

Reselling of digital videogames

Master thesis Law & Technology

Tilburg University

Name: Mike van Heumen

Student ID: 965018

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Introduction

Ever since the European Court of Justice ruling in the *UsedSoft* case¹ a lively debate has been going on in the EU about what the further implications of the ruling could be, especially with regard to the reselling of digital content such as: e-books, movies, music files and videogames. This thesis will focus on the reselling of digital videogames in the EU and will revolve around the question how judges in the EU should deal with cases on the reselling of digital content, and especially videogames, according to EU law. Where this thesis uses the word "digital" in conjunction with: "videogames", it should be noted that this is meant to create a clear distinction between downloadable videogames on the one hand and "physical" videogames (videogames on physical carriers like blu-ray, dvd, etc.) on the other. Thus "digital videogame" can also be read as "downloadable videogame".

In the year 2013, *Microsoft* launched its *Xbox One* game console. The launch of this gaming device did not go as smoothly as *Microsoft* probably had envisioned. *Microsoft* had chosen to create the possibility for game publishers to block the resale of their physical *Xbox One* games and this was cause for a lot of commotion. Previously people had been free to resell their physical games as it pleased them and many game shops were pretty happy with this practice as well, as they made substantial profits with the selling of used games.²

Microsoft received great criticism from consumers and after giving it some thought, *Microsoft* quickly came around and revised their policy by stating that:

"You told us how much you loved the flexibility you have today with games delivered on disc. The ability to lend, share and resell these games at your discretion is of incredible importance to you. Trade- in, lend, resell, gift and rent disc based games just like you do today - there will be no limitations to using and sharing games".³

So in the end nothing changed. Consumers were happy, they could still resell, trade-in and lend their games and game stores were happy to see they could continue their sales of used games.

The above example shows that consumers greatly appreciate the ability to resell, lend and trade a previously bought product to their discretion. In light of this, it is strange, to say the least, that this same discussion is completely absent in the digital domain. If a consumer buys a physical videogame, he or she becomes the rightful owner of that videogame as the intellectual property rights of the videogame publisher are exhausted by the sale (transfer) of that videogame in the EU. Because of the current copyright regime in the EU and its

¹ CJEU July 3 2012, No. C-128/11 (*UsedSoft GmbH against Oracle International Corp.*)

² 1) The gross profit margin for used game sales is about 47%, while the profit margin for new video games is just 21%.

See: <http://www.forbes.com/sites/greatspeculations/2012/11/14/gamestop-earnings-focus-on-used-game-sales-and-digital-revenues/>

2) *GameStop*, the biggest seller of used games in the United States, generated 572 million dollar from used game sales alone, in just one quarter.

See: <http://www.forbes.com/sites/nigamarora/2013/06/19/microsoft-gives-in-to-gamers-on-xbox-one-used-games-connection-requirement/>

and also: <http://www.businessweek.com/articles/2013-05-23/how-gamestop-is-trying-to-survive-the-xbox-one>

³ see for *Microsoft*'s statement: <http://news.xbox.com/2013/06/update>

subsequent exhaustion of intellectual property rights of the videogame publisher (i.e. the intellectual property rightholder) with the sale of a videogame, the consumer is free to sell, lend or trade the videogame without having to ask permission from the publisher to do so.

If a consumer buys a digital (i.e. downloadable) videogame he or she does *not* become the owner of that game. He or she does *not* acquire the rights to sell, lend or trade the game. In fact, the intellectual property rights of the publisher are, under current (inter)national copyright rules, not exhausted by the sale of that digital videogame.⁴ The consumer thus only acquires a right to play the videogame. Consequently, a situation exists where the physical version of a videogame can be resold by consumers due to the exhaustion of the rights of the Intellectual Property (IP) rightholder, but the exact same videogame in digital form cannot be resold, because there is no exhaustion of rights in the digital domain. The exhaustion rule was put in place to create an appropriate balance between the rights of copyright holders and consumers, as this balance is vital to a just copyright law.⁵ The above situation, however, shows that consumers have far less rights over their digital products than over their physical products and that the balance of rights between IP rightholders on the one side and consumers on the other side, changes based on whether a product is put on the market in physical or in digital form.

Research Question

It is true that establishing a digital second-hand marketplace for videogames could disrupt the primary market as digital content never decreases in quality after use or time and is more prone to illegal copying of content. However, especially in a time when digital content is, in many respects, economically and functionally equivalent to its physical counterpart, one could question if perhaps the current copyright regime needs an "update" to fairly balance the rights of IP rightholders and consumers in both the offline *and* online sphere.

Policymakers in the EU do not seem to see the urgency of this problem and new or amended EU copyright laws to address this issue are not to be expected in the foreseeable future. This thesis will therefore focus on the role judges can play in this regard.

This thesis takes as an assumption that digital videogames, just like their physical counterparts, should exhaust. With regard to the reselling of digital videogames this thesis will ultimately answer the question if the reselling of digital videogames should be enabled by judges in the EU according to EU law. The answer to that question will be in the affirmative and so this thesis will also pay attention to the question *how* judges could and should enable the creation of a second-hand market in digital videogames.

⁴ At the root of this is the WIPO Copyright Treaty (WCT), and its transpositions into national laws, as in the agreed statements to the WCT it can be read that: exhaustion of the distribution and rental right is exclusive to fixed copies that can be put into circulation as tangible objects.

See: World Intellectual Property Organization Copyright Treaty (WCT), December 20, 1996. Text available at: <http://www.wipo.int/wipolex/en/details.jsp?id=12740>

- See for agreed statements on the WCT: http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295456

⁵ See: Perzanowski, Aaron K. and Schultz, Jason, "Reconciling Intellectual & Personal Property" (2015), *Faculty Publications*, 1683, at p. 1212.

Available at: <http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4594&context=ndlr> ;

See also: Asay, Clark D., Kirtsaeng and the First-Sale Doctrine's Digital Problem (May 7, 2013). *Stanford Law Review Online*, Vol. 66, pp. 17-23, 2013; Penn State Law Research Paper No. 29-2013, at p. 18.

Available at SSRN: <https://ssrn.com/abstract=2262032>

Significance and previous works

The aim to possess digital copies on a permanent basis, and ultimately alienate them deserves a lively debate. Legislative and literary work on the possibilities of creating a second-hand market for digital videogames is, however, scarce. This thesis, at least, hopes to "liven up" the debate and address the possibilities for the creation of a second-hand market in digital videogames. Furthermore, talking about what would essentially be a digital exhaustion doctrine creates the possibility to address economically significant questions. Especially for the EU, with its internal market and free movement principles which are regarded as core principles of the EU⁶, it is interesting to see what impact the development of technology has on the economy, but also on law makers as the creators and amenders of legislation, and judges as the ultimate guardians of justice and balance in society.

Professor Schellekens' work on the starting point of "*what holds offline, also holds online*"⁷ plays a vital role in this thesis with regard to the exploration of the possibilities for creating a functional digital equivalent to physical videogame (re)sales. This thesis also makes use of the tremendous analysis of the CJEU *Usedsoft* case, provided by Linklater in her "*UsedSoft and the Big Bang Theory: Is the e-Exhaustion Meteor about to Strike?*"⁸ and Torremans' "*The future implications of the Usedsoft decision*"⁹. Furthermore, Savic' article on the legality of resale of digital content after *Usedsoft*¹⁰ also played a vital role in the coming together of this thesis as it is one of the few works that pays specific attention to the exhaustion of digital videogames.

Methodology

This thesis uses desk research as its main source of information gathering and makes use of doctrinal and comparative research and, to a small extent, non-doctrinal research. The first chapter consists of merely doctrinal research. This chapter will set out the scope for the rest of the thesis and as a result will be mostly descriptive. This chapter will describe the current legal situation of videogames and the broader system of copyright rules in the EU. All this will be done by an examination of: copyright laws, notable CJEU decisions and writings of academic commentators. The same doctrinal research will be applied in the second chapter, albeit in combination with comparative research, to compare the reselling of digital videogames with the reselling of other types of digital goods. As chapter two also sets out to find a technologically and economically workable solution for a second-hand market for digital videogames, this chapter will also see some economic arguments being used that are outside of the scope of strict legal research. Chapter three will mainly make use of comparative research as academic articles and studies, legislative texts and case law, are compared to find the differences and comparisons between the USA and the EU with regard

⁶ "*The single market is the EU's greatest achievement.*"

see: <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=theme3.html>

⁷ Schellekens, Maurice H.M., "What Holds Off-Line, Also Holds On-Line?", *STARTING POINTS FOR ICT REGULATION, DECONSTRUCTING PREVALENT POLICY ONE-LINERS*, IT & Law Series, The Hague: T.M.C. Asser Press, Vol. 9, pp. 51-75, 2006. Available at SSRN: <https://ssrn.com/abstract=952275>

⁸ Emma Linklater, "UsedSoft and the Big Bang Theory: Is the e-Exhaustion Meteor about to Strike?", 5 (2014) *JIPITEC* 12, para 1

⁹ Paul L. C. Torremans, "The future implications of the UsedSoft decision" (2014) 2 *CREATE Working paper*

¹⁰ M. Savic, *The Legality of Resale of Digital Content after UsedSoft in Subsequent German and CJEU Case Law*, (2015) 37 *E.I.P.R.*, Issue 7, pp. 414-429.

to the reselling of digital videogames. This comparison is made for a better understanding of the problem and will help to formulate possible solutions to it.

Thesis structure

The thesis is divided in three main chapters and one concluding chapter. Each chapter will discuss various topics and sometimes references will be made to previous or upcoming chapters. In light of this, the following summary outlines what can be expected from each chapter:

The first chapter will explain the current EU copyright laws and how these currently deal with the reselling of digital videogames. Furthermore, this chapter will deal with the question how videogames are defined. Are videogames to be considered as software or are they something else? With this question in mind a few important cases in the field of EU copyright law, and more specifically videogames and the reselling of software, will be discussed, namely: the *Usedsoft* case¹¹; the *Nintendo* case¹²; and the *Allposters* case¹³.

The second chapter starts off by comparing the current (im)possibilities to resell other types of digital media than videogames, such as: digital books, music files and movies in the EU. The main focus of this chapter will, however, deal with the legal, economical and functional differences between the reselling of tangible (offline) and intangible (online) goods. An import question from the point of legal certainty here is: does what holds offline, also holds online? The final question this chapter will answer is *how* digital videogames could be resold. This question will be approached from a more technological than a legal angle, in order to find a system that, at least technologically, enables the reselling of digital videogames.

The third chapter will bring all of the aforementioned together and will compare the system of copyright laws in the USA and the EU and the subsequent possibilities for (future) reselling of digital videogames. In this chapter it will become clear just how real the opportunities for European judges are to adapt copyright laws to the current (digital) day and age. By pinpointing the characteristics of both the USA and EU copyright situation, it will become clear how European judges should and could enable the creation of a second-hand marketplace for the reselling of digital videogames.

The fourth chapter will form the conclusion of this thesis.

¹¹ C-128/11 *Usedsoft GmbH v. Oracle International Corp.*, July 3, 2012 (*Usedsoft vs. Oracle*)

¹² C-355/12 *Nintendo Co. Ltd and Others v. PC Boc Srl and 9Net Srl*, January 23, 2014 (*Nintendo vs. Pc Box*)

¹³ C-419/13 *Art & Allposters International BV v Stichting Pictoright*, January 22, 2015 (*Allposters vs. Pictoright*)

Chapter 1

This first chapter's purpose is to provide answers to the two following questions:

- 1) are videogames to be considered as software according to EU legislation and case law, and
- 2) how is dealt with the reselling of software in general and the reselling of digital videogames in particular, in the EU?

The words 'software' and 'videogames' are not foreign to most people and are perhaps used on a regular basis, but what exactly defines software might depend on whom the question is asked to. It is highly likely that an engineer, a lawyer and a game developer will each provide a different answer to this same question. In light of this it must be examined whether or not videogames can and should be legally considered as software and, following from that, if the reselling of videogames is regulated differently than the reselling of software in the EU. In order to examine these issues this chapter will explain the current situation with regard to the possibility of reselling both software and videogames in the EU. This will mainly be done by discussing three important cases. The first case will be that of *Usedsoft vs. Oracle*¹⁴, in which the European Court (CJEU) dealt with questions about the reselling of software in the EU and tried to clarify the current rules on the reselling of software in the EU. The second case is that of *Nintendo vs PC Box*¹⁵, in which the CJEU dealt with questions on how videogames should be defined and subsequently should be legally protected. Lastly the *Allposters* case¹⁶, in which the exhaustion of the right of distribution under Article 4(2) of the EU Copyright Directive was the center of dispute, will be discussed in light of its consequences for the reselling of digital videogames. By following this order, first the subject of the reselling of software will be explored and after that the subject of the reselling of videogames will be examined.

1.1 Definition of videogames

Before, delving deeper into the (im)possibilities of the reselling of digital videogames, a brief history and definition of the medium “videogame” is in order.

Made by MIT student Steven Russel in 1961 "Spacewar" was possibly the first videogame to ever see the light of day. And then, a few years before the conception of "Asteroids"¹⁷, "Pong" was released on the market. "Pong" conquered the living rooms of many and became the most popular home videogame of its time, and was widely copied by other publishers.¹⁸ In the early days of videogame creation¹⁹, and given the fact that computer development was not

14 C-128/11 11 *Usedsoft GmbH v. Oracle International Corp.*, July 3, 2012 (*Usedsoft vs. Oracle*)

15 C-355/12 *Nintendo Co. Ltd and Others v. PC Boc Srl and 9Net Srl.*, January 23, 2014 (*Nintendo vs. Pc Box*)

16 C-419/13 *Art & Allposters International BV v Stichting Pictoright*, January 22, 2015 (*Allposters vs. Pictoright*)

17 "Spacewar" inspired Lyle Rains and Ed Logg in 1979 to make "Asteroids". The object of the game is to shoot and destroy asteroids and saucers while not colliding with either, or being hit by the saucers' counter-fire, with the game becoming harder after time as the number of asteroids increases. "Asteroids" is still the most successful arcade-game of all time.

18 See: www.en.wikipedia.org/wiki/Pong

19 For a more detailed analysis of the history of videogames see: A. Saunders-Lipson & R.D. Brain, *Compter and Video Game Law - Cases, Statutes, Forms, Problems & Materials*, Carolina Academic Press, 2009.

anywhere near the level it is now, it was sometimes difficult to clearly state what was still an idea and what was the expression of that idea. Visual displays left much to the player's imagination and were a world away from the sophisticated and seamless graphics featuring in contemporary games. As a consequence, the aforementioned games all shared great similarities: "they all had a black background, simple geometric shapes and basic functionalities (moving objects from left to right or up and down or simply ricocheting objects). Because of this narrow line between idea and expression judges were asked to analyse the legal nature and protection of these simple visual works."²⁰ As described in the World Intellectual Property Organization (WIPO) analysis: in the 1980's courts were inclined to think there were forms of expression that were inextricably associated with the idea of a particular videogame, such that the visual component of the work would not deserve copyright protection.²¹ For example, the US court, in the Atari case²², could come to such a conclusion, because games, at that time, were almost wholly the creation of computer engineers with little or no role for scriptwriters, graphic designers, photographers or sound engineers.

The modern day videogame, however, includes numerous creative forms of expression and, in light of that change, the debate on idea vs. expression in videogames has been replaced by a broader discussion of the legal nature of videogames. Videogames have transformed, not in the least part because of the development of computer science, into perhaps the single most complex works of authorship currently in existence. In the 1960s, video games were graphically not the masterpieces they are today and only incorporated the most basic of graphics forms. Not long thereafter, developers were able to incorporate rudimentary sounds, and as this constant evolution continued over time, videogames can, nowadays, not be seen as single, simple works, but more as an amalgamation of individual elements that, in essence, can each individually be copyrighted (i.e., the characters in a given videogame, its soundtrack, settings, audiovisual parts, etc., could be individually copyrighted), if they achieve an adequate level of originality and creativity.²³ According to Lipson and Brain, video games include the following creative elements²⁴:

I. Audio Elements:

1. Musical Compositions
2. Sound Recordings
3. Voice
4. Imported Sound Effects
5. Internal Sound Effects

II. Video Elements

1. Photographic Images (p.e., Giff, Tiff, Jpeg)
2. Digitally Captured Moving Images (p.e., Mpeg)
3. Animation
4. Text

²⁰ World Intellectual Property Organization, *The legal status of videogames: comparative analysis in national approaches*, July 29, 2013, at par. 5. Text available at:

http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/comparative_analysis_on_video_games.pdf

²¹ *Ibid.*

²² see: Atari, Inc. v. Amusement World, Inc., 547 F.Supp. 222 (D. Md. Nov. 27, 1981).

²³ *Supra* note 20, at par. 2.

²⁴ *Supra* note 19, at p. 54.

III. Computer Code (Source Code and Object Code)

1. Primary Game Engine or Engines
2. Ancillary Code
3. Plug-Ins (Third-Party Subroutines)
4. Comments

Additionally, one can also think of creative elements such as: script, plot, choreographs, as well as maps and architectural works. Furthermore, a specific videogame does not have to be limited to just one genre. The constituent elements of each type of game will vary. However, not all these elements are protected *per se*, as copyright protection remains a national legal matter with specific national criteria.²⁵

As discussed above and explained in more detail in Kitchin's *Code/Space*, modern videogames indisputably contain two main parts: "1) audiovisual elements (simply put: the things you see and hear while playing a videogame); and 2) software, which technically manages the audiovisual elements and permits users to interact with the different elements of the game."²⁶ But what exactly is software? Software, as Kitchin²⁷ describes it in a broader sense of the word, is:

"a set of machine-readable instructions (algorithms) that, when supplied with certain data and criteria, ensures that tasks are performed in a particular way. As such, software is a 'grammar of action' that guides machines in the production of routines."

In terms of videogames, software is the part of the game that translates player-input into instructions that can be performed by the hardware (e.g. the console, PC or handheld device) and through which a player can experience the videogame.

The question that remains is whether and how videogames should be classified as a whole. A global comparative analysis²⁸ has shown that videogames, which are original works, are currently capable of attracting three forms of protection. The analysis found that videogames can qualify as: computer programs, as audiovisual works, or as a combination of the two (multimedia works).²⁹

As for the qualification of "audiovisual work", it is suggested that it is not easy to place videogames in that category, because of a number of reasons summarized by the World Intellectual Property Organization: 1) the co-authors of these works (e.g. the scriptwriters, the composer(s) of the original soundtrack and the director) are not necessarily the same sorts of authors as those involved in the development of a particular videogame (e.g. character, setting

²⁵ *Supra* note 20, at par. 8.

²⁶ R. Kitchin & M. Dodge, *Code/Space - Software and everyday life*, Massachusetts Institute of Technology, 2011, p. 24.

²⁷ *Ibid.*

²⁸ See: I.A. Stamatoudi, *Copyright and Multimedia products: a comparative analysis*, Cambridge Intellectual Property and Information Law, December 2007.

²⁹ Furthermore, in the year 2000 dr. Stanley Lai even advocated for a fourth classification, namely: that videogames could perhaps even attract copyright protection as drawings for their characters, figures or other designs. This classification, however, has not seen itself represented in any country's law or jurisprudence. - For more on this "fourth classification" see: S. Lai, *Copyright Protection of Computer Software in the United Kingdom*, Hart Publishing, 2000, at 5.11.

and level-designers, animation designers, video testers, audio engineers etc.); 2) the rights requested by producers of videogames and audiovisual works do not always coincide; and 3) audiovisual works involve certain neighbouring rights that are not always present in videogames.³⁰

This seems to leave the path wide open for a classification of videogames as computer programs. However, before jumping to such a conclusion one must first understand the technical aspects of a videogame. All videogames make use of a (i.e. run) on a so called "game engine". A game engine is a technical instrument used both for the development of the videogame and to run the game on a console, smartphone or computer. Game engines are also known in the videogame industry as "middleware"³¹, because they provide intermediary solutions for developers so that they do not need to start building a game from scratch, but can use the tools and resources created by middleware providers. A game engine basically exists to: "abstract the (sometimes platform-dependent) details of doing common game-related tasks, like rendering, physics, and input, so that developers (artists, designers, scripters and even other programmers) can focus on the details that make their games unique."³² The game engine can thus be regarded as the basic software needed for a videogame.

Larger developers, like *Ubisoft* (AnvilNext) or *Rockstar* (Rockstar Advanced Game Engine) tend to build their own game engines on which they run their own games, but smaller companies often make use of third-party game engines to run their games on. One of the most used game engine at the moment is the *Unreal* game engine, which is used in games such as the *Gears of War* series and the *Batman* series.³³ In the 1980's and 1990's videogame companies usually developed their own game engines, instead of using third-party software tools. By using third-party tools developers can effectively save time *and* costs and because of this, nowadays, it is relatively common practice to use third-party tools when creating a new videogame.³⁴ The effect of this practice, however, is that sometimes a very small percentage of the code included in a given videogame is completely original and customized for that specific project.³⁵ Because of this economically driven shift in *modus operandi* many videogames now share source code (e.g. because the *Batman* and *Game of War* games share the same game engine, they also share the same source code). Therefore, the primarily distinctive elements of games which use the same game engines, are arguably the small amounts of customized code and the use of original audiovisual elements in the game.

³⁰ See: World Intellectual Property Organization, *The legal status of videogames: comparative analysis in national approaches*, July 29, 2013, at par. 13

- An example of one such right is the right to compensation in case of a public performance.

See also: D. Lipszyc, *Copyright and neighbouring rights*, from the Communication & Development series, Unesco, May 1999, pp. 469-470.

³¹ For more see: J. Tulip, J. Bekkema & K. Nesbitt, *Multi-threaded Game Engine Design*, Interactive Entertainment (IE06), 2006.

³² See for more: www.gamecareerguide.com/features/529/what_is_a_game_.php

³³ For full list of games running on the *Unreal* engines, see: www.en.wikipedia.org/wiki/List_of_Unreal_Engine_games

³⁴ S. Egenfeldt-Nielsen, J. Heide Smith & S. Pajares Tosca, *Understanding Video Games: the essential introduction*, Routledge 2016 (third edition), at p. 25.

- In fact a report by Developer Economics in the third quarter of 2014 claimed that 29% of game developers do not use a game engine provided by a third party. Report available at: <https://www.developereconomics.com/top-game-development-tools-pros-cons>

³⁵ *Supra* note 20, at paragraph 15.

Videogame rules are encoded into software constraints and players use common digital interfaces (keyboards, controllers, buttons, joysticks, trackpads etc.) to manipulate and explore symbolic representations that are projected on screens.³⁶ Where early videogames of the 60's, 70's and even 80's were almost wholly the creation of computer engineers with little or no role for scriptwriters, graphic designers, photographers or sound engineers, the modern day videogame possesses visual, musical, and narrative complexity rivaling more traditional media (movies, musicals, books etc.). Videogames nowadays are indeed works that represent a fusion of software and audiovisual elements. They are complex creations, composed of multiple copyrighted works (think for example of: graphic works, music, characters, literary works and of course software). The distinguishing element of videogames, much more than the underlying software, are perhaps the many different audiovisual and literary elements created for each and every videogame.³⁷ Because of this it would be odd, to say the least, to categorize videogames as just computer programs. However, as was seen above, a categorization as audiovisual work is also likely not workable.

