p. 130. **Péter Mezei**

The Doctrine of Exhaustion in Limbo. Critical Remarks on the CJEU's *Tom Kabinet* Ruling

Abstract

The Court of Justice of the European Union published its much-awaited preliminary ruling in Case C-263/18, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* (the *Tom Kabinet* case) in December 2019. In its *UsedSoft* ruling (Case C-128/11), the CJEU accepted the exhaustion of distribution right for computer programs disseminated online. Following *UsedSoft*, the CJEU tried to refine its view on (digital) exhaustion, but many of its subsequent judgments (e.g. in *Nintendo*, *Art & Allposters*, *Svensson*, *Stichting Leenrecht*, *Renckhoff*) complicated the legal environment. The expectations were high in *Tom Kabinet* and the need for consistency was badly needed. The CJEU followed First Advocate General Maciej Szpunar's restrictive approach and refused the digital exhaustion doctrine regarding e-books. The CJEU's judgment not only created an inconsistency, but it further deepened uncertainties in this field. This paper aims to introduce the *Tom Kabinet* ruling, and discuss its direct and indirect consequences in copyright law.

1. Introduction – One Two Cha Cha Cha

The question of digital exhaustion has gained spotlight around a decade ago, when the Court of Justice of the European Union (CJEU) issued its preliminary ruling in *UsedSoft*, in which it allowed for the online resale of computer programs lawfully purchased online.[1] Around the same time, a US federal district court decided with an exactly opposite result in *ReDigi* regarding sound recordings.[2] Following this 'duo', various other decisions – many of them originating from the CJEU – addressed the applicability of exhaustion in the online environment.[3] Without being too cynical, the case law of the CJEU looks like an exhausting dance exercise: a few steps right, a few steps left. I believe that the CJEU's most recent ruling in *Tom Kabinet* did not convincingly solve the tensions surrounding digital exhaustion either.

p. 131. Only a fragment of the relevant case law has focused purely on the doctrine of exhaustion in the digital environment. *UsedSoft* involved the resale of license keys rather than the actual computer programs; *VidAngel*'s model represented video rental rather than distribution;[4] and other cases focused on the interpretation and validity of terms and conditions of end-user license agreements.[5] From these cases only *ReDigi* ruled on a digital exhaustion issue in the purest sense. *Tom Kabinet* – a case that started in 2014 – gained

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[1] Case C-128/11, *UsedSoft GmbH v. Oracle International Corp.*, Judgment of the Court (Grand Chamber), 3 July 2012, EU:C:2012:407.

[2] *Capitol Records, LLC, v. ReDigi Inc.*, 910 *F.3d* 649 (2018).

[3] Peter Mezei: *Copyright Exhaustion - Law and Policy in the United States and the European Union*, Cambridge University Press, Cambridge, 2018, 98–105 and 111–118.

[4] *Disney Enterprises, Inc., v. VidAngel, Inc.*, 869 *F.3d* 848 (2017).

[5] See e.g. *SoftMan Products Co. v. Adobe Sys. Inc.*, 171 *F.Supp.2d* 1075 (2001); *F.B.T. Records, LLC, et al. v. Aftermath Records, et al.*, 621 *F.3d* 958 (2010); *Timothy S. Vernor v. Autodesk, Inc.*, 621 *F.3d* 1102 (2010); *Union Fédérale des Consommateurs – Que Choisir v. S.A.R.L. Valve*, Tribunal de Grande Instance de Paris, N° RG 16/01008.

significant popularity, since it had a 'pure digital exhaustion' scenario: the digital resale of lawfully acquired e-books by end-users via/to the operator of an online platform.[6]
Section 2 introduces the facts of the *Tom Kabinet* case. Sections 3 and 4 summarize the Opinion of the Advocate General and the Judgment of the CJEU, respectively. Section 5 recalls four significant issues related to digital exhaustion, and section 6 takes a critical look at the Opinion and the Judgment through the lenses of these specific issues. I believe that the ruling did not conclusively settle (and eliminate) the idea of digital exhaustion. Therefore, section 6 includes several policy considerations to support the need for a legal reform to extend the doctrine of exhaustion to the digital realm on a general level.
Finally, I shall add a personal statement here. This paper is written to commemorate Krzysztof Felchner, a young colleague I met in 2017. He joined a conference (CICL) in Szeged, Hungary, and had a flawless presentation on the draft EU directive on supply of digital contents and copyright law. We also discussed our general research interests – including my devotion to the topic of digital exhaustion, which was close enough to his interests too. *Tom Kabinet* was an ongoing debate that time, with a probable CJEU procedure. Krzysztof sadly cannot be with us to see the outcome of this case anymore, and I have no chance to share my opinion on this case with him.

2. The *Tom Kabinet* Case

A start-up called Tom Kabinet was launched in the Netherlands in June 2014. The founders of Tom Kabinet allowed for private users to sell and purchase lawfully acquired DRM-free, 'used' e-books via the platform.[7] It was threatened with a suit by two publishing associations (Nederlandse Uitgeversbond/NUV and Groep Algemene Uitgevers/GAU) p. 132. eight days after the platform started to operate in the Netherlands. The Associations deemed the service illegal, even though Tom Kabinet planned to keep 20 percent of the purchase price of each e-book sold through its system on an escrow fund for the benefit of the relevant authors.[8]
After an unsuccessful negotiation period, the Associations sued Tom Kabinet and requested preliminary injunctions against the website. The District Court of Amsterdam (rechtbank Amsterdam) refused to order the preliminary injunctions, claiming that under *UsedSoft* it was not self-evident that the resale of used e-books was precluded under European Union law.[9] Joke Bodewits noted that '[a] lot of emphasis was placed on the fact that Tom Kabinet adds a new watermark to the e-book after it has been purchased in an attempt to prevent trade in illegal copies. Although this may not be sufficient to prevent all illegal trade, the interim relief judge considered that further protective measures could not have been implemented without

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[6] As Advocate General Szpunar summarized: 'I think ... that these questions must all be analysed together, because they form inseparable parts of a single complex question: must the supply to users of protected works by downloading be considered to be covered by the distribution right, with the effect that that right is exhausted by the original supply made with the author's consent?' See: Case C-263/18, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v. Tom Kabinet Internet BV and Others*, Opinion of Advocate General Szpunar, 10 September 2019, EU:C:2019:697, para. 24.
[7] Nate Hoffelder, *Used eBook Website Launches in Europe*, The Digital Reader, 19 June 2014 (http://the-digital-reader.com/2014/06/19/used-ebook-website-launches-europe/).
[8] Nate Hoffelder, *Used eBook Website Faces Lawsuit in Europe*, The Digital Reader, 27 June 2014 (http://the-digital-reader.com/2014/06/27/used-ebook-website-faces-lawsuit-europe/).
[9] *District Court of Amsterdam, Nederlands Uitgeversverbond and Groep Algemene Uitgevers v. Tom Kabinet*, C/13/567567/KG ZA 14–795 SP/MV, 21 July 2014. See further Nate Hoffelder, *Publishers Lose First Round of Lawsuit against Used eBook Marketplace*, The Digital Reader, 21 July 2014 (http://the-digitalreader.com/2014/07/21/publishers-lose-first-round-lawsuit-used-ebookmarketplace/); Joke Bodewits, *The Reselling of Second Hand E-Books Allowed in the Netherlands*, E-Commerce Law Reports, 4/2014, p. 10-11; Michel Olmedo Cuevas: *Copyright: Dutch Copyright Succumbs to Aging as Exhaustion Extends to E-Books*, 1 Journal of Intellectual Property Law & Practice, 8–10 (2015).

cooperation of the publishers. Moreover, the interim relief judge was clear that the behaviour of the publishers, by not replying to the invitation to discuss participation but instead initiating interim relief proceedings, was a step too far given the good intentions of Tom Kabinet.'[10]

