary for a specific purpose, without the author's consent or payment of royalties, provided that the name of the author whose work is used and the source are mentioned, and that there is no gainful intent:

a) issuing copies of works to libraries and archives, by other libraries and archives, for reproduction of lawfully published works with the purpose of replacing lost, destroyed or unusable copies, if it is impossible to acquire such copies under normal conditions by any other means;

b) reproduction in a single copy by libraries of a lawfully published separate article and other small works or a short excerpt of a work or short parts of written works (except for computer programmes) for educational, scientific or personal purposes at the request of physical persons;

...

v) reproduction of lawfully published articles and other small works or short excerpts from written works (except for computer programmes) for training courses in general educational institutions."

18. Article 30.1 of the Law provided that the author's property rights could be transferred to others on the basis of a contract.

19. Under Article 31 of the Law, the above-mentioned contract had to specify, *inter alia*, the mode of use of the work and the amount of royalties to be paid.

20. Under Article 45 of the Law, when examining disputes on copyright, the courts, at the claimant's request, could, *inter alia*, award compensation between AZN 110 and AZN 55,000. The author could also claim, from the person who infringed his rights, the payment of the royalties which he could normally have earned.

II. RELEVANT INTERNATIONAL LAW

A. Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886

21. Article 9 of the Convention, to which Azerbaijan is a party since 1999, provides:

Right of Reproduction:
1. Generally; 2. Possible exceptions; 3. Sound and visual recordings

"(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authori[s]ing the reproduction of these works, in any manner or form.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author...'

B. WIPO Copyright Treaty of 20 December 1996

22. Article 1 of the Treaty, to which Azerbaijan is a party since 2006, provides:

Relation to the Berne Convention

"(1) This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works...

...

(4) Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention."

Agreed Statements concerning the Treaty, adopted on the same date as the Treaty, provide that:

"The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention."

23. Article 6 of the Treaty provides:

Right of Distribution

"(1) Authors of literary and artistic works shall enjoy the exclusive right of authori[s]ing the making available to the public of the original and copies of their works through sale or other transfer of ownership.

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authori[s]ation of the author."

Agreed statement concerning Articles 6 and 7 [Right of rental] provides:

> "As used in these Articles, the expressions "copies" and "original and copies", being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects."

24. Article 8 of the Treaty provides:

> "...authors of literary and artistic works shall enjoy the exclusive right of authori[s]ing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them."

25. Article 10 of the Treaty provides:

Limitations and Exceptions

> "(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.
>
> (2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author."

Agreed statement concerning Article 10 provides that:

> "It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.
>
> It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

26. The applicant complained of the State's failure to protect his intellectual property interests in relation to the infringement of his copyright on account of the unlawful reproduction and online publication of his book. He relied on Article 1 of Protocol No. 1 to the Convention, which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

27. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

28. The applicant argued that by publishing his book online, *Irali* allowed it to be downloaded by unlimited number of persons. In reply to the Government's submission (see paragraph 29 below), he submitted that even if the defendant did not have any commercial interest, its actions had violated his copyright. He further argued that the domestic decisions had lacked adequate reasoning and were not in accordance with domestic law.

29. The Government submitted that the defendant had placed the applicant's book online in order to enable the "general public to be able to get acquainted with it" and not for "commercial purposes". They argued that the domestic courts' conclusions had been based on a thorough examination of the applicant's submissions, and that he had failed to substantiate the alleged damage caused by unauthorised publication of his book.

2. The Court's assessment

30. The Court reiterates that protection of intellectual property rights, including the protection of copyright, falls within the scope of Article 1 of Protocol No. 1 (see *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 72, ECHR 2007-I, and *SIA AKKA/LAA v. Latvia*, no. 562/05, § 41, 12 July 2016). In the present case, the applicant was the author of the book in question and benefitted from protection of copyright under domestic law. This fact was never contested by the domestic courts (compare *Balan v. Moldova*, no. 19247/03, § 34, 29 January 2008, and *Kamoy Radyo Televizyon Yayıncılık ve Organizasyon A.Ş. v. Turkey*, no. 19965/06, § 37, 16 April 2019). Therefore, the applicant had a "possession" within the meaning of Article 1 of Protocol No. 1 to the Convention.