Is there then no way to classify videogames? The previously cited WIPO study focused on the question of categorizing videogames and found that among the countries which were analyzed for the study, indeed none had clarified or offered definitive answers to the question of videogame classification. The study states that:

"In countries like Argentina, Canada, China, Israel, Italy, the Russian Federation, Singapore, Spain or Uruguay, jurisprudence or scholars consider video games to be, predominantly, computer programs, due to the specific nature of the works and their dependency on software for implementation.

In contrast, other countries, including Belgium, Brazil, Denmark, Egypt, France, Germany, India, Japan, South Africa, Sweden and the United States of America, take into account the tremendous complexity of video games in favoring the hypothesis that video games have a distributive classification. As a consequence, legal protection of the different elements of the game must be found separately, according to the specific nature of each work (i.e., whether it is literary, graphic, audiovisual, etc.).

Finally, a small group of countries, including Kenya and the Republic of Korea, are inclined to think that video games, given their visual elements, are essentially audiovisual works. This does not mean that the software used in a video game is unprotected in these jurisdictions, but that their audiovisual elements must prevail."³⁸

As the above shows the question of how to classify videogames is very much without a definitive answer in international legislation.

1.2 The reselling of software

The reselling of software deals with a number of legal issues. Copyright, the right of distribution, and the concept of exhaustion all play a part in the discussion on the reselling of software. A work cannot be eligible for copyright protection if it is not an original intellectual creation.³⁹ The owner of a copyright (copyright holder) in a protected work may use the work

³⁶ G. Lastowka, *Copyright Law and Video Games: A brief History of an Interactive Medium*, October 2013, p. 4. Text available at: <http://ssrn.com/abstract=2321424>

³⁷ *Supra* note 20, at par. 294.

³⁸ *Supra* note 20.

³⁹ *WIPO Intellectual Property Handbook - Policy, Law and Use*, WIPO Publication No. 489 (E), reprinted 2008, at 2.175

as he wishes (of course the legally recognized rights and interests of others may not be impaired). Because of this right, the copyright holder may exclude others from using his work without his authorization.⁴⁰ Besides these "exclusive rights" of economic character, the original authors of works protected by copyright also have "moral rights", such as the right to claim authorship of the work.⁴¹ Copyright grants the holder of the copyright the right to prevent others from making copies of his/her work.⁴² In order to ensure that this basic right is respected, a right to authorize distribution of copies of works exists. This right of distribution enables the copyright holder to distribute copies of the original work to the public by sale or other transfer of ownership.⁴³ The right of distribution is usually subject to exhaustion upon first sale or other transfer of ownership of a particular copy of a work⁴⁴, and as such this exhaustion functions as a limitation to the right of distribution. The concept of exhaustion is often linked only to tangible goods in legislation, as professor Wolk points out⁴⁵:

"The concept of exhaustion of copyright evolved from the nature of the distribution right, which has been connected to tangible goods."

The exhaustion of the right of distribution means that after a right holder has placed copies of a work on the market, the right holder has no right to control the further circulation of these particular copies on the market (*i.e.* he cannot hinder their reselling). Note that exhaustion only applies to the right of distribution and does not apply to other rights, such as: the right of reproduction, adaptation and rights such as broadcasting, rental or lending rights.⁴⁶

The exhaustion doctrine is of great importance for the understanding of this chapter, as will be seen in the discussion of the *Usedsoft* case and later on also indirectly in the discussions of the *Nintendo* and *Allposters* cases. Because of this importance the next paragraph will further examine the doctrine in an international context.

1.2.1 Exhaustion of copyright-protected works in an international context

⁴⁰ *Ibid.*, at 2.178

⁴¹ The economic aspects of copyright cannot be seen separate from their moral counterparts. The European Court of Justice declared that the specific subject matter of copyright is to protect the economic *and* moral rights of right holders (*Collins vs. Imtrat Handelsgesellschaft MbH* (1993), ECLI:EU:C:1993:847). In an even earlier ruling the Court noted that: copyright's essential function is to protect the moral rights in the work and to ensure a reward for the creative effort. See: *Radio Telefis Eireann v. Commission*, Case T-76/89 (CELEX:61989TJ0069)

⁴² *Supra* note 39, at 2.183.

⁴³ Article 6 (1), WIPO Copyright Treaty (WCT), 1996.

Article 6 - Right of Distribution

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

⁴⁴ *Supra* note 39, at 2.184.

⁴⁵ S. Wolk, *The software business in transit – will exhaustion and defining sale or licence soon be irrelevant?*, Academy of Intellectual Property, Marketing and Competition Law (IMC), IMC Paper 2014/1, February 2014, at p. 5.

- see for legislative examples of the link to tangible goods: recital 28 to the European Copyright Directive (Directive 2001/29/EC); Agreed statements 6 and 7 to the WIPO Copyright Treaty, *supra* note 4.

⁴⁶ *Ibid.*

Exhaustion of tangible copies of products was not (really) an issue up until the 1950's when it started to become easier to copy phonograms, records and cassettes. Because this development only started in the 1950's there is no guidance regarding exhaustion of copyright-protected works in the Berne convention for the Protection of Literary and Artistic Works of 1886.⁴⁷ However, also in the Rome Convention of 1961⁴⁸ no guidelines are to be found regarding exhaustion of copyright-protected works.

As a matter of fact, aspects of exhaustion have only relatively recently found their way to international agreements, as they have been negotiated in connection with both the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement⁴⁹) of 1994 and the WIPO Copyright Treaty (WCT) of 1996. Although, in the TRIPS Agreement the issue of exhaustion is only addressed in the form of a general non-prejudice clause.⁵⁰ Article 6 of the WCT, however, does provide for a definition of the basic conditions for exhaustion of the distribution right, as it states that: "exhaustion applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorisation of the author".

As such, the article is technologically neutral, which means it could cover both tangible and intangible copies of a program. Article 6 WCT is, however, supplemented by an agreed statement⁵¹ and the agreed statement⁵² actually provides a quasi-definition of what is to be understood by 'copies', as it describes copies as things that can be "put into circulation as tangible objects", which would exclude at least some types of digital temporary reproductions. This indicates that there is *no* exhaustion of the distribution right for copies that cannot be put into circulation as tangible objects, but because the author's creation is no longer just an idea and has been given a reproducible, communicable, perceivable form (i.e. the work is "fixed") the reproduction right is triggered.

With the WCT being established in 1996, it is fair to state that in the mid-1990s, policy makers' point of view was that electronic delivery of software and other copyrighted works should not be exhausted. In light of the state of technology at that time, this position is understandable. At the time of establishment of the WCT, there really were no viable instruments for online distribution. Internet connections were relatively slow and it was too

⁴⁷ Berne Convention for the Protection of Literary and Artistic Works of 1886, as amended on September 28, 1979. Cf. Art. 9(1) of the Convention.

⁴⁸ Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 1961.

⁴⁹ For more on the TRIPS agreement see: Gervais, D., *The TRIPS Agreement: Drafting History and Analysis*, 4th ed., Thomson Reuters, London, 2012, p. 220 et. seq.

⁵⁰ Art. 6 TRIPS Agreement is entitled 'Exhaustion' and reads as follows: "For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 ["National Treatment"] and 4 ["Most-Favoured Nation Treatment"] nothing in this Agreement shall be used to address the issue of exhaustion of intellectual property rights."

⁵¹ Agreed Statement concerning articles 6 and 7 reads as follows: "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." circulation as tangible objects."

⁵² An interesting note is that the statement was passed with no objections whatsoever.

For more, see: Z. Efroni, *Access-Right: The Future of Digital Copyright Law*, Oxford University Press, 2011, at p. 267.

time-consuming to distribute books, music, films business software and games online.⁵³ Copyrighted works were, therefore, only delivered on tangible media, what also made it harder to imagine a mass distribution of digital copies.

1.2.2 Exhaustion of Copyright-protected Software in an EU context

There are many Directives at the EU level which deal with copyright issues in connection with the free movement of goods and services⁵⁴, and the issue of exhaustion is addressed in several EU Directives.⁵⁵ The most important provisions addressing exhaustion, however, are the following provisions of the Copyright Directive and the Computer Programs Directive:

Article. 4(2) of the Copyright Directive states that:

"The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the right holder or with his consent." ⁵⁶

and Article. 4(1)(c) of the Computer Programs Directive, in conjunction with Article 4(2) states that:

1. Subject to the provisions of Articles 5 and 6, the exclusive rights of the right holder within the meaning of Article 2 shall include right to do or to authorise:
 - (c) any form of distribution to the public, including the rental, of the original computer program or of copies thereof.
2. The first sale in the Community of a copy of a program by the right holder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof. ⁵⁷

The wording "any form" in Article 4(1)(c) of the Computer Programs Directive appeared for the first time in 1991 in the first version of the Directive.⁵⁸ It is unclear if this Article, when the Directive was adopted, was intended to include exhaustion of software distributed in electronic form or if it limits the distribution right to tangible media.⁵⁹ However, as stated

⁵³ Faster broadband, to accommodate online distribution, only dates back to the early 2000's and has only since then become a regular form of delivery.

See also: *supra* note 34, at p. 6

⁵⁴ see for more on the internal market system of the EU:

www.ec.europa.eu/internal_market/top_layer/index_en.htm

⁵⁵ such as in the Articles. 1(4), 3 and 9(2) of the Rental and Lending Directive.

2006/115/EC *on rental right and lending right and on certain rights related to copyright in the field of intellectual property* (Rental and Lending Directive)

⁵⁶ Directive 2001/29/EC *on the harmonization of certain aspects of copyright and related rights in the information society* (European Union Copyright Directive).

⁵⁷ Directive 2009/24/EC *on the legal protection of computer programs* (also known as the Computer Programs Directive).

⁵⁸ See Art. 4(c) of Directive 91/250/EEC *on the Legal Protection of Computer Programs*, Official Journal L 122, 17/05/1991 p. 42 et. seq.

⁵⁹ *Supra* note 45, at p. 7.

above, with the methods of delivery available in the 1990's it is likely that the wording referred to the technology of the time, e.g. floppy disks and CDs.

In the Green Paper of 1988 prior to the Computer Programs Directive of 1991, the European Commission's view was that computer programs should be protected by copyright and it further commented on a number of issues relating to the precise nature and scope of the exclusive rights for software.⁶⁰ Nevertheless, exhaustion was not analysed in detail in this Green Paper. In the proposal to a directive on the legal protection of computer programs in 1989 it was merely pointed out that once: "a product has been sold with the right holder's consent he should no longer be able to exercise control over subsequent sale, that is sale to third parties of legally acquired programs."⁶¹ In the Green Paper of 1995, however, the European Commission held that rights other than the distribution right for tangible items that are "transmitted by electronic means" could hardly be made subject to exhaustion.⁶² Moreover, in the Commission report from 2000 on the implementation of the then new Computer Programs Directive the wording: "any form", was pointed out.⁶³ According to the Commission's report it was possible to interpret Art. 4(1)(c) *widely* in relation to the distribution right, which according to the Commission was not in line with Art. 6 of the WCT. The report stated that:

"As to the exhaustion of copyright it must be borne in mind that under the [Computer Programs] Directive community exhaustion only applies to the sale of copies i.e. goods, whereas supply through on-line services does not entail exhaustion."⁶⁴

Therefore the report suggested that the Article be modified, however in the codified version of the Computer program Directive in 2009 this change was not made.

From the mere wording of the provisions of both the Copyright- and the Computer Programs Directive it does not become clear if the principle of exhaustion relates only to tangible copies of copyright-protected works. However, with regard to the Copyright Directive the Recitals to it shine some light on this matter. According to Recital 28 in the preamble to the Copyright Directive, copyright protection: "includes the exclusive right to control distribution of the work incorporated in a tangible article", and: "the first sale in the Community of a work or its copies exhaust the right to control the resale of that object in the Community". Further, in Recital 29, it is pointed out that: "[the principle of] exhaustion does not arise in the case of services and on-line services in particular". Although these recitals do not have legal effect as such, they do give an insight in what the EU Commission envisioned with the implementation of the exhaustion doctrine in the Copyright Directive.

⁶⁰ See: Commission of the European Communities, Green Paper on Copyright and the Challenge of Technology: Copyright Issues Requiring Immediate Action, COM(88) 172 final, June 7, 1988.

⁶¹ See: Proposal for a Council Directive on the Legal Protection of Computer Programs, COM (88) 816 final – SYN 183, March 17, 1989, at p. 25.

⁶² Commission of the European Communities, Green Paper, Copyright and Related Rights in the Information Society, COM(95) 382 final, July 19, 1995, at p. 48.

⁶³ See: Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the Implementation and effects of Directive 91/250/EEC on the Legal Protection of Computer Programs, COM(2000) 1999 final, Brussels, April 10th 2000, at p. 17.

⁶⁴ *ibid.*

1.3 *Usedsoft* Case

The *Usedsoft* case, a landmark EU-case, concerned the resale of digitally distributed software, thus, dealt with the legal concepts mentioned in paragraph 1.2. The CJEU (Court of Justice of the European Union) had to answer the following question: can the exhaustion principle also be applied to the sale of software (digital goods)? In other words, can there be a principle of 'digital exhaustion'? In this *Usedsoft* case it was decided that digital exhaustion is possible, at least for software. This paragraph will mainly focus on how the *Usedsoft* decision fares in the broader landscape of European (digital) copyright law.

1.3.1 Underlying facts

The company *UsedSoft* markets used software licenses. Among the licenses they market is the user license for *Oracle* computer programs. For that purpose *UsedSoft* acquires from customers of *Oracle* user licenses, or parts of them, where the original licenses relate to a greater number of users than required by the first acquirer.⁶⁵

The above was cause for a dispute between *Usedsoft* and *Oracle*. The dispute first played before the Munich Regional Court, according to which the actions of *UsedSoft* and its customers infringed *Oracle*'s exclusive right of permanent or temporary reproduction of computer programs within the meaning of Article 4(1)(a) of the Computer Programs Directive (Directive 2009/24/EC).⁶⁶ *UsedSoft* then appealed to the Bundesgerichtshof (German Federal Court) which referred a number of questions to the CJEU (Court of Justice EU) about the interpretation of the Computer programs Directive.⁶⁷

Until the CJEU *Usedsoft* ruling the exhaustion doctrine had only been applied to physical copies of a work, where it was the same physical copy that was being passed on to a new owner.⁶⁸ The digital realm complicates the wording 'that copy', because it is never the original copy that is passed along, but always a new one.

The resale of *Oracle*'s product by *Usedsoft* was in reality only a resale of the licence alone and not of the computer program, because the customer of *Usedsoft* had to download a new copy of the computer program from the *Oracle* site. In other words: there was no passing along of the first acquirer's copy of the software. However, the CJEU decided that the download and licence had to be examined as a whole and as such the Court considered that the reproduction right was indeed at issue.⁶⁹ Underpinning this finding was the notion that the tangible and intangible worlds should be treated as functionally, although not formally, equivalent.⁷⁰ In creating such a functional equivalent situation, the Court stated that the original acquirer must: "make the copy downloaded onto his computer unusable at the time of

⁶⁵ Case C-128/11 *Usedsoft GmbH v. Oracle International Corp.* (*Usedsoft* case), at point 24.

⁶⁶ Article 4(1)(a) reads:

"(a) the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole; in so far as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts shall be subject to authorisation by the rightholder."

⁶⁷ for the preliminary questions see CJEU *Usedsoft* case at point 34.

⁶⁸ Emma Linklater, *UsedSoft and the Big Bang Theory: Is the e-Exhaustion Meteor about to Strike?*, 5 (2014) JIPITEC 12, at point 13.

⁶⁹ *Supra* note 65, at point 70 and 78.

⁷⁰ *Supra* note 68, at point 14.

its resale", in order to avoid infringing that right holder's exclusive right of reproduction of his computer program under Article 4(1)(a) of the Computer Programs Directive.⁷¹

In normal circumstances the downloading of a copy of the *Oracle* computer program for the *Oracle* servers would require authorisation of the rightholder (in this case *Oracle*), but the Court found that because the computer program was useless without the licence the actions of the clients of *Usedsoft* qualified for the exception that is laid down in Article 5(1) of the Computer Programs Directive.⁷² With this reasoning the Court created the possibility of digital exhaustion (e-exhaustion) and therefore the possibility to resell software.

Concluding, the CJEU in *Usedsoft* thus held that Article 4(2) of the Computer Programs Directive allows the right of distribution over the copy of a computer program to be exhausted following the grant of a licence, when a sale has effectively been established.⁷³ However, it has to be noted that the provisions of the aforementioned Directive, in particular Article 4(2), seem to constitute a *lex specialis* in relation to the provisions of the Copyright Directive, which do not seem to allow the resale of software. This reading is confirmed by the CJEU in *Usedsoft*, where the Court stated that:

"even if the contractual relationship at issue in the main proceedings or an aspect of it might also be covered by the concept of 'communication to the public' within the meaning of Article 3(1) of the Copyright directive, the 'first sale ... of a copy of a program' within the meaning of Article 4(2) of the Computer Programs Directive would still give rise, in accordance with that provision, to exhaustion of the right of distribution of that copy."⁷⁴

1.3.2 Usedsoft in light of the communication to the public right

The WCT (or WIPO Copyright Treaty) is an international treaty of which the Member States of the EU are all part. The Treaty deals with the protection of works and the rights of their authors in the digital environment. The treaty also deals with subject matters to be protected by copyright such as computer programs, whatever the mode or form of their expression and is described as a reflection of: "a broad international agreement as to how copyright and related rights should be handled in today's environment, including the context of digital technologies."⁷⁵ The provisions of the WCT have been implemented by the EU in several Directives. The Computer Programs Directive implemented Article 4 of the WCT; the Database Directive implemented Article 5 of the WCT; the Rental Right Directive dealt with several of the issues in the WCT and the WPPT, inter alia Article 7 of the WCT and Article 9

⁷¹ *Supra* note 65, at point 78.

⁷² The exception of Article 5(1) Directive 2009/24 states that:

"In the absence of specific contractual provisions, the acts referred to in points (a) and (b) of Article 4(1) shall not require authorisation by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction."

⁷³ See: E. Rosati, *Does exhaustion apply to works other than software?*, June 2013, available at: <http://ipkitten.blogspot.nl/2013/06/does-exhaustion-apply-to-works-other.html>

⁷⁴ Case C-128/11 *Usedsoft GmbH v. Oracle International Corp.*, at point 51 and 56.

⁷⁵ See: *The Advantages of Adherence to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)*, Document prepared by the International Bureau of WIPO. Available at: http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/advantages_wct_wppt.pdf

of the WPPT. The Copyright Directive served to further implement the new international obligations set out by the WCT and the WIPO Performances and Phonograms Treaty.

This means that the Copyright Directive also includes the concept of communication to the public.⁷⁶ Had the Court in the *Usedsoft* case relied on the Copyright Directive instead of the Computer Programs Directive another outcome would have been in place, because the provisions relating to distribution and the exhaustion of rights are dissimilar in both the Copyright and the Computer Programs Directive. If the *Usedsoft* case was decided solely according to the Copyright directive the outcome could have easily been in favour of Oracle.⁷⁷ This is because the transfer of the software from Oracle to its customers would have fallen under the communication to the public right for which there is no rule of exhaustion.

The CJEU in *Usedsoft* found that if the reproduction was necessary for use, then a second acquirer could be a lawful acquirer. Had the Court decided on basis of the provisions of the Copyright Directive then there would have been no allowance for a lawful acquirer to create a reproduction copy without the authorisation of the rightholder.⁷⁸ This 'get around' for the reproduction copy only exists in the form of article 5(1) of the Computer Programs Directive.⁷⁹ A solution for courts having to come up with very creative workarounds to allow for digital exhaustion would be to not let the range of application of the Computer Programs Directive and the Copyright Directive overlap, and use the Copyright Directive exclusively for digital products, with the exception of computer programs and databases, for smooth application.

However, a more fundamental question then rises: why have special provisions for computer programs and databases? As Agarwal rightfully points out: in the end computer programs and databases are nothing more than bits and bytes, as are all digital products.⁸⁰

Although it is thus possible to resell software under the provisions of the Computer Programs Directive, it is argued by commentators that the decision in the *Usedsoft* case is possibly to be contained to future rulings on the Computer Programs Directive alone, and more specifically only on the transfer of software such as in the *Usedsoft* case.⁸¹ Not in the least place because of the CJEU decision in the later *Nintendo* case, which will be discussed next.

⁷⁶ See Article 8 of the WCT and Article 3(1) of the Copyright Directive, in this regard.

⁷⁷ G. Agarwal, *Implementing a Digital First Sale Doctrine: Comparative Study of the E.U. and the U.S.A.*, 2015, at p. 33.

⁷⁸ See also Recital 29 of the Copyright Directive, which states that:

"The question of exhaustion does not arise in the case of services and on-line services in particular. [...] every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides."

⁷⁹ *Supra* note 68, at point 29.

⁸⁰ *Supra* note 77.

⁸¹ See: Paul L.C. Torremans, *The Future Implications of the Usedsoft Decision*, working paper, February 2014; and E. Linklater, *UsedSoft and the Big Bang Theory: Is the e-Exhaustion Meteor about to Strike?*, 5 (2014) JIPITEC 12, para 1.

1.4 Videogames protected by copyright in the information society

European Union copyright legislation does not address videogames (directly). Because of this, it was not clear how videogames should be considered by the law. In the *Nintendo vs PC Box case*⁸², decided in 2014 by the CJEU and a case primarily about technical protective measures, the Court provided its stance on the concept of videogames and provided some answers to questions on the harmonisation of the Copyright Directive and Computer Programs Directive with regard to the protection of videogames.

1.4.1 Underlying facts of the Nintendo case

Nintendo is a company that creates and produces videogames and it markets two types of products for those games to be played on, namely portable systems called 'DS' consoles and fixed console videogame systems called 'Wii' consoles. *Nintendo* is a company which is known in the game-industry for their self-sufficient nature. The company creates its own consoles, game-engines, games and has adopted technological measures installed in their systems to prevent the use of illegal copies of their videogames. In doing so *Nintendo* appeals to Article 6 of the Copyright Directive, which states that:

"Member States shall provide adequate legal protection against the circumvention of any effective technological measures".

PC Box, on the other hand, markets original *Nintendo* consoles together with additional software, created specifically to be used in those consoles, that deactivates the pre-installed protection measures by *Nintendo*.

Considering that the principal purpose of the *PC Box* equipment was to circumvent and to avoid the technological protection measures of *Nintendo* games, *Nintendo* brought proceedings against *PC Box* before the Court of Milan (Italy). In addressing the issue the Court of Milan considered that videogames cannot be reduced to mere computer programs stating that:

"although videogames take their functionality from a computer program, they begin and progress following a narrated predetermined route by the authors of those games in a way to make a group of images and sound appear together with some conceptual autonomy"

The Court of Milan therefore effectively qualified videogames as 'hybrid products', as they consist not only of software but also of other creative works.⁸³ The Court then stayed proceedings and referred questions⁸⁴ to the CJEU to clarify the harmonisation of the Computer Programs Directive and the Copyright Directive with regard to the protection of videogame material. More specific it asked whether: the protection of technological protection measures attaching to copyright-protected works or other subject matter may also extend to a system (in this case the *Nintendo Wii* console) The Italian national court restricted its questions to the interpretation of article 6 of the Copyright Directive.⁸⁵ The CJEU followed the Italian national court in its assessment of videogames as products of hybrid nature⁸⁶ and

⁸² C-355/12 *Nintendo Co. Ltd and Others v. PC Box Srl and 9Net Srl.*, January 23, 2014.

⁸³ T. Rendas, *Lex Specialis (sima): Videogames and Technological Protection Measures in EU Copyright Law*, pp. 3-4.