The Dutch Court of Appeals (Hof Amsterdam) upheld the rechtbank Amsterdam's judgment; however, it prohibited Tom Kabinet from offering unlawfully downloaded e-books for sale. The court concluded that the application of *UsedSoft* on the resale of e-books could not be excluded *per se*. The online sale of contents fits into the concept of distribution, while the theory of functional equivalence stands for e-books too. Only a full trial could show whether Tom Kabinet's operation was in compliance with EU law. Nevertheless, the court believed that the plaintiff also allowed for the resale of illegal copies of e-books. The Hof Amsterdam took the view that the injunction might be dissolved, if Tom Kabinet proved that its system was used solely for the resale of lawfully acquired e-books.[11] No appeals were lodged on the Hof Amsterdam's legal conclusion.[12]

p. 133. On 8 June 2015, Tom Kabinet switched its model, and continued to operate as an e-book trader. The company purchased the used e-books either from official distributors or individuals who joined Tom Kabinet's reading club (*leesclub*); and Tom Kabinet sold the e-books to registered members of the reading club. Tom Kabinet encouraged its clients to resell the e-books to the company after they have read the works. When a client sold or donated an e-book to Tom Kabinet, the company granted 'credits' and, in case of donation, a 0.99€ discount on the monthly membership fee to the clients. The membership fee was ceased to be a requirement from 18 November 2015. Tom Kabinet required its clients to erase the e-book from their computer/devices simultaneously with the resale/donation. Tom Kabinet also placed digital watermarks on all e-books to indicate that the given copy was a lawful one.[13] It is uncertain from the docket of the case whether Tom Kabinet's service allowed for the simultaneous downloading of the same e-book by multiple members of the reading club or only individual members had access to the files.[14]

Based on such changes to Tom Kabinet's business model, NUV and GAU applied to the District Court of The Hague (rechtbank Den Haag) for an injunction to prohibit Tom Kabinet from offering its services. The rechtbank Den Haag found in its July 2017 interim injunction that e-books are works, and that Tom Kabinet's service did not constitute a communication to the public within the meaning of the InfoSoc Directive.[15] At the same time, the referring court was uncertain whether the right of distribution as well as the doctrine of exhaustion applied to

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[10] Bodewits (2014) 11.

[11] *Court of Appeal of Amsterdam, Nederlands Uitgeversverbond and Groep Algemene Uitgevers v. Tom Kabinet*, 200 154 572/01 SKG 20-01-2015, NL:GHAMS:2015:66 (available in Dutch at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2015:66). See the English translation of the decision in Computer Review International, 2/2015, 47-50. See further Michel Olmedo Cuevas: *Hot News: Amsterdam Court of Appeal Gives Tom Kabinet Three Days to Shut Down*, The 1709 Blog, 20 January 2015 (http://the1709blog.blogspot.co.uk/2015/01/hot-news-amsterdam-court-of-appeal.html); Saba Sluiter: *The Dutch Courts Apply* UsedSoft *to the Resale of eBooks*, Kluwer Copyright Blog, 28 January 2015 (http://kluwercopyrightblog.com/2015/01/28/the-dutch-courts-apply-usedsoft-to-the-resale-of-ebooks/).

[12] Compare to Case C-263/18 (AG Opinion) para. 19; Case C-263/18, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others*, Judgment of the Court (Grand Chamber), 19 December 2019, EU:C:2019:1111, para. 23.

[13] Compare to Case C-263/18 (AG Opinion) para. 18; Case C-263/18 (Judgment of the Court) paras. 22–26.

[14] Compare *ibid*., para. 69 with Ansgar Ohly, *Anmerkungen zur 'Öffentliche Wiedergabe' durch Verkauf 'gebrauchter' E-Books - NUV ua/Tom Kabinet*, 2 Gewerblicher Rechtsschutz und Urheberrecht, 184 (2020); and Philipp Homar, *Unzulässigkeit der Weiterveräußerung von E-Books - Schlussfolgerungen aus EuGH C-263/18 -* Tom Kabinet, MR-Int: Internationale Rundschau zum Medienrecht, 1 IP- & IT-Recht, 29–30 (2020).

[15] Compare with Article 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

the case at hand.[16] Likewise, the court was uncertain whether Tom Kabinet's service also necessitated the exhaustion of the (inherent) right of reproduction.[17] In other words, the court was uncertain about the 'new copy theory'.[18] In sum, the rechtbank Den Haag referred four questions to the CJEU.[19]

3. Advocate General Szpunar's Opinion

AG Szpunar's Opinion was divided in three distinct parts: he discussed the relevant norms (the legislative *status quo*), the CJEU case law, and policy considerations ('balancing the interests involved'). While AG Szpunar showed sympathy towards digital exhaustion, he ultimately rejected the concept under all three perspectives.

Regarding the *status quo* of exhaustion in the European Union, AG Szpunar's starting point was that the WCT's umbrella solution prioritized the right of communication to the public over the right of distribution regarding the dissemination of immaterial copies over the Internet. While admitting that the reality of markets had changed a lot p. 134. since 1996 (acceptance of WCT) and 2001 (acceptance of InfoSoc Directives), and online commerce or e-commerce had blurred the distinction between goods and services,[20] AG Szpunar concluded that the European legislators clearly followed WCT's logic, as evidenced by the language of recitals of the InfoSoc Directive.[21]

AG Szpunar doubted whether Article 4 of the InfoSoc-Directive applied to the online supply of digital contents, as such materials are not subject to ownership interests.[22] AG Szpunar also questioned whether 'the rule of the exhaustion of the distribution rule could limit th[e] freedom of contract'.[23] AG Szpunar also took a bright-line position in the new copy theory. He opined that reproduction was not allowed for end-users except when they downloaded the file originally.[24] More precisely, '[i]n the case of the supply of works by downloading online, the copy of the work by its original purchaser is made with the consent of the copyright holder, as an essential element of that form of making available to the public. However, that consent does not cover the reproductions that would be necessary for the subsequent transmission when the copy of the work is resold.'[25] AG Szpunar further pointed out that no limitations and exceptions applied to the reproduction of new copies.[26]

AG Szpunar continued the Opinion with the discussion of an otherwise limited list of CJEU rulings. Unsurprisingly, *UsedSoft* was analysed in detail.[27] AG Szpunar accepted the CJEU's position regarding the existence of a digital exhaustion doctrine limited to computer programs. At this point he tried to explain why *UsedSoft* was not applicable to works other than computer programs. First, he argued that the requirement of loading software to hardware as well as the need for updates/maintenance necessitated the CJEU to refer to the acquisition of a computer program as 'sale'. Based on these two features he concluded that tangible and intangible copies of computer programs were functionally equivalent; however,

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[16] Compare to Article 4(1) and (2) of the InfoSoc Directive, respectively.
[17] Compare to Article 2 of the InfoSoc Directive.
[18] Case C-263/18 (AG Opinion) para. 20; Case C-263/18 (Judgment of the Court) paras. 27–29.
[19] Case C-263/18 (AG Opinion) para. 21; Case C-263/18 (Judgment of the Court) para. 30.
[20] Case C-263/18 (AG Opinion) paras. 35 and 38.
[21] *Ibid*., paras. 33-39.
[22] *Ibid*., para. 43.
[23] *Ibid*., para. 44.
[24] *Ibid*., paras. 45–48.
[25] *Ibid*., para. 47.
[26] *Ibid*.
[27] *Ibid*., paras. 53–67.

he refused to accept that the same conclusion could hold true for other subject matters.[28] Secondly, AG Szpunar believed the market of subject matters other than software to be more fragile: 'a market for used non-material copies of literary and other works is likely to have a much greater effect on the interests of the copyright holders than the used computer program market.'[29]

AG Szpunar also accepted that the CJEU's position regarding e-lending necessitated at least an indirect and limited digital exhaustion regarding the lending of e-books. In *Vereniging Openbare Bibliotheken*, the CJEU ruled that 'Article 6 of Directive 2006/115 ... must be interpreted as not precluding a Member State from making the application of Article 6(1) of Directive 2006/115 subject to the condition that the digital copy of a book p. 135. made available by the public library must have been put into circulation by a first sale or other transfer of ownership of that copy in the European Union by the holder of the right of distribution to the public or with his consent, for the purpose of Article 4(2) of Directive [2001/29]'.[30] AG Szpunar agreed with Tom Kabinet that this ruling would become meaningless without the application of digital exhaustion regarding the immaterial copies acquired by the libraries.[31]

