

To what extent does the principle of exhaustion of IP rights apply to the on-line industry ?

National Report for Belgium

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Introduction

In the traditional “brick-and-mortar” industry, the principle of exhaustion is well established by case law as well as by legislation in both European Union and Belgian law. However, with new marketing and business models emerging and goods and services being increasingly distributed online (in the broadest sense), the traditional boundaries of the principle of exhaustion are put into question. As a consequence, the question “*To what extent does the principle of exhaustion of IP rights apply to the on-line industry ?*” (the ‘Question’), which this report discusses, is of great importance as it determines the extent to which a user is free to use and to distribute onwards the ‘goods’ that he/she purchased on-line.

This report sets as goal to give an overview of the current legal situation. As reporter for Belgium, the focus in this report shall lay on the European legislation and the recent developments in the case law of the European Court of Justice, in particular the recent *UsedSoft*-decision. The latter has given some new ‘food for thought’ regarding the Question, and it renewed the already heavily debated discussion regarding this matter. Furthermore the attention shall in particular go to copyrights as this is the domain in which ‘digital exhaustion’ encounters the most challenges and which have been the subject to the most recent developments in case law. Because of the scarcity of decisions from Belgian courts on the issue at stake, attention shall be given mainly to the writings of scholars, both Belgian and European at large.

In the first part of this report, the definition of exhaustion as well as the legal background shall be explained. Chapter two shall give an overview of what has to be understood with the notion 'exhaustion'. Chapter three shall focus on the recent *UsedSoft*-decision of European Court of Justice. Chapter four shall briefly summarize the remedies a rightholder has when being confronted with an on-line infringement. Chapter five shall hold a conclusion to the Question.

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1. The principle of exhaustion according to Belgian and European law

1.1. Notion

The exclusive right of an intellectual property rights' holder to authorise the distribution of a good (be it under a trade mark, a patent, a model or as a copyrighted work) is limited under European law by the 'principle of 'exhaustion'.¹ In essence, the notion of exhaustion is justified by the inherent tensions between intellectual property rights and the fundamental principles of the free movement of goods and services within the European Union, as enshrined in the Treaty on the Functioning of the European Union² (see chapter 2, section 2.1.). In order to preserve these fundamental freedoms, the exercise of intellectual property rights must be limited to the right of being the first to put a product on the market, including through licensees, or to exploit that product³, and does not extend to a right to control every resale of the same product by the purchaser thereof.

In the United States a similar principle is known as the 'First Sale Doctrine'.⁴

Exhaustion is limited to the territory of the Members States of the European Union (or the European Economic Area ("EEA")). In other words, the right to oppose the resale of a product shall only be exhausted when that product has been put on the market in Belgium or

¹ In Belgium known as '*de uitputtingsleer*' or '*la théorie de l'épuisement*'.

A. BERENBOOM, *Le nouveau droit d'auteur et les droits voisins* (4th Ed.), Brussels, Larcier, 2005, 365 et s; M. BUYDENS and C. BERNARD, "L'épuisement du droit à la marque", *JDE* 2013, vol. 196, 37 *et seq.* and S. MOLENAERS, « Het uitputtingsbeginsel in het merkenrecht », *IRDI* 2001, 4 *et seq.*; M. KROL and J. MENCL, "The principle of exhaustion of copyright in digital environment", *Master of Laws in Intellectual Property - Collection of Research Papers 2008*, World Intellectual Property Organization, Geneva 2009, 2; S. VON LEWINSKI and M. M. WALTER "Information Society Directive" in M. M. WALTER and S. VON LEWINSKI (eds.), *European Copyright Law. A Commentary*, Oxford, Oxford University Press, 2010, 997, nr. 11.4.16. and T. OVERDIJK, P. VAN DER PUTT, E. DE VRIES and T. SCHAFFT, "Exhaustion and Software Resale Rights. A comparison between the European exhaustion doctrine and the U.S. First sale doctrine in the light of recent case law", *Cri* 2011, vol. 2, (33) 34.

² Articles 28 to 37 (free movement of goods), and 56 to 62 (freedom to provide services).

³ Y. VAN COUTER and B. VAN BRABANT, *Handboek Licentieovereenkomsten*, Brussels, Larcier, 2008, 271-294.

⁴ We notice that the scope of application of the European notion of 'exhaustion' is not identical to the notion of 'first sale' in the United States. Article 109(a) of the U.S. Copyright Act states: "*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 entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord (...)*" See for further information: M. KROL and J. MENCL, "The principle of exhaustion of copyright in digital environment", *Master of Laws in Intellectual Property - Collection of Research Papers 2008*, World Intellectual Property Organization, Geneva 2009 (available at: <http://www.turin-ip.com/research-papers/papers-2008/Krol-Mencl.FINAL.pdf/view>.) and S. VANDEN HEUVEL, "Fighting the First Sale Doctrine: Strategies for a Struggling Film Industry", *18 Mich. Telecomm. Tech. L. Rev.* 661 (2012). Available at: <http://www.mtlr.org/voleighteen/vandenheuvel.pdf>.

in another country from the EEA. It is noteworthy that the European legislator explicitly rejected the concept of ‘international exhaustion’⁵.

1.2. The legal framework in Belgium and the European Economic Area

Exhaustion was a concept created in the first place by case law and based upon article 36 TFEU. One of the first times the principle of exhaustion was mentioned was in the judgement of the Court of Justice of the European Union in *Deutsche Grammophon Gesellschaft v. Metro-SB-Grossmärkt GmbH*:

“Although [the Treaty] permits prohibitions or restrictions on the free movement of products, which are justified for the purpose of protecting industrial and commercial property, article 36 only admits derogations from that freedom to the extent to which they are justified of safeguarding rights which constitute the specific subject-matter of such property.”

*If a right related to copyright is relied upon to prevent the marketing in a Member State of products distributed by the holder of the right or with his consent on the territory of another Member State on the sole ground that such distribution did not take place on the national territory, such a prohibition, which would legitimize the isolation of national markets, would be repugnant to the essential purpose of the Treaty, which is to unite national markets into a single market.”*⁶

⁵ Recital 28 InfoSoc Directive. See also: S. VON LEWINSKI and M. M. WALTER “Information Society Directive” in M. M. WALTER and S. VON LEWINSKI (eds.), *European Copyright Law. A Commentary*, Oxford, Oxford University Press, 2010, 1001, nr. 11.4.28 *et seq.*

In the United States the first sale doctrine similarly applies only to goods manufactured in the United States. However, a recent decision by the US Supreme Court has extended this and brought the discussion on international exhaustion back in the picture. See US Supreme Court 19 March 2013, *Kirtsaeng, dba Bluechristines99 v. John Wiley & Sons* in which was decided that “*The ‘first sale’ doctrine applies to copies of a copyrighted work lawfully made abroad*”. Decision available at: <http://www.law.cornell.edu/supremecourt/text/11-697>. It can be estimated that this decision shall not effect European law. (L. Fresco, “Kirtsae v. Wiley: de Amerikaanse uitputtingsslag om studieboeken”, *IE-Forum.nl* (Available at: http://www.ie-forum.nl/backoffice/uploads/file/IE-Forum%20L_E%20Fresco.%20Kirtsaeng%20v.%20Wiley.%20de%20Amerikaanse%20uitputtingsslag%20om%20studieboeken.%20IE-Forum_nl%20IEF%2012498.pdf))

⁶ ECJ, case 78/70, *Grammophon Gesellschaft v. Metro-SB-Grossmärkt GmbH*, ECR 1971 I-487, pt 11-12.

This case law was confirmed by the Belgian Supreme Court (*Hof van Cassatie – Cour de cassation*) as well as by lower courts.⁷

The principle was thus already well known before it was expressly set forth in respect of each intellectual property right in the various regulations and directives that harmonize intellectual property rights within the European Union (community trademarks⁸, community models⁹, unitary patents¹⁰, rental and lending rights¹¹, computer programs¹², databases¹³ and copyright¹⁴). All of these provisions are quasi-identical and are all implemented in Belgian law accordingly.

Regarding copyrights, article 1,§1, par. 6 Belgian Copyright Act (which implements article 4(2) InfoSoc Directive) states:

“The author of a literary or artistic work alone shall have the right to allow the distribution, by sale or otherwise, of the original or copies of the work to the public. The first sale or other transfer of ownership in the European Community of the original or copies of the literary or artistic work made by the rightholder or with his

⁷ Cass. 12 June 1998, *ICIP-Ing. Cons.* 1999, 100 and Brussels 11 April 1997, *A&M* 1997, 265, note V. VANOVERMEIRE. See also: S. DUSOLLIER, *Droit d’auteur et protection des œuvres dans l’univers numérique*, Brussels, Larcier, 397, nr. 504 and M. BUYDENS and C. BERNARD, “L’épuisement du droit à la marque”, *JDE* 2013, vol. 196, 37, nr. 2.