⁸⁴ C-355/12 *Nintendo Co. Ltd and Others v. PC Box Srl and 9Net Srl.*, at point 18.

⁸⁵ Case C-355/12 - Opinion of Advocate General Sharpston, at point 26.

⁸⁶ *ibid*, at point 25.

concluded as such that because a part of videogames is also software it should also take into account the Computer Programs Directive in its assessment of the issue at hand.

In that regard, it must be noted that the Copyright Directive concerns, as could be seen in paragraph 1.2.3 and is apparent *inter alia* from Article 1(1) of the Directive: the legal protection of copyright and related rights, including, for authors, exclusive rights to their works. Computer programs are protected under the Copyright Directive by copyright provided that they are original, meaning that they are their author's own intellectual creation.⁸⁷

1.4.2 The Computer Programs Directive confirmed as *lex specialis*

Among other things the Advocate-General in the *Nintendo* case argued the following:

"the Computer Programs Directive concerns only computer programs, whereas the Copyright Directive concerns copyright and related rights in intellectual works in general. The latter leaves intact and in no way affects existing EU provisions relating to, *inter alia*, the legal protection of computer programs."⁸⁸

Following that logic a simple conclusion is then that the Computer Programs Directive constitutes a '*lex specialis*' in relation to the provisions of the Copyright Directive. The CJEU in the *Nintendo* case followed that exact same interpretation and thereby referred to the *Usedsoft* case, where the Court came to a similar finding.⁸⁹ In the condition of a *lex specialis* the Computer Programs Directive thus takes precedence over the Copyright Directive (as *lex generalis*).

The CJEU decided in *Nintendo*, following the opinion of the national court of Italy, that videogames are at least partly computer programs.⁹⁰ Following that conclusion, the big question then is if the fact that a videogame is also a computer program implies that it falls under the protection of the Computer Programs Directive. To this question the Court provided the answer as follows:

"As is apparent from the order for reference, videogames, such as those at issue in the main proceedings, constitute complex matter comprising not only a computer program but also graphic and sound elements, which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption. In so far as the parts of a videogame, in this case, the graphic and sound elements, are part of its originality, they are protected, together with the entire work, by copyright in the context of the system established by Directive 2001/29."⁹¹

It could be seen in the *Usedsoft* case that the CJEU chose to create the possibility of a new market, that of the reselling of software, by finding a way to allow digital exhaustion under

⁸⁷ See also: Case C-5/08 *Infopaq International* [2009] ECR I-6569, paragraph 35

⁸⁸ Case C-355/12 - Opinion of Advocate General Sharpston, at point 34.

⁸⁹ Case C-128/11 *Usedsoft GmbH v. Oracle International Corp.*, at point 56.

⁹⁰ See previous paragraph.

⁹¹ C-355/12 *Nintendo Co. Ltd and Others v. PC Box Srl and 9Net Srl.*, at point 23.

the Computer Programs Directive. By referring to videogames as products that: "constitute complex matter comprising not only a computer program but also graphic and sound elements, which although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption"⁹², the Court argued that videogames should be protected by copyright in the context of the system established by the Copyright Directive.⁹³

The 'complex matter' statement in combination with the 'lex specialis' statement can only mean that the provisions of the Computer Programs Directive take precedence over those of the Copyright Directive, but only where the protected material falls *entirely* within the scope of the former.⁹⁴ As both the national court of Italy and the CJEU have found that videogames cannot be reduced to the status of computer program alone, videogames do not fall entirely within the scope of the Computer Programs Directive, and because of that videogames are protected by copyright under the more general provisions of the Copyright Directive.

It is interesting to note that, as the Advocate-General in the *Nintendo* case also mentions⁹⁵, the protection levels of the Computer Programs Directive and Copyright Directive are not the same. The Computer Programs Directive, namely, affords rightholders of digital content with less protection against acts of reproduction in respect of computer programs than the Copyright Directive. Under the Copyright Directive all acts of digital reproduction are restricted by the authorisation of the rightholder. Under the Computer Programs Directive, due to the exceptions of Articles 5 and 6⁹⁶, authorisation from the rightholder is not always required to reproduce a product. Hence, the Computer Programs Directive protects the rights of rightholders slightly less. In cases of intellectual works comprising both computer programs and other material which cannot in any way be separated, the Court in *Nintendo* chose to afford the greater, not the lesser protection to rightholders. The logic behind the decision of the CJEU to impart rightholders the greater protection in such cases is not clear as the Court, sadly, does not clarify this stance. As regards the parts of a work, it should be borne in mind that there is nothing in the Copyright Directive indicating that those parts are to be treated any differently from the work as a whole. It follows that they are protected by

⁹² *ibid.*

⁹³ See E. Rosati on the Nintendo ruling and its effects on the exhaustion of *Usedsoft* in: *Nintendo ruling confirmed lex specialis nature of Software Directive: does this have implications for UsedSoft exhaustion?*, January 26, 2014. Available at: ipkitten.blogspot.nl/2014/01/nintendo-ruling-confirmed-lex-specialis.html

⁹⁴ Case C-355/12 - Opinion of Advocate General Sharpston, at point 34.

⁹⁵ *ibid.*, at point 35.

⁹⁶ Article 5 provides for a number of exceptions to the exclusive rights of Article 4(1)(a) and (c). In particular, for any person lawfully in possession of a computer program and entitled to use it, authorisation is not required for: reproduction, where it is necessary for the use of the program in accordance with its intended purpose, including for error correction; the making of a back-up copy, in so far as necessary for the use of the program; or observation, studying or testing of the functioning of the program in order to determine the ideas and principles which underlie any element of it, if carried out while performing any act which the person concerned is entitled to carry out.

Under Article 6(1), the rightholder's authorisation is not required where reproduction of a code or translation of its form are indispensable to achieve interoperability between computer programs, provided that (a) the act is carried out by or on behalf of a person entitled to use the program (b) who did not previously have the information necessary to achieve interoperability and (c) that it is confined to the parts of the original program which are necessary for that purpose. Article 6(2) states that information obtained through the application of paragraph 1 must be used only for such purposes and Article 6(3) further adds that the rightholder's legitimate interests must not be unreasonably prejudiced.

copyright since, as such, they share the originality of the whole work (see *Infopaq International*, paragraph 38).⁹⁷

Nevertheless, it is because the CJEU chose to protect videogames as 'hybrid products' under the provisions of the Copyright Directive instead of the Computer Programs Directive that digital videogames are not subject to any form of exhaustion.

1.4.3 Reselling of videogames not possible

The consequence of videogames being categorised as 'more than a computer program' by the CJEU in *Nintendo*, is that rightholders are granted greater protection of their rights, simply because the Computer Programs Directive does not apply in that case. One can question if this stance should be regarded as absolutely logical as it seems to create an insuperable barrier for second hand sales of videogames. Not only that, the impossibility for consumers to resell (or rent out) their product without the permission of the rightholder is in complete opposition to the concept of free movement in the EU single market. A concept, which the EU values very high.⁹⁸

Although it cannot be said with absolute certainty, the European Court seemed to limit the concept of digital exhaustion in its *Usedsoft* ruling to computer programs falling within the confinements of the Computer Programs Directive. As for now only the Computer Programs Directive, and not the Copyright Directive, allows for the exhaustion of (certain types of) digital works. The fact that the CJEU in the *Nintendo* case allocated videogames to the working of the Copyright Directive must thus be seen as the European Court's statement to *not allow the resale* of digital videogames.

What is even more alienating, is that physical videogames (i.e. games burned on disks) can be resold without permission from the rightholder, but when it comes to digital videogames the CJEU concludes that great protection for the rightholder should be in place.⁹⁹ The CJEU nowhere addresses these clearly different approaches in its *Nintendo* ruling and so it is hard to understand, at least from a case law point of view, why the digital situation should be addressed differently than the physical situation.

1.5 Allposters case

For many people the CJEU *Allposters* case¹⁰⁰ was the most anticipated case of 2015 in the field of Copyright law.¹⁰¹ As explained before, the Copyright Directive (per article 4(2)) makes sure that the first sale of a work within the territory of the European Union exhausts the right of the copyright owner to control any subsequent distribution of the work in question,

⁹⁷ C-355/12 *Nintendo Co. Ltd and Others v. PC Box Srl and 9Net Srl.*, at point 22.

⁹⁸ In fact, according to the European Commission, the Single Market is: "at the heart of the European project", and is: "one of the EU's greatest achievements". For more see: https://ec.europa.eu/growth/single-market_en

⁹⁹ The court followed the Advocate General who stated in his opinion to the *Nintendo* case: "Where complex intellectual works comprising both computer programs and other material are concerned – and where the two cannot be separated — it seems to me that the greater, and not the lesser, protection should be accorded."

¹⁰⁰ C-419/13 *Art & Allposters International BV v Stichting Pictoright*, January 22, 2015.

¹⁰¹ See: E. Rosati, *Which is the CJEU copyright case to look most forward to? Probably Art & Allposters*, 12 August 2014. Available at: www.ipkitten.blogspot.nl/2014/08/which-is-cjeu-copyright-case-to-look.html

when that first sale was authorised by the author. As Rosati explains: "the CJEU, in *Allposters*, was asked to clarify whether this rule of exhaustion also applied to works that, following their authorised first sale, are subject to an alteration of their mediums and are then re-marketed in their new form."¹⁰² When the CJEU finally delivered its decision in early 2015 it determined that exhaustion of the right of distribution under Article 4(2) of the EU Copyright Directive only applies to the tangible support of a work, thereby seemingly not leaving any room for digital works to fall under the exhaustion doctrine.

The CJEU referred to both Article 6 of the WIPO Copyright Treaty¹⁰³ and Recital 28 to the Copyright Directive¹⁰⁴, to hold the view that exhaustion of the right of distribution only applies to the tangible copy of a work. In so doing, the CJEU appeared to rule out any possibility of having digital exhaustion under the Copyright Directive. However, it must be noted that this decision came to be within a very specific (analogue) background, as was pointed out by Rosati.¹⁰⁵

1.5.1 The CJEU's decision and its implications for digital copyright exhaustion

With regard to the CJEU's decision, it must be said that the court did not delve deep into the examination of digital copyright exhaustion in its judgment. The CJEU instead focused more on a grammatical interpretation of provisions, as pointed out by Savic.¹⁰⁶

The CJEU looked at the conditions of application of the exhaustion rule, where it notably relied on recital 28 to the Copyright Directive, and article 6 of the WIPO Copyright Treaty to come to the conclusion that exhaustion of the distribution right only applies to tangible objects.¹⁰⁷

Furthermore, by deciding this way, the Court seemed to imply that there is no general digital exhaustion under EU copyright. And so the allowance of exhaustion for computer programs in the *UsedSoft* case has to be seen in light of the *lex specialis* nature¹⁰⁸ of the Computer Programs Directive.¹⁰⁹

¹⁰² E. Rosati, *Online copyright exhaustion in a post-Allposters world*, Journal of Intellectual Property Law & Practice, 2015, p. 1.

¹⁰³ By referring to Article 6 it also included the agreed statements concerning Articles 6 and 7:

"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."

¹⁰⁴ Recital 28: "Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article."

¹⁰⁵ *Supra* note 102, at p. 13.

¹⁰⁶ M. Savic, *The CJEU Allposters Case: Beginning of the End of Digital Exhaustion?*, 37 European Intellectual Property Review, Issue 6, 2015, at p. 391.

¹⁰⁷ See: E. Rosati, *BREAKING NEWS: CJEU says exhaustion only applies to the tangible medium of a work (so no such thing as digital exhaustion?)*, 22 January 2015.

Available at: www.ipkitten.blogspot.nl/2015/01/breaking-news-cjeu-says-exhaustion-only.html

Also see: CJEU Case C-419/13 *Allposters*, at 37 to 40.

¹⁰⁸ See: paragraph 1.4.2. where it was set out that the Computer Programs Directive is of a *lex specialis* nature to the "more general" Copyright Directive.

¹⁰⁹ *Supra* note 107

This ruling prevents the possibility of transferring ownership of digital content falling under the Copyright Directive, without the consent of the copyright holder, making a second-hand market for digital content almost impossible since copyright holders will be unwilling to give consent in fear of losing revenues.¹¹⁰ The second-hand market for digital products like e-books, digital music files, digital videos and even digital videogames¹¹¹ is thus, with this ruling, made almost impossible.

However, by focusing on the literal wording of the articles and recitals of the Copyright Directive and the WIPO Copyright Treaty the CJEU overlooked the fact that both pieces of legislation are perhaps somewhat outdated in light of the technological developments the world has seen since the respective Directive and Treaty were given legal effect, with the Copyright Directive dating back to 2001 and the WIPO Copyright Treaty even dating back to 1996. In that light the CJEU also passed up the opportunity to address the online-offline equivalence¹¹² (more on this principle in the next chapter) of the reselling of tangible products and their digital equivalents.

In the *UsedSoft* case, the CJEU stressed that the purpose of the exhaustion rule is to avoid partitioning of the internal market.¹¹³ However, in the *Allposters* case, instead of favoring the realising of an internal market the CJEU clearly favoured the interests of the right holders above the interests of the consumers.¹¹⁴

The *UsedSoft* ruling stressed that the concept of exhaustion used in both the Copyright Directive and the Computer Programs Directive "must in principle have the same meaning".¹¹⁵ The *Allposters* ruling, however, shines light on the fact that in the EU the scope of the exhaustion principle seems to differ depending upon whether a work is protected by the Computer Programs Directive or the Copyright Directive.¹¹⁶

Especially for certain types of complex works, like videogames¹¹⁷, which could, at least in theory, be protected by both the Copyright Directive and the Computer Programs Directive this seems to create unnecessary and unwanted ambiguity.

Whether EU law allows digital exhaustion arguably remains however an unresolved issue, with diverging interpretations being provided at the level of national courts.¹¹⁸

¹¹⁰ *Supra* note 106, at p. 392

¹¹¹ See: paragraph 1.4.3 where it was seen that the CJEU made clear in the Nintendo case that videogames do not fall under the protection of the Computer Programs Directive, but rather fall under the protection of copyright law in the context of the Copyright Directive.

¹¹² See: M. Schellekens, What Holds Off-Line, Also Holds On-Line?, Starting Points for ICT Regulation, Deconstructing Prevalent Policy One-Liners, IT&Law Series Vol. 9, The Hague: T.M.C. Asser Press 2006, pp. 51-75.

¹¹³ See: Bird & Bird, *Anticipated CJEU ruling on exhaustion misses opportunity to clarify adaptation right*, February 24, 2015. Available at: www.twobirds.com/en/news/articles/2015/global/anticipated-cjeu-ruling-on-exhaustion-misses-opportunity-to-clarify-adaptation-right

¹¹⁴ See: also: www.out-law.com/en/articles/2015/january/transferring-copyrighted-works-to-alternative-mediums-re-sets-owners-right-to-control-distribution-rules-eu-court/

¹¹⁵ Case C-128/11 *Usedsoft GmbH v. Oracle International Corp.*, at 60.

¹¹⁶ See: also T. Ohta, *Exhaustion of rights (first sale doctrine): what are the broader implications of the CJEU's ruling in Art & Allposters?*, 30 January 2015. Available at: <http://ipkitten.blogspot.nl/2015/01/exhaustion-of-rights-first-sale.html>

¹¹⁷ which consist of a fusion of software and audiovisual elements, each consisting of many creative elements. see paragraph 1.1.

Yet, despite the legal and economic relevance of allowing markets for second-hand digital works, current EU copyright reform plans regrettably do not tackle the issues of (a lack of) general digital exhaustion.¹¹⁹

Exhaustion is intended to strike a fair balance between the rightholder's interest on the one hand and the interests of the consumer and free circulation of goods on the other hand.¹²⁰ As we have entered the digital era and tangible goods are more and more substituted for digital goods, one should think copyright law should likewise modernise and enter the digital domain. However, as Savic rightfully points out:

*"The Allposters ruling, by "inherently tying" copyright exhaustion in art.4 of the Copyright Directive to the physical medium on which the work is expressed, results in a situation where right holders can avoid exhaustion of the distribution right whenever a work lawfully sold within the EU is transformed, regardless of whether the transformation may be permissible as an exception and limitation under national law of a Member State, as follows from art.5 of the Copyright Directive, and does not amount to a violation of the author's moral rights or unreasonably prejudice the legitimate interests of the right holder."*¹²¹

The danger of the *Allposters* ruling thus lies in the fact that it may well prevent or otherwise impede national initiatives trying to modernise copyright law, providing for the adoption of innovation, fair use or other type of exception.

¹¹⁸ For more on this see next Chapter, in particular the differences between Dutch Court case *TomKabinet*, and German Court case *VZBV*.

¹¹⁹ The European Commission has launched its so called: Digital Single Market Strategy, which is formed around a set of objectives the EU plans to bring to fruition. And although the objectives are numerous, tackling the issue of possible digital exhaustion is not among the goals which the EU has set for itself.

- For more about the Digital Single Market strategy see: https://ec.europa.eu/commission/priorities/digital-single-market_en

- For a quick analysis of the Digital Single Market strategy see also: E. Rosati, *The Digital Single Market Strategy: too many (strategic?) omissions*, 2015. Available at: <http://ipkitten.blogspot.nl/2015/05/the-digital-single-market-strategy-too.html>

¹²⁰ Case C-128/11 *Usedsoft GmbH v. Oracle International Corp.*, at point 63.

¹²¹ *Supra* note 106, at p. 394.

1.6 Conclusion

This chapter's focus was to find an answer to two questions: 1) are videogames to be considered software according to EU law, and 2) how is dealt with the reselling of both software and videogames in the EU. The *Usedsoft* case has shown, that software *can* be resold without the authorisation of the rightholder in the EU. The CJEU argued that the download of a computer program, which could only be used by buying a user licence for an unlimited time, constituted a first sale. And with the reasoning that an original acquirer of a computer program could make his copy unusable at the time of the resale of the copy, a functional equivalent of a tangible sale could be created so that the right holder's exclusive right of reproduction of his computer program would not be infringed. With this reasoning the Court created the possibility to resell software under the Computer Programs Directive. This same logic, however, does not apply in the case of videogames as the CJEU argued in its *Nintendo* ruling that videogames are software, but also constitute complex matter such as graphic and sound elements which have a unique creative value. A further testament to the fact that software and videogames are not to be considered similar is that the CJEU ultimately decided in the *Nintendo* case that videogames do not fall under the scope of the Computer Programs Directive, but rather under the scope of the Copyright Directive (as opposed to software, which does fall under the scope of the Computer Programs Directive). And as the digital exhaustion doctrine was limited to the Computer Programs Directive by the Court in the *Usedsoft* case it must therefore be concluded that the resale of digital videogames without authorisation of the rightholder is *not* possible in the EU.

It could also be seen that the CJEU's decision in the *Allposters* case may have grave consequences for the free flow of goods in various digital markets. Due to the Court's choice to focus on a grammatical explanation of the Copyright Directive and the WIPO Copyright Treaty (both of which were not construed with the intention of including digital markets), the digital copyright exhaustion of: e-books, digital music files, digital movies and digital videogames, seems to have been made impossible under the Copyright Directive. Where the CJEU in the *Usedsoft* case had introduced the possibility of digital exhaustion for products that fall under the Computer Programs Directive, the CJEU in the *Allposters* case has seemingly made an end to digital copyright exhaustion (at least for works falling under the Copyright Directive) and has made it difficult for national authorities to modernise copyright law as it stressed that exhaustion per article 4 of the Copyright Directive is seemingly limited to the physical medium on which the work is incorporated.

In the *UsedSoft* case, the CJEU stressed that the purpose of the exhaustion rule is to avoid partitioning of the internal market.¹²² However, in the *Allposters* case, instead of favouring the interests of consumers and realising a coherent internal market the CJEU clearly favoured to uphold the interests of right holders.¹²³

The *UsedSoft* ruling itself pointed out that the concept of exhaustion used in both the Copyright Directive and the Computer Programs Directive must in principle have the same meaning.¹²⁴ The *Allposters* ruling, however, showed that in the EU the scope of the exhaustion principle seems to differ depending upon whether a work is protected by the Computer Programs Directive or the Copyright Directive.

¹²² *Supra* note 112.

¹²³ *Supra* note 113.

¹²⁴ Case C-128/11 *Usedsoft Gmbh v. Oracle International Corp.*, at 60.

Especially for certain types of complex works, like videogames¹²⁵, which could, at least in theory, be protected by both the Copyright Directive and the Computer Programs Directive this seems to create unnecessary and unwanted ambiguity.

¹²⁵ which consist of a fusion of software and audiovisual elements, each consisting of many creative elements. see paragraph 1.1.

Chapter 2

This second chapter deals with the regulatory differences in the reselling of online and offline goods. An import question here is: should policymakers and judges regulate the online world like the offline world? More specifically: when regulating the online world, is a starting point of 'what holds offline, also holds online' feasible?

This chapter starts off with an analysis of the current legal situation in the EU with regard to the possibilities of reselling digital media other than videogames. The focus will be on the reselling of digital music files and eBooks. This analysis will be made to place the possible reselling of digital videogames in some legal perspective. In the *Usedsoft* case the CJEU allowed the concept of digital exhaustion for software under the Computer Programs Directive. Analyzing the various national Courts stances on the reselling and lending of eBooks and digital music files will help to further understand how likely Courts in the EU are willing to expand the concept of digital exhaustion also to other digital products - such as digital videogames.

After this analysis the focus will shift to a broader comparison of the offline and online legal-situations. The concept of an online situation that is treated the same as its offline counterpart, will be introduced here. This concept, which is dubbed: 'what holds offline, also holds online'¹²⁶, will especially be explored with regard to its functionality as a reasoning for courts to allow a second-hand market for digital videogames.

Next, a part of this chapter will be devoted to digital rights management (DRM) that is incorporated in videogames, which creates a distorted balance between the rights of Intellectual Property (IP) right holders and the rights of consumers.

The final topic of this chapter is **how** digital videogames could be resold while preserving the appropriate balance between the rights of IP right holders and consumers, which is vital to a just copyright law.¹²⁷ This question will be approached from a more technological angle, searching for what can be technologically done to make the reselling of digital videogames possible.

2.1 Reselling and lending of eBooks and digital music files

2.1.1 Resale of e-books

The current situation with regard to the reselling and lending of e-books in the EU will be assessed at the hand of three landmark cases. One case originates from Germany (VZBV case) and the other two cases (TomKabinet and VOB) originate from The Netherlands.

¹²⁶ M. Schellekens, *What holds offline, also holds online*, p.1. As published in Bert-Jaap Koops, Miriam Lips, Corien Prins & Maurice Schellekens, *Starting Points for ICT Regulation, Deconstructing Prevalent Policy One-Liners*, IT & Law Series Vol. 9, The Hague: T.M.C. Asser Press 2006, ISBN 90-6704-216-1, pp. 51-75.

¹²⁷ Asay, Clark D., *Kirtsaeng and the First-Sale Doctrine's Digital Problem* (May 7, 2013). Stanford Law Review Online, Vol. 66, pp. 17-23, 2013; Penn State Law Research Paper No. 29-2013, at p. 18
Available at SSRN: <https://ssrn.com/abstract=2262032>

VZBV case 2014

The German consumer rights group 'VZBV' argued before the district court of Bielefeld in 2013¹²⁸ that consumers should have the right of digital resale.¹²⁹ It did so by arguing that two clauses that were being used by an internet portal offering digital content such as films, e-books and audio books for download, unjustly restricted the rights of consumers to resell their purchased product. The first clause stated that the customer received merely a simple, non-transferable right to use the product with the download.¹³⁰ And as Savic explained: "The second clause stated that the downloaded digital content may not be copied for others, made publicly available, resold or used for commercial purposes."¹³¹ The Bielefeld Court dismissed the claim as unfounded.