Finally, the Advocate General revisited the CJEU's case law on linking. The *Svensson* ruling[32] led to intense debates whether communication to the public might be exhausted after the first making available to the public of protected subject matter, where any future use is executed with the same technological means and Internet users do not form a 'new' public.[33] This discussion might be naïve in the light of the InfoSoc Directive's language that expressly denies the applicability of exhaustion to this right.[34] The importance of such discussion is, however, not superficial at all. *Svensson*'s outcome represents nothing else than what exhaustion really means: the loss of control over the use of the subject matter after the first lawful use by the rights holder. Vice versa: if the communication to the public right is not 'quasi-exhausted', than what does *Svensson* really mean? The Advocate General solved the Gordian knot by merely noting that 'that case law cannot be applied by analogy to the making available of works to the public by downloading.'[35]

The third prong of the Advocate General's analysis centred on the policy arguments related to digital exhaustion. At this point, AG Szpunar provided for an extremely balanced list of various policy considerations. On the one hand, exhaustion might strengthen competition, lead to more innovation, guarantee privacy, and prevent anti-competitive practices. On the other hand, digital copies do not deteriorate, the multiplication of works might risk competition, it is difficult to verify to compliance with rules, especially among end-users, it might be difficult to differentiate between lawful and illegal copies, and the whole idea of exhaustion might become obsolete in the wake (and, in fact, because of the dominance) of

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[28] *Ibid*., paras. 58–60.
[29] *Ibid*., para. 62.
[30] Case C-174/15, *Vereniging Openbare Bibliotheken v. Stichting Leenrecht*, Judgment of the Court (Third Chamber), 10 November 2016, EU:C:2016:856, para. 2 of the operative part. Cited in Case C-263/18 (AG Opinion) para. 71.
[31] *Ibid*.
[32] Case C-466/12, *Nils Svensson and Others v. Retriever Sverige AB*, Judgment of the Court (Fourth Chamber), 13 February 2014, EU:C:2014:76.
[33] On relevant literature see Case C-263/18 (AG Opinion) note 55. See further Gregor Völtz, *Das Kriterium der 'neuen Öffentlichkeit' im Urheberrecht*, 11 Computer und Recht, 721–726 (2014); Peter Mezei, *Enter the Matrix: the Effects of the CJEU's Case Law on Linking and Beyond*, 10 Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil, 887-900 (2016); João Pedro Quintais, *Untangling the Hyperlinking Web: In Search of the Online Right of Communication to the Public*, 5 The Journal of World Intellectual Property, 385–420 (2018).
[34] Article 3(3) of the InfoSoc Directive.
[35] Case C-263/18 (AG Opinion) para. 74.

streaming services.[36] Based on the various conflicting policy considerations, AG Szpunar took a rather defensive position and concluded that 'although there are strong reasons for recognising the rule of exhaustion of the right of distribution in the case of downloading, other reasons, however, at least as strong, are opposed to such recognition. Thus, the weighing up of the various interests involved does not cause the p. 136. balance to come down in a different way from that which follows from the letter of the provisions in force.'[37]

4. The CJEU's Judgment

Contrary to the detailed opinion of the Advocate General, the CJEU's Judgment was almost entirely based on historic, teleological and systematic analysis of the relevant legal sources. The CJEU noted that the InfoSoc Directive's language is not decisive whether the supply by downloading, for permanent use, of e-books is covered by the right of communication to the public or the right of distribution.[38] The CJEU argued that the *travaux preparatoires* of the InfoSoc Directive, the directive's recitals as well as the WCT support the conclusion that the right of distribution covers solely the transfer of ownership of tangible copies of works; while the right of communication to the public covers interactive/on-demand dissemination of copies in the broadest sense.[39]

The CJEU excluded e-books from the scope of the Software Directive. Indeed, in compliance with the *Nintendo* ruling,[40] even if an e-book would comprise software, too, such a program would be incidental in relation to the literary work, and hence InfoSoc Directive would trump the Software Directive.[41] The CJEU also refused to apply the theory of functional equivalence to e-books. The CJEU agreed with the Advocate General that e-books are perfect substitutes of the original copies, and do not deteriorate with age at all. The Court further noted that 'exchanging such copies requires neither additional effort nor additional cost, so that a parallel second-hand market would be likely to affect the interests of the copyright holders in obtaining appropriate reward for their works much more than the market for second-hand tangible objects, contrary to the objective referred to in paragraph 48 of the present judgment'.[42]

Finally, the CJEU discussed the meaning of communication and making available to the public in details. Communication has always been interpreted broadly by the CJEU, and public has been defined as an indeterminate, but certainly large number of people. Successive recipients of contents also form the public, that is, potential recipients shall be accumulated.[43]

The CJEU found that Tom Kabinet's service complied with all relevant prerequisites of communication to the public. As the Court noted, '[i]n the present case, having regard to the fact, noted in paragraph 65 of the present judgment, that any interested person can become a member of the reading club, and to the fact that there is no technical measure on that club's platform ensuring that (i) only one copy of a work may p. 137. be downloaded in the period during which the user of a work actually has access to the work and (ii) after that period has expired, the downloaded copy can no longer be used by that user ..., it must be concluded that

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[36] See all these arguments *ibid.*, paras. 80–96.
[37] *Ibid*., para. 97.
[38] Case C-263/18 (Judgment of the Court) paras. 37–38.
[39] *Ibid*., paras. 39–52.
[40] Case C-355/12, *Nintendo Co. Ltd and Others v PC Box Srl and 9Net Srl,* Judgment of the Court (Fourth Chamber), 23 January 2014, EU:C:2014:25, para. 23.
[41] Case C-263/18 (Judgment of the Court) para. 54. and 59.
[42] *Ibid*., para. 58.
[43] *Ibid*., para. 68. On the concept of communication to the public see e.g. Bernd Justin Jütte, *Ein horizontales Konzept der Öffentlichkeit - Facetten aus dem europäischen Urheberrecht,* 2 UFITA - Archiv für Medienrecht und Medienwissenschaft, 354–374 (2018).

the number of persons who may have access, at the same time or in succession, to the same work via that platform is substantial. Consequently, subject to verification by the referring court taking into account all the relevant information, the work in question must be regarded as being communicated to a public, within the meaning of Article 3(1) of Directive 2001/29.'[44] The CJEU concluded that members of the reading club represented a 'new public', that is, members of the public who were not taken into account when the e-book was originally sold by the right holders.[45]

5. Revisiting the critical points of digital exhaustion

Before turning to a critical analysis of the Opinion of the Advocate General and the Judgment of the Court, we shall revisit the most important doctrinal and practical aspects of digital exhaustion. We shall address the license versus sale dichotomy; whether the transfer of digital contents via the Internet fits into the right of distribution or making available to the public; the transfer (migration) of digital copies via the Internet; as well as the issues of *lex specialis* and the theory of functional equivalence.

5.1. License versus sale

In *UsedSoft*, the CJEU concluded that a licence might be characterized as a sale if the right to use a computer program lasted for an indefinite 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'.[46] Merely calling a contract a licence is not enough 'to circumvent the rule of exhaustion and divest it of all scope'.[47]

Although the CJEU's position has attracted some criticism,[48] the CJEU did not limit the freedom of rights holders to negotiate the value of their rights. What the CJEU said is that the right of distribution was exhausted as soon as the protected subject matter was put into circulation by or with the consent of the right holder in exchange for a reasonable remuneration.[49] It was not irrational for the CJEU to have relied on the reward theory.