⁸ Article 13.1 of Council Regulation 207/2009 of 26 February 2009 on the Community trade mark: “A Community trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent.” With regard to Belgium: Article 2.23.3 Benelux Convention on Intellectual Property (Trademarks and Designs), *BS* 26 April 2006.

⁹ Article 21 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, *OJ L* 5 January 2002, n° 3, 1. With regard to Belgium: Article 3.19.4 Benelux Convention on Intellectual Property (Trademarks and Designs), *BS* 26 April 2006.

¹⁰ Article 6 of Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, *OJ L* 31 December 2012, n° 361.

¹¹ Article 9.2 of Directive 2006/115 of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, *OJ L* 27 December 2006, n° 376, 28.

¹² Article 4.2 Directive 2009/24 of 23 April 2009 on the legal protection of computer programs, *OJ L* 5 May 2009, n° 111, 16. (hereafter referred to as the ‘Software Directive’) With regard to Belgium: Article 5.c of Act of 30 June 1994 regarding the transposition into Belgian law of the European Directive of 14 May 1991 on the legal protection of computer programs, *BS* 27 July 1994.

¹³ Article 5.c of Directive 96/9 of 11 March 1996 on the legal protection of database, *OJ L* 27 March 1996, n° 77, 20. (hereafter referred to as the ‘Database Directive’). With regard to Belgium: article 4, par. 3 Act of 31 August 1998 regarding transposition into Belgium law of the European Directive of 11 March 1996 on the legal protection of database, *BS* 14 November 1998.

¹⁴ Article 4.2 Infosoc Directive. With regard to Belgium: article 1,§1, par. 6 Act of 30 June 1994 on copyright and related rights, *BS* 27 July 1994 (hereafter referred to as the ‘Belgian Copyright Act’).

consent shall give rise to exhaustion of the right of distribution of the original or that copy in the European Community.” (free translation¹⁵)

In addition, the principle of exhaustion is also incorporated in several major international treaties of which the European Union is a Treaty State, such as the Agreement on Trade-Related Aspects of Intellectual Property¹⁶ (TRIPS) and the WIPO Copyright Treaty.¹⁷

2. Background of and limitations of the principle of exhaustion

2.1. A balance between free movement of goods and intellectual property rights

The aforementioned *Deutsche Grammophon Gesellschaft*-decision already the great importance of the exhaustion principle: If a rightholder could forbid the resale of his goods, parallel-import to other Member states would be hindered. This would give effect to segregation of the internal markets and would jeopardize the basic idea of the European Union, i.e. the constitution of a single market.¹⁸ Therefore, the Court of justice held that the exercise of intellectual property rights within the internal market must be restricted to the specific subject-matter thereof, i.e. the right to be the first to put the product on the market. Once a particular good has been sold, the rightholder shall no longer have the right to oppose the further sale of that particular good.¹⁹

¹⁵ The original text in Dutch states: “*Alleen de auteur van een werk van letterkunde of kunst heeft het recht de distributie van het origineel van het werk of van kopiën ervan aan het publiek, door verkoop of anderszins, toe te staan. De eerste verkoop of andere eigendomsoverdracht in de Europese Gemeenschap van het origineel of een kopie van een werk van letterkunde of kunst door de auteur of met diens toestemming leidt tot uitputting van het distributierecht van dat origineel of die kopie in de Europese Gemeenschap*” In French: “*L'auteur d'une œuvre littéraire ou artistique a seul le droit d'autoriser la distribution au public, par la vente ou autrement, de l'original de son œuvre ou de copies de celle-ci. La première vente ou premier autre transfert de propriété de l'original ou d'une copie d'une œuvre littéraire ou artistique dans la Communauté européenne par l'auteur ou avec son consentement, épuise le droit de distribution de cet original ou cette copie dans la Communauté européenne.*”

¹⁶ In the TRIPS Agreement the principle of ‘exhaustion’ is only mentioned. Member states are thus free whether to apply this concept in their national legislation. See article 6 ‘exhaustion’ of TRIPS: “*For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.*”

¹⁷ Article 6.2 WIPO Copyright Treaty of 20 December 1996: “*Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.*”

¹⁸ F. DE VISSCHER and B. MICHAUX, *Précis du droit d'auteur*, Brussels, Bruylant, 2000, 88, nr. 105 and P. TORREMANS, “The future implications of the Usedsoft Decision”, 3-4, available at <http://www.create.ac.uk/wp-content/uploads/2014/01/CREATe-Working-Paper-2014-02.pdf>, and A. WIEBE, “The principle of exhaustion in European Copyright law and the distinction between digital goods and digital services”, *GRUR*2009, 114.

¹⁹ The European legislator has however in some of the in aforementioned provision foreseen that a rightholder can still oppose further commercialization of the product if there are ‘legitimate grounds’. See regarding the

‘Exhaustion’ was thus created to strike a balance between the free movement of goods on the one hand and the exercise of exclusive intellectual property rights of the proprietor to distribute his goods on the other hand. The latter holds the right to choose where, under which conditions and at which price his goods are, for the first time, put on the market.²⁰ This way the rightholder is guaranteed to receive an appropriate reward.²¹ This ensures “*the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large*”.²²

2.2. Consensus regarding the traditional industry: the principle of exhaustion is limited to the distribution of goods by means of a tangible support

To understand why the answer to the Question is not straightforward, it is important to notice the difference between the ‘traditional industry’ and the ‘on-line industry’. None of these ‘industries’ are legally defined. One could assume that the ‘on-line industry’ amounts to the provision of ‘information society services’, as defined by the E-Commerce Directive : “*any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.*”²³ With respect to such services, the EU legislator enacted specific rules, *to ensure legal certainty and consumer confidence* with regard to electronic commerce.²⁴ These services are regulated in a particular way as compared to services provided in the ‘traditional industry’. The notion however appears not to be the most relevant with regard to the principle of exhaustion. Rather, it must be borne in mind that

Community trade mark article 13.2 Regulation 207/2009 (“Paragraph 1 *shall not apply where there exist legitimate reasons for the proprietor to oppose further commercialisation of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market.*”) and regarding unitary patent article 6 Regulation 1257/2011 (“(...) , unless there are legitimate grounds for the patent proprietor to oppose further commercialisation of the product.”)

²⁰ A. GÖBEL, “The principal of exhaustion and the resale of downloaded software – The UsedSoft / Oracle case”, *ELR* 2012, vol. 9, (226) 229 and M. KROL and J. MENCL, “The principle of exhaustion of copyright in digital environment”, *Master of Laws in Intellectual Property - Collection of Research Papers 2008*, World Intellectual Property Organization, Geneva 2009, 2.

²¹ With regard to copyright, see: Recital 10 InfoSoc Directive.

²² Recital 9 InfoSoc Directive.

²³ See the definition of ‘*information society services*’ in article 2(a) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (hereafter referred to as the ‘E-Commerce Directive’): “*any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.*” This directive was transposed into Belgian law by the Act of 11 March 2003 regarding certain procedural aspects of the information society services, *BS* 17 March 2003.

²⁴ Such as particular information requirements and liability of intermediary service providers.

exhaustion only applies with respect to the sale or transfer of ownership of a product, and not in respect of services.

2.2.1. Exclusion of services

Within the area of copyright, the principle of exhaustion only applies to the right of distribution, i.e. the right to distribute copies of works of authorship. Other exclusive rights, such as the right of reproduction²⁵ and the right of communication and of making available to the public²⁶, are not likely to be exhausted, especially to the extent that they relate to services provided by the copyright holder. The latter retains the right to oppose the making available of his/her work, or the reproduction thereof, within the context of services it provides. The rationale is that exhaustion should only impede the exercise of intellectual property rights to the extent that such exercise goes beyond the specific subject matter of such rights²⁷. In other words, the copyright holder remains entitled to an appropriate reward for all acts of exploitation of his/her works that do not consist in the mere sale of a copy of those works.

This was expressly confirmed by the European Court of Justice in its two *Coditel*-cases which concerned Belgian cable television diffusion companies:

“A cinematographic film belongs to the category of literary and artistic works made available to the public by performances which may be infinitely repeated. In this respect the problems involved in the observance of copyright in relation to the requirements of the Treaty are not the same as those which arise in connexion with literary and artistic works the placing of which at the disposal of the public is inseparable from the circulation of the material form of the works, as in the case of books or records.

²⁵ Regarding trade marks however, the European Court of Justice decided the right of reproduction can be subject to exhaustion: ECJ, case C-337/95, *Parfums Christian Dior SA & Parfums Christian Dior BV v. Evora BV*.