The VZBV appealed against this judgment. In May of 2014 the Court of Appeal (the Regional Court of Hamm) delivered its decision in appeal¹³², which upheld the decision of the District Court of Bielefeld and reiterated that the CJEU in *Usedsoft* considered the Computer Programs Directive as *lex specialis*.¹³³ The Court of Appeal further stated that: "exhaustion of the distribution right under S 17 of German Copyright Law does not apply to digital files like audio books and e-books downloaded from the internet, even if their download is made with the consent of the right holder and it amounts to a transfer of property."¹³⁴

As Rosati points out, the German Court thereby thus made it possible: "for providers of digital audio files to validly include in terms and conditions clauses that do not prohibit customers from reselling e.g. audio books, but make it effectively impossible to resell their audio books."¹³⁵ The Court of Appeal also concluded that a prohibition of that kind could validly be applied to the transfer of 'new' versions of a file.¹³⁶

The conclusion of this decision is that the German court has denied the applicability of the principles expressed by the CJEU in *Usedsoft* beyond the confines of the Computer Programs Directive. Because of this, the right of distribution is, according to the German Court, not subject to exhaustion with regard to digital subject-matter other than software, more specifically audio books and e-books.¹³⁷

¹²⁸ LG Bielefeld · Urteil vom 5. März 2013 · Az. 4 O 191/11 (e-books and audio books judgment).

Text available (in German) at: <https://openjur.de/u/621610.html>

¹²⁹ See: Nate Hoffelder, *Used eBook sales still blocked in Germany*, 28 August 2014. Available at: <http://the-digital-reader.com/2014/08/28/used-ebooks-now-illegal-germany/>

¹³⁰ *Supra* note 127, at 30.

¹³¹ *Supra* note 10, at p. 421.

¹³² Oberlandesgericht Hamm, 22 U 60/13. (decision in appeal). Text available (in German) at: <https://openjur.de/u/692344.html>

¹³³ A. Bellan, *Copyright exhaustion does not apply to digital goods other than software*, Hamm Court of Appeal says, June 13, 2014. Available at: <http://ipkitten.blogspot.it/2014/06/breaking-copyright-exhaustion-does-not.html>

¹³⁴ Press Release Oberlandesgericht Hamm (in German) see: 'Pressemitteilung - Download eines Hörbuchs nur zum Eigengebrauch', available at: drive.google.com/file/d/0B3D1Fmx3ki3YUkZsOUZjU1drNHc/edit

¹³⁵ *Supra* note 133.

¹³⁶ *ibid.*

¹³⁷ E. Rosati & J. Grosseketler, *No exhaustion beyond software: Katfriend translates German decision on audiobooks*, July 1, 2014. Available at: <http://ipkitten.blogspot.nl/2014/07/no-exhaustion-beyond-software-katfriend.html>

Tom Kabinet case 2015

The German VZBV ruling did, however, not end the debate on the reselling or even lending of e-books in the EU as a Dutch court showcased by referring questions to the CJEU in a case regarding the reselling of e-books on website *Tom Kabinet*¹³⁸.

Dutch website www.tomkabinet.nl offers consumers the possibility to buy and sell "second-hand" e-books. Sellers can upload their legally acquired e-books to the site and when they do so, they must declare that they have erased the "original" e-book from their own computer or e-reader/tablet. Consumers can purchase an e-book from the catalog on *Tom Kabinet's* website and then download the e-book-file from the servers of *Tom Kabinet* and start using the file. When the e-book-file is downloaded *Tom Kabinet* adds a watermark to the file, which is used to detect unauthorised use of the file, like illegally posting the file on the internet (e.g. circulating the file on the internet through peer to peer websites).

In light of this the Dutch Publishers Association (NUV) asked the Dutch court, in a preliminary injunction procedure, to force *Tom Kabinet* to shut down their website and essentially stop reselling e-books through the site. According to the NUV *Tom Kabinet* infringed the rights of those who were represented by the NUV, even if the e-books, which were offered on the site, had been acquired legally.¹³⁹

Tom Kabinet's primary defense rested on the argument that, like the resale of physical books, the resale of e-books is allowed due to the exhaustion of the distribution right of the original right holder after a first sale within the EU. *Tom Kabinet* based this argument on the CJEU's decision in *Usedsoft* to allow the resale of software under the Software Directive. Furthermore, it argued that the purchase of a "second-hand" e-book constituted a 'consumer purchase' (consumentenkoop) in The Netherlands, as of the twelfth of March 2014, due to the implementation of the Directive on Consumer Rights (Dutch: Richtlijn Consumentenrechten, hereinafter called: "the Directive")¹⁴⁰ and that, because of that, exhaustion also occurs.

The Dutch Court of first instance stated that there was uncertainty surrounding the applicability of the principle of digital exhaustion and stated that *Tom Kabinet* arguments were of such a principal nature that the court of first instance held that the case should be presented in front of proper court as a proper case.¹⁴¹

The case was then redirected to the Court of Appeal of Amsterdam (Gerechtshof Amsterdam), which decided that a ban to resell legally acquired e-books via a website could not be granted. The Court of Appeal thereby referred to the CJEU *Usedsoft* case and stated that the level of uncertainty concerning the scope of that decision was too great for it to actually have the legal effect to ban a website which deals in the reselling of digital media.¹⁴²

¹³⁸ ECLI:NL:GHAMS:2015:66, Gerechtshof Amsterdam, 20-02-2015 (*Tom Kabinet*). Available (in Dutch) at: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHAMS:2015:66>

¹³⁹ See: <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechtshoven/Gerechtshof-Amsterdam/Nieuws/Paginas/Feitelijk-verbod-website-Tom-Kabinet-.aspx> (only available in Dutch).

¹⁴⁰ See for the Implementation Act of the Directive on Consumer Rights (in Dutch): <http://wetten.overheid.nl/BWBR0035034/2014-06-13>

¹⁴¹ See: Case KG ZA 14-795 SP/MV, at point 4.11, July 21, 2014. Available (in Dutch) at <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2014:4360>

- see also: E. Rosati, *Dutch court refers questions to CJEU on e-lending and digital exhaustion, and another Dutch reference on digital resale may be just about to follow*, September 15, 2014. Available at: www.ipkitten.blogspot.co.uk/2014/09/dutch-court-refers-questions-to-cjeu-on.html

¹⁴² *Supra* note 138, at paragraph 3.5.2.

The Court of Appeal did, however, state that it is likely that the website *tomkabinet.nl* does not only offer legally acquired e-books but that it also offers illegally acquired e-books. For that reason the Court **did** ban *TomKabinet* to operate a website where illegally downloaded e-books could be sold. This resulted in a situation where the website had to be shut down, unless the proprietors of the website could show that they had taken enough precautionary measures to ensure that no illegally downloaded e-books are sold through the website.¹⁴³

All in all, much is still unclear on the reselling of e-books in the EU. The German Court in *VZBV* was really firm in its ruling and held that the *UsedSoft* case did not apply to downloaded e-books and audio books. The Dutch Court, however, seemed to lean more towards allowing the reselling of e-books. Whether this Dutch case will function as a breakthrough for the reselling and lending of e-books, or even broader: for the reselling and lending of more digital content, still has to be seen.

With regard to the lending of e-books the CJEU just recently provided some much awaited clarification in another case which also originated from The Netherlands, the *VOB* case. The next paragraph will delve deeper in this case and will examine what the CJEU exactly decided.

2.1.2 VOB case, lending of e-books

The Vereniging van Openbare Bibliotheken (VOB), the Dutch association of public libraries, decided to take legal action in 2014 against a collection agency designated by the Dutch government for payments of lends: the *Stichting Leenrecht*, after the Dutch Minister for Education, Culture and Science denied libraries the right to lend eBooks without the consent of right holders, stating that the public lending right exception from art. 6 of the Rental and Lending Right Directive¹⁴⁴ only applies to physical books.¹⁴⁵ VOB claimed that e-books should be available for loan under the model “one copy, one user,” which would be in accordance with the definition of lending in art. 2(1)(b) of the Rental and Lending Right Directive:

“lending’ means making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public.”

At the time of the proceedings between the *VOB* and *Stichting Leenrecht* the legal position of eBook lending in The Netherlands was unclear. This was because the Dutch rental and lending provision did not specifically address digital rental and lending¹⁴⁶

¹⁴³ *Supra* note 138, at 3.7.3.

¹⁴⁴ Directive 2006/115 on rental right and lending right and on certain rights related to copyright in the field of intellectual property. Text of the Directive available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32006L0115>

¹⁴⁵ For opinion (in Dutch) of the Minister of Education, Culture and Science see:

<https://www.rijksoverheid.nl/documenten/kamerstukken/2013/02/26/aanbieding-rapport-online-uitlenen-van-e-books-door-bibliotheken> (February 26, 2013)

- Opinion of the Minister was based on the report “Online uitlenen van e-books door bibliotheken” (November 1, 2012). Available in Dutch at: <https://www.rijksoverheid.nl/documenten/rapporten/2012/11/01/online-uitlenen-van-e-books-door-bibliotheken>

¹⁴⁶ See: Auteurswet (Law on Copyright) of 23 September 1912 ('the Aw'). Specifically artt. 10(1), jo. 12, jo. 15c(1) of the Aw. Text of the Law available (in Dutch) at: <http://wetten.overheid.nl/BWBR0001886/2015-07-01>

The first instance court in The Hague (Rechtbank Den Haag) referred questions to the CJEU seeking clarification on whether or not 'lending' under the Rental and Lending Rights Directive (Directive 2006/115) also includes 'digital lending'. The first, and most important, referred question reads as follows:

“1. Should the articles 1 (1), 2 (1)(b) and 6 (1) of the Rental and Lending Rights Directive be thus interpreted as meaning that ‘lending’ also includes the making available:

- for a limited amount of time
- without a direct or indirect economic or commercial benefit
- from a distance
- through downloading
- on the basis of a one user, one copy model
- through institutions accessible by the public of a copy in digital form of copyrighted novels, collections of short stories, biographies, travel reports, children’s books and young adult literature?”¹⁴⁷

In 2016 the CJEU delivered its judgment in the VOB case. The importance of this CJEU decision for this paper lies in the answer to the first preliminary question. In answering the first question, the Court followed a strict grammatical and historical interpretation of Directive 2006/115 to determine the scope of the Directive. By following this approach the CJEU found that Directive 2006/115¹⁴⁸ allowed enough room for the introduction of a form of digital lending.¹⁴⁹ Thus the question was answered in the affirmative.

Furthermore, especially the historical interpretation of Directive 2006/115 led to some interesting findings by the Court. Recital 4 to Directive 2006/115 reads:

"Copyright and related rights protection must adapt to new economic developments such as new forms of exploitation."

The Court found that, in accordance with that particular recital:

*"Lending carried out digitally indisputably forms part of those new forms of exploitation and, accordingly, makes necessary an adaptation of copyright to new economic developments."*¹⁵⁰

And in addition, the CJEU found that:

*"to exclude digital lending entirely from the scope of Directive 2006/115 would run counter to the general principle requiring a high level of protection for authors".*¹⁵¹

¹⁴⁷ Case C-174/15, November 10, 2016 (VOB case), at 26. Decision available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=185250&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=801247>

¹⁴⁸ Rental and Lending Directive, recitals 4 and 5; Copyright Directive, recital 9.

¹⁴⁹ *Supra* note 147, at point 54:

"the concept of 'lending' [within the meaning of the Rental and Lending Rights Directive] covers the lending of a digital copy of a book, where that lending is carried out by placing that copy on the server of a public library and allowing a user to reproduce that copy by downloading it onto his own computer, bearing in mind that only one copy may be downloaded during the lending period and that, after that period has expired, the downloaded copy can no longer be used by that user."

¹⁵⁰ *Supra* note 147, at point 45.

¹⁵¹ *Supra* note 147, at point 46.

This last principle follows only implicitly from recital 5 of Directive 2006/115, but it is clearly emphasised in recital 9 of the more general Copyright Directive:

"Any harmonisation of copyright and related rights must take as a basis a high level of protection".¹⁵²

What is more, is that the Court here pleads in favor of "lending of a digital copy of a book", in part because of the: *"essentially similar characteristics"*, that exist between the lending of a paper book and the digital copy of a book.¹⁵³

The emphasis of the Court here, on new economic developments, relatively newly discovered ways of distribution and exploitation and the recognition of *"essentially similar characteristics"*, can be described as a teleological interpretation of the present directives, and looks to be a sensible approach in dealing with the digital age. As the Court here creates a precedence on which future cases involving digitally making available of content or digital distribution - such as the allowing of the reselling of digital videogames - could build on, the possibility of creating a broad, EU-wide, digital exhaustion in the future seems to have come somewhat closer.

2.1.3 Resale of digital music files

The CJEU, as of yet, has not had to deal with a specific case on the reselling of digital music files and it is therefore only speculation what the CJEU's possible stance on this particular type of digital product would be. Music files, however, are works protected under the Copyright Directive which does not allow exhaustion for works that are not expressed on a physical medium. But this issue will remain unclear until the CJEU gets to decide in a case where the reselling of digital music files is a topic of dispute.

Recently the common belief is that a second-hand market in digital music files is not legal in the EU and sentiment is pessimistic¹⁵⁴ towards the possibility of a broad digital exhaustion (so not only software, but also e-books, digital music and videogames) in the future as well.¹⁵⁵

2.2 What holds offline, also holds online

A recurring theme of this thesis by now is the fact that the resale of digital products is treated differently than the offline resale of the, in essence, same products. Consumers who have bought digital products for hundreds of euros/dollars are, in the current situation, actually owners of virtually worthless digital products once they have been purchased and are placed on their hard drives (or other storage mediums) because they have

¹⁵² See Recital 9 at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001L0029>

¹⁵³ *Supra* note 147, at point 53.

¹⁵⁴ See for example:

- Rosati, Eleonora, Online Copyright Exhaustion in a Post-Allposters World (June 2, 2015).

- Morrisson & Foerster's interpretation of the *Allposters* case, available at:

<http://www.mofo.com/~media/Files/ClientAlert/2015/02/150203EUCopyright.pdf>

¹⁵⁵ As discussed in chapter 1, it is not only the reselling of digital videogames which is threatened by the *Allposters* case, also the legal resale of other digital media (at least) seems to have been made less likely by the CJEU's decision in *Allposters*.

no resale value and thus also no longer any monetary value. This feels unfair to some, to say the least.¹⁵⁶ Furthermore, the current differences in the reselling of online and offline goods is also cause for uncertainty amongst consumers¹⁵⁷, but also producers, as neither party exactly knows what rights they have in the digital (online) sphere.

A simple solution to these problems, however, perhaps exists in the form of the following guideline: 'what holds offline, should also hold online'.¹⁵⁸ If one were to extend the exhaustion doctrine to the digital sphere, and not just limit it to the offline sphere, resale of physical and digital products could be treated more alike.

2.2.1 Origin of the starting point "what holds offline, also holds online"

During the mid to late 90's the internet started to play a more significant role in people's daily lives. It is also during this time that regulators started feeling the need to regulate this newly found 'cyberspace'¹⁵⁹.

During the mid 90's the discussion on how to regulate the cyberspace could mainly be divided into two opposing sides. On one side were the pioneers of the internet who believed in a self-governing Internet as written down by John Barlow in his *"Declaration of the Independence of Cyberspace"*¹⁶⁰. This idea of a self-governing Internet found great support under internet users,¹⁶¹ but was also supported by lawyers and professors such as Johnson and Post in their: *"Law and borders - The rise of law in cyberspace"*.¹⁶²

On the other side of the discussion were the governments who did want to regulate the online world, and more specifically online conduct. Perhaps the best example of this was given by the American Communications and Decency Act¹⁶³. This act was created to ban "indecentcy" on the internet.¹⁶⁴ The United State Supreme Court struck the anti-indecency provisions of the Act down not long after the Act was passed by Congress, in the landmark case of *Reno v.*

¹⁵⁶ Comment from John Ossenmacher (CEO of ReDigi): "Property laws the world over have always been that if you buy something, you have the right to resell it ... Companies like EMI are trying to change the status quo by trying to take away people's property rights and their rights to resell their goods just because they happen to be digital.", January 17, 2013, interview in the Financial Times.

¹⁵⁷ See: S. Dusollier, *The relations between copyright law and consumers' rights form a European perspective*, Directorate-General For Internal Policies - Policy Department C: Citizens' Rights And Constitutional Affairs, Chapter 2;

- See also: Green Paper from the European Commission, *on policy options for progress towards a European contract Law for consumers and businesses*, 2010, at p.2

¹⁵⁸ M. Schellekens, *What holds offline, also holds online?*, as published in Bert-Jaap Koops, Miriam Lips, Corien Prins & Maurice Schellekens, *Starting Points for ICT Regulation, Deconstructing Prevalent Policy One-Liners*, IT & Law Series Vol. 9, The Hague: T.M.C. Asser Press 2006, ISBN 90-6704-216-1, pp. 51-75.

¹⁵⁹ For an extensive definition of 'cyberspace' see: L. Strate, *"The varieties of cyberspace: Problems in definition and delimitation"*, Western Journal of Communication **63** (3) at 382-3, 1999. doi:10.1080/10570319909374648.

¹⁶⁰ John Barlow, *Declaration of Independence of Cyberspace*, February 8th 1996, Davos Switzerland. Text available at: <https://www.eff.org/cyberspace-independence>

¹⁶¹ C. Yang, *"Law Creeps Onto the Lawless Net"*, BusinessWeek (3474) at 58-64, May 6, 1996. Text available at: <https://www.bloomberg.com/news/articles/1996-05-05/law-creeps-onto-the-lawless-net>

¹⁶² David R. Johnson & David G. Post, *Law and Borders - The Rise of Law in Cyberspace*, Stanford Law Review Vol. 48, p. 1367, 1996.

¹⁶³ See: Communications and Decency Act, 1996, at section 230.

¹⁶⁴ Finding a satisfactory definition for "indecentcy" was however not easy. Justice Potter Stewart of the Supreme Court, who, in attempting to define hard-core pornography famously declared: "I know it when I see it", *Jacobellis v. Ohio*, 378 U.S. 184, at 197 (1963) (Stewart, J., concurring).

ACLU¹⁶⁵, but the mindset with which the U.S. government was willing to regulate the internet had nevertheless been made clear. From a government point of view it had to be made clear that the Internet was part of society. A society in which legal rules must be adhered to.¹⁶⁶

The starting point of "what holds offline, also holds online" can be seen as a compromise: the online world is not free of legislation, as the internet users perhaps would have wanted, but legislators will also not try to subject the Internet to more severe norms than are applicable in the offline sphere. The starting point of "what holds off-line, also holds on-line" is therefore, according to Schellekens:

"a bold statement that must counterweigh claims for separatism of the pioneers of the Internet that saw their relative independence melt away by the desire to regulate." ¹⁶⁷

2.2.2 Sense of equivalence during the time of CJEU *Usedsoft* ruling

During the time of the *Usedsoft* case online/offline equivalence-based arguments were common in academic circles. German professor Thomas Hoeren made an "appeal to fairness" in 2010 expressing that it was incorrect to differentiate between on- and offline distribution methods given that they were functionally equivalent and that on- and offline markets were unjustly separated.¹⁶⁸ Janusz Kolczynski also concluded that, after analysing Polish and Austrian academia on the subject, on- and offline distribution are "functionally fully equal".¹⁶⁹ He noted that even if the Copyright Directive and Computer program Directive were so restrictively constructed as to prevent online exhaustion this would be contrary to something which is very important for the EU market, namely: the free movement of goods.¹⁷⁰ An even more compelling case was made by Tomasz Targosz whom assessed that, in an abstract and principled sense, there is no good reason not to assimilate tangible and intangible distribution,¹⁷¹ and elsewhere opining that the public interest in circulation of

¹⁶⁵ Reno v. American Civil Liberties Union 521 U.S. 844 (1997).

¹⁶⁶ See, for example, Kamerstukken II [Parliamentary Papers], 1997/98, 25880, no. 1-2, (Dutch policy document entitled: "Legislation for the Electronic Highways"). In the aforementioned Parliamentary Papers the Dutch government set out (in 1998) to create an all encompassing framework in which questions on legislation about cyberspace (i.e. Electronic Highways) could be adequately dealt with and the cyberspace itself could be fitted into the already existing "off-line" laws (and thus be regulated).

Text available (in Dutch) at: <https://zoek.officielebekendmakingen.nl/kst-25880-2.html>

- See also: Jack Goldsmith, *Regulation of the Internet: Three Persistent Fallacies*, 73 Chi.-Kent. L. Rev. 1119 (1998). Available at: <http://scholarship.kentlaw.iit.edu/cklawreview/vol73/iss4/7>

In this paper Goldsmith pleads that the newfound cyberspace is part of the "real world", as the communications take place in "real-space" and can cause "real-world" harms, and as such cannot be free from regulation

¹⁶⁷ *Supra* note 158, at p. 3.

¹⁶⁸ Prof. Dr. T. Hoeren, *Die Online-Erschöpfung im Softwarebereich - Fallgruppen und Beweislast* ("Online Exhaustion in the Software Industry: Groups and Burdens of Proof), MMR 7/2010, 2010.

Text available (in German) at:

http://www.uni-muenster.de/Jura.itm/hoeren/veroeffentlichungen/hoeren_veroeffentlichungen/Die_Online-Erschoepfung_im_Softwarebereich.pdf

¹⁶⁹ See generally: J.P. Kolczynski – "Exhaustion of copyright of computer software online", but in particular at 579.

¹⁷⁰ *ibid.*

¹⁷¹ T. Targosz, *Exhaustion in digital products and the 'accidental' impact on the balance of interests in copyright law*, pp. 337-353. In: L. Bently, I. Suthersanen, PLC Torremans, *Glogal copyright. Three hundred years since the statute of Anne, from 1709 to cyberspace*, Edward Elgar, Cheltenham, 2010, at p. 347.

works was relevant both on- and offline, making it “desirable” to apply equivalence to intangible copies.¹⁷²

This trend towards equivalence is also present in the *Usedsoft* ruling itself, as was more in depth shown in Chapter 1, and is also expressed by Nicholson:

"the CJEU emphasised “the principle of equal treatment”, explaining that software authors could undermine the cultural circulation that exhaustion protects if tangible and intangible copies were to be treated differently." ¹⁷³

Both the Advocate General and the CJEU itself emphasised in *Usedsoft* that a purposive analysis of exhaustion revealed it to be a means of ensuring protection only for the “specific subject-matter of the copyright”.¹⁷⁴ Not establishing a wide and purposive interpretation of “sale” in order to recognise a download and perpetual licence as such would allow authors to simply brand every download a “licence” and prevent further resale,¹⁷⁵ flouting exhaustion and allowing *more* than specific subject-matter protection.