Furthermore, the CJEU defined a sale as the transfer of ownership rights in tangibles or intangibles.[50] Such a right lacks merit in several legal systems, e.g. in Germany, where p. 138. property rights only exist on tangibles.[51] On the contrary, property interests exist on intangibles in Austria,[52] in the Netherlands,[53] or in Canada.[54] German,[55] Austrian[56] and Dutch[57]

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[44] Case C-263/18 (Judgment of the Court) para. 69.
[45] *Ibid*., paras. 70–71.
[46] *UsedSoft v. Oracle* (2012) para. 49.
[47] *Ibid*.
[48] Christopher Stothers, *When is Copyright Exhausted by a Software Licence?* UsedSoft v. Oracle, 11 European Intellectual Property Review, 790 (2012).
[49] In its *FAPL* ruling, the CJEU noted that rights holders might demand reasonable remuneration rather than 'the highest possible remuneration'. See Joined 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.*, Judgment of the Court (Grand Chamber), 4 October 2011, :EU:C:2011:631, para. 108.
[50] *UsedSoft v. Oracle* (2012) paras. 42 and 49.
[51] Helmut Haberstumpf, *Der Handel mit gebrauchter Software im harmonisierten Urheberrecht - Warum der Ansatz des EuGH einen falschen Weg zeigt*, 9 Computer und Recht, 562-567 (2012); Herbert Zech, *Vom Buch zur Cloud - Die Verkehrsfähigkeit digitaler Güter*, 3 Zeitschrift für Geistiges Eigentum / Intellectual Property Journal, 375–381 (2013).
[52] Friedrich Ruffler, *Is Trading in Used Software an Infringement of Copyright? The Perspective of European Law*, 6 European Intellectual Property Review, 378 (2011).
[53] District Court Mid-Nederlands, *CWS v. Vendorlink*, ECLI:NL:RBMNE:2015:1096, 25.03.2015, 60–62.

courts also decided that computer programs could be sold without the transfer of ownership over the intangible data incorporated in the software. On the other hand, German courts refused to apply the doctrine of exhaustion to the transfer of audiobooks on the ground that no ownership interests existed on digital data, e.g. a file of an audiobook.[58]

It seems very difficult to find a compromise in this question. Indeed, the best compromise might be not to limit the available legal options to only licence/service and sale. Such a flexible solution was outlined in the (since then abandoned) Proposal for a Regulation of the European Parliament and of the Council on the Common European Sales Law, intended to introduce a hybrid type of contracts. Besides sales and service contracts, Article 5(b) provided for 'contracts for the supply of digital content whether or not supplied on a tangible medium which can be stored, processed or accessed, and re-used by the user, irrespective of whether the digital content is supplied in exchange for the payment of a price'.[59] The Commission did not discuss whether and how the doctrine of exhaustion could have been applied to such hybrid contracts. In copyright terms, such contracts would fit best in the right of distribution, and hence they could be subject to the doctrine of exhaustion too.[60] More importantly, the European Union's Directive 2019/770 on certain aspects concerning the contracts for the supply of digital content and digital services did not follow such flexible idea. This directive clearly left EU copyright *acquis* – including the InfoSoc Directive – untouched.[61]

p. 139. Directive 2011/83/EU on consumer rights was more successful in providing a compromise. The Directive expressly states that contracts for digital content,[62] which are not supplied on a tangible medium, should be classified neither as sales contracts nor as service contracts.[63] Although the Directive leaves intact all other norms of the EU, including the rules

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[54] Pierre-Emmanuel Moyse, *From Importation to Digital Exhaustion: A Canadian Copyright Perspective*, in: Irene Calboli, Edward Lee (eds.), *Research Handbook on Intellectual Property Exhaustion and Parallel Imports*, Research Handbooks in Intellectual Property, Edward Elgar, Cheltenham, 489 (2016).

[55] BGH 22.12.1999 (VIII ZR 299/98) *Ablieferung von Standard-Software*, 10 JurPC Web-Dok. (2000), paras. 1–26. (http://www.jurpc.de/jurpc/show?id=20000070); BGH 15.11.2006 (XII ZR 120/04) *Zur Rechtsnatur der Softwareüberlassung im Rahmen eines ASP-Vertrages*, 1 Medien Internet und Recht, 3 (2007). (http://medien-internet-und-recht.de/pdf/vt_MIR_Dok_009–2006.pdf).

[56] OGH 23.05.2000 4 Ob 30/00s, 4 Medien und Recht, 249–253 (2000). See further Clemens Appl, Marlene Schmidt: *Zweitverwertung gebrauchter Digitalgüter - Die Folgen des UsedSoft-Urteils für Schöpfungen anderer Werkarten*, 4 Medien und Recht, 192 (2014).

[57] Dutch Supreme Court, Beeldbrigade, ECLI:NL:HR:2012:BV1301, 27.04.2012, 2 Computerrecht, 339–353 (2012).

[58] OLG Stuttgart 03.11.2011 (2 U 49/11) – Keine Erschöpfung bei Online-Vertrieb von Hörbüchern, 5 Computer und Recht, 351 (2012); OLG Hamm 15.05.2014 (22 U 60/13) - Keine Erschöpfung bei Audiodateien - Hörbuch-AGB, 9 Gewerblicher Rechtsschutz und Urheberrecht, 861–862 (2014).

[59] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final, Brussels, 10 November 2011, p. 27. Compare to Zech (2013) 386–387; Stojan Arnerstål, *Licensing Digital Content in a Sale of Goods Context*, 10 Journal of Intellectual Property Law and Practice, 753 (2015).

[60] Lazaros G. Grigoriadis, *The Distribution of Software in the European Union after the Decision of the CJEU* 'UsedSoft GmbH v. Oracle International Corp.' ('UsedSoft'), 3 Journal of International Commercial Law and Technology, 202, (2013).

[61] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, recital 36 and Article 3(9). See further Franz Hofmann: *Recht der digitalen Güter: Keine digitale Erschöpfung bei der Weitergabe von E-Books - Anmerkung zu EuGH, Urteil vom 19.12.2019 - C-263/18 - NUV u. a./Tom Kabinet Internet u. a. (ZUM 2020, 129)*, 2 Zeitschrift für Urheber- und Medienrecht, 138 (2020).

[62] '"Digital content" means data which are produced and supplied in digital form.' See Consumer Rights Directive, Article 2(11). Digital contents are for example '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.' See *ibid*., recital 19.

[63] *Ibid*.

on the doctrine of exhaustion, it can serve as a good start for a more consumer-centric regime.[64]
In sum: reasonable arguments support the view that the online supply of data should be treated as a special type of contract. The question that needs to be addressed at this point is whether such a contract should be covered by the right of distribution or communication (making available) to the public?

5.2. Distribution versus making available to the public

It might be worth recalling that the right of distribution was historically designed to cover the transfer of ownership of tangible copies, and the making available to the public right was designed to cover on-demand uses.
In *UsedSoft*, the CJEU affirmed that a data transfer via the Internet could be classified as the making available to the public. Nevertheless, the CJEU found the transfer of ownership of a copy of a computer program to be a first sale, which changed an act of communication to the public into an act of distribution.[65] In this sense, the CJEU differentiated between two types of uses via the Internet. In the first scenario, uses that do not lead to the permanent reproduction or sale of any copy of a protected subject matter are governed by the communication or making available to the public right. In the second scenario, a permanent copy is received by the end user in exchange for a fixed purchase price and is retained on a permanent basis. The CJEU declared this second category of uses to be sale of products, which is covered by the right of distribution.[66]
One might compare the wording of the making available to the public right and the business models of UsedSoft or Tom Kabinet. That right is formulated as follows: 'making available to the public of their [works/phonograms/performances fixed in phonograms] in such a way that members of the public may access these [works/phonograms/performances p. 140. fixed in phonograms] from a place and at a time individually chosen by them'.[67] Although the business models of the respective companies are generally available to any member of the public, access to specific content is conditional. One important obstacle hampers users from accessing the contents 'from a place and at a time individually chosen by them'. They need to accept the terms of the sale, by purchasing the subject matter under specific conditions.[68] Ultimately, access to protected subject matter is not on-demand but 'pay-walled'. In such situations the (broad or unlimited) application of the right of making available to the public seems to be unconvincing.[69] The Supreme Court of Canada followed a very similar approach in *ESA*. In this case, the Court concluded that the downloading of a videogame, which