Also according to the first sale doctrine in the United States exhaustion does not extend to the right to make new copies of an item. See very recently: US Supreme Court 13 May 2013, *Bowman v Monsanto Co et al.*, Available at http://www.supremecourt.gov/opinions/12pdf/11-796_c07d.pdf.

²⁶ Opinion Advocate General Bot delivered on 24 April 2012, case C-128/11, *UsedSoft GmbH v. Oracle International Corp.*, point 48. The opinion of the Advocate General was however not followed by the Court itself in this case. See further chapter 3.2.2.

²⁷ See chapter 2.1.

*In these circumstances the owner of the copyright in a film and his assigns have a legitimate interest in calculating the fees due in respect of the authorization to exhibit the film on the basis of the actual or probable number of performances.(...)*²⁸

The European legislator has confirmed this point of view explicitly regarding copyrights. Article 3.3 InfoSoc Directive stipulates: “[the right of communication to the public and the right of making available to the public] *shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.*”²⁹

2.2.2. The sale of an identical copy on a tangible support

The *Coditel*-decision clearly stipulates that the difference between a service and a good lays in the fact that goods are delivered on a tangible medium (*a material form of the work*). The principle of exhaustion thus applies when three conditions are fulfilled: (1) an identical copy (2) is sold (3) by means of a tangible support.

2.2.2.1. An identical copy

Exhaustion only applies to the specific goods that were put on the market by the proprietor. For each individual good his consent is required. If he only commercializes a limited number of disks or CD’s, additional copies of the works may not be resold without his/her consent.

At this stage, the difference between, on the one hand, the tangible medium on which the good is delivered (*corpus mechanicum*) and, on the other hand, the good which is protected by intellectual property rights (*corpus mysticum*).³⁰ When a consumer buys a CD, he becomes the owner of this particular CD. A sale has thus taken place and, as a consequence, the rightholder

²⁸ ECJ, case 62/79, *SA Compagnie Générale pour la Diffusion de la Télévision SA Coditel Brabant and SA Compagnie Liégeoise pour la diffusion de la Télévision v. SA Ciné Vog Films, ASBL Chambre Syndicale belge de la Cinématographie, SA « les Films la Boétie » and Chambre syndicale des Producteurs et Exportateurs de Films français*, pt 12 and 13 and ECJ, case 262/81, *Coditel SA, Coditel Brabant, Coditel Liège, Intermixt, Union professionnelle de radio et de télédistribution and Inter-Régies v. Ciné-Vog Films SA, Chambre syndicale belge de la cinématographie, les Films La Boétie, Serge Pinon and Chambre syndicale des producteurs et exportateurs de films français*, pt 11 and 12. See also : ECJ, case C-17/92, *Federación de Distribuidores Cinematográficos (Fedicine) v. The Spanish State*, pt. 10 and Opinion Advocate General KOKOTT delivered on 3 February 2011, Cases C-403/08 and C-429/08, *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd*, pt. 184.

See further Chapter 3.3.2.

²⁹ See also recital 29 InfoSoc Directive.

³⁰ B. VAN BRABANT, « Les conflits susceptibles de survenir entre l’auteur d’une œuvre et le propriétaire du support », *ICIP-Ing. Cons.* 2004, vol. 2, (91) 92-93.

cannot prohibit the further circulation of this particular copy. Any contractual provision that would restrict the further distribution shall in principle be void.³¹ Nevertheless, the rightholder still holds the right on the work itself. He still has the right to copy the work on other CD's or to communicate it to the public. On the other hand, the consumer who buys a CD in a shop, does not acquire intellectual property rights but only the ownership of the tangible medium³².

2.2.2.2. A sale

Exhaustion shall only take place when a 'sale' or 'transfer of ownership' takes place. As a consequence rental or lending do not give rise to exhaustion.³³

A definition of 'sale' is however not given in any of the aforementioned legal provisions.

Presumably, with respect to tangible products, there is no need to further define what a "sale" can be. However, the increasing success of distribution models such as streaming or downloading works, goes along with the need to address the exact nature of what a "sale" can be, e.g. in relation to either goods or services. For instance, under the directive on consumer rights, implemented in Belgian Code Of Economic law by the Act of 21 December 2013³⁴, a 'sales contract' "*means any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both goods and services*".³⁵ A sales agreement in a consumer context thus covers goods as well as services. However,

³¹ To this respect we mention that in Belgium (and in France) a so-called 'right of destination' (*bestemmingsrecht – droit de destination*) is known. This right, recognized by the Supreme court of Belgium (Cass. 19 January 1956, *Pas.* 1956, I, 484. See also:), falls under the reproduction right and covers the right of the rightholder to limit the use of which contracting (or third) parties can make of reproductions which are put on the market. Reproduction is thus allowed but under certain conditions as specified by the rightholder and always subject to the rule of exhaustion. See: F. GOTZEN, *Het bestemmingsrecht van de auteur*, Brussel, Larcier, 1975; F. GOTZEN, "Art. 1" in F. BRISON and H. VANHEES (eds.), *Huldeboek Jan Corbet. De Belgische Auteurswet. Artikelsgewijze commentaar* (3th ed.), Brussels, Larcier, 2012, 11-12 and B. VAN BRABANT, « Les conflits susceptibles de survenir entre l'auteur d'une œuvre et le propriétaire du support », *ICIP-Ing. Cons.* 2004, vol. 2, (91) 165 *et seq.*

³² S. DUSOLLIER, *Droit d'auteur et protection des oeuvres dans l'univers numérique*, Brussels, Larcier, 397 *et seq.*, nr. 504 *et seq.*

³³ S. VON LEWINSKI and M. M. WALTER "Information Society Directive" in M. M. WALTER and S. VON LEWINSKI (eds.), *European Copyright Law. A Commentary*, Oxford, Oxford University Press, 2010, 1003-1004, nr. 11.4.36.

³⁴ BS30 December 2013.

³⁵ Article 2.5 Directive 2011/83.

‘goods’ are described as ‘*any tangible movable item*’.³⁶ There is thus also in consumer law a link between the sale of goods and the delivery on a tangible support.

The European Court of Justice has recently defined ‘a sale’ in its *UsedSoft* decision with regard to the notion of exhaustion. We shall come back to that definition below.³⁷

2.2.2.3. By means of a tangible support

The principle of exhaustion was traditionally understood as covering exclusively goods on a tangible medium. Nonetheless, as electronic commerce developed rapidly in the information society, this distinction blurred. Nowadays music, video, software, books ... are all available in a digital form. Not only are they provided by way of on-demand services (such as streaming and cloud computing) but they can also be obtained by downloading (e.g. iTunes).

When downloading, the work is delivered over the networks and eventually incorporated on a tangible medium, which the buyer already possessed and which is thus not included as such in the “sale”. Unlike in the traditional situation where a tangible product incorporating a work is put on the market, the recipient actually obtains a new copy (a reproduction of the work) which is not the same as the one of the sender (i.e. the rightholder himself or a previous acquirer). With it a licence is granted to use the good. The original “master” copy is in fact retained by the rightholder. The question thus arises if such ‘transfer’ has to be qualified as a ‘sale’ for the purposes of exhaustion. In the affirmative, the distribution right would be exhausted and the purchaser would have the right to resell the good.

However, it is argued that such a way of distributing works does not amount to a sale, but constitutes a mere provision of services³⁸. This point of view can be founded on multiple legal provisions.

First of all, the expressions ‘copies’ and ‘original and copies’ in the WIPO Treaty *refer exclusively to fixed copies that can be put into circulation as tangible objects*.³⁹

³⁶ Article 2.3 Directive 2011/83.

³⁷ See *further* chapter 3.2.1.

³⁸ S. DUSOLLIER, *Droit d’auteur et protection des oeuvres dans l’univers numérique*, Brussels, Larcier., 396-397, nr. 503.

³⁹ Agreed Statements of 23 December 1996 concerning the WIPO Copyright Treaty, *CRNR/DC/96*, 2. Available at: http://www.wipo.int/edocs/mdocs/diplconf/en/crn_r_dc/crn_r_dc_96.pdf.