31. The Court notes that the reproduction of the applicant's book and its online publication, without his consent, affected his right to peaceful enjoyment of his possessions. The dispute in the present case was between private parties. In this regard, the Court recalls that the State has a positive obligation to take necessary measures to protect the right to property,

particularly where there is a direct link between the measures an applicant might legitimately expect from the authorities and his or her effective enjoyment of possessions, even in cases involving litigation between private parties. This positive obligation aims at ensuring in its legal system that property rights are sufficiently protected by law and that adequate remedies are provided whereby the aggrieved party can seek to defend his or her rights, including, where appropriate, by claiming damages in respect of any loss sustained. The required measures can therefore be preventive or remedial. As to possible preventive measures, the margin of appreciation available to the legislature in implementing social and economic policies is a wide one, especially in a situation where the State has to have regard to competing private interests. As regards remedial measures, States are under an obligation to afford judicial procedures that offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly any disputes between private persons (see *Kanevska v. Ukraine* (dec.), no. 73944/11, § 45, 17 November 2020, and *Saraç and Others v. Turkey*, no. 23189/09, §§ 70-75, 30 March 2021 and the case-law cited therein). In this connection, the Court's jurisdiction to verify that domestic law has been correctly interpreted and applied is limited and it is not its function to take the place of the national courts. Rather, its role is to ensure that the decisions of those courts are not arbitrary or otherwise manifestly unreasonable (see *Zagrebačka banka d.d. v. Croatia*, no. 39544/05, § 250, 12 December 2013, and *Mindek v. Croatia*, no. 6169/13, §§ 77-78, 30 August 2016).

32. Turning to the facts of the case, the Court observes that the applicant has not claimed that the rights of authors were not sufficiently protected by Azerbaijani law but that the application of the existing law by the courts in his case was unlawful and arbitrary. Under domestic law, as a general rule, authorisation by the author and payment of royalties was required in order to use his or her work (see paragraph 15 above). However, the domestic courts justified the defendant's actions relying mainly on several articles of the Law on Copyright which provided for exceptions to the general rule that reproduction required the author's authorisation (see paragraphs 10 and 12-13 above). The applicant claimed, however, that none of the exceptions applied in the circumstances of his case. The Court notes the following.

33. Article 17.1 of the Law on Copyright provided that the reproduction of a lawfully published work by a physical person, in one copy, was authorised, without the author's consent or payment of royalties, for exclusively personal purposes. However, the defendant in the instant case was a legal person and, as is apparent from the case file, had not used the applicant's book for "exclusively personal purposes" but had made it available online for an unlimited number of readers. In addition, under Article 17.2 of the Law on Copyright the above-mentioned provision did not apply to reproduction of books in their entirety. The domestic courts had not

established at any stage of the proceedings that the applicant's book had not been reproduced in its entirety.

34. Under Article 18 of the Law on Copyright libraries, archives and educational institutions were allowed to reproduce works without authorisation in specific cases. The applicant in his appeal before the domestic courts (see paragraph 11 above) argued that the defendant did not belong to any of these categories. While the Supreme Court did not explicitly elaborate on that argument, it noted that the applicant's book had been published under the library section of the defendant's website and that the purpose had been to provide information on the history of Azerbaijan (see paragraph 13 above). The Government submitted a similar argument, asserting that there was no commercial purpose on the part of the defendant (see paragraph 29 above). The Court observes that while the lack of any commercial purpose was relevant in application of Article 18 of the Law on Copyright, it was not the only element to be taken into account. Even assuming that online services offered by the defendant could be regarded as being covered by the notion of "libraries", any such interpretation of the relevant provision being incumbent on the domestic courts, they failed to mention which specific case provided for under subparagraphs (a) and (b) of Article 18 of the Law on Copyright could justify the reproduction of the applicant's book without his authorisation. In the Court's view, seeing that the defendant made the applicant's book freely available online and therefore – practically to a world-wide audience, not to visitors of a library building, elaborate reasoning by the courts was needed to justify the application of Article 18 to the applicant's case.