[64] Andrea Stazi, *Digital Copyright and Consumer/User Protection: Moving toward a New Framework?*, 2 Queen Mary Journal of Intellectual Property, 171 (2012).
[65] *UsedSoft v. Oracle* (2012) paras. 48 and 52.
[66] Some commentators criticized the above logic, e.g. Thomas Vinje, Vanessa Marsland, Anette Gärtner, *Software Licensing after* Oracle v. UsedSoft - *Implications of* Oracle v. UsedSoft *(C-128/11) for European Copyright Law*, 4 Computer Law Review International, 100 (2012); Emma Linklater, *UsedSoft and the Big Bang Theory: Is the e-Exhaustion Meteor about to Strike?*, 1 JIPITEC, 15 (2014); Ole-Andreas Rognstad, *Legally Flawed but Politically Sound? Digital Exhaustion of Copyright in Europe after* UsedSoft, 1 Oslo Law Review, 15 (2014). Others applauded it, e.g. Martin Senftleben, *Die Fortschreibung des urheberrechtlichen Erschöpfungsgrundsatzes im digitalen Umfeld*, 40 Neue Juristische Wochenschrift, 2926 (2012); Grigoriadis (2013) 203.
[67] WCT Article 10, WPPT Article 14, InfoSoc Directive Article 3(1) and 3(2)(c)–(d).
[68] Compare to Alexandra Morgan, Paul Abbott, Christopher Stothers, *ECJ Rules That the Sale of Second-Hand e-Books Infringes Copyright*, 4 Journal of Intellectual Property Law & Practice, 238 (2020).
[69] *Ibid.*

included a protected musical work, did not amount to public communication, but represented a functional equivalent of the purchase of a data carrier in a brick-and-mortar store.[70]
The rethinking of economic rights in the Internet age might become necessary at some point. This has been perfectly reflected by the Common European Sales Law and the Directive on consumer rights. The concept of the contract for the supply of digital contents is a balanced approach of contract law, which attempts to regulate digital transactions that cannot fit into sales and service-type contracts easily. Copyright law should also classify this type of contract and the right of distribution seems to meet this demand the easiest.

5.3. The new copy theory versus migration of files and forward-and-delete technologies

The copyright law of the EU and of the majority of the Member States allows for the private copying of works. This limitation of the reproduction right should not in any way lead to the expansion of the first-sale doctrine. The doctrine of exhaustion allows the lawful acquirer of a protected subject matter to resell "that particular" copy that he owns/possesses. The creation of a new copy excludes the applicability of the doctrine. Naturally, keeping a copy of a work after the resale of the originally acquired copy runs afoul of the private copying exception, as well as the doctrine of exhaustion. What can be of importance is the forwarding or migration of the copy from the original acquirer to a new user.
In *UsedSoft*, the CJEU noted that the second and any subsequent acquirers of lawfully sold copies are lawful acquirers too. The reproduction of the computer program by these subsequent acquirers is equally necessary to enable the use of the software in accordance with its intended purpose.[71] To the contrary, the "new copy theory" was p. 141. strictly followed in the German audiobook cases, so that the applicability of the doctrine of exhaustion was excluded.[72]
Although these opinions were based on the logical interpretation of the then effective copyright norms, they are far from the reality in several cases. It is true that media contents can be directly downloaded to portable devices. Average users, who are absolute strangers to the subtle nuances of copyright law, quite often download the content first to their computer's hard drive and reproduce the file on any device thereafter. Sometimes they first move the file to another folder of the computer. Some devices, like the ones produced by Apple, need to be connected to a computer first, in order to synchronize the device and the user's account (e.g., files kept in an iTunes library). In short, all portable devices might carry copies of digital contents that are certainly not those particular original copies.[73]
All of these concerns lead us to the important questions surrounding the migration of files and forward-and-delete technologies. Although their effectiveness is often questioned,[74] these concerns are superficial. There have been no technologies (neither analogue, nor digital) that have been able to perfectly control the use of protected subject matter. The introduction of digital rights management or technological protection measures remained unsuccessful in

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[70] 'In our view, 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. The Internet is simply a technological taxi that delivers a durable copy of the same work to the end user.' See *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 R.C.S. 231, para. 5.
[71] *UsedSoft v. Oracle* (2012) paras. 80–81.
[72] OLG Stuttgart (2011) 301; OLG Hamm (2014) 855–857.
[73] B. Makoa Kawabata, *Unresolved Textual Tension:* Capitol Records v. ReDigi *and a Digital First Sale Doctrine*, UCLA Entertainment Law Review, 75–76 (Winter 2014).
[74] OLG Stuttgart (2011) 302; *Capitol Records, LLC, v. ReDigi Inc.*, 934 *F.Supp.2d* 640 (2013), 650–651. See further Evan Hess, *Code-ifying Copyright: An Architectural Solution to Digitally Expanding the First Sale Doctrine*, Fordham Law Review, 2001–2011 (March 2013).

most fields of the copyright industry.[75] Indeed, there are several notable forward-and-delete technologies (some of them are patented) that allow for a technologically effective control of the transfer or 'ageing' of data.[76]
In conclusion, we shall agree with Dennis Karjala, who correctly noted that '[w]hether erasure takes place immediately after transfer or whether the transfer takes place one byte at a time with erasure occurring as part of the ongoing process makes no difference to the end result or to the position of the copyright owner once the process has finished. Yet, if the byte-by-byte process, including erasure, is deemed the making of an unauthorized copy, the first-sale doctrine is for all practical purposes a dead letter in the digital age.'[77]

5.4. Different subject matters, lex specialis, and the theory of functional equivalence

UsedSoft raised another notable question: is the Software Directive a special law (*lex specialis*) regarding the doctrine of exhaustion? Historically, international and domestic copyright norms have expressly provided for the protection of computer programs as p. 142. literary works under copyright law, rather than granting *sui generis* protection for them.[78] The EU's Software Directive shows, however, some differences when compared to the rules on literary works. One of these differences is that the Software Directive does not differentiate between tangible and intangible copies of computer programs in the context of the doctrine of exhaustion. On the contrary, under the InfoSoc Directive, solely tangible objects are subject to the doctrine.
The CJEU correctly noted that 'from an economic point of view, the sale of a computer program on CD-ROM or DVD and the sale of a program by downloading from the internet are similar. The online transmission method is the functional equivalent of the supply of a material medium.'[79] Indeed, this argument is also true from a technological point of view. The creation of a copy of the software on the computer is inevitable and therefore lawful.[80]
Yet, the above logic is partially flawed. According to the CJEU, '[i]nterpreting Article 4(2) of Directive 2009/24 in the light of the principle of equal treatment confirms that the exhaustion of the distribution right under that provision takes effect after the first sale in the European Union of a copy of a computer program by the copyright holder or with his consent, regardless of whether the sale relates to a tangible or an intangible copy of the program'.[81] The CJEU either '"purposively" construed the law to arrive at this outcome'[82] or made a mistake when it disregarded the relevant Agreed Statement of the WCT. The WCT did not provide any specific right of distribution or exhaustion for computer programs, thus the general rules should prevail for software as well. The right of distribution represents a

[75] Peter K. Yu, *Anticircumvention and Anti-Anticircumvention*, 1 Denver University Law Review, 13–77 (2006).
[76] Mezei (2018) 131–132.
[77] Dennis S. Karjala, *'Copying' and 'Piracy' in the Digital Age*, Washburn Law Journal, 255 (Spring 2013). See further Giorgio Spedicato, *Online Exhaustion and the Boundaries of Interpretation*, in: Roberto Caso, Federica Giovanella (eds.), *Balancing Copyright Law in the Digital Age – Comparative Perspectives*, Springer, Berlin, 56 (2015).
[78] TRIPS Article 10; WCT Article 4. See further Article 1(1) of the Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version). The definition of literary works is covered by Article 1(1) of the Berne Convention.
[79] *UsedSoft v. Oracle* (2012) para. 61.
[80] Compare to Article 5(1) of the Software Directive.
[81] *UsedSoft v. Oracle* (2012) para. 61.
[82] Ellen Franziska Schulze, *Resale of Digital Content Such as Music, Films or eBooks under European Law*, 1 European Intellectual Property Review, 11 (2014).

minimum right under the WCT and therefore signatories can only provide for stronger protection to rights holders.[83]

Any arguments according to which the Agreed Statement to Article 6 of the WCT does not apply to computer programs, because the Council introduced the Software Directive before the WCT was accepted, and so the directive became *lex specialis*, are misleading. The EU implemented the WCT by the InfoSoc Directive.[84] This directive harmonized a general right of distribution and a general exhaustion doctrine without making any reference to different subject matters. The InfoSoc Directive left the 'specific provisions on protection provided for by Directive 91/250/EEC' intact.[85] At the same time, '[t]his Directive is based on principles and rules already laid down in the Directives currently in force in this area, in particular Directives 91/250/EEC (...), and it develops those principles p. 143. and rules and places them in the context of the information society. The provisions of this Directive should be without prejudice to the provisions of those Directives, unless otherwise provided in this Directive.'[86] Recital 29 of the InfoSoc Directive seems to be such an 'other provision'. As a result, the special application of the doctrine of exhaustion to computer programs sold in intangible format runs afoul to the existing rules of international and EU copyright law.[87]