Second, the Infosoc Directive (as well as the preparatory work⁴⁰ hereto) confirms this. Recital 28 InfoSoc Directive states:

“Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. (...)” (emphasis added)

Recital 29 stipulates:

“The question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the rightholder. Therefore, the same applies to rental and lending of the original and copies of works or other subject-matter which are services by nature. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides.” (emphasis added)

The same principle could already be found in 1996 in recital 43 of the Database Directive.⁴¹

This view could already been found in the *Coditel*-cases⁴² and was later on confirmed by the European Court of Justice.⁴³

⁴⁰ European Commission, Green Paper « Copyright an Related Rights in the Information Society » (19 June 1995), COM (95) 382 final, 47-48: *“On the other hand, if the work or related matter is not incorporated in a material form but is used in the provision of services, the situation is entirely different. (...) the interested parties feel that it should be ensured that the rights are no exhausted by the information superhighway. In fact, given that the provision of services can in principle be repeated an unlimited number of times, the exhaustion rule cannot apply.”* (emphasis added) This was also confirmed in the follow-up to this Green Paper: European Commission, “Follow-up to the Green Paper on copyright and related rights in the information society” (20 November 1996), COM(96) 568 final, chapter 2: *“(…) Parties confirmed that given that services can in principle be repeated an unlimited number of times, the exhaustion rule cannot apply.(...)”* (emphasis added)

⁴¹ Recital 43 Database Directive: *“Whereas, in the case of on-line transmission, the right to prohibit re-utilization is not exhausted either as regards the database or as regards a material copy of the database or of part thereof made by the addressee of the transmission with the consent of the rightholder.”* (emphasis added)

⁴² See chapter 2.2.1.

⁴³ ECJ, case C-479/04, *Laserdisken ApS v Kulturministeriet*, [2006] ECR I-08089, pt. 23: *“(…) According to the twenty-eight recital in the preamble to Directive 2001/29, copyright protection under that directive includes the exclusive right to control distribution of the work incorporated in a tangible medium. (...)”* (emphasis added).

Also the Belgian court of first instance of Ghent, in one a few cases regarding this subject, affirmed this distinction: “*The rule [of exhaustion] has to be understood in the light of the substantial difference between the (actual) property right and the (material) support (i.e. a CD-rom, a floppy disk, etc.), on the one hand, and the (intellectual) property right on the (immaterial) work (i.e. the computer program as such) that lies (as a copy) herein, on the other hand.*”⁴⁴ (free translation.)

The majority of legal scholars subscribe to this point of view.⁴⁵

In the United States, during the preparation of the Digital Millennium Copyright Act, the US Copyright Office investigated the usefulness of an extension of the first sale doctrine to digital goods. They came at that time to the conclusion that this was not desirable.⁴⁶

Recently the Court of Justice has shed more light on this issue of ‘digital exhaustion’. This was done in the *UsedSoft v. Oracle* case⁴⁷, which shall now be discussed.

3. *UsedSoft v Oracle*: The beginning of digital exhaustion

3.1. Facts

A proper understanding of the Court’s decision requires to briefly summarizing the facts.

⁴⁴ Court of First Instance of Ghent 23 September 2009, *A&M* 2010, vol. 1, (42) 48: “*Deze regel moet worden begrepen in het licht van het wezenlijke onderscheid tussen het (reëel) eigendomsrecht van de (materiële) drager (d.i. een CD-Rom, een diskette, e.d.m.), enerzijds, en het (intellectuele) eigendomsrecht van het (immateriële) werk (d.i. het computer-programma) als dusdanig dat er (in kopie) in vervat ligt, anderzijds.*”

⁴⁵ In particular for Belgium: F. DE VISSCHER and B. MICHAUX, *Précis du droit d’auteur*, Brussels, Bruylant, 2000, 88, nr. 104; N. HELBERGER, “Verkauft ist verkauft; wiederholen ist wiederholen”- reflecties op de *UsedSoft*-uitspraak van het Europese Hof”, *DCCR* 2013, vol. 98, (31) 33 and S. DUSOLLIER, *Droit d’auteur et protection des oeuvres dans l’univers numérique*, Brussels, Larcier, 396-397, nr. 503. See also: L. G. GRIGORIADIS, “Exhaustion and software resale rights in light of recent EU case law”, *Journal of International Media and Entertainment Law (2013-2014)*, Vol. 5, No. 1, (111) 113 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2403554.); A. L. SCHLOETTER, “The Acquis Communautaire in the Area of Copyright and Related Rights: Economic Rights” in T-E. SYNODINOU (ed.), *Codification of European Copyright Law*, Kluwer Law International, The Netherlands, 2012, (115) 120; H. STRUIK, P.C. VAN SCHELVEN and W.A.J. HOOREMAN, *Software-recht. Bescherming en gebruik van computerprogrammatuur onder auteursrecht en octrooirecht*, Kluwer-Deventer, 2010, 140 and A. WIEBE, “The principle of exhaustion in European Copyright law and the distinction between digital goods and digital services”, *GRUR* 2009, 114-115. Contra: M. KROL and J. MENCL, “The principle of exhaustion of copyright in digital environment”, *Master of Laws in Intellectual Property - Collection of Research Papers 2008*, World Intellectual Property Organization, Geneva 2009, 2.

⁴⁶ US COPYRIGHT OFFICE, *A Report of the Register of Copyrights pursuant to §104 of the Digital Millennium Copyright Act*, August 2011. 82 *et seq.* Available at <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>. (hereafter referred to as ‘DMCA Section 104 Report’)

⁴⁷ ECJ, case C-128/11, *UsedSoft GmbH v. Oracle International Corp.* (hereafter referred to as ‘*UsedSoft*’).

The case concerned computer software marketed by Oracle, and upon which Oracle holds the exclusive rights under copyright law. Oracle distributes her software mainly by downloading from her website. If a customer wants to use the software, he must conclude two distinct agreements with Oracle: on the one hand, a licence agreement, which allows him to download the program and to store a copy of the program permanently on a server and to allow a certain number (i.e. 25) of users to access it by downloading it to the main memory of their workstation computers, and, on the other hand, a maintenance agreement which guarantees future updates and patches for the software. In return for the payment of a one-time fixed price, the user is granted *for an unlimited period a non-exclusive, non-transferable user right free of charge for everything that Oracle develops and makes available to you on the basis of this agreement.*⁴⁸

UsedSoft markets second-hand software licenses. She acquired from Oracle's customers user licences and distributed them.

Two main issues were at stake. First, could the download of a copy of a computer program from the internet, authorised by the copyright holder, give rise to the exhaustion of the right of distribution of that copy in the EU within the meaning of article 4(2) Software Directive? Second, is the acquirer of the used licences to be regarded as a 'lawful acquirer' who enjoys *inter alia* the right to reproduce the computer program to the extent necessary for the use of it in accordance with its intended purpose?⁴⁹

⁴⁸ *UsedSoft*, pt. 23.

⁴⁹ The full questions for a preliminary ruling were as follows:

1. *Is the person who can rely on exhaustion of the right to distribute a copy of a computer program a "lawful acquirer" within the meaning of Article 5(1) of Directive 2009/24?*
2. *If the reply to the first question is in the affirmative: is the right to distribute a copy of a computer program exhausted in accordance with the first half-sentence of Article 4(2) of Directive 2009/24 when the acquirer has made the copy with the rightholder's consent by downloading the program from the internet onto a data carrier?*
3. *If the reply to the second question is also in the affirmative: can a person who has acquired a "used" software licence for generating a program copy as "lawful acquirer" under Article 5(1) and the first half-sentence of Article 4(2) of Directive 2009/24 also rely on exhaustion of the right to distribute the copy of the computer program made by the first acquirer with the rightholder's consent by downloading the program from the internet onto a data carrier if the first acquirer has erased his program copy or no longer uses it?*

3.2. The decision of the Court

3.2.1. A licence agreement can constitute a ‘sale’, and a sale can relate to a tangible as well as to an intangible good

As said above⁵⁰, exhaustion only applies when a sale (or transfer of ownership) takes place. Without a sale, there is no exhaustion of the distribution right. Because a common definition of sale in European law was lacking, the Court felt free to give a uniform and independent interpretation of this notion. According to the Court “*a ‘sale’ is an agreement by which a person, in return for payment, transfers to another person his rights of ownership in an item of tangible or intangible property belonging to him.*”⁵¹

The fact that “*the downloading of a copy of a computer program and the conclusion of a user licence agreement for that copy form an indivisible whole (...) makes it no difference whether the copy of the computer program was made available to the customer by the rightholder concerned by means of a download from the rightholder’s website or by means of a material medium such as a CD-ROM or DVD. (...) Since an acquirer who downloads a copy of the program concerned by means of a material medium such as a CD-ROM or DVD and concludes a licence agreement for that copy receives the right to use the copy for an unlimited period in return for payment of a fee, it must be considered that those two operations likewise involve, in the case of the making available of a copy of the computer program concerned by means of a material medium such as a CD-ROM or DVD, the transfer of the right of ownership of that copy.*”⁵²

A ‘sale’ is thus an autonomous notion under the law of the European Union, which may include the distribution of a copy by download if (a) the rightholder receives a payment in compensation for the granting of an unlimited usage right, and (b) a transfer of ownership takes place. According to the Court, granting a licence for an unlimited period of time equals such a transfer of ownership. Whether the transfer takes place by means of a tangible or intangible medium is of no importance for the qualification and does not bear on the fact that

⁵⁰ See chapter 2.2.2.2.

