

LIGUE INTERNATIONALE DU DROIT DE LA CONCURRENCE
INTERNATIONAL LEAGUE OF COMPETITION LAW
INTERNATIONALE LIGA FÜR WETTBEWERBSRECHT

Considering that :

- 1) The principle of exhaustion of intellectual property (IP) is a general principle that is applied under copyright law as well as other IP laws ;
- 2) The extension of the principle of exhaustion to the entire on-line industry is a live and controversial issue; the principle is commonly accepted if applied to material goods but problems arise if the principle is applied to intangible products ;
- 3) The national jurisdictions are not consistent in their approaches to on-line exhaustion; the type of on-line exhaustion (including the type of protected work) and the rationale for such exhaustion vary, in some instances, according to the current technology addressed ;
- 4) On a technical level, downloaded copies are not necessarily comparable with copies stored on tangible media. The quality of downloaded copies does not deteriorate, as opposed to the quality of tangible (physical) copies. Moreover the possibility remains that the user of a downloaded copy continues to use that copy, even after he has further “distributed” the (intangible) copy ;

The LIDC recommends that :

- 1) As regards legislative or judicial intervention, changes in the law should take into consideration the different interests of those concerned, especially the interests of the rightholders, of entrepreneurs in a possible second-hand market and of „users“. More particularly, the recognition of on-line exhaustion in relation to downloaded copies should take into consideration the specificities of the products concerned and their exploitation (books, computer programs, etc) and the impact on the normal exploitation of the work. As far as the interests of users are concerned, particular attention should be paid to technical measures which make it impossible to circulate goods although the rights to them have been exhausted. Furthermore, the principle of equivalent treatment and – as far as possible - the principle of technical neutrality of law and free movement of goods should be taken into account ;
- 2) If the legitimate first sale or other transfer of ownership of intangible copies of copyrighted works is subject to exhaustion, only the right of distribution should be exhausted and the conditions such as those mentioned by the recent cases of the European Court of Justice (as mentioned in the *Usedsoft* case) should be applied, which means that on-line exhaustion does not seem relevant to a non-perpetual license, such as rental or lease; on-line exhaustion cannot be considered in the context of services such as streaming and cloud computing in the way it has been applied in the context of downloading digital copies. Moreover, on a legal level, streaming does not involve the authorization for users of streaming services to use the work on a permanent and repeated basis.