The Parliament and the Council codified the Software Directive in 2009. The fact that the Agreed Statement to Article 6 of the WCT was not implemented by the directive is either the legislator's expressed intent or a mistake. In any case, it cannot allow for an assumption that EU law can contain any special regulation on the resale of intangible copies of computer programs. The fact that the Software Directive was not amended in this respect evidences the primacy of the InfoSoc Directive too.[88]

In his Opinion in *Stichting Leenrecht*, AG Szpunar argued that '[i]n accordance with the principle of terminological consistency, rigorously applied, the term "copy" used in both Directive 2001/29 and Directive 2006/115 ought to be understood as including digital copies with no physical medium. That same principle would also afford a simple solution to the problem, widely debated by legal theoreticians and present also in this case, of the exhaustion of the distribution right following a sale by electronic data transmission. Indeed, Article 4(2) of Directive 2001/29 is formulated, in substance, in identical terms to Article 4(2) of Directive 2009/24 and consequently it ought, in principle, to be interpreted in identical fashion.'[89] Keeping the consistency of terminology of the *acquis*, as well as safeguarding the principle of equal treatment should be an important task of the CJEU. What AG Szpunar recommended is that the interpretation of a special law should determine the application of the general norms as well. This seems to be a misunderstanding of the hierarchy of EU copyright norms.[90]

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[83] Silke von Lewinski, *International Copyright Law and Policy*, Oxford University Press, New York, 452, para. 17.61 (2008); Eleonora Rosati: *Online Copyright Exhaustion in a Post-Allposters World*, 9 Journal of Intellectual Property Law & Practice, 675 (2015).

[84] InfoSoc Directive recital 15.

[85] *Ibid*., recital 50 and Article 1(2)(a).

[86] *Ibid*., recital 20.

[87] Rognstad (2014) 9-10; Miha Trampuž, *An Oracle on European Copyright Exhaustion*, Revue Internationale du Droit d'Auteur, 201-203 (July 2016). See to the contrary Ruffler (2011) 379; Alexander Göbel, *The Principle of Exhaustion and the Resale of Downloaded Software - The* UsedSoft v. Oracle *Case* [UsedSoft GmbH v. Oracle International Corporation, *ECJ (Grand Chamber), Judgment of 3 July 2012, C-128/11*], 9 European Law Reporter, 230 (2012).

[88] Compare to Thomas Hartmann, *Weiterverkauf und 'Verleih' online vertriebener Inhalte - Zugleich Anmerkung zu EuGH, Urteil vom 3. Juli 2012, Rs. C-128/11 - UsedSoft./. Oracle*, 11 Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil, 982 (2012).

[89] Case C-174/15, *Vereniging Openbare Bibliotheken v. Stichting Leenrecht*, Opinion of AG Szpunar, 16 June 2016, EU:C:2016:459, para. 52.

[90] In its judgment the CJEU did not address the above argument of AG Szpunar.

Is the theory of functional equivalence applicable to subject matters other than computer programs? The CJEU argued that from an economic point of view the online transmission of a computer program is functionally equivalent to the sale of a data carrier in a tangible format. If this is the case, one should conclude that the economic equivalence of sound recordings, audiobooks, and e-books differs. The different types of use are clear in competition with each other, as sound recordings, audiobooks, and e-books can all be marketed and used in different ways and they can be used on several different devices/platforms. The outcome is absolutely the same from a technological point of view. Sound p. 144. recordings/audiobooks do not need to be permanently copied (installed) for the purpose of enjoyment. The online transmission method does not seem to be the functional equivalent of the supply of a material medium regarding subject mattes other than software.[91] A similar conclusion can be reached from a contextual interpretation of the EU *acquis*. The Software Directive allows for the first reproduction of computer programs, if that is necessary for the proper functioning of the software.[92] Such an essential step defence does not exist in regard of any other subject matter, and there is no need for it.[93]

In sum, terminological and doctrinal consistency is necessary regarding the doctrine of exhaustion. Under the current copyright *status quo*, WCT/InfoSoc Directive has a primacy over other sources of law, and digital exhaustion can hardly be based on these norms. The theory of functional equivalence supports such conclusion, too.

6. Critical remarks on the Opinion and the Judgment – reforms needed!

We have seen in the previous section that, on the one hand, the licence versus sale dichotomy, the clash of economic rights (distribution versus making available to the public) and the existence of workable forward-and-delete technologies leave considerable space for progressive thinking. On the other hand, the most important copyright norms speak against (a general) digital exhaustion doctrine. In light of these findings, it is of no surprise that both the Opinion and the Judgment were against Tom Kabinet in this case.

Such doctrinally safe (or defensive) outcomes do not seem to push modern copyright law towards in the proper direction. First, the Judgment and the more balanced and more nuanced Opinion include points that are logically, practically and theoretically flawed. Second, we should re-evaluate the Judgment and the Opinion in the light of various fundamental policy considerations of the exhaustion doctrine. I believe that the only viable solution to the challenges of digital exhaustion requires reformatory, constructive thinking, rather than doctrinal, rigid interpretation of the law. Time has ripened to amend the laws on the doctrine.

6.1. Five critical notes on the Judgment and the Opinion

While several researchers thought that the Judgment settled the tensions surrounding digital exhaustion,[94] I believe that the Judgment and the Opinion include several notable inconsistencies.

p. 145. First, the Judgment and the Opinion are flawed in categorizing Oracle's original contract in *UsedSoft*. Both documents expressly refer to the 'sale' of the relevant computer

[91] See to the contrary Hartmann (2012) 982; Sven Schonhofen, UsedSoft *and Its Aftermath: The Resale of Digital Content in the European Union*, 2 Wake Forest Journal of Business and Intellectual Property Law, 291 (2015).

[92] Software Directive Article 5(1).

[93] Homar (2020) 29.

[94] Linda Kuschel, *Zur urheberrechtlichen Einordnung des Weiterverkaufs digitaler Werkexemplare Anmerkung zu EuGH, Urteil vom 19.12.2019 - C-263/18 - NUV u. a./Tom Kabinet Internet u. a. (ZUM 2020, 129)*, 2 Zeitschrift für Urheber- und Medienrecht, 138 (2020).

program.[95] In *Tom Kabinet*, the CJEU paid no attention to the practical reasons why Oracle's agreement was declared to be a sale.[96] The Advocate General noted that such broad interpretation of the concept of sale regarding computer programs was necessary to guarantee that the effectiveness of the exhaustion doctrine was not undermined by the different legal consequences in case of material and immaterial supply of copies.[97] None of these options are correct or relevant. As mentioned earlier, the CJEU ruled in *UsedSoft* that a licence might be 'transformed' into a sale if the right to use a computer program lasted for an indefinite 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'.[98] Neither the Advocate General, nor the CJEU criticized or overruled this legal argument, and the online supply of e-books fulfils the doctrinal requirements of CJEU'S *UsedSoft* standard. Therefore, such 'transformation' of the contracts (and the relevant economic rights) appears entirely valid and applicable to the supply of e-books as well.

Second, the CJEU partially misconstrued the theory of functional equivalence as well. Both the Advocate General and the CJEU correctly stressed that the material and non-material supply of copies of software are functionally similar, as the copy has to be installed, and hence the source of the file(s) might be economically and materially irrelevant.[99] The CJEU, however, unnecessarily extended the scope of the functional equivalence theory by referring to the non-deterioration of digital copies. The Court treated the files as perfect substitutes of the original copies, which therefore posed an economic danger to the original market of rights holders.[100] Such arguments are true for software as well, but – more importantly – they are independent of the functional equivalence theory. Indeed, they represent serious (and plausible) policy arguments. Such a mistake by the CJEU is directly documented by the Court itself. The Grand Chamber refers to point 89 of the Advocate General's Opinion, which was located in the Advocate General's policy considerations.