⁵¹ *Usedsoft*, pt. 42.

⁵² *UsedSoft*, pt. 44 and 47.

there is a “transfer of ownership”. Nor does it make it a difference how such ‘transfer’ was qualified by the parties (as a ‘sales agreement’ or a ‘licence agreement’).⁵³

The decision of the Court is thus in contrast with the majority opinion so far.⁵⁴ Exhaustion can take place even when the computer program is provided exclusively online.

The Court leaves no room for doubt on this point. It found “*abundantly clear the intention of the European Union legislature to assimilate, for the purposes of the protection laid down by [the Software Directive], tangible and intangible copies of computer programs.*”⁵⁵ In contrast with what one might think, according to the Court, such interpretation is not in contradiction with the InfoSoc Directive, as the Software Directive is a *lex specialis*.⁵⁶ Moreover, such assimilation is justified from an economic point of view: *the on-line transmission method is the functional equivalent of the supply of a material medium.*⁵⁷ If these two ways of distribution would not be equal, a rightholder would have the opportunity to control the resale of copies downloaded from the internet and to demand further remuneration on the occasion of each new sale. Such restriction would create partitioning on the markets and would jeopardize the principle of free movement of goods.⁵⁸ As the latter forms one of the fundamental principles of the European Union, it must prevail.⁵⁹

Nevertheless, the decision of the Court offers no argument to sustain that also services can ‘exhaust’. The right of distribution still *does not relate to contracts for services*.⁶⁰

⁵³ *UsedSoft*, pt. 49: “(...) if the term ‘sale’ within the meaning of Article 4(2) of Directive 2009/24 were not given a broad interpretation as encompassing all forms of product marketing characterised by the grant of a right to use a copy of a computer program, for an unlimited period, in return for payment of a fee designed to enable the copyright holder to obtain a remuneration corresponding to the economic value of the copy of the work of which he is the proprietor, the effectiveness of that provision would be undermined, since suppliers would merely have to call the contract a ‘licence’ rather than a ‘sale’ in order to circumvent the rule of exhaustion and divest it of all scope.”

⁵⁴ See *supra* chapter 2.2.2.3.

⁵⁵ *UsedSoft*, pt. 58.

⁵⁶ *UsedSoft*, pt. 56. This was later confirmed: ECJ, case C-355/12, *Nintendo Co. Ltd, Nintendo of America Inc., Nintendo of Europe GmbH v PC Box Srl and 9Net Srl*, pt. 23.

⁵⁷ *UsedSoft*, pt. 61.

⁵⁸ *UsedSoft*, pt. 62-63.

⁵⁹ See above chapter 2.1.

⁶⁰ *UsedSoft*, pt. 66.

3.2.2. Exhaustion of the right of communication to the public but not of the right of reproduction

Although it deems that ‘*the on-line transmission method is the functional equivalent of the supply of a material medium*’⁶¹, it may come as a surprise that the Court expanded the scope of exhaustion to the making available of a copy of the computer program on a website. After all, such a transmission constitutes an act of communication to the public under the InfoSoc Directive.⁶² As already mentioned, paragraph 3 of this article explicitly states that no act of making available to the public shall give rise to exhaustion.⁶³ However, according to the Court, such ‘making available to the public’ of a computer program cannot be qualified as a ‘making available to the public’ within the meaning of article 3.1 and 3.3 InfoSoc Directive.

Although the text of the InfoSoc Directive is quite clear and leaves little room for interpretation, the Court bases its decision, once again, on the fact that the Software Directive is a *lex specialis* in relation to the InfoSoc Directive. In such a case, when an act of communication at the same time constitutes a “transfer of ownership” (i.e. a licence for unlimited duration against a one-time payment) of the copy of this computer program, this “*changes an ‘act of communication to the public’ provided for in Article 3 [InfoSoc Directive] into an act of distribution referred to in Article 4 [InfoSoc Directive] which, if the conditions in Article 4(2) of the directive are satisfied, can, like a ‘first sale ... of a copy of a program’ referred to in Article 4(2) [Software Directive], give rise to exhaustion of the distribution right.*”⁶⁴

The right of reproduction still remains unaffected by exhaustion. If the first acquirer wishes to make a reproduction, he shall in principle be obliged to request the authorization of the rightholder. It is also for this reason that the Court emphasises that, if the first purchaser decides to resell his copy, then, in order to avoid infringing the exclusive right of reproduction of a computer program belonging to the author, he has to make his own copy unusable at the time of this resale. The practices of UsedSoft, i.e. acquiring some of the user rights of the original purchaser, are thus illegal as both UsedSoft (or a later acquirer) and the first

⁶¹ *UsedSoft*, pt. 61.

⁶² Recital 23 InfoSoc Directive.

⁶³ See above chapter 2.2.1.

⁶⁴ *UsedSoft*, pt. 52.

purchaser shall continue to use the same copy of the computer program: the Court does not allow to split multi-users licences.⁶⁵

3.2.3. The second acquirer is a ‘lawful acquirer’ and therefore allowed to use the copy of the computer program

The Court also had to address whether the acquirer of the used licenses could actually use these licenses (and the copy of the computer program).

In that respect, the Court decided that the second acquirer could be qualified as a ‘lawful acquirer’ within the meaning of article 5(1) Software Directive. Such ‘lawful acquirer’ is allowed to *inter alia* reproduce permanently the computer program without requiring the rightholder’s authorization when this reproduction is necessary for its use in accordance with its intended purpose. The download (from the website of Oracle) by the new acquirer onto his computer of the copy of which the license was sold by the first acquirer “*must be regarded as a reproduction of a computer program that is necessary to enable the new acquirer to use the program in accordance with its intended purpose.*”⁶⁶

3.3. The post *UsedSoft* period: an isolated case, limited to computer programs?

3.3.1. The recent *Nintendo v PC Box*-decision

The *UsedSoft* decision has undoubtedly extended the scope of exhaustion by considering that the grant of a licence on a copy of a computer program for an unlimited period provided by means of an intangible support constitutes a sale and thus leads to exhaustion. The question remains however if the reasoning of the Court of Justice would also apply to other categories of works, especially literary and artistic works.

After all, *UsedSoft* only dealt with computer programs and a good deal of the Court’s reasoning relies on the idea that the Software Directive is a *lex specialis*⁶⁷. Computer

⁶⁵ *UsedSoft*, pt. 70.

⁶⁶ *UsedSoft*, pt 81.

⁶⁷ *UsedSoft*, pt. 56.

programs, who are by their nature ‘digital’⁶⁸, are to be distinguished from other ‘works’ (e.g. film, music, books, etc.) which fall under the general InfoSoc Directive.

This was very recently affirmed in the Court’s *Nintendo v. PC Box* decision of 23 January 2014. In this case, which concerned mainly article 6 InfoSoc Directive and the notion of ‘technical protective measures’, the Court stated that a videogame is ‘*a complex matter which does not only contain 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*’. Therefore it is protected exclusively by the InfoSoc Directive.⁶⁹ As none of the questions for a preliminary ruling were related to the scope of the Software Directive it may seem noticeable that the Court made this explicit clarification.

The scope of the Software Directive, and as a consequence of the *UsedSoft*-decision, seems thus limited to computer programs in the strictest sense.⁷⁰

In Belgium there exists at this moment no case law applying the principles from the *UsedSoft*-decision.

⁶⁸ M. KROL and J. MENCL, “The principle of exhaustion of copyright in digital environment”, *Master of Laws in Intellectual Property - Collection of Research Papers 2008*, World Intellectual Property Organization, Geneva 2009, 24.

⁶⁹ ECJ, case C-355/12, *Nintendo Co. Ltd, Nintendo of America Inc., Nintendo of Europe GmbH v PC Box Srl and 9Net Srl*, pt. 23.

The fact that videogames were not to be qualified as ‘computer programs’ was until then not completely clear. See e.g. B. PEETERS, “Videospelen: bescherming onder het auteursrecht, maar volgens welke spelregels?”, *IRDI* 2013, vol. 2, 155-169 and A. NICHOLSON, “Old habits die hard?: *UsedSoft v Oracle*”, *SCRIPTed* 2013, vol.10/3, (389) 400. Available at: <http://script-ed.org/?p=1167>.

⁷⁰ R. SCHOEFS, « Ontwikkelaars mogen bescherming spelconsoles omzeilen », *Juristenkrant* 26 February 2014, 5 and E. WILDMAN and G. DICKSON, “Nintendo judgments puts Usedsoft back in the PC Box”, available at <http://www.lexology.com/library/detail.aspx?g=40aa8656-34d9-451e-a4e1-04008d789733>.