A landmark Supreme Court case in Canada took place roughly at the same time as the *Usedsoft* ruling.¹⁷⁶ The Canadian case was a case about the downloading of a work and the relationship between reproduction and communication rights under the Canadian Copyright Act. More importantly, however, was that the Supreme Court applied the principles of technological neutrality and equivalence between online and offline situations. It stated, *inter alia*, that:

"there is no practical difference between buying a durable copy of the work in a store, receiving a copy in the mail, or downloading an identical copy using the Internet", and that "the Internet is simply a technological taxi that delivers a durable copy of the same work to the end user."¹⁷⁷

The Supreme Court of Canada based its majority ruling on the policy claims of a balance of interests between right holders and users.¹⁷⁸ Commentators have argued that (maintaining) this balance of interests is also what made the CJEU come to its decision in *Usedsoft* to allow the resale of software under the Computer Programs Directive.¹⁷⁹ The Canadian Supreme Court went on to conclude that the Copyright Act in place was to be interpreted in a way that avoided imposing an additional layer of protections and fees based solely on the method of delivery of the work to the end user:

¹⁷² *ibid*, at 345.

¹⁷³ A. Nicholson, “*Old Habits Die Hard?: UsedSoft v Oracle*”, (2013) 10:3 *SCRIPTed* 389 <http://script-ed.org/?p=1167>

¹⁷⁴ Advocate General Bot's opinion, *Usedsoft*-case, at paragraph 83; and C-128/11 (*UsedSoft v Oracle*) at paragraphs 62 – 63.

¹⁷⁵ *UsedSoft v Oracle* at paragraph 49, referencing the AG's opinion at paragraph 59.

¹⁷⁶ *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231, pp. 242 – 252., paras. [12]-[43]. Decision available via: <http://www.canlii.org/en/ca/scc/doc/2012/2012scc34/2012scc34.pdf>

- An interesting side note is that Canada *did* sign the WCT on December 22, 1997, but *did not* ratify it until May 13, 2014; the ratification came into force on August 13, 2014.

¹⁷⁷ *ibid.*, at paragraph 5 (pages 14-15).

¹⁷⁸ *ibid.*, at paragraph 7.

¹⁷⁹ Y.H. Lee, *Sales of “used” software and the principle of exhaustion*, *International Review of Intellectual Property and Competition Law* 846, 2012, at 847 and 852.

"To do otherwise would effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies."¹⁸⁰

From an EU perspective one could easily add the arguments of a free flow of goods and services and the protection of the internal market to this enumeration of the Canadian Supreme Court. All in all making for a very strong case to introduce a broad digital exhaustion doctrine.

2.2.3 What the starting point as a guideline can mean with regard to the resale of digital videogames

In general it can be said that the application of the starting point "what holds offline, also holds online" enhances the clarity of law. If one has separate laws regarding online and offline cases, this creates an (unwanted) additional source of disputes. To make effective use of the starting point it is best used as a guideline. Using the starting point as a guideline means paying attention to the underlying norms and values of the offline situation and transposing these norms and values to the online situation. Meaning, in the case of allowing the resale of digital videogames, that courts should judge cases on the reselling of digital videogames based on the function that copyright law fulfills in the offline sphere, namely: to balance the IP right holder's exclusive right to obtain a just reward for his work and the right of consumers to own, use, lend or sell their property as they wish.

In the current offline market for videogames, a fair balance seems to be reached between the rights of IP right holders and the rights of consumers through the application of the exhaustion doctrine, which limits the control that IP right holders have over their works and thus allows for the resale and lending out of tangible videogames. In the current online situation, however, the balance is tilted heavily in favour of the IP right holders, as there seems to be no exhaustion for digital products other than software, and the CJEU is not willing to define videogames as software. Moreover, exclusive to the online environment is that IP right holders make use of Digital Rights Management (DRM) to add an extra layer of security to their exclusive rights. More on this extra layer of rights management in the next paragraph.

In short: by applying the starting point in the situation of digital videogames it becomes an instrument for courts to reach 1) a situation of technology neutrality¹⁸¹, and 2) a more equally balanced distribution of rights between IP right holders on the one hand and consumers on the other.

2.3 Digital Rights Management

In the online world IP right holders make use of technological protection measures to fortify the protection of their rights. These measures are better known as: Digital Rights Management (DRM). The introduction of DRM reshaped the landscape of copyright protection as DRM enabled copyright owners to exercise a higher level of control over their works. Or, to put that in the words of Yang Sun:

¹⁸⁰ *Supra* note 176, at paragraph 9.

¹⁸¹ *Supra* note 158, at p. 21.

"Specifically, the DRM with accompanied technologies enables copyright owners to expand their copyright-like protection and strengthen the exclusive control on their digital works".¹⁸²

Through DRM technology, copyright owners can control specific use of the digital content even after sales.¹⁸³ In the current situation online users have to either accept the DRM measures when purchasing a digital product, which is cause for undesirable user experiences¹⁸⁴, or they have to conduct online piracy to access contents.

Tito Rendas describes the application of DRM in digital videogames as follows¹⁸⁵:

"Technological protection measures consist in encryption, scrambling and copy control mechanisms designed to prevent or restrict unauthorised acts related to copyrighted works. When used in console hardware and software, these measures prevent users from running unauthorised videogames – be they “pirated” copies or unlicensed “homebrew” videogames – in their consoles."

The application of DRM is not flawless and DRM alone is not enough to successfully restrict infringement, because circumvention of DRM protected works frequently occurs due to technological loopholes.¹⁸⁶ As also mentioned by Samuelson: "what one technology can do, another technology may well be able to undo."¹⁸⁷ And so the use of these measures in copyrighted works is reinforced by a legal prohibition against their circumvention and against the creation and distribution of devices that bypass them. In the EU article 6 of the Copyright Directive and article 7(1)(c) of the Computer Programs Directive are the result of this partnership struck between law and IP holders using technological protection measures and in the US this protection can be found in §1201-02 of the DMCA.¹⁸⁸

As a consequence DRM systems are widely accepted and adopted by copyright owners.¹⁸⁹ By implementing DRM and seeking support from anti-circumvention provision, copyright owners gradually expand the boundary of their exclusive rights, which leads to tension between them and online users. This tension is rooted in the nature of IP law, where a more equal balance between the rights of IP right holders and consumer has to be created. DRM affects this balance by giving the interests of IP right holders a much higher priority than the

¹⁸² Y. Sun, *Rightholder as the Center: the DRM system in Copyright after So Many Years*, April 28th 2014, at p. 2. Available at: <http://ssrn.com/abstract=2430424>

¹⁸³ EC-Council, *Computer Forensics: Investigating Network Intrusions and Cybercrime*, Cengage Learning, September 16, 2009, at 9-26.

¹⁸⁴ *The Witcher 3* Game developer Konrad Tomaszkiewicz speaking out against DRM due to the fact it limits the rights of consumers to play the games they own: <http://www.forbes.com/sites/erikkain/2013/04/24/talking-the-witcher-3-with-cd-projekt-red-single-player-only-drm-worst-thing-in-video-game-industry/>;

- *Electronic Arts* discontinued their Online Pass after gamers begun vocalizing their displeasure at systems that would keep them from enjoying cheaper used games: <http://www.theverge.com/2013/5/15/4335494/ea-discontinues-online-pass-used-game-drm-multiplayer>;

- The DRM system *Microsoft* had envisioned for its *Xbox One* console would require a daily online authentication and would therefore not even allow to play offline, thereby creating a situation that was really undesirable for users: <http://www.theguardian.com/technology/2013/jun/19/xbox-one-drm-second-hand-restrictions-abandoned>

¹⁸⁵ *Supra* note 83, at p. 2.

¹⁸⁶ See: T.K. Armstrong, *Digital Rights Management and the Process of Fair Use*, (2006). Faculty Harvard Journal of Law, Volume 20 No. 1, Fall 2006, pp. 50-121, at p. 61.

¹⁸⁷ P. Samuelson, *Technological Protection Measures for Copyrighted Works* (1996), available at: <http://people.ischool.berkeley.edu/~pam/courses/cyberlaw97/docs/techpro.pdf>

¹⁸⁸ *Supra* note 83, at p. 3;

¹⁸⁹ *Supra* note 182, at p. 39.

interests of consumers. One could even say that the DRM system theoretically fails to comply with basic IP law policy.¹⁹⁰

2.4 How digital videogames can be resold

The marketing of videogames can be divided in two types of distribution, namely: physical and digital distribution. Digital distribution is the process of delivering videogame content as digital information, without the exchange or purchase of new physical media. The process has been around since the early 1980's¹⁹¹, but it was not until network advancements in bandwidth capabilities in the early 2000's that digital distribution became more prominent as a method of selling games, with digital sales, for example, in the USA comprising a whopping 74% of total videogame sales in 2016.¹⁹² Currently, the process is dominated by online distribution over broadband internet.¹⁹³

To facilitate the sale of games, various companies have set up their own distributing platforms for the digital distribution of videogames. Some of the big players include: *Steam*, *Origin*, *Xbox Live Marketplace* and the *Playstation Store*.

Despite the multitude of different digital videogame platforms, breaking down the process of making a digital purchase usually looks the same regardless of the platform used. The process starts with a consumer selecting a game he wishes to purchase from a virtual library. After the consumer has made his choice he chooses from a variety of supported payment methods. In addition, many of these online stores provide the option to add funds tied to an account.¹⁹⁴ After the game has been successfully purchased, the consumer can start downloading the game straight to the hard-drive of his own console (or handheld device/PC). Once the game has been downloaded and installed, the game is ready for launch. The same process applies for any DLC, which stands for: Downloadable Content, sold on the service. DLC can be anything from extra levels in a game to wallpapers or avatars to use as your background screen or online identity respectively.

Once the digital copy is purchased it is usually added to a library tied to the account from which the purchase was made and even if the game data is removed or uninstalled, the game can still be reinstalled from the same account.¹⁹⁵ In other words, once the purchase is made the game is linked to the users account and stays there permanently.

2.4.1 Three crucial differences between digital files and tangible products

A secondary market can stimulate the primary market by creating a resale value and giving liquidity to a product. However, when analyzing the secondhand market for digital files, and

¹⁹⁰ *Supra* note 182, at p. 40.

¹⁹¹ A service called *GameLine* operated during the early 1980's. The service allowed the owners of an Atari 2600 console to use a specialized cartridge to connect through a phone line to a central server and rent a videogame for 5-10 days.

¹⁹² Entertainment Software Association, *Essential Facts About the Computer and Video Game Industry*, April 2017. Available at: <http://essentialfacts.theesa.com/mobile/>

- and for PC games the digital sales even comprised 92% of total sales even back in 2014, see: <http://www.pcr-online.biz/news/read/digital-sales-make-up-92-of-global-game-revenues/034551>

¹⁹³ see: www.en.wikipedia.org/wiki/Digital_distribution_in_video_games

¹⁹⁴ N. Hoglund, *Digital distribution of video games for PC: A SWOT analysis*, 2014, at p. 16.

¹⁹⁵ *ibid*, p. 20.

more specifically digital videogames, three important differences between digital files and tangible products must be taken into account:

1) There is, actually, no such thing as a *used* digital file: pre-owned digital files are always pristine and have the exact same quality as a new and unused file.¹⁹⁶ In contrast to a tangible videogame, there is no need to discount for wear and tear in the case of a digital videogame file since the digital file does not scratch like a blu-ray disc. So rather than a secondary market in the typical sense, used digital files do in fact compete in the primary market with new files. At first sight this means that consumers would have no real reason to buy their game from the original stores on the primary market. However, reasons for costumers to still choose to buy from 'first-market' services might be that these services always offer the full back-catalog, are safer in terms of payment and personal information storage and/or offer free bonuses (such as extra playable characters or levels, etc.).¹⁹⁷

2) Another difference between the tangible and digital form of a videogame are the distribution costs, or better put: the lack of distribution costs in the digital environment. Distributing digital content is much easier than distributing physical copies of copyrighted works from one place to another, because: “[t]ime, space, effort[,] and costs no longer act as barriers to the movement of copies.”¹⁹⁸ This lack of transaction costs further increases the impact secondary markets have on primary markets in the digital realm.

3) Thirdly, a digital file is indefinitely reproducible, by which is meant that a digital file can be copied an indefinite amount of times without loss of quality.¹⁹⁹ A potential seller could keep a perfect copy of the file on his hard drive (or on another device) and continue to enjoy it, even after he has sold it. For this reason, it is critical in a second-hand market to make sure that all of the seller's copies of the file are deleted (or otherwise made inaccessible) after he has sold his file so that he cannot continue to enjoy the file and possibly resell the same file over and over. In other words: to indefinitely reproduce the file.

In light of these differences, how should the second-hand market for digital videogames be given form (if the reselling of digital videogames would be allowed) from a technological point of view to create a situation of equivalence between the offline and online world? The next paragraph will try to answer this question.

2.4.2 The resale model

This paragraph argues that the differences in the reselling of digital files and tangible products, as seen in the previous paragraph, can be overcome through simple technical

¹⁹⁶ See: U.S. Copyright Office, *DMCA Section 104 Report 82*, August 2001, at 82-83.

Available at: <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf> ;

- Also: J. Grimmelmann, *ReDigi and the Purpose of First Sale*, PrawfsBlawg, Feb. 8, 2012. Available at: <http://prawfsblawg.blogs.com/prawfsblawg/2012/02/redigi-and-the-purpose-of-first-sale.html> ;

- And also: A. Harmeyer, *Can Digital Music Files Really Be Considered "Used"?*, Columbus Law Review, February 2012. Available at: <https://cblr.columbia.edu/can-digital-music-files-really-be-considered-%E2%80%99Used%E2%80%99D-online-marketplace-redigi-sued-by-capitol-records-2/>

¹⁹⁷ See also: N. Anderson, *Can I Resell my MP3's?: The Post-Sale Life of Digital Goods*, Ars. Technica, December 17th 2008. Available at: <https://arstechnica.com/tech-policy/2008/12/post-sale-life/>

¹⁹⁸ *Supra* note 196 - U.S. Copyright Office, *DMCA section 104 report 82* (2001), at 82.

¹⁹⁹ *Ibid* note 198;

- Also: N. Davis, *Reselling Digital Music: Is There a Digital First Sale Doctrine?*, Loyola of Los Angeles Entertainment Law Review (2009), at 371. Available at <http://digitalcommons.lmu.edu/elr/vol29/iss3/2>

solutions, and will show that a second-hand market for digital videogames can be created to more evenly balance the rights of consumers and copyright holders in the digital realm.

Current situation

From a pragmatic point of view it makes sense to utilize as much of the already existing infrastructure of gaming platforms as possible to set up the new second-hand market. Most, if not all, gaming platforms are subject to constant software updates, which vary from the introduction of complete new features to the improvement of already available features on the platform. These software updates can be downloaded from the internet, and once they are downloaded they are automatically installed on the console.

Introducing the personal 'locker':

To enable the reselling of digital videogames, one could think of a personal 'locker' system. This system grants every user of the gaming device his own 'locker' where he can store the videogames he no longer wishes to play. These 'lockers' are in fact digital spaces that would exist on the (cloud)servers of the game platform provider and which can only be accessed after an internet connection has been established with the servers. Each account can be identified and subsequently linked to its own personal storage space (locker) on the (cloud)servers through the verification process that takes place when a connection with the servers is being established.

Through a software update the digital locker can fairly easy be introduced to all accounts, whereby the software update, upon installation, automatically creates a personal, digital locker on the servers of the gaming device for the account(s) on the device.

How does the resale of digital videogames work with this locker system:

If a consumer downloads a digital videogame from the virtual store, he downloads the game to the hard drive of his device. This hard drive is where all digital purchases are stored and from where the game is run.

A situation may then arise wherein the consumer no longer envisions to play the game and wants to dispose (sell) of his game (e.g. to create space on his hard drive for other games, or perhaps because he is in need of some money). The consumer can then select the videogame he no longer wants from the hard drive and upload the videogame file to his personal locker from where he can offer the videogame on the digital second-hand market.

One gaming device, however, can hold multiple accounts. In such a situation, the device remembers from which account the game was purchased and although the game can be played by all users (accounts) on the device, the game can only be resold by the account that made the original purchase. This is to ensure that the user who bought the game holds the exclusive right to decide whether or not he wants to resell the game.

Furthermore, only game files that are purchased through the official channels are eligible for an upload to the personal locker, thereby excluding files: ripped from Blu-Ray's; downloaded from torrent sites; or obtained from other sources than the official ones. Before the uploading transmission starts, the gaming device verifies whether the uploaded game file is indeed eligible and then, after the file is uploaded to the locker, deletes all copies of the file on the seller's console and attached devices. If a copy of the uploaded file is detected on a subsequently attached device, the user is prompted to authorize its deletion or else his account will be suspended, by which the user is excluded from all online activities.

Two options:

Once the game file has been uploaded to the locker a user is given the choice to 1) offer the game for sale on the second-hand market, or 2) lend the game out to a friend. A distinct copy for each user is stored on the (cloud)server. If multiple users upload the same file only the user associated with a particular locker has access to its contents, i.e. the only person who can use a particular game file is the owner of that file.

If the file is selected for resale, other consumers can search for and find the file through a search function in the used videogame marketplace. When the file is sold, the file pointer associating it with the seller's cloud locker is modified so to associate the file with the purchaser's cloud locker, and the seller can no longer access the file, as it is crucial that there is at all times only one copy in circulation, just like there would also only be one physical copy in circulation at all times. The purchaser of the second-hand file can then download the game file from his locker to his hard drive and start playing the game.

If the file is selected for lending out, a unique code is granted to the person who wishes to borrow the game. This unique code allows for the transfer of the game file from the locker of the lender to the locker of the borrower. With this transfer the game file disappears in the locker of the lender and re-appears in the locker of the borrower. The borrower has to download the game file from his locker to his hard drive to play the game. However, if for whatever reason the borrower decides not to download the game to his hard drive and lets the game file remain in his locker this is not a problem. Regardless of where the game file is (in the borrower's locker or on his hard drive), after a set duration of the loan, the game file will disappear from the borrower's hard drive/locker and will reappear in the locker of the lender for him to do with it as he pleases.

Business model:

Software as a service and maintenance agreements do not apply for exhaustion, according to the CJEU in *Usedsoft*.²⁰⁰ Although the model described above is intended to establish a second-hand marketplace, where an arrangement between the selling and buying party (with the facilitating party as neutral third party) to transfer a file of data is meant to be tantamount to a sale of a copy, there is a possibility that the model will be classified by judges as a "service".²⁰¹ Ideally the locker system is provided by the owner of the game platform free of charge, since consumers already paid a price for the new game that represents the full economic value of that copy of the game, and consumers already have to pay a membership fee to be able to use the online functions of a gaming platform.²⁰² However, in the event judges should come to the conclusion that facilitating a second-hand marketplace can be considered as delivering a "service" to consumers that would open the real possibilities for game platform owners to ask an additional service fee for the use of the marketplace.

²⁰⁰ Case C-128/11 (*UsedSoft v. Oracle*), at 8.

²⁰¹ As is written by Kathy Berry on *Linklaters*: "[through online services, such as the cloud, an] arrangement is per definition less likely to be tantamount to a 'sale of a copy' of software." See: <https://www.linklaters.com/en/insights/publications/tmt-news/tmt-news-november-2012/eu---usedsoft-v-oracle-ecj-approves-sale-of-used-software>

²⁰² Users of online services of all gaming platforms already have to pay a membership fee to be able to play games online. See for example how this works on the Playstation console: <https://www.playstation.com/en-us/explore/playstation-plus/>

2.4.3 Effects of a second-hand market

In general it can be said that a secondary market for a used product has multiple effects. Firstly, the secondary market competes with the primary market. If a used product is available for a cheaper price than the new product, consumers are less likely to spend more for a new product.²⁰³ Secondly, the secondary market thus places a price pressure on products offered on the primary market. Another effect of a second-hand market is that the secondary market enhances the value of the original purchase, because a consumer can at least recoup a part of his initial investment when he chooses to resell his product.

Another effect of a second-hand market, as for instance Kawabata has further argued, is that the resale of a digital good is generally useful for the whole economy, since it leads to reinvestment into the system.²⁰⁴ Not only that, a second hand work will generally be cheaper and therefore more consumers will be able to buy the work.²⁰⁵

Some scholars, including Professor Clark D. Asay, believe that if a digital first sale doctrine existed this would decrease piracy, because consumers would be able to purchase content from legitimate secondary markets instead.²⁰⁶ Furthermore, when a company stops producing a certain product, there is (at least some times) still demand for the product. The secondary market can supply in this demand. Also, secondary markets can stimulate the primary market by creating a resale value and giving liquidity to the product. In the context of digital videogame files, where illegal copies are available in plenty, a second-hand marketplace can provide an affordable alternative to illegal file sharing platforms such as BitTorrent or LimeWire.²⁰⁷ And finally, a secondary market can increase awareness and knowledge about a certain product, which in its turn can increase demand for the product in the primary market.²⁰⁸

A negative economic effect of digital exhaustion would be that there will be a decreased need for "original" products. As professor Tjong Tjin Tai however points out, a vital premise of the exhaustion doctrine is that rightholders are not allowed to control the future sales of their contents, if they have received a fair remuneration at the time of the first sale.²⁰⁹ In other words: there is no need for right holders to control the future sales of their contents if they have already been fairly remunerated the first time round. The form of the sale (digital or analogue) should make no difference in this. As Mezei points out:

²⁰³ M. Glatthaar, *Resale of Digital Music: Capitol Records V. Redigi*, Working Paper, April 30 2012, p. 3.

²⁰⁴ M. Kawabata, *Unresolved Textual Tension: Capitol Records v. ReDigi and a Digital First Sale Doctrine*, UCLA Entertainment Law Review, Vol. 21 Issue 1, 2014, pp. 33-78, at pp. 76-77.

²⁰⁵ Spedicato G. (2015) Online Exhaustion and the Boundaries of Interpretation. In: Caso R., Giovanella F. (eds) *Balancing Copyright Law in the Digital Age*. Springer, Berlin, Heidelberg, at p. 33.

²⁰⁶ See e.g. Clark D. Asay, *Kirtsaeng and the First-Sale Doctrine's Digital Problem*, 66 STAN. L. REV. ONLINE 17, 23 (2013), at 22.;

- Sarah Abelson, *An Emerging Secondary Market for Digital Music: The Legality of ReDigi and the Extent of the First Sale Doctrine*, 29 ENT. & SPORTS LAW. 8 (2012), at 10;

- Jonathan C. Tobin, *Licensing as a Means of Providing Affordability and Accessibility in Digital Markets: Alternatives to a Digital First Sale Doctrine*, 93 Journal of the Patent and Trademark Office Society, Vol. 93, July 31 2011, at 176.

²⁰⁷ *Supra* note 203, at p. 5.

²⁰⁸ *Supra* note 203, at p. 4.

²⁰⁹ E. Tjong Tjin Tai, *Exhaustion and Online Delivery of Digital Works*, European Intellectual Property Review, 2003, at p. 209.

*"should the form be decisive, the right holders would be able to exclude others from the downstream market, and would receive an unfair advantage in this sphere."*²¹⁰

If one were to accept the view that exhaustion applies for the resale of digital goods, then any payment to the right holder is per se unnecessary.²¹¹ However, there are commentators that have stated that a resale royalty is appropriate for digital works. For example Serra points out that such a resale royalty is appropriate, because it:

“recognizes the unique risks that non-degrading digital formats, connected to a vast and limitless distribution system, pose for copyright owners. At the same time, it stays true to the axiom that a consumer has the right to alienate his personal property, though it be digital.”²¹²

This thesis recognizes the point that digital goods do not degrade in quality over time. However, if a product loses its quality over time or not has nothing to do with the fact that the owner of the intellectual property right holder has the opportunity to receive an appropriate remuneration the first time a sale takes place. If the right holder is of the opinion that, due to the lack of degradation, he should receive a higher remuneration for the digital product than for its physical counterpart he should raise the price of the digital product at the time of the first sale. For the right holder to receive an additional royalty at the resale, would not be in line with the exhaustion doctrine.