Third, the CJEU has important rulings other than the ones that the Advocate General analysed. Indeed, *Art & Allposters* is significant for the proper interpretation of 'new copies' made of original artworks;[101] *Ranks and Vasiļevičs* correctly excluded illegal back-up p. 146. copies from the scope of exhaustion;[102] *Nintendo* is relevant with respect to mixed subject matters (e.g. computer games that include software elements and literary/musical works as well);[103] *European Commission v. France* concluded from tax law perspective that the supply of e-books represented service rather than sale;[104] and a reference to/analysis of *Renckhoff* would support the CJEU in refuting the applicability of the exhaustion doctrine to the making

[95] E.g. Case C-263/18 (AG Opinion) para. 59; Case C-263/18 (Judgment of the Court), para. 57. The Advocate General was more cautious in this regard, as he used the term 'supply' quite frequently (and more often than sale).

[96] Maybe paragraph 57 of the Judgment was an attempt to clarify the reasons behind this 'transformation' of a licence into a sale contract, however, the theory of functional equivalence had a totally different relevance in the original *UsedSoft* ruling.

[97] Case C-263/18 (AG Opinion) para. 59.

[98] *UsedSoft v. Oracle* (2012) para. 49.

[99] Case C-263/18 (AG Opinion) para. 60; Case C-263/18 (Judgment of the Court) para. 57.

[100] *Ibid*., para. 58.

[101] Case C-419/13, *Art & Allposters International BV v. Stichting Pictoright*, Judgment of the Court (Fourth Chamber), 22 January 2015, EU:C:2015:27. This was the only ruling that the CJEU referred to in its Judgment. See Case C-263/18 (Judgment of the Court), para. 52.

[102] Case C-166/15, *Aleksandrs Ranks and Jurijs Vasiļevičs v. Finanšu un ekonomisko noziegumu izmeklēšanas prokoratūra and Microsoft Corp.*, Judgment of the Court (Third Chamber), 12 October 2016, EU:C:2016:762.

[103] Case C-355/12, *Nintendo Co. Ltd and Others v. PC Box Srl and 9Net Srl*, Judgment of the Court (Fourth Chamber), 23 January 2014, EU:C:2014:25.

[104] Case C-479/13, *European Commission v. France*, Judgment of the Court (Fourth Chamber), 5 March 2015, EU:C:2015:141.

available to the public right.[105] Taking these rulings into account would most probably have not changed the outcome of *Tom Kabinet*. The deep divergence of case law highlights, however, the urgent need for statutory or judicial clarification in the field.

AG Szpunar was of the mind that '[i]t is true that the Court's case-law may give an impression of complexity and inconsistency and that it would be tempting to simplify the legal situation by acknowledging the rule of exhaustion of the right of distribution in the digital environment for all categories of works. I think, however, that in the absence of full regulation by means of legislation as regards that rule, the diversity of judicial solutions is justified, and even inevitable, in the case of different factual situations, governed by different legislative acts and pursuing specific objectives. To my mind, the desire for consistency cannot on its own serve as a basis for judicial recognition of the rule of exhaustion.'[106] Leaving the solution to the legislators might be the most reasonable solution (at least in typical continental European countries). At the same time, the CJEU was often criticised for 'judicial activism',[107] that is, for those rulings that contributed to the pragmatic development of EU (copyright) law. Such activism was detected both in the presence and in the lack of relevant international norms. A notable example is the CJEU's 'new public theory'. The 'new' element of the communication to the public right has no relevant international legal background.[108] Putting it differently: the CJEU is not deterred from ruling against the (international) copyright *status quo*, if it wants to do so. (Some might declare the *UsedSoft* ruling to be a perfect example of this practice.) At the same time, in lack of clear consistency, it is not easy to understand when the CJEU will exercise or refrain from activism. The opinion of Harri Kalimo et al. is perfectly evidenced by the outcome of *Tom Kabinet*. According to these authors 'the Court gives only a (very) limited voice to those other discourses that p. 147. would have supported the legal arguments and values that were contrary to the Court's judicial decision. ... [W]e observed a clear structural bias favouring the voices that supported the Court's own argumentation.'[109] Such a bias is clearly evidenced by the CJEU's (almost) complete disregard for policy considerations; lack of coherent interpretation of the relevant terminology [e.g. 'copy' or '(first) sale'] of EU law;[110] or the highly questionable interpretation of the 'public' with respect to members of the reading club.[111]

Fourth, the CJEU might have completely misunderstood Tom Kabinet's business model. The CJEU noted that '[i]n the present case, having regard to the fact, noted in paragraph 65 of the present judgment, that any interested person can become a member of the reading club, and to the fact that there is no technical measure on that club's platform ensuring that (i) only one copy of a work may be downloaded in the period during which the user of a work actually has

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[105] Case C-161/17, *Land Nordrhein-Westfalen v. Dirk Renckhoff*, Judgment of the Court (Second Chamber), 7 August 2018, EU:C:2018:63.

[106] Case C-263/18 (AG Opinion) para. 78.

[107] Compare to Mark Dawson, Bruno De Witte, Elise Muir (eds.), *Judicial Activism at the European Court of Justice*, Edward Elgar, Cheltenham, 2013; Gunnar Beck, *Judicial Activism in the Court of Justice of the EU*, 2 University of Queensland Law Journal, 333–353 (2017).

[108] The CJEU's rhetoric in *Tom Kabinet* regarding the obligation to follow international standards is a bit sarcastic. In its Judgment, the CJEU notes that 'EU legislation must, moreover, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the European Union (judgments of 7 December 2006, *SGAE*, C-306/05, EU:C:2006:764, paragraph 35; ...)'. See: Case C-263/18 (Judgment of the Court), para. 38. It was exactly *SGAE* that introduced the 'new public theory' in the face of lack of any supportive international source.

[109] Harri Kalimo, Trisha Meyer, Tuomas Mylly, *Of Values and Legitimacy - Discourse Analytical Insights on the Copyright Case Law of the Court of Justice of the European Union*, 2 Modern Law Review, 304 (2018).

[110] Christoph Peter: *Urheberrechtliche Erschöpfung bei digitalen Gütern*, 6 Zeitschrift für Urheber- und Medienrecht, 500 (2019).

[111] Compare to Ohly (2020) 184-185; Homar (2020) 30–31.

access to the work and (ii) after that period has expired, the downloaded copy can no longer be used by that user ..., it must be concluded that the number of persons who may have access, at the same time or in succession, to the same work via that platform is substantial'.[112] Such a holding is problematic, as the referring court briefed the facts of the case to the direct opposite.[113] Imagine that – in the real facts of the case – the CJEU incorrectly viewed the members of the reading club as 'public', and turn your eyes on the other element of the CJEU's argumentation: having regard to the fact ... that there is no technical measure on that club's platform'. Imagine that Tom Kabinet (or any other platform) applies technical measures that guarantee the acquisition of a single copy of a work by one end-user at a given time. (We might call such a measure an effective forward-and-delete technology.) Should the CJEU's syllogism mean that digital exhaustion is acceptable in the latter situation?[114] Or – even worse – should that mean that the CJEU believes there is no 'public' in the latter situation, and so the making available to the public right is 'quasi-exhausted'? It is truly hard to decide which of these options is more favourable in a legal sense and from a policy perspective.

Fifth, as the CJEU missed to answer the remaining questions of the referring court, an important issue remained unanswered. The referring court requested clarification whether the resale of the device containing the digital files fitted in with the concept of exhaustion. We should agree with Phillip Homar that such resales should not be prohibited by EU law.[115]

6.2. Seven policy considerations

First, following *Tom Kabinet*, the doctrine of exhaustion can practically lose its relevance in the online environment. Is such castration of the doctrine really in the p. 148. interests of the society?[116] Would it not be wiser to force/keep competition between the rights holders and newcomers in order to guarantee the best available services for the benefit of the whole society? Indeed, Advocate General Szpunar expressly noted that the position in the *VOB* case (the acceptance of e-lending, partially based on a *de facto* acceptance of digital exhaustion) would lose its significance if the CJEU voted against digital exhaustion.[117] The CJEU was not frightened by such a consequence.