According to recital 7 Software Directive a ‘computer program’ is defined as ‘*any form, including those which are incorporated into hardware. This term also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage*’. The European Court of Justice furthermore precised that this covers ‘*the expression in any form of a computer program which permits reproduction in different computer languages, , such as the source code and the object code.*’ (ECJ, case C-393/09, *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury*, pt 35.) Does not fall within this definition: the elements of a computer program neither the functionality of a computer program nor the programming language and the format of data files used in a computer program in order to exploit certain of its functions constitute a form of expression of that program. (ECJ, case C-406/10, *SAS Institute Inc. v World Programming Ltd*, pt. 39). Also the graphic user interface does not fall under this definition. (ECJ, case C-393/09, *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury*, pt 42.)

3.3.2. The present legal framework is not adopted to an extension to other works

The main argument to give a limited interpretation to the *UsedSoft*-decision is that the current legal framework does not provide any grounds to expand the scope of *UsedSoft* to other works.

First, according to the WIPO Copyright Treaty, the right of distribution concerns exclusively fixed copies that can be put into circulation as tangible objects.⁷¹ As the European Union is a Treaty State hereof, European legislation has to be in compliance with it.⁷² International treaties are recognised as prevailing over secondary Community legislation.⁷³

As mentioned above, the InfoSoc Directive, in particular recitals 28 and 29, and the case law of the European Court of Justice appear to sustain the same reasoning as they still link exhaustion with a tangible support.⁷⁴ Nevertheless, the tone of the same Court of Justice in *UsedSoft* leaves some room for doubt: “*However, even supposing that Article 4(2) of Directive 2001/29, interpreted in the light of recitals 28 and 29 in its preamble and in the light of the Copyright Treaty, (...) indicated that, for the works covered by that directive, the exhaustion of the distribution right concerned only tangible objects (...)*”⁷⁵ It must therefore be noticed that the Court introduced the idea of equivalence between services and goods which are downloaded from the internet. Advocate General KOKOTT already suggested quite a similar idea in her opinion delivered in the *Premier League*-case.⁷⁶

⁷¹ Agreed Statements of 23 December 1996 concerning the WIPO Copyright Treaty, *CRNR/DC/96*, 2. Available at: http://www.wipo.int/edocs/mdocs/diplconf/en/crn/dc/crn_dc_96.pdf.

⁷² Article 216(2) TFEU states: “*Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.*” See also: E. LINKLATER, « *UsedSoft* and the big bang theory : Is the e-exhaustion meteor about to strike ? », pt. C.1. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2271129.

⁷³ ECJ, case C-344/04, *The Queen on the application of: International Air Transport Association, European Low Fares Airline Association v Department for Transport*, pt. 35: “*Article 300(7) EC provides that ‘agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States’. In accordance with the Court’s case-law, those agreements prevail over provisions of secondary Community legislation.*” See also ECJ, Case C-61/94, *Commission v Germany*, [1996] ECR I-3989, pt. 52, and ECJ, Case C-286/02, *Bellio F.Ili*, [2004] ECR I-3465, pt. 33.

⁷⁴ See chapter 2.2.2.3.

⁷⁵ *UsedSoft*, pt. 60.

⁷⁶ Opinion Advocate General KOKOTT delivered on 3 February 2011, Cases C-403/08 and C-429/08, *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd*, pt. 184-185: “*Admittedly, some services differ from goods in that they cannot be re-used per se (...). Other services, by contrast, do not differ significantly from goods. Computer software, musical works, e-books, films, etc. which are downloaded from the internet can easily be passed on in electronic form. (...)*”

Even assuming that ‘services’ in recital 29 only cover works exclusively made available without providing the possibility for the user to store a copy on a tangible medium,⁷⁷ there still remains an obstacle. After all, to use its copy of the work two acts of reproduction has to take place: to acquire a copy of the work, it has to be transferred from the first acquirer to the second and, afterwards, a copy has to be made each time the device (e.g. computer, smartphone, tablet, etc.) has to run the copy of the work.⁷⁸ In principle, for each act of reproduction the rightholder’s authorisation is required since his right of reproduction is not exhausted.⁷⁹

In the *UsedSoft*-decision a ‘get around’⁸⁰ was found in article 5(1) Software Directive to cover both acts. The InfoSoc Directive does however not contain an exception with the same extent (i.e. to allow both acts of reproduction are made without the authorisation of the author). It seems justifiable to state that article 5(1)⁸¹ covers the ‘use’ of the work as these acts of reproduction are only temporary, transient (or incidental), form an integral and essential part of a technological process and their sole purpose is to enable a lawful use. However, the first act of reproduction (i.e. the second acquirer obtaining the work) does not fall under this exception as this reproduction is neither temporary or transient. Also the exceptions and limitations enumerated in paragraph 2 of article 5 InfoSoc Directive do not seem to provide sufficient legal ground to allow without the author’s consent an act by which a work is digitally transferred from one device to another on which it may be used indefinitely. The Infosoc Directive enumerates the possible exceptions a Member State is allowed to implement in its national law. This is an exhaustive list.⁸² Such copy can, for example, not be qualified as a private copy⁸³ as a resale implicates evidentially the reproduction is done for ends that are commercial. Article 5(2)b InfoSoc Directive can thus not being invoked to justify such use.⁸⁴

⁷⁷ W.G.L. DURING, “Rekken en strekken met de *UsedSoft*-formule”, *AMI* 2014, vol. 1, (1) 5 and M. KROL and J. MENCL, “The principle of exhaustion of copyright in digital environment”, *Master of Laws in Intellectual Property - Collection of Research Papers 2008*, World Intellectual Property Organization, Geneva 2009, 45 *et seq.*

⁷⁸ H. STRUIK, “Past de *UsedSoft*-constructie ook in de Auteursrechtlijn?”, *AMI* 2014, vol. 2, 47-52.

⁷⁹ A. GÖBEL, “The principal of exhaustion and the resale of downloaded software – The *UsedSoft* / Oracle case”, *ELR* 2012, vol. 9, (226) 230.

⁸⁰ E. LINKLATER, « *UsedSoft* and the big bang theory : Is the e-exhaustion meteor about to strike ? », 11. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2271129.

⁸¹ “Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use.”

⁸² Recital 32 InfoSoc Directive. P. CHARLETON and S. KELLY, “The Oracle speaks. Case C-128/11”, 14. Available at http://fordhamipconference.com/wp-content/uploads/2013/03/2013.charleton.paper_.pdf.

⁸³ Article 5(2) b InfoSoc Directive : ‘in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders

In our opinion, although the tone of the ECJ in *UsedSoft* seemed to be favourable for such an analogy between computer programs and other works, the present legal framework does not allow such extension. We come back on this point in our conclusion.⁸⁵

An interesting case to refer to is *Capitol Records v ReDigi*, a decision from the US District Court of New York.⁸⁶ In this case, *ReDigi* provided an on-line service by which a user could sell music on *ReDigi's* website. To do so the user has to download a specific program first. This program selects the music on a person's computer, which is eligible for sale (i.e. only music from iTunes or from another *ReDigi* user). This music is then uploaded to a remote server ('Cloud Locker'). After a file is uploaded, the software deletes the file from the original computer. After a second analysis of the file, the music is ready to be sold. The argument of *ReDigi* that this process was covered by the first sale doctrine was rejected by the court: "(...) *the first sale defense is limited to material items, like records, that the copyright owner put into the stream of commerce (...) ReDigi is not distributing such material items (...) it is distributing reproductions of the copyrighted code embedded in new material objects (...) The first sale doctrine does not cover this (...)*".⁸⁷ The argument of *ReDigi* that such reading of the first sale doctrine would in effect exclude digital works from the meaning of the statute was also not accepted. The US District Court clearly stated that, even if there were good reasons to extend the scope of the first sale doctrine to such digital works, such extension could not be made in the current legal framework.⁸⁸

4. Intellectual property rights and on-line industry: infringement and remedies

As the question of on-line infringement is not a particular problem with regard to the principle of exhaustion, this chapter shall be limited to a survey of the remedies that are available for a rightholder.

receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject matter concerned"

⁸⁴ W.G.L. DURING, "Rekken en strekken met de UsedSoft-formule", *AMI* 2014, vol. 1, (1) 8.

⁸⁵ See chapter 5.

⁸⁶ US District Court Southern District of New York 30 March 2013, *Capitol Records v ReDigi*. Available at: <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1334&context=historical>. (hereafter referred to as '*ReDigi*').

⁸⁷ *ReDigi*, 12.

⁸⁸ *ReDigi*, 13.