Another point in favor of a second-hand market is that it seems to be more – rather than less – probable that the introduction of any digital exhaustion doctrine will not kill the videogame industry, or more broad the copyright industry. Rather, businesses will respond to it with new business models. All in all, such an outcome will be beneficial for members of the society. And as is expressed by rights such as the freedom to receive and impart information and the right to education²¹³, access to content (whether digital or analog) is vital from a cultural and educational point of view. And although some might say that the existence of peer-to-peer (P2P) file-sharing poses a clear danger to the functioning of a digital second hand market for videogames²¹⁴, the introduction of digital exhaustion in itself might actually obviate this whole argument. As the creation of a second hand market will direct users’ attention away from illegal platforms and to legal digital retail stores.²¹⁵

²¹⁰ P. Mezei, *Digital First Sale Doctrine Ante Portas: Exhaustion in the Online Environment*, 6 (2015) JIPITEC 23, para 1, p. 54.

- See also: C. Berger, *Urheberrechtliche Erschöpfungslehre und digitale Informationstechnologie*, Gewerblicher Rechtsschutz und Urheberrecht (GRUR), pp. 198-203, 2002, at p. 200.

- See further: F. Ruffler, *Is Trading in Used Software an Infringement of Copyright? The Perspective of European Law*, European Intellectual Property Review, 2011/6, at pp. 378 - 379.

²¹¹ *Supra* note 207 P. Mezei, at p. 55.

²¹² T. Serra, *Rebalancing at Resale: ReDigi, Royalties, and the Digital Secondary Market*, 93 B.U. L. REV. pp. 1753-1801, (2013), at p. 1799.

²¹³ See Articles 11 and 14 of the Charter of Fundamental Rights of the EU. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>

²¹⁴ Peer-to-peer was first introduced in 1999 due to the lack of lawful alternatives to consume digital goods online. See also: Helberger, Huygen & van Eijk, *Ups and Downs - Economic and cultural effects of file sharing on music, film and games*, Amsterdam Law School, Research Paper No. 2012-33.

²¹⁵ See: J.T. Soma & M.K. Kugler, *Why Rent When You Can Own? How ReDigi, Apple, and Amazon Will Use the Cloud and the Digital First Sale Doctrine to Resell Music, E-books, Games, and Movies*, North Carolina Journal of Law & Technology, 2014, pp. 455 - 460.

- See also: M. Kawabata, *Unresolved Textual Tension: Capitol Records v. ReDigi and a Digital First Sale Doctrine*, UCLA Entertainment Law Review, 2014, pp. 76 -77.

Of course, this is just one concrete example of how a second-hand market could be established. Perhaps there may be many other ways in which this could also be done. In chapters three (specifically paragraph 3.4) and four, however, this thesis sets out the conditions under which digital exhaustion should be allowed and thus why the above shown example is workable.

2.4.4 Cloud based services

As a side note it is worthwhile to briefly look at the interest copyright proprietors seem to have to deliver their software on a subscription basis (be that in the cloud or not) as Software as a Service (SaaS). It is safe to say that these proprietors were gently pushed in the direction of "the cloud" by their awareness of the CJEU's focus on exhaustion only taking place when ownership is permanently transferred as the result of a *sale*.²¹⁶ Where media is provided over the cloud it is accessed purely over the internet and therefore neither files nor ownership change hands, thereby sidelining all possibilities of digital exhaustion. However the future of second-hand digital content will most likely depend on the future relations between suppliers and consumers. As Nicholson adequately puts it: "It would be reasonable to assume that suppliers would ultimately like to switch to the cloud. What remains to be seen is whether consumers will allow for such rigid cloud-based (lack of) ownership."²¹⁷ Many consumers are accustomed to the model of paying a flat fee and being granted ownership in return.²¹⁸ It is very much the question if consumers are willing to abandon this practice and are willing to settle, for example, for cloud-based systems which never grant ownership over their purchases. What is more is that consumers are generally wary of the cloud and feel it exposes them to security risks.²¹⁹

Sales of digital products will mostly likely be better off within a system of transfer that consumers are familiar with, as this increases consumer comfort.²²⁰ And as is also pointed out by Nicholson: almost all consumer media is currently available in a "traditional" download, available in an offline, perpetual access format; alteration of this status quo would be unpopular.²²¹ It is therefore not unthinkable that consumers will take the stance that providers have to maintain "traditional" download services to which exhaustion would possibly apply and through which a second-hand market may flourish. It is interesting to keep a watchful eye on the development of cloud-based distribution, but for now it does not look as if cloud-based distribution is going to completely replace "traditional" downloads in the digital distribution realm.

²¹⁶ see note 201,

- and also: T. Cohen Jehoram & L. Moerel, *UsedSoft v Oracle opens up market for second-hand software licences*, July 6th 2012. Available at: <http://www.lexology.com/library/detail.aspx?g=e40f6199-0705-4487-bfa9-1f1afa52a2d8> ;

- Dr. A. Duisberg c.s., *UsedSoft v Oracle: What does it mean for your business?*, July 12th 2012. Available at <https://www.twobirds.com/en/news/articles/2012/usedsoft-v-oracle-what-does-it-mean-for-your-business>

²¹⁷ *Supra* note 173, at p. 407.

²¹⁸ See: R. Moscona, *"The Software Industry Wakes Up To A Brave New World"*, Dorsey & Whitney LLP, July 11th 2012.

²¹⁹ F. Maclean, *European Union (CJEU) has delivered its long-awaited decision in UsedSoft v Oracle International Corp.*, Computer and Telecommunications Law Review 1, 2013, at p. 2.

²²⁰ *Supra* note 171, at pp. 347 - 348.

²²¹ *Supra* note 173.

2.5 Conclusion

This chapter has shown that the reselling of digital products, other than software, is a sensitive subject in the EU. The CJEU has not been able to communicate conclusively if the reselling of digital products other than software is allowed without the permission of the right holder. The court in the *Tom Kabinet* case has recently even redirected questions to the CJEU for a preliminary ruling in light of this uncertainty.²²² The court of The Hague basically asks, with its four preliminary questions, if there is such a thing as digital exhaustion. This case specifically deals with e-books, but one might imagine an answer in the affirmative to the questions redirected by the Court of The Hague could have far greater impact. All in all, because of this uncertainty there is still a possibility that the exhaustion doctrine in the EU might be extended beyond the confines of the Computer Programs Directive to also include other digital products than software, which would open the path for a second-hand market for digital videogames and other digital products.

Following this notion, this chapter examined in what way courts should address the current differences in offline and online rules, especially with regard to the resale of digital and tangible videogames. It was seen that, in order to remove the current discrepancies between the online and offline sphere, courts could make effective use of the guideline: "what holds offline, should also hold online". This meant that, in the case of allowing a second-hand market for digital videogames, courts should judge cases on the reselling of digital products other than software, but specifically digital videogames, based on the function that copyright law fulfills. In the offline sphere, copyright law has created a more or less equal balance between the rights of the IP right holder and the rights of consumers by exhausting the right holder's exclusive right to control the distribution of his work after its first sale. The online situation favours the IP right holders heavily, because there is no digital exhaustion to protect the rights of consumers. IP right holders, furthermore, employ technological protection measures (known as DRM) to exercise an even higher level of control over their works. Through the application of "what holds offline, should also hold online" courts should reach a situation of technological neutrality and a more equally balanced distribution of rights between IP right holders on the one hand and consumers on the other, in the online sphere.

In light of all this, this chapter also sought to construct a system wherein the resale of digital videogames could be made possible from a technological point of view. The system that was drawn up, took into account the differences that exist between digital files and tangible products and showed that, with the right measures in place, a digital equivalent to the offline second-hand market of videogames could be created.

The next chapter will delve deeper into how the CJEU could allow the resale of digital videogames. This will be done against the backdrop of a mostly teleological comparison between the European exhaustion doctrine and the USA's equivalent to that doctrine: the first sale doctrine. Considering the goal of creating a single market/free movement of goods in the EU vs. a U.S.-system that is firmly rooted in U.S. copyright law and even the constitution.

²²² The CJEU, at this moment (May 11, 2018), still has to assign a case number to these preliminary questions. An answer from the CJEU to these questions could therefore still take a while.

See for the preliminary questions (in Dutch): Court of The Hague, case C/09/492558 / HA ZA 15-827, March 28 2018, at points 7.10, 7.15, and 7.17. (ECLI:NL:RBDHA:2018:3455)
- for a non-official translation of the preliminary question in English, see:
<http://ipkitten.blogspot.nl/2018/03/does-infosoc-directive-envisage-digital.html>

Chapter 3

The previous chapter *inter alia* set out how is dealt In EU-courts with the concept of digital exhaustion. This chapter will mainly function as a comparative analysis, that will focus on the differences and similarities between the EU and United States of America with regard to their respective dealing with the exhaustion of intellectual property rights in digital products, such as digital videogames, eBooks and digital music.

Firstly, this chapter will look into the classification of videogames in the United States and will delve deeper into the functioning of the so called "first sale doctrine", in the digital domain. Next, a comparison will be made by comparing the EU and US approach in dealing with the "new copy argument" and the "tangible vs. intangible argument". Hereinafter, the chapter will focus on the specific elements that clearly differentiate the EU from the US, such as the wish for an internal market and the (perhaps consequential) willingness to treat the digital domain the same as the offline domain.

3.1. Characteristics of the US situation

3.1.1. United States videogames classification

The United States has one of the largest videogame industry in the world (only to be outdone in terms of revenue numbers by China).²²³ However, the U. S. does not have a clear definition of video games and because of a lack of a clear classification, protection could ultimately vary depending on each particular game and the elements that are part of it.²²⁴

According to section 102 of the United States Copyright Act, 17 U.S.C. copyright protection subsists in: literary works; musical works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; and sound recordings. It is true that videogames are not mentioned explicitly in section 102, but if videogames are original, can be fixed in a medium, and be perceived and reproduced, they can still comply with U.S Copyright requirements, established in the US Copyright Act.²²⁵

Videogames consist of elements of computer programs, but also elements of audiovisual works, etc. However, a single registration may be made for creative works in the U.S. A question on the application form for copyright registration for computer programs reads: "Type of work being registered". According to the Copyright Office this question shall be answered with: "the type most appropriate to the predominant authorship".²²⁶ For videogames this could mean that the type of protection (by copyright as a computer program, audiovisual work or visual work) depends on the elements and characteristics of each individual videogame. Not one videogame is the same in that regard and therefore videogames have a complex and fragmented legal classification in the U.S.

223 For the top 100 countries by game revenue per April 2017, see: <https://newzoo.com/insights/rankings/top-100-countries-by-game-revenues/>

224 A. Ramos, L. López, A. Rodriguez, T. Meng & S. Abrams, *The Legal Status of Video Games: Comparative Analysis in National Approaches* Comparative analysis of videogame classification, World Intellectual Property Organization, July 29, 2013, at p. 89.

225 As was decided in: *Williams Electronics, Inc. v. Artic International, Inc.*, 685 F.2d 870 (Third Circuit 1982).

226 "Copyright Registration for Computer Programs". Available at: <http://www.copyright.gov/circs/circs61.pdf>

Each videogame thus has to be analysed in the U.S. to find out which elements predominate before a work can be accordingly classified. Nevertheless, videogames always comprise of computer code and because of this: "a distributive classification will be applicable to tangible videogames and thus exhaustion applies after a first sale has taken place."²²⁷ Exhaustion, however, does not apply to digital videogames, or digital products in general, as will be made clear by the following paragraph.

3.1.2. United States - first sale doctrine

After the *Usedsoft* case, a lively debate has been taking place within the EU as to determine whether EU copyright law allows (or will allow) the resale of copyright protected works in digital format.²²⁸ In the United States, the situation is somewhat different in that regard: a digital secondary marketplace for videogames, e-books, digital music files, or digital movies does not currently exist and it does not seem likely that this situation will change in the near future.

The reselling of physical copies of music is an integral part of our culture. Just think of how many CD's and LP's you can find at any given flea market. How different is this in the online world, where the reselling of a digital music file is almost unheard of. It was not until 2011, when a US-based company called *ReDigi* was the first to establish a second-hand marketplace for digital music files. On the *ipkitten*²²⁹, *ReDigi's* business model is explained. It is set forth that users can sell their music to *ReDigi's* "library" and can also buy "second-hand" music from this library. *ReDigi* profits from every transaction that is made on its site. The songs sold on *ReDigi's* site are slightly cheaper compared to the songs that are sold on a platform such as iTunes. To be able to use the services of *ReDigi*, users are requested to prove that they only upload legally bought songs. In actuality this means that user uploads are subjected to *Redigi's* system which verifies the aforementioned. If a song is indeed bought legally, the song is then uploaded to *Redigi's* servers and simultaneously erased from the hard drive of the person selling his copy of the song. Furthermore, through this system sellers are prevented from reinstalling a sold song to their computer.

However, in January 2012 Capitol Records sued *ReDigi* for copyright infringement. The main question of the proceedings was if a digital music file could fall under the first sale doctrine and thus be resold by its owner through the service of *ReDigi*.

Before diving deeper in this case, an explanation of the aforementioned "first sale doctrine" is in order. In short, the first sale doctrine functions as the US equivalent of the exhaustion doctrine in the EU. The first-sale doctrine was recognized in the *Bobbs-Merrill Co. v. Straus* case²³⁰ as a common law principle, and this principle is codified at Section 109(a) of the U.S. Copyright Act:

"Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is

²²⁷ *Supra* note 224, at p. 93.

²²⁸ For example, arguing that general digital exhaustion would likely *not* be legally foreclosed, see S. Karapapa, *Reconstructing copyright exhaustion in the online world* (2014) 4 IPQ 307, at 324.

- Arguing that such principle is yet to be even recognised, see ET Synodinou, *E-books, a new page in the history of copyright law?* (2013) 35(4) EIPR, pp. 220-227, at p. 227.

²²⁹ see: E. Rosati, *ReDigi to launch in Europe: what's the legal regulation of second-hand digital files?*, January 20 2013. Available at: www.ipkitten.blogspot.nl/2013/01/redigi-to-launch-in-europe-whats-legal.html

²³⁰ *Bobbs-Merrill Company v. Isidor Straus and Nathan Straus*, 210 U.S. 339 (1908).

entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."

ReDigi hold the position that the service it provided was legal under the United States' first sale doctrine.²³¹ This claim was rejected by the District Court on several grounds.²³² First, the court stated that the first-sale doctrine not applies to the making of new copies. Instead the making of new copies only acquits liability for unauthorised distributions. Secondly, the Court stated only lawfully acquired copies fall under the first-sale doctrine and that because of that illegal copies on the servers of Redigi do not fall under that doctrine. Third and lastly, the Court used a rather literal explanation of the term phonorecord.

In its decision the District Court referenced²³³ to the Supreme Court's decisions in *Quality King v L'anza Research*²³⁴ and in *Kirtsaeng v John Wiley*²³⁵, to conclude that the exhaustion/first sale doctrine plays no role in the US in relation to the resale of digital downloads of copyright works and is limited to the (re)sale of hard copies of copyright works. The court in the *Redigi* case held that first-sale rights do not apply to digital transfers of copyrighted works because the transferred file does not bear the same properties as the original file.²³⁶ In essence it reasoned that because the transferred file is fixed on a different hard drive, the transferred file is a new copy of the original file, not the original file itself. And first-sale rights only apply to the original.²³⁷

For example, the reselling of eBooks is simply not allowed in the U.S due to the fact that the first-sale doctrine is strictly limited to offline (tangible) products.²³⁸

The Court in *ReDigi* has thus created a clear differentiation between the online and offline spheres. In the offline sphere the reselling of music on a material object is allowed, but the reselling of digital music in the online world is practically made impossible by the strict reading of art. 109(a) of the Copyright Act.

As could be seen above, the text of art. 109(a) Copyright Act, when read strict and plain, limits the distribution right to the distribution of physical embodiments of the copyrighted works, e.g., a CD.

As professor Sanders of the Vanderbilt University Law School rightfully points out, however, the Court in *ReDigi*, by limiting the first sale defense to material items, has created a weird distinction in the digital world.

The example of professor Sanders is as follows:

²³¹ United States District Court for the Southern District of New York, *Capitol Records, LLC v ReDigi Inc*, 934 F. Supp. 2D 640, March 30, 2013, at p. 12. Memorandum available at:

<http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1334&context=historical>

²³² *Ibid*, at p. 11-12

²³³ *Ibid*, at p. 11.

²³⁴ *Quality King Distribs. Inc. v L'anza Research Int'l Inc* 523 US 135, 152 (1998).

²³⁵ *Kirtsaeng v John Wiley & Sons Inc*, No. 11-697, [2013] WL 1104736, March 19, 2013.

²³⁶ *Supra* note 228.

²³⁷ The legislative history of the Digital Millennium Copyright Act supports this interpretation of the Copyright Act. See note 196 (DMCA report).

²³⁸ Of course, when publishers themselves allow for the reselling/lending of their eBooks this is allowed. For such an example see the website of US-based books and videos retail shop *O'Reilly*, available through this link: <http://shop.oreilly.com/category/customer-service/ebooks.do>

"you own your hard drive and you "own" the music file. You can sell your hard-drive with the song on it, but you can't sell the song you "own" by itself because, to do so, you must make a new phonorecord, and that phonorecord is not lawfully made because it violates the reproduction right."²³⁹

According to *ReDigi*, the limitations of the US first-sale doctrine should also cover digital sales, because technological change has rendered the literal terms of the Copyright Act ambiguous.²⁴⁰ By using this argument *ReDigi* referred directly to an earlier ruling of the U.S. Supreme Court in *Sony v. Universal City Studios*.²⁴¹

The District Court admitted that technology has changed dramatically since the time the Copyright Act entered into force (1978), but although Section 109(a) of the Copyright Act may be somewhat unsatisfactory to some, the section is not ambiguous, so the court concluded.²⁴²

3.1.3. Copyright rooted in the Constitution

As Torremans points out²⁴³ the *ReDigi* decision is a decision rooted in copyright: "and that is not just the Copyright Act, but, almost more importantly, the US Constitution". The Constitution has granted the U.S. Congress the express power to: "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."²⁴⁴ From this perspective *Redigi*'s activities are not indispensable to fulfill the role laid down in the Constitution and so, in its decision, the District Court just followed the constitutional copyright logic.²⁴⁵ Ultimately the Court did consider the need for exhaustion in the digital environment, however, the Court felt it was not up to her to make such a decision, but instead it deferred this issue to Congress and left it for Congress to decide if physical limitations on the first sale doctrine are indeed 'outmoded'²⁴⁶.

The leading historical precedent of the first sale doctrine in the US is the *Bobbs-Merrill v. Straus* case.²⁴⁷ This case set forth that a rightholder cannot control the resale of the copy of a work after another party has lawfully acquired the copy. The new copyright act, of 1909, enacted the *Strauss*-doctrine by stating that:

"[n]othing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work, the possession of which has been lawfully obtained."

²³⁹ R. Sanders, *ReDigi: Can the First-Sale Doctrine Ever Apply to Digital Downloads?*, November 17, 2011. Available at: <http://ipbreakdown.com/blog/redigi-can-the-first-sale-doctrine-ever-apply-to-digital-downloads-part-18-of-our-online-music-series/>

²⁴⁰ B. Sookman, *Capital Records v ReDigi: resale of digital music copyright infringement*, April 8th, 2013. Available at: www.barrysookman.com/2013/04/08/unlicensed-resale-of-digital-music-copyright-infringement-capital-records-v-redigi/

²⁴¹ In this case the Supreme Court stated: "When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of its basic purpose", namely, to incentivize creative work for the "ultimate cause of promoting broad public availability of literature, music and the other arts." see: U.S. Supreme Court, *Sony vs. Universal City Studios*, 464 US, 417 (1984), at 432.

²⁴² On which more in the next paragraph.

²⁴³ P. Torremans, *The future implications of the UsedSoft decision*, 2014, at p. 3.

²⁴⁴ As follows directly from Article I, Section 8, Clause 8 of the United States Constitution.

²⁴⁵ *Supra* note 243, at p. 4.

²⁴⁶ *Supra* note 243.

²⁴⁷ *Supra* note 230.

The current Copyright Act transferred the previous statutory provision with some minor – but not insignificant – changes and so USCA §109(a) now regulates that:

“[n]otwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”²⁴⁸

Another chapter of US copyright law is the Kirtsaeng case²⁴⁹ in which the Supreme Court allowed for the application of the first sale doctrine to the importation of works lawfully produced abroad, irrespective of the place where the works were first put into circulation. Justices noted that the expression “lawfully made under this title” does not have any geographical meaning and the majority took the view that:

“the Constitution’s language nowhere suggests that its limited exclusive right should include a right to divide markets or a concomitant right to charge different purchasers different prices for the same book, say to increase or to maximize gain. (...) To the contrary, Congress enacted a copyright law that (through the ‘first sale’ doctrine) limits copyright holders’ ability to divide domestic markets. And that limitation is consistent with antitrust laws that ordinarily forbid market divisions.”²⁵⁰

Notice here the focus on the "Constitution's language". This case, perhaps inadvertently, shows exactly what the main point of focus is in the US approach to the exhaustion doctrine, namely: rules on copyright are laid down in the Constitution and it is not up to judges to reform the Constitution.

3.2 United States Copyright Office

In early 2016 the U.S. Copyright Office published a report on the making available right in the U.S.²⁵¹ This report gave many insights into the current state of U.S. "digital law" and *inter alia* answered the question if there is such a thing as a digital first sale doctrine.

A small number of commentators argued, according to the Copyright Office, that digital transmissions should not fall under the right of distribution at all. To come to this view, these commentators noted that Section 106(3) USCA only speaks of distribution in relation to “copies or phonorecords,”. Copies and phonorecords are defined in Section 101 as:

*“material objects . . . in which a work is fixed by any method now known or later developed, and from which the [work/sounds] can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”*²⁵²

²⁴⁸ See also: U.S. Copyright Office, *DMCA Section 104 Report* 82, August 2001.

Available at: <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>

²⁴⁹ *Supra* note 235.

²⁵⁰ *Supra* note 235, at p. 1371.

The Supreme Court’s argument is clearly the opposite to that of the US Government during the negotiations of the WCT/WPPT. Compare to Mihály Ficsor: *The Law of Copyright and the Internet, The 1996 WIPO Treaties, their Interpretation and Implementation*, Oxford University Press, New York, 2002, pp. 241 – 242, 245 – 246, 248 – 249.

²⁵¹ United States Copyright Office, *The making available right in the United States, A Report of the Register of Copyrights*, February 2016.

²⁵² *ibid*, at p. 19.