Second, Yves Gaubiac noted as early as in 2000 that the dematerialization of works and the advancement of online uses made it necessary to appropriately categorize the supply of digital contents via the Internet. The importance of such categorization is great, as it can directly affect the fate of the doctrine of exhaustion.[118] The same opinion was expressed by Advocate General Kokott in *FAPL*.[119] The CJEU seemed to be unable to sidestep the service versus goods dichotomy. Admittedly, as indicated above, the existing norms did not introduce a 'hybrid model' of online contracts. A consumer/end-user oriented approach would, however, be the most reasonable and balanced solution to the stalemate of the service versus goods dichotomy.

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[112] Case C-263/18 (Judgment of the Court) para. 69.
[113] Homar (2020) 29–30.
[114] Compare to Morgan et al. (2020) 237.
[115] *Ibid*., 32-33.
[116] Ohly (2020) 186–187; Homar (2020) 29.
[117] Case C-263/18 (AG Opinion) paras. 71–72.
[118] Yves Gaubiac, *The Exhaustion of Rights in the Analogue and Digital Environment*, 4 Copyright Bulletin, 10 (2002).
[119] Joined 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.*, Opinion of AG Kokott, 3 February 2011, EU:C:2011:43, paras. 184–188.

Third, AG Szpunar concluded that 'although there are strong reasons for recognising the rule of exhaustion of the right of distribution in the case of downloading, other reasons, however, at least as strong, are opposed to such recognition. Thus, the weighing up of the various interests involved does not cause the balance to come down in a different way from that which follows from the letter of the provisions in force'.[120] No doubt, balancing various interests is a troublesome and challenging task – and therefore a subjective one as well. With full respect to AG Szpunar's detailed analysis of the policy considerations, I disagree with such a conclusion. Indeed, if we compare the pros and cons of digital exhaustion, much more relevant arguments speak in favour of generalized application of the doctrine of exhaustion. E.g. the three-step test (especially its third prong, related to the economic effects of any subsequent uses) does not apply to exhaustion; the fact that downstream commerce is cheaper allows for easier access to culture and for the reinvestment of the remaining resources in the economy as a whole; a digital exhaustion doctrine is in full compliance with the logic of the reward theory; voluntary remuneration systems (like the one Tom Kabinet or ReDigi imagined) might further ease tensions. *De facto* or *de jure* monopolies are not supported by copyright (and competition) law, and therefore the preservation of the *status quo* by the hindering of external innovations is truly undesirable. History also demonstrated that downstream commerce did not quash 'original' markets – indeed, rights holders modernized their business models in the wake of new technological or p. 149. social challenges.[121] I believe that the fear of technological superiority of digital files over analogue ones (which is not an absolute truth, however), the negative commercial consequences or the complicated control of file exchanges do not trump the arguments listed above.

Fourth, the legal distinction between the online supply of software and other subject matter necessarily leads to tensions with other legal norms, especially consumer protection law. As we have seen above, the European Union's directive on consumer protection treats the online supply of contents equally – irrespective of the copyright status of the works. Consumers can have a valid claim to have their purchases treated on an equal footing – and for the doctrine of exhaustion to apply to lawfully acquired copies of subject matter other than software, too. This argument has been accepted by a recent trial court ruling in France. In *Union Fédérale des Consommateurs*, an association representing consumers' interests successfully claimed that a leading computer games producer's strict limitations on the resale of lawfully acquired computer games ran against French consumer protection laws. The French court also held that such computer games (in compliance with the CJEU's *Nintendo* ruling), as mixed works, fell under the scope of the InfoSoc Directive, rather than the Software Directive. Consequently, consumers/end-users should be allowed to dispose of the copies they downloaded against payment from the software corporation's website under the doctrine of exhaustion.[122] If this ruling is be confirmed by the court of appeals, it will be able to serve as solid grounds for a 'consumer-law-based doctrine of exhaustion' on a European level, too.

Fifth, the CJEU's treatment of e-books as a service rather than goods in *EC v. France*, and the reliance on the making available to the public rather than on the distribution right in *Tom Kabinet* does not only lead to the exclusion of e-books (and almost all other subject matters) from the scope of exhaustion, but also narrows down the limitations and exceptions available to end-users (lawful acquirers) under the InfoSoc Directive. As Member States have implemented this Directive with notable differences, it is possible that nationals of various EU countries face significantly different treatment with regard to limitations and exceptions.

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[120] Case C-263/18 (AG Opinion) para. 97.

[121] See in detail: Mezei (2018) 148–154.

[122] *Union Fédérale des Consommateurs - Que Choisir v. S.A.R.L. Valve*, Tribunal de Grande Instance de Paris, N° RG 16/01008.

Sixth, AG Szpunar echoed a recurring argument in his Opinion, when he declared exhaustion obsolete in the age of streaming and online subscriptions.[123] There is no doubt that online consumption of copyright-protected contents tend to be more access-based rather than 'ownership-based'. Nevertheless, a significant amount of contents is still available for download and purchase; and that is true for almost all sectors of the copyright industry. Consequently, the need to address the resale of lawfully acquired copies of protected subject matter cannot be ignored yet.
Seventh, I might note that world IP policy leaders need to get ready to introduce 'emergency IP norms' at some point. The pandemic of SARS-CoV-2 (COVID-19) coronavirus, and the extensive legal, social and economic limitations imposed by the worlds' p. 150. governments shed light on the vulnerability of the existing IP order. COVID-19 will not only lead to significant (and longstanding) social distancing,[124] but will also affect distance education, media consumption, and the copyright industry's existing business models (especially related to the production and dissemination of contents).[125] The growing need for online consumption and the still 'existing ownership interests' of consumers might also support the application of the exhaustion doctrine to copies supplied via the Internet. Beyond any doubt, only extensive empirical research can show whether a digital exhaustion doctrine would be advisable in such an 'emergency IP regime'.

Summary

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The Doctrine of Exhaustion in Limbo. Critical Remarks on the CJEU's Tom Kabinet Ruling

The Court of Justice of the European Union published its much-awaited preliminary ruling in the *Tom Kabinet* case in December 2019. Both the Advocate General and the Court of Justice ruled against the application of the doctrine of exhaustion to the online (digital) resale of lawfully acquired e-books via and by an online platform.
In its *UsedSoft* ruling, the CJEU accepted the exhaustion of distribution right of computer programs disseminated online. The CJEU continued to discuss exhaustion (either directly or indirectly) in various other preliminary rulings; however, these judgments complicated further the legal environment of the doctrine.
The paper introduces in considerable details the factual background of the *Tom Kabinet* case, as well as the Advocate General's Opinion and the CJEU's Judgment. The paper further discusses four significant issues related to digital exhaustion: the license versus sale dichotomy; whether the transfer of digital contents via the Internet fits in with the definition

[123] Case C-263/18 (AG Opinion), para. 95.
[124] Gideon Lichfield, *We're Not Going Back to Normal*, MIT Technology Review, 17 March 2020 (https://www.technologyreview.com/s/615370/coronavirus-pandemic-social-distancing-18-months/).
[125] E.g. Brooks Barnes, Nicole Sperling, *Studio's Movies in Theaters Will Be Offered for In-Home Rental*, The New York Times, 16 March 2020 (https://www.nytimes.com/2020/03/16/business/media/coronavirus-universal-home-movies.html); Alexandra Alter, *The World of Books Braces for a Newly Ominous Future*, The New York Times, 16 March 2020 (https://www.nytimes.com/2020/03/16/books/coronavirus-impact-publishing-industry-booksellers-authors.html).

of the right of distribution or making available to the public; the transfer (migration) of digital copies via the Internet; as well as the issues of *lex specialis* and the theory of functional equivalence. The paper argues that the first three issues allow for a flexible interpretation and application of the doctrine of exhaustion. To the contrary, the legal *status quo* is clearly restrictive on this field; at the same time, it looks outdated, and needs reconsideration. The paper therefore takes a critical look at the Opinion and the Judgment through the lenses of p. 151. these four specific issues, and argues that the *Tom Kabinet* ruling did not conclusively settle (and eliminate) the idea of digital exhaustion. The paper finally includes several policy considerations to support the need for a legal reform to extend the doctrine of exhaustion to the digital realm at a general level.

***Keywords**: Tom Kabinet, CJEU, digital exhaustion, online resale of e-books, UsedSoft, comparative law, copyright law, European Union*

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