35. As to Article 15.3 of the Law on Copyright, referred to by the Supreme Court, the Court observes that that provision concerned the rule of exhaustion of right to distribution. As the wording of that provision and Agreed statement concerning Article 6 of the WIPO Copyright Convention suggest (see paragraphs 15 and 23 above), that rule referred to lawfully published and fixed copies of works which were put into circulation by sale as tangible objects. As is apparent from the facts of the present case, while the applicant had published his book and physical copies were available in the book market, nothing suggests that he had ever authorised its reproduction and communication to the public in a digital form. The Supreme Court did not explain why it considered this provision relevant to the circumstances of the present case where the dispute concerned not the distribution of the lawfully published copies of the applicant's book but its reproduction in a new, digital, form and its online publication without his consent.

36. In sum, in the Court's view, the domestic courts failed to provide reasons establishing that the above-mentioned provisions of the Law on Copyright, relied on by them, could constitute legal grounds for the situation at hand (compare *Andriy Rudenko v. Ukraine*, no. 35041/05, § 44, 21 December 2010, and *Atima Limited v. Ukraine*, no. 56714/11, § 44,

20 May 2021). The respondent State therefore failed to discharge its positive obligation under Article 1 of Protocol No. 1 to protect intellectual property notably through effective remedial measures.

37. There has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

38. The applicant complained that the domestic courts' judgments in his case had not been reasoned.

39. Having regard to its conclusions under Article 1 of Protocol No. 1 to the Convention (see paragraphs 26-37 above), the facts of the case and the parties' submissions, the Court considers that there is no need to give a separate ruling on the admissibility and merits of the above-mentioned complaint (see, for a similar approach, *AsDAC v. the Republic of Moldova*, no. 47384/07, §§ 54-55, 8 December 2020).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

41. The applicant claimed 78,286 euros (EUR) in respect of pecuniary damage, comprising of 13,344 manats (AZN) (approximately EUR 6,630 at the time of the submission of the claim) for the unauthorised reproduction and publication of his book, plus an unspecified amount for the lost profit and an adjustment for inflation. He submitted that his book was sold for AZN 13 in Azerbaijan, whereas its price in foreign countries was 63 United States Dollars. He provided a print-out from a website in respect of the latter. He also claimed EUR 50,000 for non-pecuniary damage.

42. The Government submitted that (i) the applicant had failed to submit any evidence showing the price of the book at the local bookstores; (ii) the print-out from the internet store did not contain an indication of the date on which it had been printed; (iii) the applicant had failed to present any indexes or calculation as regards the inflation rate; and (iv) a finding of a violation would constitute sufficient reparation for non-pecuniary damage.

43. The Court firstly notes that the sums claimed in respect of lost profits and adjustment for inflation have not been specified and that no supporting documents have been provided in respect of them. These parts of the claim must therefore be rejected. As to the part of the claim concerning damages

for the unauthorised reproduction and publication of his book, the information and documents submitted by the applicant are insufficient for the precise calculation of the damages claimed. Nevertheless, the Court accepts that the applicant must have suffered on account of the unauthorised reproduction of his book and its online publication, which justifies an award of just satisfaction (compare, *mutatis mutandis*, *Rasul Jafarov v. Azerbaijan*, no. 69981/14, § 193, 17 March 2016). At the same time, the Court considers that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. Ruling on an equitable basis, the Court awards the applicant the global sum of EUR 5,000 in respect of both pecuniary and non-pecuniary damage.

B. Costs and expenses

44. The applicant also claimed AZN 1,000 (approximately EUR 500) in respect of legal fees for his representation before the domestic courts and the Court, and EUR 41 for postal expenses.

45. The Government submitted that the applicant had failed to provide any proof to substantiate his claims.

46. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, the applicant has not provided the Court with any relevant supporting documents. It therefore dismisses the claims under this head.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 1 of Protocol No. 1 to the Convention admissible;

2. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

3. *Holds* that it is not necessary to examine the admissibility and merits of the complaint under Article 6 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of pecuniary and non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 1 September 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik Registrar	Síofra O'Leary President