In these commentators' views, the "transmission of bits" over the Internet does not involve the distribution of a material object.²⁵³ The Copyright Office continued by stating that:

*"these commentators pointed to language in Section 106(3) limiting the scope of the right to distributions made 'by sale or other transfer of ownership, or by rental, lease, or lending,' which they interpret to require a change in ownership or possession of a material object from transferor to transferee. A digital transmission fails to satisfy that requirement, they argued, because it does not divest the sender of his copy of the relevant file; it merely creates a duplicate at the recipient's location."*²⁵⁴

The Copyright Office, however, countered those arguments by pointing out that:

*"such a narrow view of the distribution right, of course, would wholly upend protections for copyright owners online and therefore defeat the very purpose of the WIPO Internet Treaties"*²⁵⁵— that is, to confirm exclusive rights for copyright owners in the digital age.²⁵⁶

Furthermore, the Copyright Office pointed out that it was not aware of courts in the United States that had adopted the same extreme position as taken by the aforementioned commentators.²⁵⁷

In this regard the District of Massachusetts' opinion in *London-Sire Records, Inc. v. Doe 1* provided an especially good analysis.²⁵⁸ In this case it was noted that electronic files are "material objects" within the meaning of the Copyright Act, and that "any object in which a sound recording can be fixed", is such a "material object".²⁵⁹ The Court noted that the distribution functions as a way to allow an author to keep control over the availability of a work for the public. And furthermore the District Court determined that electronic file transfers are "distributions" under Section 106(3),²⁶⁰ by deciding that:

*"while the statute requires that distribution be of 'material objects,' there is no reason to limit 'distribution' to processes in which a material object exists throughout the entire transaction—as opposed to a transaction in which a material object is created elsewhere at its finish."*²⁶¹

According to the District Court an electronic transmission can constitute a "transfer of ownership" under Section 106(3) of the U.S Copyright Act, as it reasoned that the statute does not deal with a person retaining his ownership over a file while also creating ownership in someone else.²⁶²

²⁵³ *ibid.*

²⁵⁴ *Supra* note 251, at p. 20.

²⁵⁵ "WIPO Internet Treaties" here refers to the pair of treaties completed in 1996 also known as the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

²⁵⁶ *Supra* note 251, at p. 20.

²⁵⁷ *ibid.*, specifically note 83.

²⁵⁸ United States District Court, *London-Sire Records, Inc. v. DOE 1*, 542 F. Supp. 2d 153 (2008).

²⁵⁹ *ibid.* at p. 171.

²⁶⁰ *ibid.* at 173–74.

²⁶¹ *ibid.* at 173.

²⁶² *ibid.* at 174

The Copyright Office, in line with the reasoning of the aforementioned District Court of Massachusetts, readily concluded that Section 106(3) (i.e. the distribution right) is not limited to the distribution of tangible products but is also applicable to digital transfers.²⁶³ A logical elaboration of that view would seem to be that a recipient of an electronic file is also allowed to transmit a digital file without the rightholder's authorization. But unlike in the offline situation, where this is allowed, the Copyright Office (sadly) did not follow this logic:

"The Office does not find this construction persuasive because the first sale doctrine protects only distribution by 'the owner of a particular copy or phonorecord . . . of that copy or phonorecord.'²⁶⁴ By contrast, a digital file transfer creates a new copy or phonorecord on the transferee's computer."²⁶⁵

The Copyright Office was thus not ready to plead for the introduction of a "digital first sale doctrine". This didn't come as a total shock, however, because previously, in its report on the Digital Millennium Copyright Act, 17 U.S.C. § 512, the U.S. Copyright Office had already outright shut down the possibility of an extension of the first sale doctrine to the digital world.²⁶⁶ Of course, the opinion of the Copyright Office is just that: an opinion. It does not have the same weight as actual legislation, but it is an opinion that is not easily brushed aside by policy makers and judges alike, which makes it unlikely the U.S. will introduce a digital first sale doctrine on any short term.

3.3 New copy argument

As explained in Chapter 2, the problem with downloads opposed to tangible products is that the copy cannot simply be handed over in the context of a resale. A new copy has to be made every time the digital file is 'transferred'.

In the US, the so called Information Infrastructure Task Force reported the following on the matter in 1995:

"the first sale doctrine should apply if the particular copy involved is, in fact, the copy that is further distributed, even if the copy was first obtained by transmission. Furthermore, if the technology utilized allows the transmission of a copy without making an unlawful reproduction – i.e., no copy remains with the original owner – the first sale doctrine would apply and the transmission would not be an infringement."²⁶⁷

However, no perfect forward-and-delete methods existed in 2001, according to the U.S. Copyright Office, as it expressed that it is difficult to prove or disprove that a person has deleted his own file or has only transmitted a single copy.²⁶⁸ Furthermore, the view in the U.S. is that even if adequate measures exist to monitor the transmission of a copy, the market will not bear the cost of such an expensive measure.²⁶⁹ Ultimately the Register of Copyrights

²⁶³ *Supra* note 251, at p. 22.

²⁶⁴ *Supra* note 251, at footnote 94.

²⁶⁵ *Ibid.*

²⁶⁶ *Supra* note 196, *DMCA Section 104 Report* 82, at pp. 81-85.

²⁶⁷ Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights*, September 1995, at p. 93.

Paper available at: <https://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf>

²⁶⁸ *Supra* note 196, *DMCA Section 104 Report* 82, at p. 98.

²⁶⁹ *Supra* note 193, *DMCA Section 104 Report* 82, at p. 19.

recommended no changes to the first-sale doctrine, thereby discouraging the idea of a digital first-sale doctrine.²⁷⁰

This situation is slightly different in the EU. The lawful acquirer of a protected subject matter may only sell "that particular" copy that he owns. If he were to create a "new" copy in the process of distributing his own copy this might lead to the exclusion of the exhaustion doctrine. Up to this point the situation is pretty similar to that in the U.S.A., however, when one takes into account that the rule of free movement is of massive importance within the EU, the situation changes. Even with the absence of an article 5(1)²⁷¹ equivalent under the Copyright Directive, a copy will likely be allowed to be made, as an alternative approach would fly in the face of the all important free movement principles.²⁷² A line already followed by the CJEU in the Dutch *Kruidvat* case.²⁷³ Furthermore, the CJEU countered *Oracle's* argument in *Usedsoft* that "policing deletions is difficult" by saying that in a similar situation with a physical medium (a CD-ROM or DVD) the ability to control reproductions is equally hard, but "it is permissible for the distributor to make use of technical protective measures"²⁷⁴. The Court then explicitly mentioned product keys as such a measure. In that light the forward-and-delete model introduced by *ReDigi*²⁷⁵, could well be seen as another workable and effective solution to counter the creation of a "new" digital copy.

All in all, the above seems to implicate that across-the-board-digital-exhaustion will be justified by the CJEU when a greater means is provided for rightholders to protect themselves against the creation of an 'additional copy', which clearly differentiates the EU-situation from the U.S.-situation.

3.4 Tangible vs. Intangible and the WCT-problem

As has been said previously, in the EU the WIPO Copyright Treaty (WCT) has been transposed in the Copyright Directive. However, the Copyright Directive has attracted criticism for being based upon the incorrect assumption that all online distribution amounts to a service and not a sale. Thereby "cutting off" the debate about online exhaustion at a time (1996) when it was impossible to see how technology would advance to the point it would be possible to create a real equivalent of physical distribution in the digital realm.²⁷⁶

²⁷⁰ *Supra* note 196, *DMCA Section 104 Report* 82, at pp. 97 - 101.

²⁷¹ As a reminder, Article 5(1) Computer Programs Directive reads as follows: "[i]n the absence of specific contractual provisions, [permanent reproduction of a computer program] shall not require authorisation by the right holder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction."

²⁷² *Supra* note 243 at p. 9.

²⁷³ Case C-337/95 *Parfums Christian Dior SA & Parfums Christian Dior BV v Evora BV* [1997].

The court concluded in this case that: in terms of exhaustion the reproduction right in copyright could not undo the effect of the exhaustion of the trade mark rights. In other words: the court adhered to the *accessorium principalis sequitur*, to make the copyright follow the exhaustion of the trade mark right, by which it made possible the further free movement of goods. It decided along this line because it realised that there are technical processes that simply require a copy to be made in order to establish a resale.

²⁷⁴ See *Usedsoft*-case at paragraph 79.

²⁷⁵ *Apple* and *Amazon* now have similar patent applications to *Redigi's* model pending. Both *Apple's* and *Amazon's* services have not launched yet. Nonetheless, the fact that these big companies have applied for patents proves that these technologies are present and most probably provide effective solutions for the resale of digital contents.

²⁷⁶ T. Targosz, *Exhaustion in digital products and the 'Accidental' Impact on the Balance of Interests in Copyright Law*, Chapter 26, at 346 – 357 and footnote 32;

A different approach was taken in the U.S. with regard to the implementation of the WCT. There the WCT is a self executing treaty in such a way that the “first sale doctrine” can apply to works that are distributed online or off, despite the agreed statements of the WCT.²⁷⁷ The Court in the *ReDigi* case clearly limited exhaustion to tangible products, however. Furthermore, typically the contract governing a transaction when someone buys and downloads digital content in the U.S. is not considered a sale and does not transfer ownership of the work. Rather, the contract is given the form of a license by distributors. Whereby someone is granted the right to use a digital work instead of ownership of the work.

In the EU, recitals 28 and 29 of the Copyright Directive see to limit the scope of the exhaustion doctrine to tangible copies and exclude intangible copies and services (especially online services).²⁷⁸ Furthermore, Recital 33 of the Database Directive²⁷⁹ stresses that “every online service is in fact an act which will have to be subject to authorization where the copyright so provides.” The E-commerce Directive likewise categorises online sales of goods as services.²⁸⁰ The agreed statements concerning articles 6 and 7 of the WCT are at the basis of this logic. The agreed statements, namely, stress that original works and copies of protected works may only be subject to distribution (and subsequently exhaustion) if they are fixed and can be put into circulation as tangible objects. Professor Mezei referred to these statements as: “[t]he ultimate barrier to the acceptance of the notion of digital exhaustion”.²⁸¹ However, it can be argued that the agreed statements may after all not be so “ultimate”. A U.S. report from 2001 commissioned by the U.S. Department of Commerce, National Telecommunications and Information Administration (NTIA) accepted a “limited digital first sale doctrine” and, even more importantly, treated this concept as fully in accordance with the WCT’s Agreed Statements on articles 6 and 7. According to the NTIA Report:

“both the proponents and the copyright community seem to agree that if the files are downloaded with the consent of the copyright owner, a ‘lawfully made copy or phonorecord’ will have been created on the PC hard drive or tangible portable medium (such as a writeable CD). Thus, Section 109 would apply to the owner of that new digital copy or phonorecord. With respect to other applications of Section 109 to digitally downloaded files, however, there was considerable divergence between the stakeholders with respect to whether a copyright owner’s interest could be adequately protected. There was significant information

- Also see: E. Tjong Tjin Tai, *Exhaustion and online delivery of digital works*, EIPR 207, 2003, at 211.

²⁷⁷ M. Peters, *The legal perspective on exhaustion in the borderless era: considerations of a digital first sale doctrine for online transmissions of digital works in the United States*, from L. Bently, U. Suthersanen, P. Torremans (eds) *Three Hundred Years Since the Statute of Anne, From 1709 to Cyberspace* (Cheltenham, Edward Elgar Publishing, 2010), Chapter 25, at p.329 & pp. 332 – 333.

²⁷⁸ Recital 28: “Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article.”

- Recital 29: “The question of exhaustion does not arise in the case of services and on-line services in particular.”

²⁷⁹ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (Database Directive). Recital 33: “... every on-line service is in fact an act which will have to be subject to authorization where the copyright so provides.”

²⁸⁰ Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce in the Internal Market (E-commerce Directive), Recital 18: “Information society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line”.

²⁸¹ *Supra* note 210, at p. 52.

in the record to suggest, however, that DRM systems and other like developments hold some promise of offering a technological solution."²⁸²

Since the WCT is a self-executing treaty in the U.S., the lack of clear wording on the issue in the U.S. Copyright Act (USCA) makes it difficult for companies and producers (or more general: right holders) to know under what conditions judges might provide protection and what level of protection they are then provided with in respect of the online use of their copyrighted works. As is shown by the fact that several Federal Courts in the U.S. came to opposite conclusions with regard to the digital protection of copyrighted works.²⁸³

In the EU the first sale doctrine does not apply. For example, the circulation of intangibles is currently regulated through the making available right of the Copyright Directive, which is not limited by the exhaustion principle.

What becomes clear from the above is that in order to introduce a broad digital exhaustion it is necessary to review the current tangible vs. intangible dichotomy, because based upon the current terms a sale of a digital videogame is to be subjected to authorization of the copyright holder, just because it is an intangible object.

The division of tangible and intangible works in the EU-situation, with relation to the exhaustion doctrine comes over as awkward and perhaps even as a relic of the past. Advocate General Bot noted, in his opinion to the *UsedSoft* case, that Recital 29 to the Copyright Directive appears to draw a distinction between the sale of goods, to which the exhaustion rule would apply, and the provision of services, to which that rule would be inapplicable. He then concludes that:

*"the fact remains that online services, as defined by EU law, include the sale of goods online. Thus, for example, by the standard of the wording of that recital, the exhaustion rule should not apply to an online purchase of a CD-ROM in which the copy of the computer program is incorporated. To my mind, however, the distinction as to whether the sale takes place remotely or otherwise is irrelevant for the purposes of applying that rule."*²⁸⁴

Indeed, in a world where intangible (digital) goods are equally consumed as tangible goods and where intangible goods are economically and functionally equivalent to their tangible counterparts, it seems rather strange to differentiate by looking at *how* a sale takes place for the purpose of applying the exhaustion rule.²⁸⁵

²⁸² National Telecommunications and Information Administration, *Study Examining article 17 U.S.C. Sections 109 and 117 Pursuant to Section 104 of the Digital Millennium Copyright Act*, March 21, 2001.

Available at: <https://www.ntia.doc.gov/report/2001/report-congress-study-examining-17-usc-sections-109-and-117-pursuant-section-104-digital>

²⁸³ *Atl. Recording Corporation, et al., v. Pamela and Jeffrey Howell*, 554 *F.Supp.2d* 976 (2008); *London-Sire Records, Inc., et al., v. Doe 1, et al.*, 542 *F.Supp.2d* 153 (2008); *Sony BMG Music Entertainment, et al., v. Joel Tenenbaum*, 660 *F.3d* 487 (2011), are all court cases in which the court did not accept the concept of making available to the public at all, whereas in: *Universal City Studios Prods. LLP, et al., v. Clint Bigwood*, 441 *F.Supp.2d* 185 (2006); *Motown Record Co., LP, et al., v. Theresa DePietro*, 2007 *WL* 576284; *Atl. Recording Corp., et al., v. Abner Anderson*, No. H-06-3578, 2008 *WL* 2316551; *Elektra Entertainment Group, Inc., et al., v. Denise Barker*, 551 *F.Supp.2d* 234 (2008); *Capitol Records, Inc., et al., v. Jammie Thomas-Rasset*, 692 *F.3d* 899 (2012), the Courts reached decisions with the opposite result.

²⁸⁴ See Advocate General Bot's opinion, at 76.

²⁸⁵ See also: T. Dreier: *Online and Its Effect on the 'Goods' Versus 'Services' Distinction*, *International Review of Intellectual Property and Competition Law*, Vol. 44, Issue 2, at pp. 138 – 139. Text available at: <https://link.springer.com/article/10.1007%2Fs40319-013-0020-y>

The misplaced emphasis on tangible versus intangible goods in EU copyright law is perhaps best expressed by Spedicato,²⁸⁶ according to whom it is not the distinction between tangible and intangible that should play a part in the application of the exhaustion doctrine. Rather the distinction between selling a work on the one hand, and making it available on the other hand should function as the instrument to decide whether or not exhaustion applies.²⁸⁷

The CJEU concluded in *UsedSoft* that the download of a computer program, which could only be used by buying a user licence for an unlimited time, constituted a first sale if a fee was paid for the licence that represented the economic value of the copy (the emphasis here being on: sale). The same should apply to digital videogames, because when a consumer purchases a downloadable videogame the exact same structure is used, namely: the consumer downloads a copy of the videogame file to his PC/console hard drive, which can only be used by buying a license²⁸⁸ for an unlimited time. This thesis argues that when the right holder is paid a fee for this purchase that represents the economic value of the copy of the videogame, a sale has taken place. When a consumer wishes to resell his copy of a videogame to someone else, no actual transfer of the copy takes place. Instead a new copy is made on the PC/console hard drive of the other person. In order to prevent that there are multiple copies in circulation at the same time, the seller should make his own copy unusable at the time of the sale. When the above is adhered to, the distribution right for the intellectual property right holders can and should effectively exhaust, just like it would when the videogame is sold in a tangible medium.

Furthermore the tangible versus intangible goods differentiation with regard to the exhaustion doctrine, reflects a time in the past when technology was not as advanced as it is now. What is more is that it is to be expected that in the future, most copyrighted works will be transmitted online.²⁸⁹ With this technological advancement, Neelie Kroes stated that: "it is necessary for the legal framework to take into account the needs of society. Users' interest and expectations matter alongside creators' rights. Rules cannot be impractical, uncertain, or unreasonable for ordinary users."²⁹⁰

If the freedom of movement of goods and services is to be maintained, which seems likely given that this is one of the most important pillars on which the EU is built²⁹¹, the criteria for distinguishing between 'goods' and 'services' are to be found outside of the scope of the exhaustion doctrine.

It is necessary that the CJEU, in order to interpret the copyright directive and the computer programs directive in a uniform manner, departs from the views expressed by the European Commission²⁹² and the clearly outdated agreed statements of the WCT stating exhaustion

²⁸⁶ *Supra* note 205, at p. 49.

²⁸⁷ *ibid.*

²⁸⁸ It even states in the terms and conditions of *Sony Playstation* that: "You purchase a license to use the products. Apart from this license you have no ownership, property rights, economic or pecuniary interests in the products you purchase"

Available (in Dutch) at: http://legaldoc.dl.playstation.net/ps3-eula/psn/nl_tosua_nl.html

²⁸⁹ *Supra* note 285, at p. 138.

²⁹⁰ See: Neelie Kroes' statements on the need for EU Copyright reforms, available at: http://europa.eu/rapid/press-release_SPEECH-14-528_en.htm

²⁹¹ For a notice of the EU's focus on the free movement of goods see for instance the EU's single market strategy: available at http://ec.europa.eu/growth/single-market/smact/index_en.htm#maincontentSec3

²⁹² As expressed in recital 29 of the Copyright Directive.

ought to apply to tangible articles only. The CJEU should do so, not just because of the technological progress that was made the past 20 years, but also from an internal market point of view, as will be described in the following paragraph.

3.5. Internal market EU (free flow of goods) inadvertently calling for a digital second-hand market

What exhaustion generally aims to do is to create a balance between the rights of rightholders (property rights over goods and copyrights over intellectual creations²⁹³), and ultimately the free flow of goods.²⁹⁴ However, as professor Westkamp pointed out in 2007, in the EU context, the: “promulgation of an overarching European exhaustion principle has been, if at all, a response to the dynamics of shaping a single market rather than an attempt to approximate intellectual property laws”.²⁹⁵ Linklater perhaps expresses it even more clearly: “The single market is the cornerstone of the EU and as a result the EU Treaty provisions and free movement (and competition law) dominate and are the unavoidable main principles that apply to all areas, including copyright.”²⁹⁶

It can therefore be said that copyright must justify itself and fit in with the free movement rules.²⁹⁷ This particular meaning of exhaustion in the EU can also be found in the Commission's proposal to the Rental and Lending Directive.²⁹⁸ There the Commission emphasised, per Articles 34-36 TFEU²⁹⁹, that the rationale of the exhaustion doctrine in the EU is to reconcile the principle of free movement of goods throughout the territory of the Union with the protection of the specific subject matter of intellectual property rights. This specific rationale has been part of EU copyright exhaustion since the seminal decision of the then European Court of Justice in *Metro*.³⁰⁰

What becomes clear from the above is that, unlike the United States, the EU's focus in the digital era will not be so much on copyright law itself, but rather on the rules of free movement and competition law,³⁰¹ and in doing so the EU thus follows a fundamentally different logic than the US.

²⁹³ Richard H. Stern, *Some Reflections on Parallel Importation of Copyrighted Products into the United States and the Relation of the Exhaustion Doctrine to the Doctrine of Implied Licence*, European Intellectual Property Review, 1989, p. 119.

²⁹⁴ See Dietrich Reimer: Der Erschöpfungsgrundsatz im Urheberrecht und gewerblichen Rechtsschutz unter Berücksichtigung der Rechtsprechung des Europäischen Gerichtshofs, Gewerblicher Rechtsschutz und Urheberrecht International, 1972, at p. 222.

- See further Christian Berger: Urheberrechtliche Erschöpfungslehre und digitale Informationstechnologie, Gewerblicher Rechtsschutz und Urheberrecht, 2002, at p. 199.

²⁹⁵ G. Westkamp, (2007), *Intellectual Property, Competition Rules and the Emerging Internal Market: Some Thoughts on the European Exhaustion Doctrine*, 11 Marquette Intellectual Property Law Review 2, pp. 291-335, at p. 334.

²⁹⁶ *Supra* note 68, at p. 19.

²⁹⁷ See also Torremans, 2014, at p. 4.

²⁹⁸ See further B Ubertazzi, ‘The principle of free movement of goods: Community exhaustion and parallel imports’, in I Stamatoudi – P Torremans (eds.) *EU copyright law. A commentary* (Edward Elgar, 2014), at pp. 39-40.

²⁹⁹ Treaty on the Functioning of the European Union (Consolidated version 2012), OJ C 326, October 26, 2012. Text available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>

³⁰⁰ Judgment in: CJEU, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG.*, EU:C:1971:59, paras 12-13.

³⁰¹ For a more complete analysis, see: P. Torremans, *Holyoak and Torremans Intellectual Property Law*, Oxford University Press (7th ed., 2013), at pp. 344-349.

The EU has set a basic definition of the exhaustion doctrine, under which the resale of a tangible product, that has already been rightfully put on the market by the rightholder, or with his permission, can take place without the authorization of the rightholder.³⁰² Consequently, the resale of goods might be only blocked if originally sold outside of the economic community.³⁰³ This so called "Eurodefense"³⁰⁴ must at the same time be seen as the acceptance that Member States of the European Union are excluded from providing a broader scope of exhaustion, that is, an international one.³⁰⁵ As the CJEU stressed it in its ruling in the *Laserdisken* case:

*"[i]t follows from the clear wording of Article 4(2) of the Copyright Directive, in conjunction with the twenty-eighth recital in the preamble to that directive, that that provision does not leave it open to the Member States to provide for a rule of exhaustion other than the Community-wide exhaustion rule. (...)"*³⁰⁶

What follows from this is that a possible digital exhaustion doctrine would therefore likely have to be a Community-wide digital exhaustion to protect the principles of the free movement of goods and services (internal market protection).

The exhaustion of digital goods, and thus videogames, can function as an enabler of free movement in the EU. This is exactly what differentiates the EU from the US: within the EU, copyright rules and principles are subordinate to the rules of free movement.³⁰⁷

Just recently the EU took further steps in the direction of an all encompassing single market. With The Digital Single Market Strategy (DSMS)³⁰⁸, which is an ongoing process to create a single European digital economy, the European Commission revealed its ambitious answer "toward a connected digital single market".³⁰⁹ The preliminary text of the so called DSMS has already been unveiled and shows that there are three pillars on which the DSMS is to be build:

- 1) better access for consumers and businesses to digital goods and services across Europe;
- 2) creating the right conditions and a level playing field for digital networks and innovative services to flourish;

³⁰² This much was clear already in 1981, when the European Court gave its verdict in the joined cases 55/80 and 57/80 - *Musik-Vertrieb Membran GmbH and K-tel International v GEMA* - Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte, 20 January 1981, see especially at para. 15 and 18.

³⁰³ Computer Programs Directive, Article 4(2); Copyright Directive, Recital 28; Rental Directive, Article 9(2).

³⁰⁴ J. Corbet, *The Law of the EEC and Intellectual Property*, Journal of Law and Commerce, Volume 13, 1994, at p. 327.