Although protecting intellectual property rights online is a specific topic of Europe's Digital Single Market agenda⁸⁹, no specific European regulation is made on this point. Two legal instruments are in particular worth mentioning. First, the Directive on the enforcement of intellectual property rights (hereafter referred to as the 'Enforcement Directive')⁹⁰ which provides the general framework for Member States to enforce intellectual property rights.⁹¹ Second, in particular with regard to 'information society services', the E-Commerce Directive, which enables intellectual property rights holders to obtain interim measures against intermediaries whose services are used to infringe upon their rights.⁹²

A rightholder who is confronted with an infringement of his intellectual property rights online disposes of several remedies: coercive and monetary remedies as well as criminal sanctions are possible.⁹³

Rightholder may move before the Belgian courts with a specific cease-and-desist procedure (*vordering tot staking – action en cessation*)⁹⁴ by which an injunction can be requested either before the President of the Commercial Court or the President of the Court of First Instance, depending on the matter. This procedure somehow is similar to ordinary summary proceedings, but the applicant does not have to prove the urgency, and the judicial decision will be rendered on the merits, which will be provisionally enforceable notwithstanding any appeal or opposition, and which may be accompanied with the obligation to pay a penalty lump sum in case of non-compliance with the order. It provides the rightholder (or any other

⁸⁹ <http://ec.europa.eu/digital-agenda/en/pillar-i-digital-single-market/action-6-protecting-intellectual-property-rights-online>.

⁹⁰ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, *OJ L 2* June 2004, n° 195, 16. The Directive was implemented into Belgian law by the act of 9 May 2007 concerning civil law aspects of intellectual property rights protection (*BS* 10 May 2007) and the act of 10 May 2007 concerning aspects of judicial law of intellectual property rights protection (*BS* 10 May 2007).

⁹¹ According to its article 1 Enforcement Directive applies to *the measures, procedures and remedies necessary to the enforcement intellectual property rights*. Moreover, Member States are free to extend for internal purposes, the provisions of the Directive. (recital 13 Enforcement Directive) For copyright, article 8 InfoSoc Directive already contained such provision. The Enforcement Directive is without prejudice to the InfoSoc Directive (recital 16).

⁹² Article 18.1 E-Commerce Directive. In Belgium: Act of 11 March 2003 concerning certain procedural aspects of information society services as meant in article 77 of the Constitution, *BS* 17 March 2003. This act only deals with procedural aspects and is to be distinguished of the act adopted on the same date and also concerning certain procedural aspects of information society services.

⁹³ See regarding copyright infringement in Belgium: Articles 80 *et seq.* Belgian Copyright Act.

⁹⁴ Depending on the matter, a rightholder can base its action on article 114 Act of 6 April 2010 on market practices and consumer protection (*BS* 12 April 2010) *juncto* article 3 Act of 6 April 2010 with respect to certain procedures in the frame of the Act of 6 April 2010 on market practices and consumer protection, *BS* 12 April 2010. (hereafter the 'Procedural Act on Market Practices') and, with regard to copyrights, article 87, §1 Belgian Copyright Act.

who has a legal interest) with an efficient mean to have the infringement cease rather quickly.⁹⁵ No damages can be claimed at this stage.⁹⁶

Such an injunction can be applied for, not only against the infringer itself, but also against intermediaries, for instance internet service providers. This is of great importance in an on-line environment, as the infringer himself is often very difficult to identify or to sanction effectively. Intermediaries are most of the time best placed to put an end to infringements of intellectual property rights⁹⁷. A rightholder can even apply for preventive measures to be taken by the intermediary⁹⁸.

In the same time, the provisions of the E-Commerce Directive⁹⁹ establish a specific regime of exclusion of liability for certain intermediaries.¹⁰⁰ Against this backdrop, in order to obtain an injunction against the intermediary, the applicant does not need proving that the latter acted with negligence nor is personally liable for the infringing acts, but simply has to establish the existence of such infringing acts, which are carried out thanks to the services of the intermediary. In contrast to an injunction against the infringer itself, even if he concludes that the applicant's (intellectual property) rights have been infringed upon, the judge has no obligation to issue an injunction against the intermediary, but has a certain margin of appreciation to take into account the interests and the fundamental rights and freedoms not only of the intermediary, but also of those using its services¹⁰¹.

A rightholder shall also have the possibility to claim damages before the Belgian Courts and this, in extra-contractual matters, based on article 5(3) Regulation No 44/2001 of 22

⁹⁵ B. MICHAUX and E. DE GRUYSE, "De handhaving van intellectuele rechten gereorganiseerd", *TBH* 2007, vol. 7, (623) 633, pt. 25.

⁹⁶ Article 3, §3 Procedural Act on Market Practices.

⁹⁷ Recital 59 InfoSoc Directive.

⁹⁸ ECJ, case C-324/09, *L'Oréal SA, Lancôme parfums et beauté & Cie SNC, Laboratoire Garnier & Cie, L'Oréal (UK) Ltd v eBay International AG, eBay Europe SARL, eBay (UK) Ltd, Stephen Potts, Tracy Patchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi*, pt. 131 and ECJ, case C-70/10, *Scarlet Extended NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM)*, pt. 31.

⁹⁹ Recital 15 Enforcement Directive.

¹⁰⁰ Articles 12-14 E-Commerce Directive.

¹⁰¹ Antwerp 26 September 2011, *RABG* 2011, vol. 18, (1269) 1271, note P. VAN EECHE and A. FIERENS; ECJ, case C-314/12, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktiongesellschaft mbH*, pt. 61 and ECJ, case C-70/10, *Scarlet Extended NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM)*, pt. 43.

December 2000¹⁰². In such a case, Belgian courts shall only have jurisdiction to determine the damage caused within the Belgian territory. The principle of territoriality hinders to adjudicate on the damage caused in other Member States.¹⁰³

The decisions of a Belgian court are in principle enforceable in other Member States. The Brussels I-Regulation contains compulsory rules that ascertain judgments given in one Member state are not to be refused recognition and enforcement in another Member States.¹⁰⁴

The enforceability against an infringer who has his headquarters in a non-member state shall be more difficult and shall mainly depend upon the existence of an international treaty with the country in which the headquarters can be found. If no bilateral treaty exists, the rules of the Belgian code of international private law shall apply.¹⁰⁵

5. Conclusion

“To what extent does the principle of exhaustion of IP rights apply to the on-line industry?”

Our answer to this question is that at this time the extension of the principle seems to be limited to computer programs. The traditional opinion holds that the right of distribution can only be exhausted when a good is sold by means of (or together with) a tangible medium. The download of the same good from a website appears thus not to trigger the exhaustion of the distribution right. As we have seen the European Court of Justice did not share the same opinion in respect of computer programs. Under certain conditions, the distribution right is exhausted when a copy of a computer program is provided by download. Our report showed that this decision cannot simply be extended to other categories of works but rather is rooted in the specific nature of the Software Directive. The current legislative framework simply does not allow such an extension of the exhaustion principle.

The question arises of course if a legislative intervention is necessary or desirable. In our opinion this would be preferable. As the business models of distribution change rapidly, a

¹⁰² Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L* 12, 16 January 2001. (hereafter referred to as the ‘Brussels I-Regulation’)

¹⁰³ ECJ, case C-170/12, *Peter Pinckney v KDG Mediatech AG*, pt. 45-46 and ECJ, case C-387/12, *Hi Hotel SARL v Uwe Spoering*, pt. 38-39.

¹⁰⁴ Article 32 *et seq.* Brussels I-Regulation.

¹⁰⁵ Articles 22-31 of the Belgian Act of 16 July 2004 concerning the Code of private international law.

proper answer should be given to the Question on a European level. This can only be done by the legislator himself. This does not necessarily mean the latter has to choose whether or not a download can be seen as a good or as a service. It is interesting to draw the attention here on the European consumer law. Also in this domain, digitization had blurred the classical difference between ‘goods’ and ‘services’¹⁰⁶ The European legislator has recently introduced the new Directive 2011/83 on consumer rights.¹⁰⁷ Instead of ‘choosing a side’, a third category, namely ‘digital content’, was introduced. Recital 19 of directive 2011/83 states:

“Digital content means data which are produced and supplied in digital form, such as computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means. Contracts for the supply of digital content should fall within the scope of this Directive. If digital content is supplied on a tangible medium, such as a CD or a DVD, it should be considered as goods within the meaning of this Directive. Similarly to contracts for the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, or of district heating, contracts for digital content which is not supplied on a tangible medium should be classified, for the purpose of this Directive, neither as sales contracts nor as service contracts.” (Emphasis added)

Therefore, certain provisions in the new Directive make a distinction between sales agreements, service agreements and, with regard to ‘digital content’¹⁰⁸, ‘contracts for the supply of digital content which is not supplied on a tangible medium.’¹⁰⁹

A similar solution may be an appropriate response for the issue of exhaustion.