³⁰⁵ See David T. Keeling, *Intellectual Property Rights in EU Law*, Volume I. - Free Movement and Competition Law, Oxford EC Law Library, Oxford University Press, New York, 2003, at pp. 144 – 145.

³⁰⁶ Case C-479/04 - *Laserdisken ApS v. Kulturministeriet*, 12 September 2006, at paragraphs 24 and 26.

³⁰⁷ *Supra* note 297.

³⁰⁸ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on *A digital single market strategy for Europe*, COM(2015) 192 final. Text available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015DC0192>

³⁰⁹ *Ibid.* See the statement of Jean-Claude Juncker, President of the European Commission, on the Digital Single Market Strategy.

3) *maximising the growth potential of the digital economy.*³¹⁰

The first pillar looked most promising to include the introduction of digital exhaustion. Especially as the DSMS stated that: "this requires the rapid removal of key differences between the online and offline worlds to break down barriers to cross-border online activity."³¹¹ However, as was quickly pointed by commentators like Eleonora Rosati: "a real discussion on whether markets for second-hand digital works, e.g. videogames, audio- and video- files etc., may and should be actually considered legitimate under EU law is completely absent from this DSMS."³¹² It therefore remains uncertain in which direction the EU legislators will move with regard to the concept of digital exhaustion, but the DSMS (at least) seems to leave the option of digital exhaustion on the table.

As it appears, in the medium term no policy/legislative initiatives will be introduced in the area of digital exhaustion at the EU level and as Rosati points out: "*at the EU-level it would appear that whether the law should allow for digital exhaustion is due to remain for some time a matter for the judiciary alone*".³¹³ Due to a lack of legislative action, it falls to the CJEU to fill this lacuna. It certainly has the power to determine, EU-wide, whether exhaustion of the right of distribution should also encompass digital exhaustion.

3.6. Conclusion - Summary of differences between EU and US situation

It was clearly seen in this chapter that copyright must justify itself and fit in with the free movement rules in the EU. How different is this in the United States where, as could be seen through the decisions in the *ReDigi*, *Kirtsaeng* and *Bobbs vs. Merill* cases, copyright is firmly rooted in not only the US Copyright Act, but also in the copyright clause of the US Constitution. While the District Court in *ReDigi* considered there may be some need for exhaustion to apply to certain digital situations, it did not feel it was appropriate to take such a decision and instead deferred the issue to Congress.³¹⁴ And the US Congress, in its turn, has not yet felt the urge to take legislative action to revise the current first sale doctrine to allow a digital first sale doctrine.

The Court in the *ReDigi* case was not willing to partake in the act of judicial legislation. Perhaps it was not willing, because of the fact that the Copyright Act is a federal statute and the Court itself was not even the most superior court in its jurisdiction. The CJEU, however, is the most superior court in the EU and was seemingly undisturbed by the concerns of judicial legislating in the *Usedsoft* case. These contrasting approaches further highlight the approach that the CJEU could and did take. Perhaps even more exemplary of the contrast between the U.S. and EU approach, is that the U.S. District Court only noted that *ReDigi*'s service was vulnerable to copyright infringing use as it was difficult to guarantee that

³¹⁰ See also: European Commission - Press release, *A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen*. Available at: http://europa.eu/rapid/press-release_IP-15-4919_en.htm

³¹¹ *Supra* note 308. See chapter 1 of the Digital Single Market Strategy.

³¹² See: - Rosati, *The Digital Single Market Strategy: too many (strategic?) omissions*, May 7, 2015, on the IPKat, Available at: <http://ipkitten.blogspot.nl/2015/05/the-digital-single-market-strategy-too.html>

- Also see: T. Synodinou, *EU Digital Single Market copyright law: "Impressionist", but not impressive*, May 11, 2015. Available at: <http://copyrightblog.kluweriplaw.com/2015/05/11/eu-digital-single-market-copyright-law-impressionist-but-not-impressive/>

³¹³ *Supra* note 102, at, p. 18.

³¹⁴ See also Torremans, 2014, at p. 3.

transferred files were erased from the transferor's computer.³¹⁵ Whereas, on the other hand, the CJEU was much more willing to lend a helping hand by encouraging rights holders to improve their own "Technological Protection Measures" to ensure that files would indeed be erased.³¹⁶

It has been said that videogames are more than computer programs in the definition of Article 4(2) Computer Programs Directive, but for both videogames and computer programs the reasoning of the CJEU used in *Usedsoft* holds up, namely: the first sale of a copy enables the copyright holder to obtain an appropriate remuneration. To then also control every resale of the copy goes beyond what is necessary to safeguard the specific subject-matter of the intellectual property concerned.³¹⁷ The exhaustion doctrine is envisioned to establish a situation that both safeguards the right of the intellectual property right holder to obtain an appropriate remuneration, and respects the rights of consumers. To control the resale of downloadable videogame copies simply goes beyond that reasonable principle.

This chapter also argued that, just like the CJEU concluded in the *UsedSoft* case, an argument could be made that an actual sale takes place when a consumer downloads a copy of the videogame file to his PC/console hard drive, and pays a fee to acquire a user license so that he can actually play the videogame. When the right holder is paid a fee for this purchase that represents the economic value of the copy of the videogame, a sale has taken place, which opens up the path to exhaustion of the distribution right.

Although the strict word of the law does not support any extension of *UsedSoft* in the EU, the ruling itself shows that the CJEU looks to have another plan up its sleeve. In the *Usedsoft* case a court could be seen that was determined to make the free movement and exhaustion principles from the off-line world applicable to the digital world. This chapter showed the reasoning of the CJEU was fully in line with overarching EU principles such as the freedom of movement of goods and the creating of a single market. In upholding this internal market strategy of the EU, with its free flow of goods and services, lies perhaps the single most important reason for the CJEU to work towards the implementation of a digital exhaustion doctrine.³¹⁸

Furthermore, this chapter set forth that across-the-board e-exhaustion is likely to be justified by the CJEU when a greater means is provided for rightholders to protect themselves against the creation of an 'additional copy'. With the current technological possibilities this means that there is a viable path to the implementation of a digital exhaustion doctrine. In order to walk down this path it is, however, necessary for the CJEU to acknowledge that the criteria for distinguishing between 'goods' and 'services' are to be found outside of the scope of the exhaustion doctrine. The current day and age calls for a revision of the tangible versus intangible dichotomy in to a differentiation based on the making available of a work or selling of a work. Regardless of whether a sale takes place at a distance or not, the ownership of the work transfers with that sale and the exhaustion rule applies. Whereas with the making available of a product, be that tangible or intangible, no transfer of ownership takes place and therefore exhaustion does not occur.

³¹⁵ Judgment in *Capitol Records v. ReDigi*, at 2.

³¹⁶ Judgment in *UsedSoft GmbH v Oracle International Corp*, at paragraph 79.

³¹⁷ Judgment in *UsedSoft GmbH v Oracle International Corp*, at paragraph 63.

³¹⁸ See also: Emma Linklater, "UsedSoft and the Big Bang Theory: Is the e-Exhaustion Meteor about to Strike?", 5 (2014) JIPITEC 12, at paragraph 47.

Chapter 4 - End conclusion

Definition of videogames

Videogames are per definition always played on a computer (handhelds, consoles and mobile phones all fall under the definition of computer), but are not considered to be computer programs. The European Court of Justice (CJEU) in the *Nintendo* case concluded that videogames fall under the protection of the Copyright Directive, and not the Computer Programs Directive, because they have a unique creative value which cannot be reduced to that of mere encryption language. Furthermore, it stated that if graphic and sound elements are part of the originality of the videogame, they are protected, together with the entire work, by copyright in the context of the system established by the Copyright Directive and not by the Computer Programs Directive. According to the logic of the CJEU in the *Nintendo* case, videogames categorise as something: 'more than a computer program'.

Nevertheless, graphic and sound elements **are** reduced to computer language and are only triggered by certain types of events in the computer program. A certain sound or graphic image may only appear at a certain time or level in the game, meaning that these elements are well integrated parts of the videogame and therefore the computer program. The CJEU's conclusion that elements of a videogame cannot be reduced to encryption in computer language may therefore not be entirely accurate and be up for amendment in the future. A gamer provides input for the videogame by pressing buttons on his controller. The computer program part of the game then converts this input into graphic and sound elements (output). These elements combined amount to the total experience of playing a videogame. An experience that will be different for every player as no one plays a game exactly the same as someone else. This is especially true for videogames with multiple possible endings. The outcome of the videogame can, in these cases, be vastly different for every player based on the actions he or she has performed in earlier parts of the videogame. The experience may thus be different for every player, however, what is not different is the underlying computer program of the videogame (the game-engine). Everyone has access to the same computer program, graphic and sound elements, just not everyone experiences the same videogame. From a technological point of view the videogame itself is perfectly reducible to mere technological elements or, to more accurately follow the wording of the CJEU: to encryption in computer language. This would then implicate that videogames should be protected under the Computer Programs Directive. However, it was seen that it is hard to precisely define videogames and thus just as hard to pinpoint under which Directive they should fall. A case can certainly be made for digital videogames to fall under the protection of the Computer Programs Directive if the above is, but a case could also be made for the Copyright Directive, because to simply state that a videogame is predominantly software and therefore should fall under the protection of the Computer Programs Directive ignores the creative value of the videogame's sound and graphic elements that would certainly be protected by the Copyright Directive would they not be in a videogame, but on *inter alia* an album or a painting.

In the current situation if graphic and sound elements are original to a videogame they are protected together with the entire work. From a pragmatic point of view it is understandable to follow this logic. If graphic and sound elements, for example, were to be treated differently than other parts of a videogame a situation could arise where a consumer is able to resell the 'computer program part' of a videogame under the Computer Programs Directive (*Usedsoft*)

without the consent of the rightholder, but not the accompanying sound and graphic elements under the Copyright Directive.

The narrow definition of 'computer programs' in the *Nintendo* case appeared to imply that only very few digital products can be resold without the rightholder's permission. However, the CJEU in *Nintendo* did not specifically address the question of resale. More interesting than that is that the *UsedSoft* ruling, which did address the question of resale, pointed out that the concept of exhaustion used in both the Copyright Directive and the Computer Programs Directive must in principle have the same meaning. In order to interpret the Copyright Directive and the Computer Programs Directive in a uniform manner, the CJEU, in this writer's opinion, needs to depart from the views expressed by the European Commission and the clearly outdated agreed statements of the WIPO Copyright Treaty exclaiming that exhaustion ought to apply to tangible articles only. In doing this, it also becomes irrelevant under which Directive videogames should be protected.

However, currently in the EU, the Computer Programs Directive presents greater levels of protection for consumers than the Copyright Directive does. If a videogame should be categorized as just one product, either under the Computer Programs Directive or under the Copyright Directive, we are presented with the choice between greater and lesser protection for consumers. This author would in that case plead for a categorization of videogames as: "computer programs", and as a result lesser protection for rightholders, but more rights for consumers. Nevertheless, it would be even more preferable to avoid this discussion in its entirety through a uniform understanding and introduction of the exhaustion doctrine in both the Copyright Directive and the Computer Programs Directive. Furthermore, the consequence of videogames being categorised as 'more than a computer program' by the CJEU in the *Nintendo* case, is that right holders currently are granted greater protection of their rights under the Copyright Directive, simply because the Computer Programs Directive does not apply in that case. This stance creates an undesirable barrier for second hand sales of videogames, as consumers will have to ask permission from the right holder to resell (or rent out) their product, which can lead to anti-competitive results. Results that are in opposition to the concept of free movement of goods. A concept, as was shown, the EU at times seems to value more than anything else.³¹⁹

It was also explained that not all parts of a videogame are "original". As set forth in chapter one, these days most videogames share the same underlying software. A valid question is then to what length one can speak of "original games" with "unique creative value". Most videogames are created within the limitations of a third-party game engine (middleware). Although games may look different and are developed by different studios, they might still share the same source code, because they make use of the same middleware. This insight comes against the backdrop of the CJEU's decision in the *Nintendo* case. The CJEU in *Nintendo*, namely, stated that videogames are software, but also constitute complex matter such as graphic and sound elements which have a "unique creative value". For videogames that make use of their own game-engine it would be fairly easy to say that they have their own "unique creative value". If, however, videogames make use of middleware, the "uniqueness" becomes a little bit more ambiguous. This is something the CJEU in *Nintendo* did not take into account. If it had taken this into account, perhaps it would not have emphasised the importance of the unique creative value and wouldn't have consequently decided that videogames should be protected by copyright in the context of the system established by the

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Copyright Directive, but instead by the Computer Programs Directive. Although, it must be said that how a certain game ultimately looks and sounds definitely is an important part of the value and uniqueness of the videogame. Nevertheless, future court decisions should at least take the above into account. In light of legal certainty it would be preferable to treat all videogames the same in this regard.

What holds offline could also hold online

The exhaustion doctrine was developed in the analogue world in a time when it made perfect sense to restrict exhaustion to the trading of tangible copies. However, due to the technological progress that was made since then, works can now easily be traded online and the sale of files over the internet has become a substitute for the sale of physical books, CDs, DVDs and more. And while the drafters of the Copyright Directive were probably aware of the possibility of online sales of files, they might not have fully realised that the offline trade of computerised data would successively be replaced by online dealings. New business models such as the sale of 'used' software were not clearly predictable.

This thesis has shown that the reselling of digital products, other than software, is a sensitive subject in the EU. There is still quite some uncertainty as to whether the reselling of digital products other than software is allowed or not. This was especially illustrated in chapter two by the fact that courts in different European countries interpreted the CJEU *Usedsoft* decision in their own way and subsequently differed in opinion as to whether or not the exhaustion doctrine should be limited to software or should be extended beyond the confines of the Computer Programs Directive to also include other digital products than software.

It was argued that, in order to remove the current discrepancies between the online and offline sphere, courts could make effective use of the starting point: "what holds offline, also holds online", when used as a guideline. Effectively meaning that, in the case of allowing a second-hand market for digital videogames, courts should judge cases on the reselling of digital products other than software, but specifically digital videogames, based on the function that copyright law fulfills. That function is to create a fair balance between the IP right holder's exclusive right to control the distribution of his work and the right of consumers to exploit their property, as they wish, through instruments such as the exhaustion doctrine. This balance is lost in the online sphere for videogames, which instead heavily favours the right holder, because there is no digital exhaustion to protect the rights of consumers and IP right holders can employ technological protection measures (known as DRM) to exercise an even higher level of control over their digital works, which is not achieved in the offline sphere. Through the application of the starting point courts should reach a situation of technological neutrality and a more equally balanced distribution of rights of IP right holders and consumers in the online sphere.

The CJEU concluded in *UsedSoft* that the download of a computer program, which could only be used by buying a user licence for an unlimited time, constituted a first sale if a fee was paid for the licence that represented the economic value of the copy (the emphasis here being on: sale). The CJEU should apply this same logic with regard to digital videogames, because when a consumer purchases a downloadable videogame the exact same structure is used, namely: the consumer downloads a copy of the videogame file to his PC/console hard drive,

which can only be used by buying a license³²⁰ for an unlimited time. This thesis argued that when the right holder is paid a fee for this purchase that represents the economic value of the copy of the videogame, a sale has taken place. When a consumer wishes to resell his copy of a videogame to someone else, no actual transfer of the copy takes place. Instead a new copy is made on the PC/console hard drive of the other person. In order to prevent that there are multiple copies in circulation at the same time, the seller should make his own copy unusable at the time of the sale. Courts should approach cases on the reselling of downloadable videogames as outlined here and should come to the conclusion that the distribution right for the intellectual property right holders can and should effectively exhaust, just like it would when the videogame is sold in a tangible medium.

In light of all this, this thesis outlined a system wherein the resale of digital videogames could be made possible from a technological point of view. The system that was drawn up, took into account that a possible statutory description of the digital exhaustion doctrine shall explicitly refer to the obligation to erase the sold content from the users' computer, to ensure there will always only be one copy in circulation, and that the doctrine only protects the lawful acquirers of digital files. Thereby serving the interests of both rightholders and consumers.

Differences between EU and U.S.A.

The first two chapters focused solely on the possible reselling of digital videogames from an EU point of view. Chapter three looked to examine the issue from a U.S. point of view and subsequently compare it to the EU-situation. It was seen in chapter three that there is currently no such thing as a digital exhaustion doctrine (digital first sale doctrine) in the United States. Furthermore, the rules of copyright in the U.S. are firmly rooted in the US Copyright Act, but also in the copyright clause of the US Constitution. In order for new copyright rules to be implemented in the digital domain they would either have to comply with the already existing constitution, or require the amending of the constitution. In the EU, however, copyright must simply justify itself and fit in with the rules of free movement. Because of this inherently different view on copyright rules it was shown that it is highly unlikely the U.S. will take steps in the direction of a digital exhaustion doctrine (for videogames) in the near future. On the other hand it showed that there are real possibilities in the EU for an expansion of the exhaustion doctrine also to digital videogames. The *Usedsoft* ruling is, in that regard, a prime example of the possibilities for such an expansion, because essentially the *Usedsoft* ruling is a European Court decision focused on making the free movement and exhaustion principles from the off-line world applicable to the digital world to uphold the internal market strategy of the EU. This EU-focus on the free flow of goods and services, creates a massive chance for the CJEU to work towards the implementation of an all encompassing digital exhaustion doctrine. It was further stressed in *Usedsoft* that the purpose of the exhaustion rule is to uphold the internal market. Following this logic it would seem that the only way forward is to also allow the resale of digital products under the more general Copyright Directive.

As set forth in chapter three, the agreed statements to the international Wipo Copyright Treaty (WCT) are widely accepted as being the ultimate blockade for introducing exhaustion into the

³²⁰ It even states in the terms and conditions of *Sony Playstation* that: "You purchase a license to use the products. Apart from this license you have no ownership, property rights, economic or pecuniary interests in the products you purchase"

Available (in Dutch) at: http://legaldoc.dl.playstation.net/ps3-eula/psn/nl_tosua_nl.html

digital domain, because they limit the application of the exhaustion doctrine to tangible items. However, it was seen that the agreed statements of the WCT actually state that copies: "can be put into circulation as tangible objects". Up to now this has been understood as limiting exhaustion to the offline domain. As was expressed in this thesis, however, this could also be understood to mean that: it must be possible to fix a copy in a tangible medium, and not that it must already be fixed as a tangible object. In this view, it is only Copyright Directive Article 4(2) that needs to be clarified to cover the digital domain as well. If one, however, accepts the more positivist point of view, it becomes evident that it is the agreed statements to the WCT that require amendment first. Although the first view perhaps provides a more straightforward solution, the latter view would clearly and definitively create more legal certainty. Ideally policymakers would indeed address the issue of amending the agreed statements to the WCT. Until then, however, and in order to interpret the Copyright Directive and the Computer Programs Directive in a uniform manner, the CJEU needs to depart from the views expressed by the European Commission and the clearly outdated agreed statements of the WCT expressing exhaustion ought to apply to tangible articles only. Furthermore, because of this strict adherence to a literal understanding of the agreed statements to the WCT and the Copyright Directive by policymakers and judges, a possible discussion on whether or not the digital domain is benefited by the exhaustion doctrine is effectively cut off, which is utmost regrettable.

What the current day and age really calls for, in this author's opinion, is a revision of the exhaustion doctrine. More specifically: a revision of the tangible versus intangible dichotomy. In a world where intangible (digital) goods are equally consumed as tangible goods and where intangible goods are economically and functionally equivalent to their tangible counterparts, it seems rather irrelevant to differentiate by looking at how a sale takes place for the purpose of applying the exhaustion rule. Instead the exhaustion doctrine should differentiate on the basis of whether a work is sold or made available. Regardless of whether a sale takes place at a distance or not, it is the distinction between selling a work on the one hand, and making it available on the other hand that should function as the instrument to decide whether or not exhaustion applies and as explained EU judges should come to the conclusion, based on the decision in *UsedSoft*, that a sale does take place when a consumer purchases a digital videogame and that forward-and-delete technology is available to ensure an effective way of controlling the amount of copies in circulation. Thereby providing all the essentials for introducing exhaustion in the digital domain.

Closing comments

The *UsedSoft* ruling was described by American professor Randal C. Picker as embracing "a version of media neutrality".³²¹ Ultimately this is what the debate on exhaustion should be all about: creating a legal situation of media neutrality. Where the rule of exhaustion will apply regardless of whether a product is sold on the market in tangible or intangible form.

The CJEU has shown, in *Usedsoft*, it is a court willing to commit to equivalent exhaustion of tangible and intangible products as it relates to the Computer Programs Directive. Along with the strong indications that the Copyright Directive ought to be interpreted in the same manner

³²¹ Prof. Randal C. Picker – "*UsedSoft GmbH v Oracle: Are you Exhausted Yet?*", originally for the Media Institute, now available at Techpolicy, August 7, 2012.

as the Computer Programs Directive, good foundations for a digital second-hand market in videogames appear to be in place. In light of the free flow of goods in the EU it seems awkward to pull up a wall in the digital domain and limit this free flow of goods only to tangible products. Especially in a day and age where the market for intangible media products is just as big as the market for tangible media products. With policymakers failing to address this issue, it falls to EU judges to introduce exhaustion of the distribution right to the digital realm.

The CJEU concluded in *UsedSoft* that the download of a computer program, which could only be used by buying a user licence for an unlimited time, constituted a first sale if a fee was paid for the licence that represented the economic value of the copy (the emphasis here being on: sale). The CJEU should apply this same logic with regard to digital videogames, because when a consumer purchases a downloadable videogame the exact same structure is used, namely: the consumer downloads a copy of the videogame file to his PC/console hard drive, which can only be used by buying a license³²² for an unlimited time. This thesis argued that when the right holder is paid a fee for this purchase that represents the economic value of the copy of the videogame, a sale has taken place. When a consumer wishes to resell his copy of a videogame to someone else, no actual transfer of the copy takes place. Instead a new copy is made on the PC/console hard drive of the other person. In order to prevent that there are multiple copies in circulation at the same time, the seller should make his own copy unusable at the time of the sale. Courts should approach cases on the reselling of downloadable videogames as outlined here and should come to the conclusion that the distribution right for the intellectual property right holders can and should effectively exhaust, just like it would when the videogame is sold in a tangible medium. Whether courts come to this conclusion on the basis of the Computer Programs Directive or the Copyright Directive is of less importance as the Directives ought to be interpreted in the same manner. However, as was also described in this thesis, if the CJEU sticks to its definition of videogames as being more than a computer program, the only way to allow exhaustion is via the Copyright Directive. A possible benefit of this is that it then would also be likely that exhaustion applies to other digital media products that don't qualify as computer programs.

However, technological progress may not be lost out of sight. The growth of software as a service and cloud-based computing may mean that in the near future the concept of exhaustion will become essentially inapplicable in the digital sphere. For now, however, the concept of exhaustion has an important role to play in the area of digital videogame sales.

Due to a lack of legislative action from the European Commission and European Parliament, the debate on introducing a EU-wide digital exhaustion doctrine for all digital goods, such as digital videogames, runs the risk of reaching an impasse. The CJEU could and should break this impasse, as the highest judicial authority in the EU, and adapt the outdated copyright laws to the current day and age to accommodate for an exhaustion doctrine that would allow a digital second-hand market for videogames.

³²² It even states in the terms and conditions of *Sony Playstation* that: "You purchase a license to use the products. Apart from this license you have no ownership, property rights, economic or pecuniary interests in the products you purchase"
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