¹⁰⁶ M. DEMOULLIN, *Droit des contrats à distance et du commerce électronique*, Brussels, Kluwer, 2010, 7-11, nrs. 8-10 ; H. JACQUEMIN, “Digital Content and Consumer Protection within European Law » in A. ARNAB and J.-N. COLIN (eds.), *Virtual Goods '10*, Namen, P.U.N., 2010, (41) 45-47 and H. JACQUEMIN, « Les nouvelles règles applicables aux contrats à distance et l’incidence des Technologies de l’information et de la communication sur certaines pratiques du marché » in E. BALATE, I. FERRANT, H. JACQUEMIN, J. LAFFINEUR and J. STUYCK, *La protection du consommateur après les lois du 6 avril 2010*, Louvain-la-Neuve, Anthemis, 2010, (59) 62-65, nrs. 3-10.

¹⁰⁷ Directive 2011/83 of the European Parliament and the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, *OJL* 22 November 2011, nr. 304, 64.

¹⁰⁸ According to article 2.11 Directive 2011/83 : ‘*Digital content*’ means data which are produced and supplied in digital form.

¹⁰⁹ See for example: article 9.2(c) Directive 2011/83.

Nevertheless, a more fundamental question should, in our opinion, be answered first: is it desirable at all to treat digital goods and “traditional” goods equally ? With regard to computer programs, the European Court of Justice clearly indicated it did. The Court decided ‘*The on-line transmission method is the functional equivalent of the supply of a material medium*’: there is no difference between making available a copy of computer program by means of a material support or by means of a download.¹¹⁰ The decision of the Court is thus positive as it honours in a way the principle of equal treatment: there may be no differentiation between a buyer of a CD and an on-line buyer of a MP3. This equalization was mainly inspired *from an economic point of view*.¹¹¹

However, several remarks can be made at this stage.

First, this functional approach is, in our opinion, not fully respected by the Court itself. ‘Traditional’ distribution only exhausts the rights on the original copy¹¹² (i.e. as it was sold to the first purchaser) while ‘digital’ distribution, according to the Court, also ‘*extends to the copy of the computer program sold as corrected and updated by the copyright holder*’.¹¹³ This is at least questionable and it indicates that there is more than just a difference in the way both items are delivered.¹¹⁴

Second, from an economic point of view, the decision can also be criticized. The creation of a digital second hand market seems to be less attractive than at first glance, both for the consumer and for the software developer.

One should remember that a secondary market could very likely have a detrimental effect on the rights of copyright holders. The value of digital goods do not decrease in time. There is at least a possibility that the quality of the goods which could thus be found on a second market be exactly the same as the original ones sold by the rightholder. In that perspective it can be doubted whether an authentic “second hand” market actually exist at all. Because the second

¹¹⁰ *UsedSoft*, pt. 47 and 61.

¹¹¹ *UsedSoft*, pt. 61.

¹¹² See above chapter 2.2.2.1.

¹¹³ *UsedSoft*, pt. 68.

¹¹⁴ M. RAZAVIA and S. ANDRÉ, “*Orade c/ UsedSoft*, un an après: regard critique sur les conséquences pratiques de cette décision”, *RLDI* 2013, vol. 97, (8) 9.

purchaser can offer the same good as the rightholder and this at a lower price¹¹⁵. Admittedly, the first purchaser has the obligation to erase its own copy of the work, though for the right holder this may prove hard to assess with certainty. As a consequence, it can be further questioned whether an on-line secondary market is possible at all.¹¹⁶

The question thus arises if the balance between the free movement of goods and the protection of intellectual property rights is properly struck. It seems doubtful to us that the exclusive right of distribution and the guarantee of receiving an appropriate award still can be ensured. After all, if a second hand market would exist, a rightholder shall evidently have to adapt his pricing policy (i.e. to lower the prices). His possibilities of determining when, how and at which price he brings his goods on the market prior to the others, will thus become more limited. Admittedly, the same goes for a traditional industry where the second hand market also has an influence on the prices of the rightholder. However, in an on-line industry he has to compete with goods of equal quality.¹¹⁷ Under these circumstances it seems doubtful whether the price still constitutes ‘an appropriate reward’. After a “sale” in the UsedSoft sense, the user is allowed to resell the good, so that the ‘appropriate award’ might need to be higher than in cases where only a non-transferable licence is granted. This is all the more so, considering that two acts take place for which the rightholder’s consent is needed: an act of distribution and, at the same time or subsequently, an act of communication to the public. For both a rightholder can request a payment.

If the licence given constitutes in fact a sale, there are thus good reasons to justify a higher price. Nevertheless, the contrary shall be more likely: as a second market with goods of equal quality emerges, the rightholder shall see itself forced to lower his prices.

It may be tempting to rely on the idea that, if exhaustion would also extend to other works, consumers would enjoy lower prices. Nonetheless, we wonder if this would truly set-off all the negative effects that can come with this evolution. It goes without saying that a software developer shall take steps in order to protect its rights and to receive the aforementioned

¹¹⁵ As the US Copyright Office emphasises: “*Physical copies of works degrade with time and use, making used copies less desirable than new ones. Digital information does not degrade, and can be reproduced perfectly on a recipient’s computer. The “used” copy is just as desirable as (in fact, is indistinguishable from) a new copy of the same work.*” (See : DMCA Section 104 Report, 82 *et seq.*)

¹¹⁶ DMCA Section 104 Report, 82.

¹¹⁷ J. CABAY, « L’épuisement en ligne du droit d’auteur. Pérégrinations le long des frontières américaines et européennes du droit de distribution », *A&M* 2013, vol. 5, (303) 315-317, nr. 11.b.

appropriate reward. As it shall be difficult to receive the latter fully, a rightholder shall have an incentive to limit the use of its goods by implementing technical protective measures. This was also suggested by the ECJ itself in order to solve the problem of first purchasers who would not delete their copy after reselling it.¹¹⁸ One might therefore wonder how far these measures could or may go and if, ultimately, this would not limit the consumer in its use more than just being deprived of the right to resell its digital object? If a rightholder has to prevent the making of unlawful copies, in order to protect their rights, it shall certainly implement such measures to the extent even a private copy might no longer be possible? Consequently, this could affect the regime of fair compensation, as the potential harm to rightholders would increase by allowing ‘digital exhaustion’. It is thus not uncertain that the amount of a ‘fair compensation’, which is introduced to compensate a rightholder adequately for the use made of their protected works or other subject-matter, would increase, as the possible harm for the rightholders also increases.¹¹⁹ An increase in compensation shall ultimately be paid by the consumer himself.¹²⁰

Furthermore, the recent *UsedSoft* development gives rightholders the incentive to change their business models. As the case law of the European Court of Justice still excludes services from the principle of exhaustion, rightholders shall seek alternative ways of delivery which do not consist in providing a real copy of the good (on an intangible support). Cloud computing services such as *SaaS* (Software as a Service) shall become more and more important for this matter.¹²¹ The consequence however is that, if a consumer wants to use the service, e.g. listen to an MP3, he shall always need an internet connection. Downloading and copying an MP3 to an iPod shall thus no longer be possible *offline*.

To conclude, although the European Court of Justice has slightly opened the door for ‘digital exhaustion’, we think the legal framework that currently exists in the European Union does not allow a full extension of the exhaustion principle to the on-line industry. It seems up to the

¹¹⁸ *UsedSoft*, pt. 79.

¹¹⁹ Recital 35 InfoSoc Directive.

¹²⁰ J. CABAY, « L'épuisement en ligne du droit d'auteur. Pérégrinations le long des frontières américaines et européennes du droit de distribution », *A&M* 2013, vol. 5, (303) 317, nr. 11.c.

¹²¹ B. DOCQUIR, “Les programmes d’ordinateur et le droit de l’Union”, *IRDI* 2013, vol. 2, (142)153; P. LAURENT, « De auteursrechtelijke bescherming van software : drie beslissingen van het HJEU die de zaak veranderen » 24, available at <http://www.crid.be/pdf/public/7198.pdf>; A. GÖBEL, “The principal of exhaustion and the resale of downloaded software – The *UsedSoft* / Oracle case”, *ELR* 2012, vol. 9, (226) 232 and M. RAZAVIA and S. ANDRÉ, “*Oracle c/ UsedSoft*, un an après: regard critique sur les conséquences pratiques de cette décision”, *RLDI* 2013, vol. 97, (8) 11.

European legislator to provide an answer. As the US Supreme Court stated in the *Redigi* case when considering *ReDigi*'s argument that the existing legislation would be out-of-date if *ReDigi*'s business model would be considered unlawful: "*It is left to Congress, and not this Court, to deem them outmoded.*"